

THE TRAVAUX PRÉPARATOIRES

CMI Project on Issues of Transport Law

Following its 29th Session in 1996, UNCITRAL requested the CMI (as well as other organizations) to gather information about current practices and laws in the area of international carriage of goods by sea, with a view to establishing the need for uniform rules in the areas where no such rules existed. UNCITRAL noted that

“existing national laws and international conventions left significant gaps regarding issues such as the functioning of the bill of lading and sea waybills, the relation of those transport documents to the rights and obligations between the seller and the buyer of goods, and to the legal position of the entities that provided financing to a party to the contract of carriage.”

CMI set up an International Working Group on Issues of Transport Law in May 1998 chaired by Stuart Beare. In accordance with CMI’s well-established practice the Working Group prepared a questionnaire on the above topics, to which sixteen National Maritime Law Associations affiliated to the CMI responded. The Working Group analysed these responses and identified what it considered should be the principal issues for discussion at the first meeting of the International Sub Committee (“ISC”), which the Executive Council had set up in November 1999. These issues were refined as discussions in the ISC proceeded.

Issues of liability were not included in the brief to the Working Group when it was established in May 1998. These issues had been, over a period of some years, considered by the CMI International Sub Committee on the Uniformity of the Law of the Carriage of Goods by Sea (“the Uniformity Sub Committee”) under the chairmanship of Prof. Francesco Berlingieri. However some members of the “Round Table” of representatives of the industry (which the Executive Council had set up at the same time as it established the Working Group) urged that they should be brought into the project. It had also already become clear that consideration of some of the functions of the bill of lading or sea waybill inevitably impinged on such issues. Prof Berlingieri submitted his report on the work of the Uniformity Sub Committee in May 1999 and the CMI recommended to UNCITRAL that the project be extended to include issues of liability.

The third meeting of the ISC, at which issues of liability were first discussed, was held in July 2000 immediately after a UNCITRAL/CMI Colloquium. Comments made at this Colloquium suggested that it should be considered whether the liability regime should extend beyond the sea leg. Considerable support was expressed at the CMI Conference in Singapore in February 2001 for extending the period of the carrier’s responsibility to cover inland carriage preceding or subsequent to nautical carriage from the time of receipt by the carrier to the time of delivery to the consignee and for a “network” system of liability. The ISC was therefore instructed to cover the possibility that the Instrument could apply to other forms of carriage associated with the carriage by sea.

The ISC was also instructed at Singapore to include provisions in the Instrument to facilitate the needs of electronic commerce. There was a consensus at the Singapore Conference that the final

Instrument must facilitate and be compatible with electronic commerce and that the provisions covering these aspects should be technology-neutral. The Instrument was therefore drafted to apply to all contracts of carriage (save for charterparties and possibly some other similar contracts), including those concluded electronically. Rather than define the word “document”, which is widely felt to mean paper, to include information recorded in any medium, the expression “electronic record” was used to deal with contracts concluded electronically, or evidenced by messages communicated electronically.

Following the Singapore Conference a draft of the Instrument was circulated for comment to all National Associations and a number of international organisations, including some which had not previously been members of the Round Table. A further meeting of the ISC was held in July 2001 at which discussion was concentrated on those chapters which had been substantially redrafted after Singapore. Responses and comments were received from fifteen National Associations and nine international organisations and a further draft was circulated (on which some further comments were received) for final revision at the sixth meeting of the ISC in November 2001. Many organisations and individuals, both within and outside the CMI (to whom the CMI is most grateful), contributed to the production of the Draft Instrument, which was thus the subject of as wide a consultation process as was possible in the allotted time frame.

The preparatory work of the CMI on Issues of Transport Law came to an end with the submission to the Secretariat of UNCITRAL on 11 December 2001 of the CMI Draft Instrument on Transport Law. The completion of this Draft Instrument represented the culmination of three and a half years intensive work by CMI on its Issues of Transport Law project.

A number of issues of principle nevertheless remained to be resolved, as indicated by the bracketed text and explained in the commentary, and in view of the very tight time frame in which it was produced, the CMI does not claim that the Draft Instrument was perfect. It was thought that it would no doubt provoke controversy, comment and criticism, but it was hoped that this would be largely constructive, and the CMI would remain involved as the project developed within UNCITRAL.

UNCITRAL Working Group III

First Reading – Ninth, Tenth and Eleventh Sessions

The project was put on the agenda of Working Group III (Transport Law) and the CMI Draft Instrument, with its explanatory commentary, was annexed to a Note by the UNCITRAL Secretariat which is document A/CN.9/WG.III/WP.21 (“WP 21”). The Working Group generally reviewed the themes of the Draft Instrument at its ninth session in April 2002. It then began its first reading of the individual articles (save for the provisions dealing with the use of electronic commerce techniques). This first reading continued through the tenth and eleventh sessions in September 2002 and March/April 2003.

Following the completion of the first reading the Secretariat was requested to prepare a revised version of the Draft Instrument to reflect the decisions made by the Working Group during the first

reading. Where no decisions had been made, the Secretariat was asked to bear in mind the various views which had been expressed. The Secretariat accordingly prepared the revised draft which forms the Annex to the Note by the Secretariat which is document A/CN.9/WG.III/WP.32 ("WP 32"). WP 32 contains variants of a number of articles, one usually being based on the original text in WP 21 and the other a suggested redraft for consideration by the Working Group. The articles are renumbered serially and the changes from the text in WP 21 are indicated by underlining and strikeout. The changes are explained in footnotes which summarise the points raised on the first reading. The commentary contained in WP 21 is not included.

WP 32 contains provisions on jurisdiction and arbitration, which were not included in the CMI Draft Instrument. One variant of these provisions reproduces articles 21 and 22 of the Hamburg Rules. The other variant omits the provisions in these articles which the CMI Uniformity Sub Committee suggested should be deleted.

Second Reading – Twelfth and Thirteenth Sessions

The second reading of the Draft Instrument based on the text in WP 32 began at the twelfth session in October 2003 when it was decided that topics should be grouped into core issues and sub issues. The first issues to be discussed were the scope of application of the Instrument and conflicts with international and national legislation. The Working Group then considered the basis of the carrier's liability (articles 14 and 15) and the carrier's obligations in respect of a voyage by sea (article 13). Discussion of article 15 resumed at the thirteenth session in May 2004. The Working Group then considered articles 16 (delay), 17 (calculation of compensation), 18 (limits of liability), 19 (loss of the right to limit), 20 (notice of loss), 21 (non contractual claims), 22 (fire and salvage), 23 (deviation) and 24 (deck cargo). The Working Group next considered the obligations of the shipper (articles 25 to 32). Finally the Working Group decided to delete from the Draft Instrument all the provisions in chapter 9 relating to freight.

Following the twelfth and thirteenth sessions the Secretariat prepared provisional redrafts of the articles considered at these sessions which are contained in documents A/CN.9/WG.III/WP 36 and 39 ("WP 36" and "WP 39"). As in WP 32 some of these redrafted provisions reflect decisions made by the Working Group; others are preliminary drafts prepared by the Secretariat on the basis of views which had been expressed.

Fourteenth and Fifteenth Sessions

The Working Group came back to the basis of the carrier's liability (article 14) at the fourteenth session in November/December 2004. At the conclusion of the discussion a revised text of article 14 was considered to be broadly acceptable. The Working Group next considered freedom of contract (articles 1, 2, 88 and 89) which had previously been considered during the first reading and at the

twelfth session under the general issue of scope of application. Finally the Working Group considered for the first time the provisions on jurisdiction (chapter 15) and arbitration (chapter 16).

The Working Group resumed its consideration of scope of application and freedom of contract at the fifteenth session in April 2005. The Working Group concluded that a revised text should be used as a basis for continuation of the discussion at the seventeenth session.

The Working Group then came back to jurisdiction and arbitration. The discussion was based on a revised text which had been prepared following the discussion at the fourteenth session and subsequent inter-sessional exchanges. The Secretariat was requested to prepare a further revised text in the light of the decisions made and points raised. The Working Group did not consider the articles on arbitration, partly because of lack of time and partly because a suggestion was made for reconciling the various conflicting views. This suggestion was subsequently contained in a formal proposal from the Netherlands set out in document A/CN.9/WG.III/WP.54 ("WP 54").

Finally the Working Group considered the revised provisions on electronic commerce contained in document A/CN.9/WG.III/WP.47 ("WP 47") which had been prepared following a joint meeting of experts drawn from Working Groups III and IV (Electronic Commerce). With a few further amendments these revised provisions were adopted.

Although the second reading had not been completed, the Secretariat prepared a consolidated text of a Draft Convention which is set out in the Annexes to the Secretariat's Note which is document A/CN.9/WG.III/WP.56 ("WP 56"). Annex I is a clean text. Annex II contains the same text, but with underlining and strikeout to indicate changes from previously published versions of the text. The underlining and strikeout does not indicate changes from WP 32, because agreed changes had been published in WP 36, WP 39, WP 47 and the reports of the fourteenth and fifteenth sessions. The underlining and strikeout indicates changes suggested by the Secretariat where the Secretariat was asked to prepare a revised text and suggested corrections, clarifications, improvements and relocation of provisions which were thought to be simply matters of drafting. As in WP 32 the changes are explained in footnotes, save where they are thought to be purely matters of drafting. The articles have been renumbered, but the old article numbers, as referred to above, can be found alongside the new numbers in the contents pages of Annex II.

Sixteenth and Seventeenth Sessions

Chapter 8 (obligations of the shipper) was reviewed at the sixteenth session. It was agreed that a fault based regime should be adopted for a breach of the obligations under articles 28 and 30(a) and (b), whilst strict liability should be adopted for a breach of the obligations under articles 30(c) and 33. Articles 29, 30(b), 31 and 33(4) were reviewed again at the seventeenth session, but the Working Group was unable to reach a conclusion on liability for delay.

Chapter 10 (delivery to the consignee) was considered and the substance of articles 46-63 was broadly approved, subject to some drafting modifications by the Secretariat, and a new provision on the right of retention based on paragraph 14 of A/CN.9/WG.III/WP.63 would be included. It was also

agreed that provisions on bills of lading consigned to a named person should be included as proposed in A/CN.9/WG.III/WP.68.

Chapter 11 (right of control) was considered at the seventeenth session. Article 58 was approved in substance; it was agreed that the other articles would be revised by the Secretariat.

A revised text of the articles in chapter 16 (jurisdiction) was accepted at the sixteenth session as set out in paragraph 73 of A/CN.9/591. The compromise proposal in WP 54 was broadly accepted and the revised text set out in paragraph 103 of A/CN.9/591 was supported as part of a compromise package on jurisdiction and arbitration.

A revised text of the articles in chapter 3 (scope of application) and chapter 20 (validity of contractual obligations) based on the text proposed in A/CN.9/WG.III/WP.61 was agreed.

Eighteenth Session

The discussion of chapter 16 (jurisdiction) was based on the text in A/CN.9/WG.III/WP.75, which is substantially the text accepted at the sixteenth session. The United States proposed that contracting states should be able to decide whether or not to be bound by chapter 16 either by making a reservation opting out or by opting in. The European Commission then proposed a partial opt in so that states should be permitted to opt in to chapter 16 with or without article 76. There was support for the United States' proposal and interest was expressed in a partial opt out/in. The Secretariat was asked to prepare a revised text giving effect to these proposals.

The Secretariat tabled a revised text of chapter 17 (arbitration) which it had prepared following a joint meeting of experts drawn from Working Group III and Working Group II (Arbitration) and which is set out in paragraph 270 of A/CN.9/616. This text also provides for an opt in/out procedure corresponding to that proposed for chapter 16. It was decided that this text represented a good compromise and acceptable grounds on which to continue discussions. Again the Secretariat was asked to prepare a further version.

In the discussion of chapter 9 (transport documents) the addition of article 38(e) proposed in A/CN.9/WG.III/WP.79 ("WP 79") was adopted. Article 40(3), revised as based on the text in WP 79, would be maintained in square brackets and the revised text of article 43 set out in paragraph 58 of A/CN.9/616, with an amendment to paragraph (b), was considered to be acceptable in substance.

The mechanism of per package and per kilo limits of the carrier's liability for loss of or damage to the goods in article 64(1) was approved, but a final decision on limitation levels was deferred. No firm decision was made on liability for delay.

The outcome of the discussion on the relationship with other conventions was that the scheme of article 27(1) would be maintained, with the references to national law in square brackets, and that articles 89 and 90 would be deleted. The Secretariat was asked to prepare a drafting clarification to ensure that there was no conflict with the Montreal Convention.

It was agreed that chapter 14 (rights of suit) be deleted.

Following the substantial completion of the second reading at the eighteenth session the Secretariat prepared a new consolidated version of the Draft Convention which is contained in A/CN.9/WG.III/WP.81 (“WP 81”). Changes to the text in WP 56 are indicated in footnotes. WP 81 contains the revised texts which the Secretariat was asked to prepare at the eighteenth session, including the text of chapters 15 and 16 (previously 16 and 17).

Third Reading – Nineteenth and Twentieth Session

Articles 2 to 41, 43, 84 and 88-90 were considered at this session. Articles 2 to 41, 43 and 84 were approved substantially as they appear in WP 81, including the second alternative bracketed text of article 19(4), although some drafting improvements are to be made. The definitions in article 1 were considered in conjunction with the substantive articles containing the defined terms and a revised text of article 1(6) and (7) was approved, together with consequential amendments to articles 4, 18 and 19, as set out in paragraph 141 of A/CN.9/621.

A compromise proposal was made regarding the reference to national law in article 26(1) (formerly article 27(1)). It was agreed that all references to national law be deleted and the Secretariat should draft a declaration provision allowing a contracting state to include its mandatory national law in article 26(1) subject to the conditions referred to in paragraph 192 of A/CN.9/621.

The Working Group resolved the issue of delay by agreeing to delete all references to the shipper’s liability for delay and to limit article 21 to the opening phrase, with the word “expressly” deleted, omitting the reference to delivery within a reasonable time.

Article 89 was discussed at length, but it was finally agreed not to reopen the previously agreed compromise and to approve article 89 as drafted. Article 88, including the word “increases” in article 88(2), and article 90 were approved.

In the light of the changes made at the nineteenth session, the Secretariat proposed corresponding drafting improvements to articles 42, 44 and 49 for consideration at the twentieth session, as set out in A/CN.9/WG.III/WP.94.

The remaining articles were considered and the third reading was completed during the twentieth session. Articles 42 and 44, as contained in WP 94, and 45-47 and 50 and 51, as in WP 81, were approved substantially as drafted, and article 49 was revised as proposed by Denmark and the Netherlands in A/CN.9/WG.III/WP.95. The inclusion of article 48 was to be reconsidered.

Chapter 11 (rights of the controlling party) was approved substantially as drafted. The Netherlands had made a proposal in A/CN.9/WG.III/ WP.96 to delete articles 60(2) and 61 from Chapter 12 (transfer of rights). It was agreed to delete article 61, but to retain 60(2) with some revision. Chapter 14 (time for suit) was approved substantially as drafted.

Article 62 (limits of liability) was discussed at length in conjunction with articles 63 and 99 and the decision made at the nineteenth session to include a declaration provision in article 26(1). It was provisionally agreed that 835 SDR per package and 2.5 SDR per kilo be inserted in article 62(1), that 2.5 times the freight be inserted in article 63 and that the reversal of the decision to include a declaration provision in article 26(1) and the deletion of articles 62(2) and 99 be considered further.

It was agreed that the provisions of Chapter 15 (jurisdiction) should only bind states that opted in to it and that the alternative provisions for a full or partial opt out be deleted. It was agreed that a similar opt in approach should apply to arbitration (article 81).

The Secretariat was asked to review the text of article 83 (denunciation of other conventions). Two proposals for resolving possible conflicts between the Draft Convention and other conventions were considered and the Secretariat was asked to prepare a further draft of article 84. Views were divided on the number of ratifications etc. which would be required for the Convention to enter into force (article 97).

Following this session the Secretariat prepared a further text to give effect to the decisions made on the third reading which is contained in A/CN.9/WG.III/WP.101 (WP 101).

Final Review – Twenty-first Session

The Working Group reviewed the Draft Convention on the basis of the text contained in WP 101 and resolved the issues which remained outstanding from the twentieth session.

In accordance with a proposal from the Netherlands contained in A/CN.9/WG. III/WP 102, it was agreed to include “road and rail cargo vehicles” in articles 26 (deck cargo), 28 (delivery for carriage) and 62(3) (package limitation). It was also agreed, as proposed by Italy, Korea and the Netherlands in A/CN.9/WP.III/WP 103, to delete all references to “consignor”. In order to obtain a broader consensus, a number of delegations proposed a revised text of article 83, which clarified the text in WP 101. The revised text was approved, but the Working Group did not agree to amend the definition of “volume contract” in article 1(2).

The limitation amounts in article 62(1) were finally agreed at 875 SDR per package and 3 SDR per kilo. It was also agreed that articles 62(2) and 99 be deleted and that no declaration provision be included in article 27(1) (article 26(1) in WP 81).

It was agreed that article 49 (article 48 in WP 81) be deleted, that article 85 (other conventions), which the Secretariat had prepared following the twentieth session, be approved and that twenty ratifications etc. be required for the Convention to enter into force.

At the conclusion of the session the Working Group approved the text of the Draft Convention as contained in the annex to the report of the session (A/CN.9/645) with the title “Draft convention on contracts for the international carriage of goods wholly or partly by sea.” The work of the Working Group was thus concluded.

Uncitral Commission – Forty-first session

Following the approval of the text of the Draft Convention by Working Group III, the text as set out in the annex to A/CN.9/645 was circulated to Governments for comment. Sixteen states and the “African Group” submitted comments which are contained in A/CN.9/958 and Addenda 1-14 thereto. The Draft Convention was then considered by the Commission at its 41st session in June/July 2008.

The text was approved by the Commission substantially as in the annex to A/CN.9/645, but amendments were made to articles 1(10), 1(14), 42(3), 45(5), 50(2)(b), 78(2) and 84, a new paragraph 38(3) was added, and articles 13, 36 and 75(2)(b) were deleted.

The most substantial amendments made by the Commission were to article 49. This article (renumbered as article 47) now provides that the provisions of paragraphs (a) to (h) of the article will only apply if the negotiable transport document /electronic transport record expressly states that the goods may be delivered without surrender; in other words it provides for a contractual opt-in system. Consequential amendments were made to articles 47 and 48.

Although the articles in question were not amended, other articles, in particular articles 12, 18, 61, 81.2, 82 and 92, provoked considerable debate.

On 3 July 2008 the Draft Convention, revised as noted above, was formally approved by the Commission.

In giving its approval to the Draft Convention, the Commission graciously expressed its appreciation to the CMI for the advice it provided during its preparation.

UN General Assembly

Following its approval by the Commission, the Draft Convention was considered by the Sixth (Legal) Committee of the General Assembly in October, when the Committee reviewed the report of the 41st session of the Commission. The Committee recommended that the Convention be adopted in the form of the Draft Convention annexed to the report of the Commission.

* * *

All Working Group III's Working Papers (WP with a serial number from 21 to 103 inclusive), including the documents referred to above, and a Joint Proposal by Australia and France on freedom of

contract prepared for the thirty-ninth session of the Commission in June-July 2006 (A/CN.9/612) are published on the UNCITRAL website:http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html.

* * *

The reports of the sessions of Working Group III referred to above are also published as follows:

A/CN.9/510 Report of the ninth session

A/CN.9/525 Report of the tenth session

A/CN.9/526 Report of the eleventh session

A/CN.9/544 Report of the twelfth session

A/CN.9/552 Report of the thirteenth session

A/CN.9/572 Report of the fourteenth session

A/CN.9/576 Report of the fifteenth session

A/CN.9/591 Report of the sixteenth session

A/CN.9/594 Report of the seventeenth session

A/CN.9/616 Report of the eighteenth session

A/CN.9/621 Report of the nineteenth session

A/CN.9/642 Report of the twentieth session

A/CN.9/645 Report of the twenty-first session

The comments of Governments (A/CN.9/958 and Addenda 1-14) and the Report of the 41st session of the Commission (A/63/17) are published as Commission papers.

The report of the Sixth (Legal) Committee (A/63/438) is published as General Assembly Resolution (A/RES/63/120).

The CMI travaux préparatoires are published in Yearbook 2000-Singapore I (<http://www.comitemaritime.org/Uploads/Yearbooks/Yearbook+2000.pdf>) and Yearbook 2001-Singapore II (http://www.comitemaritime.org/Uploads/Yearbooks/YBK_2001.pdf) and are available on this site.

They consist of the following documents:

1. Agenda Paper
2. Door to Door Transport
3. Draft Outline Instrument
4. Electronic Commerce Implications of the Draft Outline Instrument
5. Report of the First meeting of the I-SC
6. Report of the Second meeting of the I-SC
7. Report of the Third meeting of the I-SC
8. Report of the Fourth meeting of the I-SC
9. Report of Committee A to the Singapore Conference
10. Resolution of the Conference
11. Revised Draft Outline Instrument of 31 May 2001
12. Consultation Paper of 31 May 2001
13. Synopsis of the Responses to the Consultation Paper and other comments on the Draft Outline Instrument
14. Report of the Fifth meeting of the I-SC
15. Report of the Sixth meeting of the I-SC
16. CMI Draft Instrument on Transport Law

Documents 1-8 may be found in Yearbook 2000 - Singapore I (<http://www.comitemaritime.org/Uploads/Yearbooks/Yearbook+2000.pdf>). Documents 9-10 may be found in Yearbook 2001 - CMI 37th Conference (http://www.comitemaritime.org/Uploads/Yearbooks/YBK_2001.pdf). Documents 11-16 may be found by clicking on Yearbook 2001-The Work of the CMI after the Singapore (http://www.comitemaritime.org/Uploads/Yearbooks/YBK_2001.pdf).