ICC Commission on Transport and Logistics

Comments on the United Nations Commission on International Trade Law (UNCITRAL) draft instrument on the carriage of goods [wholly or partly] [by sea]

The International Chamber of Commerce (ICC) believes that trade by sea would be facilitated by a harmonised, international ocean cargo regime, updated to take into account modern developments in transportation and logistics. ICC commends the ongoing effort by UNCITRAL to draft an instrument on transport law and welcomes the opportunity to provide business views to the drafting process.

A variety of regimes currently govern liability for cargo loss or damage that occurs during international ocean carriage. The most prominent among those regimes are the “Hague Rules” of 1924 and the “Hague-Visby” rules, which were adopted in 1968. Another cargo liability regime is the Hamburg rules. In general, however, none of these regimes takes full account of modern developments in international trade such as containerization, multimodal transport, just-in-time delivery and e-commerce.

In developing a new, harmonised international ocean transportation cargo regime, ICC supports a regime that would:

- Contribute to the harmonization of liability regimes for maritime transport and related door-to-door transportation;

- Update and clarify the burdens of proof for all parties and defenses of a carrier or intermediary against whom a claim is made;

- Permit all parties wishing to enter into customized ocean transportation contracts to agree to depart from the requirements of the international ocean transportation cargo liability regime;

- Allow for adjustment of the Hague-Visby liability limits over time;

- Establish procedures and provide clarity of rights and obligations regarding cargo liability to minimize the burden on international trade resulting from excessive litigation; and
Adopt modern and appropriate provisions governing other matters of importance in the international transportation of goods.

Because the issue of cargo regimes for maritime transport is by its very nature an international issue, any new standard in the area should entail substantive consultations with all relevant industry representatives.

In a statement released on March 2003, ICC expressed its conviction that the efforts carried out by UNCITRAL to elaborate a new regime for the international carriage of goods are timely and valuable. The ICC Commission on Transport and Logistics sets out hereafter its observations on the latest available version of the UNCITRAL draft (document A/CN.9/WG.III/WP.32)

**Freedom of Contract**

ICC supports the inclusion in the draft instrument of a provision that permits shipper(s) and carrier(s) to deviate from the terms of the instrument in an Ocean Liner Service Agreement (OLSA). The draft instrument would apply to an OLSA unless the parties expressly agree to deviate from its terms in the OLSA for a significant volume of cargo.

An OLSA is a contract mutually negotiated in good faith in writing or electronic format that provides for the carriage of goods by sea in a series of shipments over a specified period of time at a specified rate. An OLSA may provide for greater or lesser duties, rights, obligations or liabilities than those provided for in the draft instrument.

ICC does not believe that charterparties, volume contracts with non-liner operators, or slot charters should be subject to the draft instrument, nor would they qualify as an OLSA.

The OLSA provision of the draft instrument would apply equally to vessel operators and non-asset based carriers who issue documentation in their own name and are responsible for the performance of the ocean carriage. This principle may be addressed through the definition of the term carrier to include a contracting carrier (whether or not such carrier operates the vessel or other vehicle of transport) who enters into the contract of carriage with the shipper.

In the interest of international uniformity, the draft instrument should also have the indicia of a "self-executing treaty" as distinguished from a non-self-executing treaty (such as the Hague/Visby system which UNCITRAL will replace), so that it would not require further implementing legislation in order to be brought into effect in countries which recognize self-executing treaties.

**Liability of the carrier**

As previously stated in WP.28, ICC supports a regime that would provide clarity of rights and obligations regarding cargo liability to minimise the burden on international trade resulting from excessive litigation.

- ICC supports a fault based liability system as proposed in Article 14 of the draft instrument.
- The list of “excepted perils” should be maintained in view of the extensive jurisprudence, and should be modernised. The list should also include fire;
perils, dangers and accidents of the sea or other navigable waters; and saving or attempting to save life or property at sea.

- It is imperative that a causal connection exists between unseaworthiness and the loss or damage.
- Burdens of proof should be clearly stipulated to facilitate the claims process.
- The limits of liability should be those established by the Hague-Visby Rules which are generally sufficient in practice, and the regime should allow for adjustment of the limits over time.
- ICC supports a regime that would achieve an equitable balance in the risk allocation between carrier and cargo interests.

**Jurisdiction and arbitration**

ICC supports the concept of freedom of contract and considers that commercial parties should remain free to choose the forum and method for resolution of disputes.

ICC believes that the instrument should provide a claimant with a list of reasonable places where a cargo claim could be litigated or arbitrated. With regard to the ICC position expressed above on OLSAs and charter parties, ICC believes that agreements on jurisdiction and arbitration should have effect notwithstanding the provisions of the instrument. ICC also supports the extension of a forum and method of dispute resolution designated in an OLSA to third parties if certain conditions are met.

The present practice whereby jurisdiction clauses in contracts of carriage are upheld allows for the multitude of claims that may arise from a single incident to be directed to a single forum, providing an efficient and economic dispute resolution system.

**The International Chamber of Commerce**

ICC is the world business organization, the only representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world. ICC was founded in 1919. Today it groups thousands of member companies and associations from over 130 countries. National committees work with their members to address the concerns of business in their countries and convey to their governments the business views formulated by ICC.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. These include financial services, information technologies, telecommunications, marketing ethics, the environment, transportation, competition law and intellectual property, among others.

ICC’s Commission on Transport and Logistics represents all segments of the international transport industry, including shippers, vessel operators, freight forwarders, carriers and insurers.