

## *The Continuing Saga of Cargo Liability Reform: the Debate Goes International*

by *Steven W. Block* June 2003

**Reprinted with permission from  
*Marine Digest and Transportation News***

It still hasn't happened. We've heard nearly a decade of hoopla about pending cargo liability reform, but the powers-that-be haven't even considered a bill which would bring the law governing cargo liability in international shipping out of the Great Depression era and into the 21<sup>st</sup> Century.

But we may be getting closer. Not in the halls of the U.S. Congress as originally contemplated, but in a tribunal that may make more sense given that we're talking about international business here. Instead of modifying its Carriage of Goods by Sea Act (COGSA), Uncle Sam now is exploring a uniform, multinational liability regime alongside his major trading partners in the United Nations. The UN's Committee on International Trade Law (UNCITRAL) is overseeing the effort by participants from many member nations. U.S. shipper and carrier interests are represented by attorneys from both spheres.

Much of the world already adheres to an international treaty regarding cargo liability known as the Hague-Visby Rules, which has existed in various forms since 1924. The U.S. never embraced Hague-Visby, preferring to implement its own statute, COGSA, in 1936. In 1978, UNCITRAL blessed an updated regime known as the Hamburg Rules, which 30 countries have adopted. The U.S. was not one of them. All of these liability regimes work similarly – granting a laundry list to carriers of defenses for lost or damaged cargo claims, along with many other particulars – but, each has its own peculiarities.

So we're left with a complicated mess on the international scene, with some players operating by one international set of rules, others by another, and still others by their own scheme. Moreover, the international regimes, as well as COGSA, are obsolete. They simply don't contemplate modern shipping volumes and practices, intermodalism, today's economy, the electronic era, and other issues. Since the mid 1990s, we've realized it's time for some serious change.

Bills were sent to committee on the hill a couple times over the past decade, but the effort was either stalled by players dissatisfied with one or more provisions or sidetracked by more pressing events. Leading the charge during that period was the National Industrial Transportation League (NITL), a very influential trade group representing the country's largest shippers. But with the passage of the Ocean Shipping Reform Act – another NITL effort – in 1998, along with an economy predominantly favoring shippers' economics, NITL apparently has seen little reason to fight for reform legislation. In this market, large shippers hold the cards and can usually get what they want from carriers and others who might be liable for lost/damaged cargo.

Nonetheless, the issue of outdated cargo liability law has lately received enough international attention to gain the critical mass needed for a UN effort. An UNCITRAL Working Group recently was formed, schedules for submission of draft instruments were set, and meetings have convened to haggle out a deal. The last such meeting, held in New York City in April, further revealed the plethora of interrelated issues international shipping liability presents. If you think getting Congress to agree on maritime subjects is tough, try organizing dozens of countries with divergent legal systems, business and economic cultures, and operational circumstances.

The biggest issue before UNCITRAL's Working Group is any new liability regime's scope of coverage. Intermodalism is an issue everyone agrees the new rules should address. Ideally, one big liability regime spelling out everyone's rights and obligations throughout a transport, door-to-door, would be wonderful. But it's just not that easy. There are so many different approaches to trucking and rail regulation throughout the world that pleasing everyone would be an unrealistic goal. Instead, negotiators are considering a "network" system, which incorporates national or multinational liability provisions for trucking and railroad liability. A concept gaining momentum appears to be one whereby surface transportation statutes and treaties to which carriers, shippers and others are mandatorily subject would trump the international maritime treaty. If players can opt out of the applicability of a statute or treaty (such as the U.S.'s Carmack Amendment governing trucking and rail liability), then the provisions of that statute or treaty which conflict with UN-mandated maritime rules wouldn't apply.

A related scope of coverage issue is determination of entities subject to the new regime. The proposed COGSA reform bill introduced the concept of "performing carriers," i.e., entities which don't actually haul cargo, but which play an integral role in the ocean transportation process (referred to as "performing parties" in the Working Group's draft instruments). Working Group negotiators propose subjecting these entities to the new regime's dominion. But in certain sectors, intermediaries, stevedores, warehousemen, and others just aren't used to adhering to carrier liability standards – especially ones that could force them to defend claims in faraway lands. Multimodalism has resulted in contracts of carriage that combine transport and forwarding, complicating this issue. It will be among the thorniest.

The U.S. is particularly concerned with maintaining the sanctity of individually negotiated service contracts which might contain carrier liability terms. Discussion includes whether this concept should be extended to charter parties, another species of tailor-made contract. Other countries prefer liability rules that are mandatory regardless of what certain participants agree to. They state concern third parties might directly or indirectly fall outside the scope of the new regime as a result of someone else's deal. To address this, the definition of "service contract" might be doctored up to give individual agreements narrower effect.

So many other points are at issue that mere mention of each would be space prohibitive here. A few notables include nixing enforceability of forum selection clauses (which, in the U.S., by way of the Supreme Court's 1995 *Sky Reefer* decision, has resulted in much

exported cargo litigation); eradication of the “Error in Navigation and Management” defense, which some view as too carrier lenient; modification of the per package limitation, currently a minimum of \$500 under COGSA; extension of time to file suit from one year to two years; and imposition of obligations on shippers in an era focused more heavily on security.

While UNCITRAL appears well under way with moving along cargo liability reform expeditiously, it still could be a time consuming process. Sessions to address draft instrument issues are scheduled through the end of this year, and extensive efforts will follow those. Expect slow movement, but hope that it’s steadily productive progress. It’s time to enter the 21<sup>st</sup> Century, but we have a wide sea to travel before we get there.

***Ref: Draft Instrument and other reports of UNCITRAL’s Working Group***  
***<http://www.uncitral.org/en-index.htm>***