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INTERNATIONAL CONVENTION ON TRANSPORT LAW

Executive Summary

1. The international carriage of goods by sea is largely governed by the Hague Visby Rules, which were adopted under an international convention in 1968 and subsequently given legislative effect by most of New Zealand's trading partners. Historically, the Rules and their predecessors were a response to the contractual exclusion of liability imposed by ship owners on cargo owners, and they focussed on striking a balance by giving ship owners defined and irreducible obligations in return for a limitation on their maximum liability.

2. Under the Rules the carrier is obliged to exercise due diligence in relation to the seaworthiness of the ship and in making it fit and safe for the preservation of the goods, and has a duty to properly and carefully handle the goods. Having fulfilled those obligations, the carrier is excused from loss or damage arising from certain excepted perils; but is otherwise liable for amounts limited by a formula intended to withstand the effects of inflation.

3. The Rules have become largely the domain of the cargo insurers and the carriers' P & I Clubs. The principles governing the adjustment of liability are well known, and most claims are quickly and pragmatically settled between experienced claims handlers.

4. In 1996 UNCITRAL (United Nations Commission on International Trade Law) requested the Comité Maritime Internationale to gather information about current practices in the area of international carriage of goods by sea. Following its work, a final draft convention was adopted in November 2001 and transmitted to UNCITRAL. It now awaits consideration at a diplomatic level.

5. The convention provides for uniform rules in areas currently not subject to an international regime and expands the provisions of the existing regimes to take account of modern transport practices. There are some direct and tangible benefits to New Zealand interests, including:

- The extension to cover combined transport;
- The provisions for electronic transport documents;
- The extension of the carrier's obligations of due diligence to cover carrier-supplied containers; and
- The ability to sue the registered owner in cases of doubt about the identity of the carrier.

6. The convention is not likely to bring about cost savings from reductions in damage, loss and delay itself because carriers already have strong commercial incentives to minimise such losses. The benefits would come from reduced work in claims handling and trouble shooting on the part of the staff of shippers, carriers, insurers, loss adjusters and law firms because the new regime will simplify the delineation of responsibility between the parties.

7. As the convention offers significant benefits over many years and presents no detriments, and as its adoption would require minimal input from New Zealand, we conclude that New Zealand should press for its earliest possible adoption.

8. Finally, many of New Zealand's exports are biological and need special care with respect to temperature, atmosphere, humidity and ventilation throughout the voyage. We believe there may be a case for an additional Article dealing with the particular problems presented by cargoes of this kind; probably including a requirement that carriers provide data on carriage conditions - at least when there are grounds to believe there may have been damage. We suggest the Ministry consult with shippers of these products to establish whether there is an interest in or need for an Article in this area; and then determine whether other countries with similar interests would support such an Article. Its prospects of success would also need to be assessed.

A Introduction

1. The Ministry of Transport engaged us in June to prepare a short report on the extent of New Zealand's legal and economic interest in a possible new convention on the carriage of goods by sea. Currently UNCITRAL (United Nations Commission on International Trade Law) has before it a draft Convention on Transport Law. This report considers that draft and is to:

    - Provide an assessment of the extent to which existing conventions meet New Zealand's interests;

    - Identify the ways in which the proposed convention could improve New Zealand's interests;

    - Assess the benefits to New Zealand which could be achieved through these improvements to the regime;

    - Identify matters not dealt with in the proposed convention that might benefit New Zealand;

    - Make an assessment on the likelihood of such changes being able to be included in the convention.

2. Section B of the report describes the present regime and Section C identifies its costs. Section D describes the proposed new international regime and the improvements it offers from a New Zealand perspective. Section E identifies the principal additional feature that could assist New Zealand. Section F then discusses the benefits of the proposed convention and concludes that it should be supported unhesitatingly. Section G discusses the principal additional feature that New Zealand could seek and the prospects for achieving it. Finally, Section H summarises our conclusions - essentially that New Zealand should unhesitatingly support the proposed convention and should consider an additional article relating to products which are sensitive to temperature, atmosphere, humidity and ventilation.

3. We have consulted briefly, mainly by telephone, with a number of industry participants, including shippers, lawyers and insurers. Few of them had any prior knowledge of the draft convention. However after discussion there was a high degree of support for its objectives, coupled with the recognition that it cannot be expected to solve all problems. If a new convention promises to give comparative certainty and clarity to more aspects of the law governing the international carriage of goods then it will be welcomed.

B Description of present regime

4. The Hague Visby Rules, adopted under an international convention in 1968, are designed to govern the rights and obligations of the parties to contracts for the international carriage of goods under bills of lading. The Rules are given the force of law in New Zealand by virtue of section 209 of the Maritime Transport Act 1994, and appear as the Fifth Schedule to that Act. Most of New Zealand's trading partners, including Australia, Britain and the other countries of Europe, and Japan, have enacted legislation giving effect to the Rules.

5. The Hague Visby Rules represent the current evolution of rules governing the international carriage of goods by sea which commenced with the adoption of the Harter Act by the United States of America in 1893. The history is briefly summarised in paragraph 9 of the judgment of Williams J in *Dairy Containers Limited* v *The Ship "Tasman Discoverer"* [2002] 1 NZLR 265, as follows:

> "The Hague Rules arose out of the massive growth of international sea trade during the nineteenth century. That, in its turn, led to carriers inserting exculpatory clauses in bills of lading to reduce their liability. Ultimately, they achieved near immunity from any head of liability for cargo. That, in its turn, led to legislative intervention, first in the United States of America which passed the Harter Act in 1893. It cut down freedom of contract by invalidating bill of lading clauses which gave carriers wider exemptions than those in the Act irrespective of whether the ship was United States-owned or trading to or from ports in the United States or whether there was a causal connection between unseaworthiness and cargo damage. Many countries in the then British Empire followed suit, including New Zealand's Shipping and Seamen Act 1903. Civil law countries did not follow but, partly because of massive damage to the merchant fleet in World War I, and proposed imperial legislation based on the Harter Act, the Comité Maritime Internationale adopted draft model rules in 1921 which were later adopted at an international conference convened at the Hague that year and recommended the adoption of a set of rules based on the Harter Act for voluntary inclusion in bills of lading. After further revision at conferences in Brussels in 1922 and 1923, they were adopted at a conference in Brussels in 1924 and became the International Convention for the Unification of Certain Rules relating to Bills of Lading 1924, commonly called the Hague Rules. Many countries in the British Empire and elsewhere passed legislation adopting the Hague Rules soon afterwards. The USA adopted the Hague Rules in its Carriage of Goods by Sea Act 1936, and in 1940, New Zealand passed the Sea Carriage of Goods Act. In 1963, there was a conference which addressed problems in the Hague Rules, particularly relating to the package

> limitation and its monetary value, and an amending draft called the Visby Rules was discussed. This resulted in a protocol to the Hague Rules being signed in 1968, the resultant document being the Hague–Visby Rules.

6. A more detailed description is contained in the attached "Introductory Notes" reproduced from the 18th edition of *Scrutton on Charterparties and Bills of Lading*, pages 402-409.

7. The Hague Visby Rules were adopted primarily to deal with two problems which had emerged with the 1924 rules – the need to deal with containers, and the monetary value of the package limitation.

8. It is fair to say that the Hague Rules in their various manifestation did not purport to provide a complete code governing all aspects of the carriage of goods by sea. Initially a response to the contractual exclusions of liability imposed by shipowners on cargo owners made possible by complete freedom of contract, their focus was on striking a balance by giving shipowners defined and irreducible obligations in return for a limitation on their maximum liability.

9. Thus, under Article III rule 1, the carrier has an obligation to exercise due diligence in relation to the seaworthiness of the ship, its manning, equipment and supply, and in making the ship fit and safe for the reception, carriage and preservation of the goods; and under Article III rule 2 a duty to properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods. Having fulfilled those obligations of due diligence, the carrier is excused from loss or damage arising from the excepted perils specified in Article IV rule 2. And, in the event of liability, the amount of such liability is limited in terms of Article IV rule 5 by reference to the number of packages or the weight of the goods.

10. Although the Hague Visby Rules provide certain minimum requirements for the contents of bills of lading, many aspects of the international carriage of goods are left to be dealt with by the general law, or are mentioned only in passing. Such topics include the liability to pay freight, the rights of shippers or bill of lading holders to control the goods whilst in transit, the transfer of rights to goods in transit under negotiable documents of carriage, or issues relating to the delivery of cargo at the conclusion of carriage. Furthermore, the Rules cover only ocean carriage itself – from tackle to tackle.

11. Because of the primary focus of the Hague Visby Rules on liability issues as between carriers and cargo owners, they have become largely the domain of the parties' insurers. From a New Zealand perspective, cargo owners are able to obtain insurance on the New Zealand market and pay premiums in New

Zealand currency. The liabilities of carriers for damage to cargo (and many other risks) is almost universally covered by a small group of mutual insurers (P & I Clubs – "P & I" stands for "protection and indemnity") based primarily in England. Carriers' insurance costs are therefore recovered as an element of the freight, generally remitted to a foreign shipowner and therefore a foreign exchange debit so far as New Zealand is concerned.

12. Other relationships – e.g., between shippers and consignees, or holders of bills of lading generally; and other issues – such as the right to give instructions in respect of cargo in the course of carriage, or obligations in respect of freight – are left to be dealt with by the general law and insurers are not necessarily involved.

C Costs of present regime

13. As noted above, problems arising from loss or damage to cargo are generally dealt with between insurers. As the core elements of the liability regime have been in place for the best part of a century, the principles governing the adjustment of liability are well known and most such claims are quickly and pragmatically settled between experienced claims handlers; and it is now almost unknown for a "cargo claim" to go to trial.

14. But peripheral issues continue to cause trouble. For example, the facts relating to a loss might be clear, and the existence of liability might be clear, but it is not clear precisely who is responsible. Is the party who issued the bill of lading to be treated as the liable carrier? Or is it the registered owner of the ship, or one of several charterers? There may be questions as to the precise legal regime in force in the country of shipment (the law of which will generally govern), and issues as to whether the damage occurred during the ocean voyage or elsewhere, and if so what rules govern the existence of liability.

15. So there is still room for debate, and the possibility of expensive litigation, even in resolving particular claims for loss or damage to cargo. In the *Dairy Containers* case referred to above, issues of liability were governed as a matter of contract by a modified version of the Convention text of the Hague Rules; and the case went to the Court of Appeal solely on the legal issue of whether the package limitation was to be measured in gold value or in ordinary pounds sterling. The costs to both sides was probably of the order of $80,000.

16. Beyond the issue of particular incidents of loss or damage, however, unresolved or obscure questions arise from time to time, and are capable of causing delay, worry and expense. It is not called for in this report to undertake a detailed case

analysis to provide examples, but a range of examples coming to mind from experience over the years includes the following:

- Is a combined transport bill of lading (rather than a port to port one) acceptable to banks under letters of credit as a negotiable document?

- Is a bill of lading issued by a charterer or non-vessel owning carrier acceptable to banks under letters of credit as a negotiable document?

- Who amongst parties interested in the cargo has title to sue in the event of loss or damage?

- Who is the party liable under the bill of lading – the vessel owner, one of possibly several charterers, or a non vessel-owning carrier (NVOC)?

- Is the bill of lading, when issued by the carrier, acceptable to the buyer and the bank having regard to any qualification or limitations endorsed on it?

- What is the extent of the cargo owner's liability if the cargo begins to present a threat to other cargo or the ship during the course of carriage? What are the carrier's rights in such a situation?

- How can a shipper establish that a temperature-controlled cargo is sound on arrival when the carrier withholds container temperature records?

- What are the rights and obligations of each party if the shipper wishes to change the port of destination of the cargo?

- When is the carrier entitled to freight from the shipper? This is a question which arises when, e.g. the vessel is lost or damaged in the course of the voyage. Were the shippers of logs loaded on board the *Jody F Millennium* obliged to pay the freight even though the vessel completed only a mile or two of its intended voyage?

- When is the carrier entitled to treat the goods as having been delivered to the consignee? This question arises when the carrier is compelled to surrender custody and control of cargo at the port of destination to Customs or the port authority, or where the consignee either cannot be found or does not wish to take delivery.

- What are the carrier's rights and obligations when the consignee wishes to take delivery but is unable to produce the original bill of lading?

17. Many of these issues do not give rise to money claims, but it costs time and money to resolve them. Considering that much of New Zealand's exports are of "biological" cargo, time is important. Delay in resolving problems can be costly both in terms of the particular shipment and in terms of market credibility and future business. As much of the cost is incurred in management time, accurate data would be difficult to obtain; but interviews with industry participants have given an indication of the proportion of time spent in trouble shooting problems of the kind illustrated above.

D Proposed new regime (CMI draft)

(a) Background

18. It is now more than 30 years since the text of the Hague Visby Rules was adopted.

19. Beginning in 1996, interested groups began to be concerned to determine whether there were any deficiencies in the Hague Visby Rules, and whether there were other matters which should be covered by uniform rules. In that year, UNCITRAL requested the Comite Maritime International 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 way-bills, 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."

(The Comite Maritime International (CMI) is a non-governmental organisation, established in 1896, the members of which are national maritime law associations. The Maritime Law Association of Australia and New Zealand (MLAANZ) is a member, and is represented on the organisation's Executive Council. Until bodies such as the International Maritime Organisation and UNCITRAL began to interest themselves in maritime conventions, the CMI was responsible for the development of a number of such conventions including the Hague Rules themselves.)

20. A process of consultation and debate has taken place since 1996, leading to the endorsement of a provisional draft convention at the triennial conference of the CMI in Singapore in February 2001. This draft underwent further consultation and review, leading to a final CMI draft which was adopted in November 2001

and transmitted to UNCITRAL. It now awaits consideration at a diplomatic level.

21. The scope of the draft convention is ambitious. It:

- provides for uniform rules in areas which are not currently subject to an international regime;

- sets out a new regime of carrier's liability which, whilst retaining many of the familiar features of the Hague Visby regime, and hopefully much of the body of law based on this regime, is put forward in the hope that it may form the basis of a regime which could supersede the Hague Visby and the Hamburg regimes;

- updates and expands the provisions of the existing regimes to take account of modern transport practices;

- covers inland carriage preceding and subsequent to ocean carriage, thus recognising the fact that today, the majority of contracts for the carriage of goods by sea include an element of land carriage;

- covers not only contracts evidenced by traditional documents but also contracts concluded electronically.

(b) Response to date

22. Since the draft has become exposed beyond the CMI, some comments have begun to emerge. The most notable concerns relate to the through transport element of the draft: in some countries (primarily in Europe) international road and rail transport is already covered by respectively the CMR and COTIF Conventions; and the relationship between them and the new draft is unclear. In the case of road haulage from the north of England to Italy, for example, the sea leg is insignificant; but the draft convention gives a pronounced maritime flavour to the entire transit.

(c) Commentary on features of draft

23. We now draw attention to some of the more important aspects of the draft. Most of the matters mentioned are ones where we think New Zealand interests will have a view, even if it is only to support the proposed change; or where they are otherwise significant for New Zealand.

Article 1 - definitions

24. The definitions are much more extensive than in the Hague Visby Rules. They look forward to changes and extensions made to the substance of the Rules in subsequent Articles. There is a wide definition of "container", and definitions appropriate to the later provisions for electronic bills of lading.

25. There are also definitions appropriate to the proposed application of the Rules to through transport, including the definition of a "performing party". Such a party is rather like a person performing an "incidental service" within the meaning of the New Zealand Carriage of Goods Act 1979.

26. There is also a definition of "negotiable transport document" and "negotiable electronic record"; but the definitions entail little more than recognition of documents which are treated as negotiable by the law governing the document.

Article 2 – electronic communication

27. This Article is entirely new. It proceeds on

> "The general principle of equivalence between electronic and paper communication … the emphasis is on the consent of the parties to communicate electronically."

28. The Article recognises that electronic communication is not confined to the transport document itself, but also to notices, confirmations and agreements envisaged elsewhere in the Rules.

29. There does not seem to be any recognition of the problems which might exist where the bill of lading is required to be produced to and stamped by government authorities.

Article 3 - Scope of application

30. This Article contains a range of jurisdictional provisions which do not differ greatly from the Hague Visby Rules. The Rules are intended to apply to international carriage having appropriate connection with a contracting State; and they do not apply to charterparties and similar agreements.

Article 4 – Period of responsibility

31. This important new Article emphasises that the carrier is responsible for the goods from the time they are received for carriage until the time they are

delivered to the consignee – i.e., covering both land and sea carriage if that is agreed between the parties.

32. Delivery to an authority or other third party to whom, pursuant to law or regulation applicable at the place of delivery, the goods must be handed over and from whom the consignee may collect them is treated as delivery to the consignee.

33. Article 4.2.1 deals with disputes relating to the land segments of through carriage. It provides that where there is an international convention already existing which governs the situation then, to the extent that the provisions of that convention are mandatory, they will prevail over the new instrument. It is expressly stated that national law otherwise applicable does not apply in this situation. In New Zealand, the effect would be to deprive the Carriage of Goods Act 1979 of any effect in relation to the land segment of international carriage.

34. There is provision for mixed contracts of carriage and forwarding, where the carrier is obliged only to take the goods to a certain point and then arrange for their on-carriage to the ultimate destination.

Article 5 – Obligations of the carrier

35. This Article restates the core obligations of the carrier as presently stated in Articles II and III of the Hague Visby Rules.

36. An important extension of the core Hague Visby Rules obligations treats carrier-supplied containers as, effectively, part of the ship, so that the carrier is obliged to make them fit and safe for the reception, carriage, and preservation of the goods.

37. During the 2001 consultations and debate referred to in paragraph 22 above, MLAANZ proposed a further rule in this Article requiring carriers in temperature-controlled trades to make available temperature data on request. The proposal was thought inappropriate for the Convention, but was identified as a topic which might be further considered. We think there remains a case for consideration of a separate, broader-based, Article dealing with the problems of biological cargoes. We have developed this topic in more detail in Sections E and G (paragraphs 71-74 and 93-98) below.

Article 6 – Liability of the carrier

38. This Article restates the basic rule of liability, and the exceptions from liability, available to carriers, along the lines of the Hague Visby Rules. It adopts the Hamburg Rules recognition of liability for delay as well as for loss of or damage to the goods. The impact of the exceptions is affected by the proposal that they create only presumptions that, if the exceptions are made out, the carrier is not responsible for the loss.

39. There is an interesting proposal for apportionment of loss where the loss is attributable partly to a cause for which the carrier is liable and party to a cause for which it is not. The usual rule in common law countries, including New Zealand, is that if the carrier is unable to prove what part of the loss was caused by an event for which it is not liable, then it is liable for the whole loss.

40. In repeating and restating the general list of exceptions to liability contained in Article IV rule 2 of the Hague Visby Rules, some changes or possible changes have been signalled. Primarily, the draft proposes (though only tentatively) that the existing exceptions for nautical fault and fire should continue.

41. Although the nautical fault exception has been argued about at length over many years, the fact is that it is seldom encountered in practice[1].

42. There is a suggestion for a further exception for "act, neglect, or default of a compulsory pilot in the navigation of the ship". Although one can see the moral justification for this, the practical justification for it appears debatable.

43. One proposed change to the list of exceptions is the predictable inclusion of "terrorism".

44. Not surprisingly, the exceptions relate most clearly to loss or damage occurring in the ocean voyage. It remains for consideration whether further exceptions should be developed to cover typical incidents of land carriage.

45. Article 6 also contains detailed provisions governing deck carriage. These provisions should be examined carefully considering that the carriage of containers on deck is a normal aspect of New Zealand's overseas trade.

46. As noted earlier, there is limited provision for compensation for loss caused by delay, based on a multiple of the freight payable on the goods. The

[1] Having said this, Mr Broadmore is aware of two current incidents which impact on New Zealand interests, involving the vessels *Tasman Pioneer* and *Jody F Millennium*, where the defence of nautical fault is likely to be a central issue.

commentary to the relevant Rule notes the Australian provision for a maximum of two and a half times the sea freight.

Article 7 – Obligations of the shipper

47. This Article imposes much more detailed obligations on the shipper in respect of the condition of the goods tendered for shipment and the information to be supplied to the carrier concerning them. There is an express obligation on the shipper to stow lash and secure goods in containers properly, and an express provision for the shipper to be liable for breach of its obligations under the Article.

Article 8 – Transport documents and electronic records

48. This Article contains more detailed requirements than those in the Hague Visby Rules for the particulars to be included in a bill of lading or electronic record, a definition of the phrase "apparent order and condition of the goods" and a provision specifying the consequences of omission of required particulars.

49. There is a further detailed rule specifying the circumstances under which the carrier may qualify the description of the goods in the particulars appearing on the bill of lading, and a range of corollary provisions dealing with the implications of qualifications on the description of the goods.

50. These provisions are important because qualifications endorsed on a bill of lading by the carrier may seriously affect its negotiability, and consequentially the ability of the shipper to complete a sale.

51. A particular Rule deals with the consequences of failure to identify the carrier on the bill of lading. There is a default provision to the effect that the registered owner is deemed to be the carrier liable under the bill of lading, with further provisions enabling the registered owner to prove to the contrary. On its face, this provision seems to benefit cargo interests, but the implications of the proposed rule require careful study.

Article 9 - Freight

52. This Article appears to do no more than state the basic elements of the common law concerning liability for and payment of freight, permissible deductions, and the carrier's remedies if freight is not paid.

Article 10 – Delivery to the consignee

53. This Article performs two broad functions. First, it sets out the obligations of the parties to make and acknowledge delivery.

54. Secondly, it contains extensive, but not particularly complicated, provisions intended to balance the interests of carriers, shippers and consignees when certain events occur at the place of destination.

55. These provisions are intended to give protection to the carrier when the consignee fails or refuses, or is unable to, take delivery, so that the carrier can legitimately divest itself of further responsibility; and also to give protection to an unpaid seller or intermediate holder of the bill of lading, who may have withheld the bill of lading from the consignee precisely in order to prevent the consignee from taking delivery until it has paid for the goods.

56. The provisions need to be reviewed by industry participants - particularly those involved with temperature-controlled cargoes - with an eye to their likely operation in practice.

Article 11 – Right of control

57. The right of control means the right to give instructions in respect of the goods, including demanding delivery before arrival at the contractual destination, and the right to negotiate variations of the contract of carriage. The topic was not dealt with in the Hague Visby Rules. It has increased importance where the transport document is a non-negotiable waybill; and the shipper wishes to transfer the right of control to another party.

58. The Article contains measures designed to protect the carrier against additional expense or liability, including the right to demand security before implementing instructions.

59. Like the provisions of Article 10, these provisions need to be reviewed by industry participants with an eye to their likely operation in practice.

Article 12 – Transfer of rights

61. The substance of this Article is to state the core common law principles governing the negotiability of bills of lading, and to extend such principles to negotiable electronic records.

62. Of particular interest are the provisions dealing with the liability of intermediate holders of the bill of lading. They do not attract liabilities – e.g., for demurrage - solely by becoming a holder, but may do so if they exercise any right under the contract of carriage.

Article 13 – Rights of suit

63. Where there has been a loss in the course of transit, questions often arise as to which party is entitled to bring a claim – the shipper, an intermediate holder of the bill of lading, the consignee named on the bill, or the holder who takes delivery. Claims sometimes fail because the claimant turns out not to be the party which actually suffered the loss.

64. Article 13 proposes rules to identify clearly who may and may not bring a claim. English and New Zealand law on this topic is complex; and some careful consideration is required to determine whether the proposed text overcomes the difficulties.

Article 14 – Time for suit

65. The one-year time limit under the Hague Visby Rules is continued, with one beneficial extension. Where a claim is brought against a registered owner under Article 8.4.2, and the registered owner establishes that it is not the carrier under the bill of lading, further time is allowed in which to bring the claim against the demise charterer.

66. It is possibly a cause for concern that the extension of time does not apply where it is established that the carrier under the bill of lading is a time charterer.

Articles 15, 16 and 17 – General average, other conventions, and limits of contractual freedom

67. These articles are largely machinery provisions which are unremarkable except in one respect, relating to live animals. Live animals are completely outside the scope of the Hague Visby Rules. What is proposed here, in Article 17.2(a), is that live animals are covered but the parties may agree to exclude or limit liability for loss of or injury to them. Although not expressly stated, we assume that other provisions of the draft convention (such as those relating to documentation, freight and delivery) would nevertheless continue to apply.

Summary on benefits of draft convention

68. There are some direct and tangible benefits for New Zealand interests in the draft. These include:

- The extension to cover combined transport (but note the conflict with the Carriage of Goods Act 1979);
- The provisions for electronic transport documents;
- The extension of the carrier's obligations of due diligence to cover carrier-supplied containers;
- The ability to sue the registered owner in cases of doubt about the identity of the carrier.

69. The more general provisions of the draft also seem beneficial. They offer a detailed code covering not just the liabilities of the parties but most aspects of the law relating to international carriage under bills of lading and analogous contracts. These provisions have the potential to simplify the bureaucratic aspects of such carriage and to provide quick and easy answers over a wider area than previously. These benefits are, of course, not unique to New Zealand – they apply to all engaged in international seaborne trade.

E What other things New Zealand would like to see in any new convention

70. Our consultation to date includes Mr Broadmore's meeting with the Shippers' Council in Mt Maunganui on 20 June, and the brief discussions with a reasonably representative range of industry participants noted in paragraph 3. So there has been little opportunity for consideration of further topics which might be covered.

71. However, it is apparent that neither the Hague Visby rules nor the proposed convention deal adequately with the problems of long-distance carriage of biological cargoes. One such problem has already been identified, and is referred to in paragraph 37 above: the difficulty of getting temperature records from a carrier when temperature variation in a container is suspected. But transit times[2], atmosphere, ventilation, and the effect on and from adjacent cargoes (taint, for example), as well as temperature, are all important; and

[2] Transit times are important for two reasons – obviously, the "shelf life" of the product; and also the need for food cargoes to arrive in time for a particular festival or to fill a seasonal gap when the product is not available from other sources of supply.

when taken together may justify the promotion of an Article particularly devoted to the carriage of biological cargoes.

72. We have floated the idea of such an Article with industry participants, with a mixed response. Major exporters (for example, kiwifruit and apple exporters) have detailed long-term contracts with carriers which cover their needs in this area, but there are potential benefits in other trades (for example, squash, onions and wine).

73. We do not have developed views on the possible content of such an Article; but it might include provision for shippers to provide carriage requirements to carriers, with liability on carriers if the requirements were not observed and exoneration if they were, and for carriers to provide records if there was an indication of damage. We have explored the possible economic implications of such an Article in more detail in section G below.

74. We think there is a case for more detailed consultation with industry participants on this issue in particular. Depending on the outcome, the issue could then be raised for discussion with other countries likely to share New Zealand's interest in the topic.

F Benefits of the proposed regime

75. The costs of damage, loss, delay and more general transport problems arise in three ways:

- the costs of the damage, loss or delay itself;
- the costs of handling claims;
- the costs of resolving a range of problems arising from documentation concerns, unexpected bureaucratic requirements and the like.

Costs of damage, loss and delay

76. The costs of the damage, loss and delay are usually wider than the actual damage, loss or delay itself. They can involve the loss of a customer through failure to deliver on time and in the contracted condition. They also include the costs of rectifying the problem - usually in obtaining and shipping suitable replacement product. The immediate costs fall on the cargo owners, but they then make a claim upon their insurers and carriers. In the short term, the cost is borne by the cargo owners up to their excesses, by their insurers beyond their

excesses, by the carriers up to their excesses, and by the carriers' P & I Clubs beyond their excesses.

77. To the extent that the costs fall on the cargo owners' insurers, in the long run they tend to come back to the cargo owners in insurance premiums. To the extent that the costs fall on the P & I Clubs, in the long run they tend to come back to the carriers. And then to the extent they come back to the carriers, either direct or via the P & I Club, they tend to eventually come back to the shippers in the freight rates. Thus eventually all the costs of damage, loss and delay tend to be borne by the cargo owners. In the short term, however, carriers bear some of the costs and therefore have an incentive to minimise those risks where they have a liability for damage, loss or delay.

78. The proposed regime improves the alignment of responsibility between the carriers and the cargo owners for damage, loss and delay. For example, there is a suggestion that the exemption for errors of navigation under the present regime might be removed. A better alignment of the responsibility for the costs of damage, loss and delay with the party best placed to mitigate them should result in these costs being minimised. There are, however, few cases of damage, loss and delay occurring as a result of carriers not taking sufficient care to avoid risks in areas where they are excluded from responsibility.

79. We have therefore concluded that the change in the regime is unlikely to make a significant impact on the costs of the damage, loss or delay itself. From the consultation we have carried out, we did not hear any suggestion that damage, loss and delay would be likely to be reduced by the realignment of responsibility.

Costs of claims handling

80. The second area of costs is in claims handling. Importers and exporters have someone on their staff handling claims, but even the largest exporters have less than the equivalent of one full time equivalent person (FTE) working on them. For most exporters and importers the work represents a fraction of one person's time. Sometimes, when the problem is a major one, a manager is also involved because the problem may have meant that the exporter or importer failed to deliver to its customer(s). The work involved in resolving claims is largely done by and between insurance firms, with input from loss adjusters. Each insurance company has one or more officers dealing with marine claims, and there are several firms of loss adjusters handling marine damage, loss and delay. Finally, some claims lead to disputes and lawyers become involved.

81. The new regime will simplify the delineation of responsibility between the parties and bring the regime into line with modern transport practices. The principal steps in achieving this improvement were covered in section D, and in summary were:

- better provision for through transport;
- allowing electronic bills of lading;
- requiring carrier supplied containers to be fit and safe;
- recognising the registered owner of the ship;
- better definition of the right to control cargo.

82. Through these improvements the new regime will reduce the costs of handling claims and will speed up their resolution. Resolving claims more quickly has a benefit to shippers as they will be reimbursed earlier than at present.

Costs of trouble shooting

83. The third area of costs is in trouble shooting. These costs are incurred when goods are held up in transit or at a transition point. They arise in cases such as when a buyer's bank has failed to honour a letter of credit, a buyer fails to take delivery, a buyer wants to change the destination of the cargo, or a government authority has unexpectedly intervened.

84. The improvements under the proposed regime should reduce the time required to carry out this trouble shooting - because the regime will apply more widely and because it better recognises current transport practices. The savings will be in the time of staff of exporters, importers, shipping companies and banks.

85. The proposed regime will simplify business, but is not likely to make significant changes to the costs of transacting business. Its recognition of electronic bills of lading, however, is important. The convention will allow the improvements possible through increased use of electronic documents, but will not bring them about. For this reason we have not regarded this aspect of the convention as generating further savings.

Estimate of benefits

86. The two principal areas for savings under the proposed regime are therefore in reduced costs of claims handling and reduced costs of trouble shooting. Ideally,

we would obtain estimates of the savings expected by major shippers and extrapolate them across all exporters and importers. Time has not permitted that, and we do not believe it was necessary. We can, however, attempt to identify the order of magnitude of the savings by making some broad assumptions.

87. If we assume there are about the equivalent of 20 FTEs on exporters', importers' and shipping companies' staff involved in claims handling, 15 FTEs covering marine claims in insurance firms, and 15 FTEs in loss adjusters' firms, that gives a total of 50 FTEs. Assuming an average cost of $60,000, and assuming a one quarter reduction in workload from the proposed convention, the savings would be 50 x $60,000 x 1/4 = $750,000 per annum.

88. Assuming there are about 8 lawyers on an FTE basis involved in maritime dispute resolution and drafting marine contracts, and assuming the change in regime lessens the scope for disputes by a factor of one quarter, the saving would be 8 x 150,000 x 1/4 = $300,000 per annum.

89. In addition, there would be savings from less trouble shooting. Assuming a total of 20 FTEs involved in trouble shooting on exporters', importers' and shipping companies' staff, and assuming the time on trouble shooting is reduced by one quarter, the savings would be another 20 x $60,000 x 1/4 = $300,000.

90. On these broad assumptions, the total savings would therefore be likely to be of the order of $1.3 million per annum. When discounted at 6% per annum, their present value would be about $20 million.

91. The present value of these potential benefits can be compared with the order of magnitude of the costs in securing the proposed convention. They are likely to involve, say, 20 days work at the Ministry of Transport (including consultation with the industry) and 10 days work at the Ministry of Foreign Affairs and Trade (in New Zealand and overseas) at an average cost of $1,500 per day. As the convention is likely to proceed without major specific input from New Zealand, no travel would be involved. The costs would therefore be of the order of 30 x $1,500 = $45,000. On these broad assumptions, the savings are sufficient to cover the costs many times over.

92. We therefore conclude that New Zealand should support the proposed convention unhesitatingly, and should press to prevent delays in its adoption.

G Benefit of an Article on cargoes sensitive to temperature, atmosphere, humidity and ventilation

93. Many of New Zealand's exports are biological cargoes that need special care with respect to temperature, atmosphere, humidity and ventilation. They include fish, meat, butter, cheese, apples, kiwifruit, onions, and other horticultural products. Frozen products are reasonably straightforward, but chilled products may need special care, particularly fruit. When they are shipped in bulk (pallets) the carriers generally provide temperature, humidity and other data daily during the voyage. The cargo owners are then in a position to assure the buyers of the quality of their products on arrival. The carriers provide this information as part of their quality programmes, not because they are obliged to under the present regime.

94. For container shipping, however, carriers generally do not provide temperature and humidity records during the voyage and only sometimes make them available at discharge. Sometimes carriers refuse to supply them. Their reluctance is partly because of a lack of control equipment on some ships, but the new generation of ships has this capability. As the carriers need the control equipment to fulfil their responsibilities on board ship, it is only a simple matter to transmit the data from the ship to the cargo owner as frequently as the cargo owner requires during the voyage. Not only are the chances of damage reduced, but also these cargoes can be sold more readily, and therefore for higher prices.

95. As the value of these exports is about $2 billion per annum, a small percentage gain would be significant. This suggests that an article requiring carriers to provide temperature and other data relating to sensitive cargoes, when there are grounds for believing that damage has occurred in transit, could be worthwhile to New Zealand.

96. This interest could be shared by other nations with a significant proportion of biological cargoes. They include Australia, South Africa, Chile, Argentina and perhaps the US. In order to secure such an article, however, New Zealand would have to mount a greater diplomatic effort than for the convention as proposed. We do not know whether these other countries consider such an article desirable. We would expect it to need diplomatic representation from New Zealand at one meeting among such nations, and at one conference of all nations over and above the effort required to support and promote the present proposal.

97. Assuming two people would attend each of these conferences, the travel and accommodation expenses would be about $50,000 and the cost of the time would be about 50 days x $1750 per day = $90,000. There would also be time

involved in consultation in New Zealand and in preparing a draft article, costing about 15 days x $1,750 per day = $26,000. The total cost, over and above the cost of supporting the convention as it is currently drafted, would therefore be about $170,000. Such a cost could be small in relation to the potential benefits, but it may not have a great chance of success if volumes of this type of product are small in relation to world shipping.

98. Were the Ministry of Transport to promote such an article, we believe that greater consultation should be carried out with the shippers of these cargoes to more precisely define present practices, the improved practices that would be sought, and the form of wording required to achieve it. If the requirement were consistent across shippers and were sufficiently general, the Ministry might then want to approach other governments in the other countries likely to benefit from it in order to gauge their likely level of support. A decision could then be made as to whether it was worth mounting a campaign. A further consideration would be the risk of it delaying the adoption of the international convention as currently proposed.

H Conclusions and recommendations

99. The proposed international convention on transport law offers significant benefits - not in reduced damage, losses and delays – but in reducing the costs of claims handling and troubleshooting. It has no detriments.

100. The proposed convention is likely to be adopted without needing significant NZ input. The benefits are very high in relation to the costs to New Zealand in supporting it through to adoption. New Zealand's main interest should be in pressing to prevent delay in its adoption.

101. It may be desirable to try to add an article relating to cargoes that are sensitive to temperature, atmosphere, humidity, and ventilation. Additional benefits could be obtained in reduced damage, in improved marketing and in reduced claims handling costs if carriers were obliged to provide temperature and other records during the voyage. Further consultation would be required to ascertain the extent to which exporters of these types of products have similar requirements to each other. Seeking such an article would require greater effort in the diplomatic process than is required in promoting the present proposal. It would probably not be worth pursuing such an article if it only relates to a small proportion of trade and if it risked causing delay in the adoption of the present proposed convention.

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