The Revised Hague Rules on Bills of Lading

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In what amounts to a proposed new Convention to replace the "Hague Rules," the United Nations Commission on International Law (UNCITRAL) has included an Article (22) authorizing parties to a contract for the carriage of goods to provide for arbitration of disputes arising therefrom. States which become parties to the Convention would be required to give effect to such a contract. The proposed Convention gives the plaintiff much the same options with respect to either the judicial or the arbitral forum. These options as to locale tend to favor the defending party—usually the carrier. On the other hand, Article 22 also permits the parties to agree on a locale after a dispute has arisen, an arrangement which would probably reflect the interests of the plaintiff (usually the cargo owner). In addition, the Convention provides that the good faith purchaser of a bill of lading issued pursuant to a contract of carriage would not be bound by an arbitration agreement between the original parties to the contract, unless it appeared in the bill of lading itself.

THE REVISED HAGUE RULES
ON BILLS OF LADING

by Gabriel M. Wilner*

Introduction

The United Nations Commission on International Trade Law (UNCITRAL)\(^1\) has recently completed its work on a revision of the International Convention for the Unification of Certain Rules Relating to Bills of Lading, 1924, commonly known as the Hague Rules.\(^2\)

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2. 120 (2764) League of Nations Treaty Series 157. The United States version of the convention, which the U.S. ratified in 1936, is the "Carriage of Goods by Sea Act (COGSA)," 46 USCA § 1300-1315.

35
It appears that the changes are so extensive that a new Convention will in fact have been created. This is not inconsistent with the mandate given to the Commission by the General Assembly of the United Nations.

Of course, the most fundamental change in the 1924 Convention (which has been ratified by more than 80 states) made by the revisers is the change in structure of the liability of the carriers in the maritime carriage of goods. The revised rules retain the principle of fault as the basis of carrier liability; however, the exceptions to this general liability, which in the present Convention, under certain circumstances, permit the carrier to be exculpated even if he is at fault, are removed and the burden of proof is, with one exception, placed on the carrier.*

Among the new rules of the Draft Convention on the Carriage of Goods by Sea, not to be found in the present Convention, is a provision which specifically authorizes the parties to the contract for the carriage of goods to provide for arbitration of disputes arising out of the contract of carriage. The present Convention does not contain a provision on arbitration, and while arbitration is not prohibited, it is indeed very seldom that a bill of lading contains an arbitration clause. Of course, the lack of a Convention provision has not precluded the possibility of the use of arbitration in cases of bills of lading issued pursuant to a charter party which itself contains an arbitration clause. An initial study made by the Secretariat of UNCITRAL on the subject stated that "at present few bills of lading contain arbitration clauses." The study, which served as a working document to the UNCITRAL Working Group on International Legislation on Shipping which prepared the draft convention for the Commission, then added that "if provisions are adopted restricting the choice of the judicial forum greater use may be made of arbitration in bills of lading."

The Commission adopted a rule on choice of judicial forum (article 21) which does in fact have an impact on the freedom of

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THE REVISED HAGUE RULES

the parties to choose the court in which the dispute may be brought. The first paragraph of the provision on choice of judicial forum clauses states:

In a legal proceeding relating to carriage of goods under this Convention the plaintiff, at his option, may bring an action in a Court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places or ports: (a) the principal place of business or, in the absence thereof, the ordinary residence of defendant; or (b) the place where the contract was made provided that the defendant has there a place of business, branch, or agency through which the contract was made; or (c) the port of loading or the port of discharge; or (d) the place designated for that purpose in the contract of carriage.

A second paragraph of the provision is directed at the in rem action that is so important under United States law. This paragraph represents an important compromise between the United States legal system and other legal systems. The first part of this second paragraph reads as follows:

Notwithstanding the preceding provisions of this article an action may be brought before the courts of any port in a contracting State at which the carrying vessel may have been legally arrested in accordance with the applicable law of that State. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim but before such removal the defendant must furnish security sufficient to insure payment of any judgment that may subsequently be awarded to the claimant in the action.

7. UNCITRAL Report, 9th Session at 28. A basic argument in favor of this approach is stated in the Commission's report: "Bills of Lading and other documents evidencing contracts of ocean carriage were often contracts of adhesion which a shipper was compelled to accept because of the superior bargaining position of the carrier. They often contained clauses conferring exclusive jurisdiction in respect of actions arising out of contracts of carriage on a forum which was only convenient to the carrier. Since it was in practice very difficult for the shipper to institute an action at such a forum, these clauses had the effect of protecting the carrier from possible actions against him. Article 21 was therefore necessary to ensure for the shipper a convenient forum in which he might bring an action." UNCITRAL Report, 9th Session at 142. See also, "Report of the Working Group on the Work of its third session, January 31 to February 11, 1972," III UNCITRAL Yearbook 258-259 (1972).
The draft provision also prohibits the bringing of legal proceedings in a place not specified in the first paragraph.

The Draft Article on Arbitration

After preparing the provision on choice of judicial forum, the UNCITRAL Working Group, at its fourth session in April 1973, considered a number of alternatives for a provision on arbitration clauses. There was general support for the inclusion of a provision which would deal with the place where arbitration proceedings may be held and that would assure that the Hague Rules would always be applied in arbitration proceedings. The Working Group submitted its proposed draft to the Commission. The provision (article 22) as finally adopted by the Commission reads:

1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.

2. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.

3. The arbitration proceedings shall, at the option of the plaintiff, be instituted at one of the following places:
   (a) A place in a State within whose territory is situated:
      (i) The principal place of business of the defendant or, in the absence thereof, the ordinary residence of the defendant; or
      (ii) The place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or
      (iii) The port of loading or the port of discharge; or
   (b) Any place designated for that purpose in the arbitration clause or agreement.

4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.

5. The provisions of paragraphs 3 and 4 of this article shall be deemed to be part of every arbitration clause or agreement,

THE REVISED HAGUE RULES

and any term of such clause or agreement which is inconsistent therewith shall be null and void.

6. Nothing in this article shall affect the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage has arisen.9

Support in the Commission for adopting article 22 was expressed as follows:

The article was a necessary corollary to the protection given to the plaintiff by article 21 of the Convention. If article 21 were retained but article 22 deleted, clauses conferring exclusive jurisdiction on courts only convenient to the defendant, imposed on the plaintiff by the superior bargaining power of the defendant, would be replaced by clauses similarly imposed stipulating that all disputes were to be settled by arbitration at a place only convenient to the defendant.10

The Report also states that the article is meant only to prevent abuse of arbitration and that it "would not have adverse consequences on efforts to promote arbitration in general as a method of dispute settlement."11 The very inclusion in the Convention of a provision supporting the binding nature of arbitration in the context of bills of lading (paragraph1) where no such provision existed previously suggests explicit approval of the process of arbitration.12

Under the approach taken in this article the plaintiff is given a choice of a number of possible fora for arbitration; nevertheless, the insertion of a non-exclusive arbitral forum clause in the contract

10. UNCTRAL Report, 9th Session at 149.
11. Id.
12. The Report of the Commission reported two arguments made against the article. It was suggested that the "well-established" practice was to determine the specific place of arbitration by agreement. Under Article 22 the exclusivity of the chosen place was replaced by a choice given to the plaintiff of several places and so a plaintiff could institute arbitration proceedings at a place which had not been agreed to. It was also suggested that "the uncertainty as to the place of arbitration resulting from the many optional places at which a plaintiff could institute arbitration proceedings would discourage resort to arbitration." UNCTRAL Report, 9th Session at 148-149. This conclusion appears to place undue emphasis on the exclusive place for arbitration as a determinant of whether parties go to arbitration except for instances where a party (e.g. the carrier) wishes to discourage the other party from undertaking arbitration by choosing a place which is inconvenient for the other. Thus, the party (e.g. the carrier) might not be interested in arbitration under the Convention rule.
of carriage is permitted. The arbitral forum chosen in the bill of lading is one of a number from among which the claimant may choose. The provision adopted (paragraph 4) also requires that the arbitrator or arbitration tribunal must apply the rules of the Convention. The fifth paragraph provides that the parties may not waive either the choice given to the plaintiff in his selection of the arbitral forum or the application of the Convention rules. Since the States which are parties to the Convention are bound to give effect to it, courts in such countries when they enforce the arbitral award will be bound by the provision that the Convention rules must have been applied in the arbitration. If the arbitration award is to be enforced in a State which is not a party to the Convention, the requirement that the Convention rules be applied in the arbitral proceeding may still be mandatory if the bill of lading contains a paramount clause providing for application of the Convention.

Paragraph 6 of the draft provision on arbitration was agreed to as a part of the compromise that permitted the acceptance of this provision by consensus. It was recognized that the bill of lading is most often drafted by the carrier who is likely to be the defendant in an arbitral proceeding. The place specified in the bill of lading may not in fact have been agreed to by the cargo owner; it is often a place which is most convenient for the carrier (such as his place of business). This is why the draft provision gives the plaintiff a choice of possible arbitral fora including a place stated in the bill of lading. However, once a dispute has arisen it is more likely that the place agreed to in a subsequent agreement between the parties to a dispute will also reflect the interest of the plaintiff (usually the cargo owner).

Paragraph two, which had not been part of the article as originally drafted by the Working Group, limits the effects of an arbitration clause in a charter party on bills of lading issued pursuant to it. Thus the purchaser of a bill of lading, who had no relationship to the parties to the charter party, would not be bound to pursue his claim solely by means of arbitration, unless this was stated in the

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13. There may be some difficulty in enforcing this paragraph in states whose laws do not generally require (or in fact permit) the courts to inquire into the merits in enforcing an arbitration award; this is the case in the United States. However, it may be possible for the courts to interpret the Convention (and the national legislation enacted to give it effect) as requiring that the courts do look to the law applied and perhaps that the award be required to contain a reasoned opinion for this purpose.
bill of lading itself; the good faith purchaser of a bill of lading would thus not be held to an exclusive method of dispute settlement he did not know of when he acquired the bill of lading.14

A Brief History of the Provision on Arbitration

Other approaches to the formulation of a provision on arbitration had been considered by the Working Group and were rejected, although in some instances the approaches rejected contained some of the elements later accepted in article 22.15 One such approach was merely to state that arbitration clauses were permitted, that arbitration should take place within a Contracting State and that the rules of the Convention should be applied. Another approach would have limited the places where arbitration might be brought but would not have imposed restrictions on the power of a body or person designated in the arbitration clause to select the place for arbitration. Still another approach would have given the plaintiff the right to select the place of arbitration from among: (1) the domicile of the plaintiff if the defendant has a place of business in that state, (2) the place where the goods were delivered to the carriers, or (3) the place designated for delivery to the consignee. Any other place, including a place designated in the bill of lading or other document evidencing the contract of carriage, could not be selected by the plaintiff. This approach was meant to eliminate the possibility of using the place of business of the carrier as the place for arbitration.

The approach that was selected by the Working Group originally contained a sentence which the Working Group did not wish to adopt. The sentence provided that: "The parties may agree that the arbitrator shall act as an amiable compositeur." Such a provision would have permitted the parties to agree that the arbitrator use equity, practice and his own good judgment rather than adhering strictly to the Convention rules. This idea was firmly rejected in the draft adopted.

14. See Gilmore and Black, supra note 4 at 220 for a discussion of the subject and citations to cases.
Conclusion

The Commission (UNCITRAL) unanimously recommended that the General Assembly convene a diplomatic conference for the purpose of concluding a new convention on the Carriage of Goods by Sea. The Commission noted the suggestion by the Working Group that the Conference be held in 1977 or the early part of 1978. In the meantime, the draft convention will be circulated to governments and international organizations for their comments; a particular reference is made in the Commission resolution to submission of the draft to the United Nations Conference on Trade and Development (UNCTAD) for comments and proposals. An analytical compilation of the comments and proposals is to be made for submission to the diplomatic conference.¹⁶

Whether the provisions on jurisdiction (article 21) and arbitration (article 22) survive intact the rigors of a diplomatic conference cannot be determined at this point. There has been opposition to one or both of these provisions, or at least to certain paragraphs, from some major maritime States. For example, at the Working Group stage the Soviet Union (not a party to the 1924 Convention) proposed that in effect the provision should not contain any reference to the choice of a place for arbitration. This was countered by a proposal that arbitration be binding only where agreed to after the dispute has arisen. Fortunately, neither of these extreme views is in the Commission's draft.¹⁷

The approach of articles 21 and 22 to the choice of judicial and arbitral forum is sound given the fact that one of the parties to the contract of carriage evidenced by the bill of lading usually has not been able to negotiate its terms. The Convention's purpose is the setting up of mandatory standards for the contract of carriage of

¹⁶. UNCITRAL Report, 9th Session at 16, 17.
¹⁷. A complete report of the various proposals of the States members of the Working Group and the discussion of these proposals is set forth in an article by the United States representative to the Working Group. See J. C. Sweeney, "The Uncitarl Draft Convention on Carriage of Goods by Sea (Part I)," 7 J. Mar. L. & Comm. 69, 117-124 (1975). Sweeney noted that the representative of a Latin American State, Argentina, stated that the case-law of his country would never give validity to any clause that would oust the jurisdiction of the national courts. Id. at 121. Professor Sweeney has published several subsequent articles in the Journal of Maritime Law and Commerce that describe the Working Group's proposals and debates regarding the remaining parts of the draft convention. The five articles will be a lucid and impartial account of the work done in UNCITRAL over a period of five years, and will be an invaluable source for the legislative history of the new convention.
goods by sea and it is highly appropriate that fair standards be created for the dispute settlement mechanisms to be used. If a party is prevented from vindicating a substantive right because of the difficulty and expense it will have in bringing its claim, then even the most exacting and severe rules on liability would be to no avail.

Of course, article 22 explicitly recognizes the right of parties to provide for arbitration as the exclusive method for dispute settlement. Moreover, the parties are given the right to choose the place of arbitration, even if it is not one of the places listed in the article. Thus, if both parties agree, when a dispute arises the arbitration will be held at the place specified in the bill of lading. It is only in cases where the plaintiff is dissatisfied with the place selected in the bill of lading that he may use one of the optional places set forth in article 22. Nevertheless, the plaintiff is still obliged to arbitrate and may only select from among the few places specified in the Convention.

The most important question remains open. Will arbitration clauses be inserted in bills of lading once the encouraging provision of the new Convention comes into force? The fact that the choice of a judicial forum will be circumscribed may result in some increase in the use of arbitration. Moreover, there has been a general practice of using arbitration in the other major type of maritime commercial contract — namely, the charter party; in some cases bills of lading issued pursuant to charter parties containing arbitration clauses have been the subject of arbitration. Nevertheless, long standing commercial practice is not easily changed and, of course, the issuers of bills of lading will be contemplating the question of whether the use of arbitration is likely to substantially benefit the plaintiff in a cargo claim.