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CARGO LIABILITY REFORM GETS A PUSH FORWARD

All eyes on CMI's Madrid meeting this week

Peter A. Buxbaum
AJOT Staff

After years of standstill, the march towards reform of the global regime governing liability for carriage of goods may finally be moving forward. In late September, in a landmark announcement designed to break the deadlock, the National Industrial Transportation League (NITL), an organization representing major US shippers, and the World Shipping Council (WSC), a global body of ocean liner carriers, announced that they would jointly support a compromise draft of an international accord on the subject. The eventual success of that move will be put to the test this week in Madrid as the Comité Maritime Internationale (CMI), a global maritime law group, considers what it will pass along to the United Nations Commission on International Trade Law (UNCITRAL), the intergovernmental body empowered to draft a proposed treaty.

The elements of the MITL-WSC agreement include the recognition of the freedom of carriers and shippers to contract as established in the Ocean Shipping Reform Act of 1998, the elimination of the carriers' error or navigation defense, and the adoption of updated cargo damage liability limits. Both organizations also agreed not to pursue unilateral agendas for about the next two and a half years, while the UNCITRAL process is still ongoing, and to prioritize international efforts over the adoption of domestic US legislation.

One reason for the timing of the NITL-WSC agreement is that the process of drafting an international convention was set to move forward, with or without their input. "The issue was stymied when one group or another decided it could not support changes to the US [Carriage of Goods by Sea Act] COGSA," says Peter J. Gatti, the NIT League's vice president for international relations. "What we tried to do is to sit down with the WSC to see if we could identify areas where we could reach agreement and formalize those in a written understanding." The end game of the international process was imminent, in other words, and both organizations wanted the new regime to incorporate elements of interest to each.

SHIPPER & CARRIER COOPERATION

In the US, a broad coalition of carriers and shippers had endorsed a 1996 draft by the Maritime Law Association of the United States to overhaul COGSA. That measure, designed to stand in for an international transportation convention until one could be signed and ratified, died in a US Senate committee in 1999. That draft was also roundly criticized by non-US interests.

Another enabling factor to the NITL-WSC accord, according to Gatti, is the atmosphere of greater cooperation between shippers and

carriers that has prevailed since the adoption of OSRA. "We are in a less confrontational environment," he says. "Part of OSRA's mission is for shippers and carriers to work together as economic partners. Carriers needed to be listening more closely to their customers and shippers needed to convey what they want. We have better interaction between shippers and carriers today than we did five years ago."

Part of what the NITL and WSC are seeking to accomplish is to enshrine the spirit of OSRA's service contract provisions within an international agreement. Thus, for example, the NITL-WSC proposal on liability limits seeks to have contract terms trump legal strictures. "In a service contract, the parties can include elements that each side specifically wants," Gatti explains. "Under this agreement, the parties can opt out of the international regime by putting forward whatever liability limits they want. But if the contract is silent then the new regime would apply. This proposal takes into account the customized relationships between shippers and carriers that OSRA has brought about."

The Maritime Law Association has yet to take an official position on the NITL-WSC agreement, but in a meeting earlier this month it did convey several questions and concerns. "We think there are still a

few points that would benefit from further clarification," says Prof. Michael Sturley of the University of Texas School of Law, who acts as reporter for the MLA's COGSA working group and who participated in the meeting.

One of the MLA's bugaboos involves forum selection clauses that are usually included in bills of lading. Those clauses typically require that damage claims be brought in the country where a vessel is registered. The 1995 US Supreme Court decision in the *Sky Refer* case makes those forum selection clauses presumptively enforceable. The MLA proposal would require a connection between the jurisdiction where a claim is brought and the shipment which is the subject of the claim.

According to Sturley, the NITL-WSC forum selection clause restricts *Sky Refer* somewhat. "I would like to see how those restrictions would operate in practice," he says. "It seems to expand the circumstances where forum selection clauses might bind a third party. It could be read to restrict the right of a cargo owner to bring suit against one who actually damaged the cargo." The MLA has been unhappy with the *Sky Reefer* decision, and its main interest is to ensure the availability of US courts for US cargo interests.

Despite any reservations, Sturley sees the NITL-WSC agreement as a positive development. "It is most encouraging that a major shipper organization and a representative of most of the liner services have been able to agree on a package after years of disagreeing," he says. "For years, carriers have been unwilling

to give up the error of navigation defense." That strategy allows carriers to avoid liability by blaming damage on the negligence of their own crews. The MLA draft also strikes that legal defense.

As for the likely CMI reaction, Sturley believes that interest is high within that organization. "In many respects, the current CMI draft is broadly similar to the MLA proposal," he says. "There are a number of points left open for discussion at UNCITRAL and it was anticipated that CMI would offer UNCITRAL alternatives for consideration. The NITL-WSC compromise appears to have been based primarily on the MLA proposal but also considered the most recent CMI draft," a factor which may encourage a final international agreement based on those compromises.

The NITL-WSC agreement calls for the two organizations to work together during the approximately two and a half years that the UNCITRAL process will be pending. The agreement also contains an opt-out provision, so that each side can reassess its interests towards the end of the anticipated UNCITRAL process. "The agreement says that assuming elements we agreed to are incorporated in an international agreement, both sides will work toward seeing that agreement enacted into US law," says Gatti.

This, according to Gatti, increases the chances that the US will eventually ratify the provisions. "This is not a front burner item for congressional action," he explains. "It is an extremely complex area of law and it is not on the legislators' minds. But

if we can go to them in concert then it makes the issue a no brainer for Congress. If Congress feels that there is industry consensus then it will be in a position to move forward with reforms. If the opposite is true, Congress will be reluctant to move forward."

The United States does not have a good track record for ratifying agreements, Gatti points out. "The OECD ship-building agreement and two cargo liability changes in the last 30 years were never ratified," he says.

For now, all sides must wait and see what comes out of CMI's Madrid meeting this week. The plan for that meeting, according to Sturley, is to agree on a final draft instrument that will be passed on to the CMI executive council for approval and then forwarded to UNCITRAL, a process that is scheduled to take until the end of this year. UNCITRAL, for its part, has scheduled working group meetings for April and September in Vienna. This suggests to Sturley that the UNCITRAL secretariat intends to move the convention along on a fast track.

As for the NITL-WSC agreement, "It is clearly a positive development," says Sturley. "But there is still work to be done. There is still a lot of work to be done."



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