THE CANADIAN BAR ASSOCIATION
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May 26, 2008

Ms. Tracy Chatman
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Dear Ms. Chatman:

Re: Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

I write on behalf of the Maritime Law Section of the Canadian Bar Association (CBA Section), in response to the Notice to Industry dated March 6, 2008 (which we received April 16, 2008). We are pleased to provide our comments regarding the Draft Convention on Contract for the International Carriage of Goods Wholly or Partly by Sea.[1] This letter provides an overview of the legal implications of ratifying of the Convention, both generally and in relation to various specific provisions. The Convention has the potential to fundamentally change the liability scheme for the carriage of goods by sea. Accordingly, we recommend that Canada adopt a cautious approach to the Convention that is informed by the positions of its major trading partners.

General Overview of the Convention

Overall, the purpose of the Convention is to create uniform rules for carriage of goods door to door, including transport of goods inland to and from ocean terminals. The liability regime for the ocean transit stage of the transportation resembles the *Hamburg Rules* [2] – with liability limits of 835 Special Drawing Rights (SDRs) per package or 2.5 SDRs per kilogram, whichever is higher, and a two year limitation period for cargo claims. The Convention does not impose these

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1 We have reviewed the most recent draft of the Draft Convention, from the report of the 21st session of UNCITRAL Working Group III (Transport Law) at Vienna, 14th – 25 January, 2008, UN Doc. A/CN.9/WG.III/WP.101, online: http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html [the Convention].

2 United Nations Convention on the Carriage of Goods by Sea, March 30, 1978, A/Conf.89/13, U.N.T.S., U.N. Doc. 1978.

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limits on contracts governed by the various international conventions applying to inland motor, rail or air carriage.

However, the Convention is not mandatory and may be contracted out of, in the case of "volume contracts" (agreements covering at least two shipments). Some commentators have speculated that 90% of ocean transport would be excluded from the Convention by reason of the exclusion relating to volume contracts. This may mean that these shipments are not covered by *any* international legislative regulation regarding limitations on liability. Article 91 of the Convention requires that ratifying countries denounce the *Hague-Visby Rules*[3] governing the liability for loss or damage of sea-borne cargo. Thus, liability for shipments not covered by the Convention would instead be subject to the general law of contract. This could cause the same uncertainty in the law that originally gave rise to the *Hague-Visby Rules* almost a century ago.

Ratification of the Convention may have unintended consequences for inland carrier liability in Canada. The liability regime of the Convention for ocean transit under Article 61 applies the *Hamburg* limits of liability. However, Article 84 states that the Convention does not affect any international conventions governing the carriage of goods by road or rail to the extent that such international convention affects the liability of the carrier. Canadian motor and rail carriage are not governed by any international conventions. Therefore, the Convention limits could apply in Canada to inland legs that are part of a contract for international ocean carriage.

As well, the Convention conflicts with s.46 of Canada's *Marine Liability Act*, which allows arbitration or litigation in Canada of most cargo claims having a Canadian connection by invalidating non-Canadian exclusive jurisdiction clauses. Convention chapter 14 validates exclusive court jurisdiction clauses and chapter 15 validates exclusive arbitral forum clauses, in volume contracts or where the parties are the original parties to the contract.

Last, there is still an issue as to whether Canada's trading partners will adopt the Convention. We suggest that Canada be cautious in advocating the adoption the Convention, given the lack of general acceptance of the *Hamburg Rules*. The *Hague-Visby* regime has stood the test of time and a change will be disruptive. It should be demonstrated that the Convention is in Canada's interest before drastically altering the current regime.

Comments on Specific Provisions of the Convention

Chapter 1 – General Provisions

The Article 1 definitions in the Convention are very broad, which may result in unintended consequences for existing law. For instance, freight forwarders would often fall within the definition of documentary shipper, attracting liabilities under the Convention that they likely do not have under existing law.

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[3] Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Brussels: 23 February 1968), Schedule to the Carriage of Goods by Sea Act 1971 (U.K.), 1971, c. 19 [Hague-Visby Rules].

Chapter 4 – Obligations of the Carrier (Articles 11 to 17)

Convention Articles 12 and 13 define the period of responsibility of the carrier for the goods as the period between "when the carrier or a performing party receives the goods for carriage and…when the goods are delivered," excluding any period outlined in the contract of carriage. Again, this has the potential of extending the Convention inland where the carrier or performing party receives and delivers the goods. In the absence of any mandatory Canadian legislation about such carriers' liability, the Convention would apply with its monetary limits and two year limitation period. These provisions extend the period of responsibility beyond that envisioned by the *Hague-Visby Rules*.

Under Article 13, a carrier can be requested to issue a transport document for transport beyond what it is paid for in the carriage contract. In that case, the carrier may contract out of responsibility. This changes the current regime under *Hague-Visby*, where an ocean carrier may issue a door to door bill of lading but then claim exemptions or exclusions of greater benefit to it than *Hague-Visby* if damage occurs other than during ocean transport.

Article 15 extends the carrier's obligation to use diligence to keep the ship seaworthy to the whole voyage. By contrast, under Article III(1) of *Hague-Visby*, that obligation only exists at the beginning of the voyage. This obligation of the carrier is one of the few "super-mandatory clauses" in the Convention which cannot be varied by contract. Other such obligations are the shipper's obligation to properly describe the cargo and warn of dangerous goods (Articles 30 and 33).

Chapter 5 – Liability of the Carrier for Loss, Damage or Delay (Articles 18 to 24)

Article 18 extends carrier liability to circumstances where "the claimant proves that the loss, damage or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4." Amongst the exclusions listed are "Act of God," "Perils, dangers, and accidents of the sea or other navigable waters;" "Fire on the ship," and "Latent defects not discoverable by due diligence." The exclusion of the carrier's defence of error in navigation or management of the ship, found in Article IV(2)(a) of *Hague-Visby*, is a significant omission. The Article 24 requirement for notice of damage to be given to the carrier within seven days is also a notable change from the three-day requirement under Article III(6) of *Hague-Visby*.

Under Article 18(2), the carrier can be relieved of part or all of the liability if it proves that the cause, or one of the causes, of loss is not attributable to its fault, or to fault of any person for which it is responsible. This could be equated with Article 4(2)(q) of the *Hague-Visby Rules*, but the language in *Hague-Visby* is much clearer. It is not clear in Article 18(2) if the carrier must prove how the accident occurred before it is entitled to show that the cause of the loss was not attributable to its fault. This appears to be the logical conclusion, but the wording leaves room for doubt.

Of particular importance is Article 18(5)(a) which, for liability to attach to the carrier, requires the claimant to demonstrate that "the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods

are carried…were not fit and safe for reception, carriage and preservation of the goods." This due diligence element is in Article III of the *Hague-Visby Rules*. However, the Convention essentially reverses the onus, and places it on the claimant to prove a lack of due diligence.

Chapter 6 – Additional Provisions Relating to Particular Stages of Carriage (Articles 25 to 27)

Article 26 sets out the regime for carriage of deck cargo on ships. It provides that the carrier is not liable for loss of goods where the goods are carried on deck, if such carriage is required by law, they are "carried in or on containers or road or railroad cargo vehicles that are fit for deck carriage, and the decks are specially fitted" to carry the containers, or carriage on deck is in accordance with the contract of carriage, or the customs, usages and practices of the trade in question. This is a new regime for deck carriage. The provisions recognize deck carriage of containers, which did not exist when the *Hague-Visby* regime was created.

The deck carriage provisions would considerably alter the current law, namely, that deck carriage can be excluded from *the Hague-Visby Rules* if a bill of lading explicitly states on its face that the goods are carried on deck and are so carried. If Canada adopted the Convention and applied it to domestic carriage in the same manner as the *Hague-Visby Rules*, there would be a significant change in the liability regime applicable to "tug and tow" contracts. Canada should give careful consideration to how these provisions could impact the tug and tow industry.

Chapter 7 – Obligations of the Shipper to the Carrier (Articles 28 to 36)

These provisions give considerably more detail about the potential liability of shippers with respect to dangerous goods and misdescription. They do not appear to alter liabilities developed by the courts with respect to dangerous goods, and are appropriate. However, Article 35, *Liability of the shipper for other persons*, may make shippers liable for all breaches of obligations of sub-contractors. This liability is currently not uniformly imposed.

Chapter 8 – Transport Documents and Electronic Transport Records (Articles 37 to 44)

Article 39, *Identity of the Carrier*, deems the registered owner of the ship to be the carrier, unless the carrier is clearly identified in the contract and its address indicated. This may alter the current practice of not clearly identifying the charterer in charterers' bills of lading.

Article 43 makes the particulars of the goods as stated in the transport document *prima facie* proof of evidence of the carrier's receipt of goods as stated in the contract particulars. The carrier may not rebut that evidence when the transport document is in the hands of a third party. The Convention sets out specific provisions permitting the carrier to qualify the information in a transportation document when it has not been able to inspect the goods (e.g. in a closed container). This would alter the current regime under the *Hague-Visby Rules* with respect to the quantity of goods.

Chapter 12 – Limits of Liability (Articles 61 to 63)

The limits under the Convention are higher than the *Hague-Visby* limits of 666.67 SDR per package, or 2 SDR per kilogram (whichever is higher). In addition, the limit of liability for delay

under Article 62 of the Convention is 2 ½ times the freight payable on the goods delayed. There is no similar limit for delay claims under *Hague-Visby*. These Convention limits, including the limit for delay, are taken from the *Hamburg Rules*.[4]

Article 61(2) contains a welcome clarification as to what constitutes a package or unit and requires that the number of packages or units be enumerated. Otherwise, the container or the item listed (e.g. pallet) will be deemed to be the package.

Chapter 14 – Jurisdiction (Articles 68 to 76)
Chapter 15 – Arbitration (Articles 77 to 80)

The Convention jurisdiction provisions are a modified *Hamburg Rules* regime. One reason the *Hamburg Rules* did not find acceptance amongst leading commercial nations were the jurisdiction provisions, which gave the consignee the option to sue in a number of jurisdictions. The Convention recognizes choice of forum agreements in volume contracts that have either been individually negotiated, or contain a prominent statement that there is a choice of forum agreement and specifies the sections of the contract containing the agreement. Therefore, it appears that for liner transport, the Convention would give the consignee the option of suit in the place of receipt or place of delivery specified in the contract, or the loading or discharge ports. It is not certain whether this will find any greater acceptance than the *Hamburg Rules* in leading jurisdictions. Liner carriers will be concerned that this provision will mean, for example, that in the case of a significant loss of a container vessel (fire, collision, etc), they would face suits in numerous jurisdictions over the same loss.

Further, these provisions conflict with s.46(1) of Canada's *Marine Liability Act,* because the Convention allows non-Canadian exclusive choice of court jurisdiction clauses. Section 46(1) reads:

> 46(1) If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, where
> (a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;
> (b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or
> (c) the contract was made in Canada.

The arbitration provisions in Chapter 15 also conflict with s. 46(1), because they allow non-Canadian exclusive choice of arbitration forum clauses.

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[4] An exception to this is the per kilo limit in the *Hamburg Rules* of 2.5 SDR, which will be increased to 3 SDR under the Convention.

Chapter 16 – Validity of Contractual Terms (Articles 81 to 83)

The effect of Convention Article 82(4) is to impose super-obligations that cannot be excluded, even in volume contracts. These super-obligations include the carrier's obligation to exercise due diligence to keep the ship seaworthy and properly crew the ship (Article 15(a) and (b)), the carrier's loss any benefit of liability limitations if there is a personal act or omission done recklessly by the carrier (Article 63), the shipper's obligation to provide information and documents (Article 30), and the shipper's obligation to mark and inform the carrier about dangerous goods (Article 33).

Chapter 17 – Matters not Governed by this Convention (articles 84 to 88)

Article 84 makes the Convention inapplicable to international Conventions regulating the liability of carriers for loss, most notably by road and rail. However, in Canada, this exemption would not apply because we have no international Convention on those topics.

This would lead to non-uniformity in Canada inland transport law, because the Convention liability regime may apply to those inland shipments that are part of an international sea through-carriage. In contrast, the existing motor carrier liability limit of $4.41/kg would apply to the same motor carriage if there was no international sea carriage component.

Chapter 18 – Final Clauses (articles 89 to 98)

Article 91 requires States ratifying the Convention to denounce the *Hague-Visby* and *Hamburg Rules*. Again, this would leave a gap for the large amount of Canadian marine traffic that is not governed by the Convention, for example due the "volume contract" exemption, which is currently governed by the *Hague-Visby Rules*.

Conclusion

Adopting the Convention would result in significant changes to Canadian maritime law, many of which are controversial. These changes include a return to freedom of contract for ocean carriers' liabilities under volume contracts, and the extension of the Convention's liability regime into inland Canadian transport, and undermining the Canadian jurisdiction for cargo claims permitted under s.46(1) of the *Marine Liability Act*. In our view, these changes should only be considered, and the Convention ratified, only after very careful consideration, and only if many of Canada's major trading partners signal their intention to adopt the Convention.

Yours truly,

(original signed by Kerri A. Froc for Richard Southcott)

Richard Southcott
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