# U.S. Participation in Private International Law Negotiations: Why the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea Is Important to the United States

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## SUMMARY



## I. INTRODUCTION

On July 3, 2008, the United Nations Commission on International Trade Law (UNCITRAL) approved the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.[1] The Convention will be presented to the United Nations General Assembly for final approval in the fall of 2008. The United States delegation to this negotiation strongly supports the Convention, which

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1. United Nations Comm'n on Int'l Trade Law, *Report of the United Nations Commission on International Trade Law, 41st Session*, para 298, Annex I, U.N. GAOR, 63rd Sess., Supp. No. 17, U.N. Doc. A/63/17 (July 3, 2008) [hereinafter *Convention*].

will provide much-needed harmonization and modernization of the law in this area. When it goes into force, the new Convention will make the process of transporting goods by sea across international boundaries simpler, more efficient, and less costly.

This article will discuss why the new Convention is important to the United States and describe the United States' role in its negotiation.

## II. BACKGROUND

Just about everybody agrees that the world needs a new carriage of goods regime. The two main problems with the current regimes—including the 1924 Hague Rules[2] (in use in the United States and a few other countries), the 1968 Hague-Visby Rules[3] (in use by most of our major trading partners), and the 1978 Hamburg Rules[4] (in force, but rejected by most major maritime and commercial powers)—are that they are outmoded and there are too many of them. They fail to address the astonishing changes brought about by containerization, multimodal transport, and e-commerce. Their mandatory nature, with no possibility for party autonomy, is out of step with today's commercial need for flexibility. But the fact that these rules are substantively inadequate is not the worst of it. It would be bad enough if there were one set of uniform, outmoded rules. After all, international uniformity in this field probably matters more than the substance of those rules. It is inevitable that there will sometimes be losses in the carriage of goods by sea. The law must allocate financial responsibility for these losses. Knowing in advance the rules that will apply to determine who is liable and for how much allows parties to make rational, efficient decisions about contract terms and insurance. If there is uniformity, each party involved in a transaction will know at the outset what its liability (or possible recovery) will be if there is a dispute, no matter where the dispute is resolved. Predictability and certainty will reduce transaction costs and minimize litigation. Ultimately, the consumer will benefit from lower prices. But there is no uniformity in the law governing the carriage of goods by sea. In addition to the three current regimes mentioned above, there are numerous national regimes that incorporate some or all the Hague, Hague-Visby, and Hamburg Rules, but with major variations.[5]

The situation in the United States is even less uniform and more outmoded than in most other countries. The Carriage of Goods by Sea Act (COGSA)[6] is the U.S. enactment of the Hague Rules, which represents the oldest existing regime. COGSA differs from the Hague Rules in significant respects.[7] Congress made some changes that were intended to be clarifications but actually turned out to be substantive, and it also added provisions to COGSA that have no counterpart in the Hague Rules.[8]

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2. International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155 [hereinafter *Hague Rules*].

3. Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, 1412 U.N.T.S. 128 [hereinafter *Hague-Visby Rules*].

4. United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3[hereinafter *Hamburg Rules*].

5. *See generally* Michael F. Sturley, *The United Nations Commission on International Trade Law's Transport Law Project: An Interim View of a Work in Progress*, 39 TEX. INT'L L.J. 65, 67 (2003) (discussing the adoption of the Hague, Hague-Visby, and Hamburg Rules by various countries).

6. Ch. 229, 49 Stat. 1207 (1936), 46 U.S.C. §§ 30701–30707 (2006).

7. Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. MAR. L. & COM. 553, 564 (1995).

8. *Id.* at 564–65.

The United States is out of step with the rest of the world largely because of the U.S. courts. U.S. judicial interpretations of the Hague Rules differ from the generally accepted international interpretations on a number of issues.[9] Moreover, judicial interpretations of COGSA are not even consistent within the United States.[10]

In addition to being outmoded and inconsistent, the current U.S. carriage of goods by sea regime—like all such existing regimes—is inflexible. Its provisions are "one-way mandatory," *i.e.*, contracts under them cannot derogate from the convention to the detriment of the shipper, but derogation that increases the carrier's obligations is allowed.[11] These mandatory regimes were developed for a commercial context that no longer exists, and they do not meet today's commercial realities. "It can no longer be assumed that the carrier always has the more powerful bargaining position" with regard to a shipper; "nor can it be assumed that transport contracts are always adhesion contracts, which the shipper must take or leave."[12] In this aspect, as in many others, maritime law shows its long history and its fondness for tradition! In other areas of the law, there has long been a recognition that laws and treaties regulating business-to-business contracts should provide a framework of default rules, but that the parties should be free to agree to different terms. For example, the widely ratified 1980 United Nations Convention on Contracts for the International Sale of Goods provides that parties to a contract can exclude application of the Convention, or derogate from or vary the effect of its provisions.[13]

The UNCITRAL Convention addresses all of these problems: the need for a modern legal regime, the need for uniformity, and the need for flexibility. That is why the convention is important to the United States.

## III. HOW DID THE UNITED STATES GET IN THIS SITUATION?

Why is it that the United States is still operating under a 1924 Convention that everyone recognizes no longer works well? The answer is that it has been impossible for the United States to revise its carriage of goods by sea law because there has never been an industry-wide consensus as to what form that revision should take. During the 1980s and 1990s there were efforts at reform: shipper interests favored adoption of the Hamburg Rules while carrier interests favored the Hague-Visby Rules. The Maritime Law Association developed a compromise proposal in the 1990s that got as far being introduced in the Senate. All of these efforts failed because they had the support of some, but not all, of the affected U.S. industry groups.[14]

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9. *Id.* at. 565–67.

10. *Id.* at 567.

11. Mary H. Carlson, *U.S. Participation in the International Unification of Private Law: The Making of the UNCITRAL Draft Carriage of Goods by Sea Convention*, 31 TUL. MAR. L. J. 615, 636 (2007).

12. *Id.*

13. Convention on Contracts for the International Sale of Goods art. 6, *opened for signature* Apr. 11, 1980, S. TREATY DOC. NO. 98-9 (1984), 1489 U.N.T.S. 3.

14. *See generally* Michael F. Sturley, *The Proposed Amendments to the Carriage of Goods by Sea Act: An Update*, 13 U.S.F. MAR. L.J. 1, 4–5 (2000–01) (discussing the refusal by different interest groups in the United States to compromise in regard to rules for carriage of goods by sea); Michael F. Sturley, *Proposed Amendments to the Carriage of Goods by Sea Act*, 18 HOUS. J. INT'L L. 609, 613–14 (1996) (stating that Congress refuses to act when the different interest groups do not agree on which carriage of goods by sea rules to adopt); Michael F. Sturley, *Overruling* Sky Reefer *in the International Arena: A Preliminary*

Because of the nature of private international law instruments and the unique nature of the American political system, private international law projects rarely succeed in the United States if any single, significant interest group objects. Private international law regulates transactions between individuals, not governments. Often, as in the case of the carriage of goods by sea, it involves a highly complex and technical topic. Congress has little expertise in these topics, and not many voters know or care about them. As a result, Congress is often unwilling to legislate in the absence of a strong consensus among all the affected interest groups. The Executive Branch is reluctant to put forward proposals that Congress will not accept. The result, as in this case, is often a stalemate. Any single, significant interest group can often block a private international law initiative.[15]

## IV. WHAT IS DIFFERENT THIS TIME?

This gloomy picture has changed dramatically because industry has learned its lesson. Everyone now realizes that cargo-liability reform in the United States will only be possible if the major players compromise and cooperate with each other. Recognizing this, in 2001 the World Shipping Council (WSC, representing primarily foreign owners of liner vessels that serve the U.S. trade) and the National Industrial Transportation League (NITL, representing U.S. shippers) reached a compromise agreement on cargo-liability reform.[16] As important as the fact of compromise is the fact that the substance of this agreement meets the needs of all U.S. industry sectors for a modern, flexible, comprehensive, and balanced regime. The major elements of the NITL/WSC agreement became the U.S. government position in this negotiation, and eventually became part of the Convention approved by UNCITRAL on July 3, 2008.[17] These include a restructuring of the burden of proof, an increase in the liability limitation, forum selection rules that allow the cargo plaintiff to choose the forum notwithstanding a forum selection clause in the contract, and a provision allowing parties to certain contracts covered by the Convention to deviate from the Convention's terms.[18]

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*Assessment of Forum Selection and Arbitration Clauses in the New UNCITRAL Transport Law Convention*, 37 J. MAR. L. & COM. 1 (2006) (describing the 2005 UNCITRAL negotiation where the U.S. delegates held opposing views); Constantine G. Papavizas & Lawrence I. Kiern, *1999–2000 U.S. Maritime Legislative Developments*, 32 J. MAR. L. & COM. 349 (2001) (describing the difficult prospects faced in trying to push COGSA reform through the 106th session of Congress).

15. Peter H. Pfund, *Contributing to Progressive Development of Private International Law: The International Process and the United States Approach*, *in* 249 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1, 63 (1996).

16. THE WORLD SHIPPING COUNCIL & THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE, JOINT STATEMENT OF COMMON OBJECTIVES ON THE DEVELOPMENT OF A NEW INTERNATIONAL CARGO LIABILITY INSTRUMENT (September 25, 2001), http://www.worldshipping.org/jointstatement.pdf (last visited Feb. 11, 2009).

17. U.N. Comm'n on Int'l Trade Law, Working Group III (Transport Law), *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by sea], Proposal by the United States of America*, Annex, U.N. Doc. A/CN.9/WG.III/WP.34 (July 11, 2003) [hereinafter *U.S. Proposal*].

18. Convention, *supra* note 1,art. 80 (special rules on volume contracts).

## V. WHY SHOULD THE REST OF THE WORLD BELIEVE US WHEN WE SAY WE WILL RATIFY THIS CONVENTION?

The United States has an unfortunate reputation for actively participating in private and public international law negotiations, using all its power to persuade the negotiators to accept the U.S. position on issues of importance to us, and then not ratifying the Convention that results from those negotiations. This has made other countries understandably leery of our assurances that we will join a particular convention only if they adopt our position on major issues. We have heard these concerns expressed during negotiations, especially when our position on certain issues has initially not received much support from other countries and we have stated that these issues are deal-breakers for us.

Forum selection clauses and freedom of contract are two such issues: if it were not for the fact that the United States had insisted that these issues be addressed in the Convention in a manner that is consistent with the U.S. position, the Convention probably would not include any provisions on those topics. Other participants in this negotiation have also frequently stated that U.S. acceptance of the new Convention is critical to its success. "As more than one delegate has put it, the maritime cargo transportation world does not need another treaty to which the United States is not a party."[19] Therefore, the negotiators agreed that the Convention would cover these subjects, and after years of discussions, much hard work, and significant compromises by all sides, including the United States, the issues of forum selection clauses and freedom of contract are covered in the Convention in a manner that meets the needs of U.S. industry.[20] I believe that this is evidence that other countries believed us when we said that these were critical issues to us, and also took us at our word when we said that we expected that the United States would quickly ratify the Convention.

There is every reason to believe that the United States will, in fact, not only ratify this Convention, but be one of the first, if not the first, country to do so. Why? First of all, the timing is right: major segments of the affected U.S. interests (WSC and NITL) agreed to a compromise, and agreed to work together on a new domestic or international legal regime. Second, our process in this negotiation has been both highly participatory and extremely pragmatic. In the United States there is now a strong consensus in support of this Convention because we have included every possible interest sector and everyone has been willing to compromise.[21]

19. Carlson, *supra* note 11, at 637; *see* David Michael Collins, *Admiralty—International Uniformity and the Carriage of Goods by Sea*, 60 TUL. L. REV. 165, 165 (1985) (arguing that it is important to have uniformity within the international maritime community).

20. *See* Convention, *supra* note 1, ch. 14, art. 80 (chapter 14 contains the forum selection clause terms and article 80 contains the freedom of contract terms).

21. *See* Sturley, *supra* note 5, at 109 ("Commercial interests were represented in the CMI process from the beginning, and commercial observers have regularly participated in all of the CMI and UNCITRAL meetings"); STEAMSHIP MUTUAL, *UNCITRAL—International Carriage of Goods Wholly or Partly by Sea*, May 2008, http://www.simsl.com/IGUNCITRAL0508.html (last visited Feb. 12, 2009) ("The United States has participated very actively in the drafting process and it appears that a significant body of United States carriers and shippers support the latest draft").

## VI. THE U.S. APPROACH TO THIS NEGOTIATION: PARTICIPATORY AND PRAGMATIC

This approach is unusual enough to warrant some discussion.

First, our process is highly participatory. The State Department's Office of the Legal Adviser for Private International Law (L/PIL), of which I am a part, is the action office for private international law within the U.S. government. The United States did not actively participate in private international law negotiations until the 1960s, and it was not until the late 1970s that L/PIL was established as the coordinating office within the United States government for such negotiations.[22] The forum by which we seek guidance and expertise in private international law matters is the Secretary of State's Advisory Committee on Private International Law. The Advisory Committee's membership includes representatives from all national legal organizations that have an interest in private international law, including the ABA, the National Conference of Commissioners on Uniform State Laws, the National Association of Attorneys General, the Judicial Conference of the United States, the Maritime Law Association, and many others. For specific pending projects, we turn to groups of experts who make up Study Groups, which are subgroups of the Advisory Committee. The Study Groups include industry experts. We hold regular meetings of these Study Groups, which are open to the public and announced in advance in the Federal Register. The U.S. delegation to a particular negotiation is usually chosen from the Study Group.[23]

In this negotiation, the government offices that are involved, in addition to L/PIL, are the State Department's Bureau of Economic, Energy and Business Affairs and the Department of Transportation's Maritime Administration. But we are not the subject-matter experts in this negotiation. The members of the Study Group formed for this project include every sector of industry concerned with the carriage of goods in the United States. This includes the MLA, the WSC, the NITL, the Transportation Intermediaries Association, FedEx, UPS, the American Institute of Marine Underwriters, the Association of American Railroads, the American Trucking Association, and representatives of the stevedores and terminal operators. The U.S. delegation to this negotiation includes, in addition to the government representatives, representatives from many of these organizations. It also includes University of Texas Law Professor Michael Sturley, who is perhaps the leading U.S. expert on COGSA and the Hague Rules.

The goal of this inclusive process is to include every interest group in the process of developing the U.S. position on the various legal and policy issues that have arisen in this negotiation. It is of paramount importance to us that every interested party has an opportunity to be heard. "In private international law, unless there are public or foreign policy interests that are inconsistent with the interests of the affected private sector groups, the U.S. government generally seeks to carry out the goals of those groups."[24] That has been the case in this negotiation. The U.S.

22. *See* Pfund, *supra* note 15, at 51–54 (explaining the evolution of U.S. participation in IGOs specializing in international trade legislation).

23. Federal Advisory Committee Act, 5 U.S.C. app. 2, § 1–16 (2006); Carlson, *supra* note 11, at 622; *see* Pfund, *supra* note 15, at 55–57 (describing the role of Study Group members from the Advisory Committee).

24. Carlson, *supra* note 11, at 622.

government position has reflected the compromise position agreed to by our industry.

This highly participatory process is unusual. Many countries prefer to send only government officials to private international law negotiations, and sometimes these officials express positions that the U.S. private sector advisors know is not the position of the industry representatives in these countries.[25] The United States is one of the very few countries to have included industry representatives in its delegation to the UNCITRAL Carriage of Goods negotiation.

While it seems to us to make sense to include in our delegation representatives of the elements of the private sector that are supposed to benefit from the convention (and to listen to those individuals), there is also a very practical reason why we do so: we must if we want the United States to join the Convention. We do not have a parliamentary form of government, where there is no separation of the legislative and executive branches. In a parliamentary system, "there may be little likelihood . . . that a convention, once submitted to parliament by decision of the Government, will not receive the requisite political approval for ratification."[26] Thus, there is no compelling political need to ensure that industry approves the convention. That is decidedly not the case in the United States. In this country, a single major industry sector can derail a private international law convention during the Congressional approval process.[27] Unless a Convention meets the often-competing needs of all major stakeholders, the U.S. will not be able to become a party, no matter how strong the Executive Branch's support may be.

I can state without hesitation that the U.S. government's process in this negotiation has been highly participatory. In fact, some members of our delegation have been known to grumble upon learning that there will be yet another meeting or conference call, or upon seeing yet another industry sector show up at a delegation meeting. When this Convention is before Congress, no group will be able to say that it did not have a seat at the negotiating table.

That brings us to the second characteristic of the U.S. approach to this negotiation: pragmatism. We recognize that it would be impossible to develop a U.S. position that every member of the U.S. delegation agreed with completely. Similarly, it would be highly unlikely for the United States to convince the international community to accept every single U.S. proposal in its original form. We listened carefully to each other and to our international partners. We tried very hard to stay away from ideological, theoretical arguments and to focus instead on finding practical solutions to real problems. We encouraged our industry advisors to prioritize, *i.e.*, to identify which issues were critical and hold firm to our position in those areas, but be willing to compromise on other issues. The Convention is full of examples of this pragmatic approach. For example, Articles 66–73 provide for a treatment of forum selection clauses that is consistent with the U.S. position.[28] But, in order to meet the needs of other countries with different domestic jurisdiction

25. Pfund, *supra* note 15, at 78–79.

26. Carlson, *supra* note 11, at 623; Pfund, *supra* note 15, at 81.

27. Pfund, *supra* note 15, at 63.

28. Convention, *supra* note 1, at art. 66–73; *see* U.S. Proposal, *supra* note 17, at para. 30–33 (the Convention provides for all of the forums that the U.S. proposal suggested, including a forum specified by contract and ports where the loading and discharging actually occurred).

rules, Article 74 provides that these articles are optional.[29] The result of all this pragmatism is a Convention that may not be as elegantly drafted or as ideologically coherent as some would like. However, it is a balanced convention that meets not only the competing demands of various U.S. industry sectors, but also the differing priorities of other countries and regions of the world. It is a convention that hopefully the United States will ratify quickly.

## VII. NEXT STEPS

UNCITRAL approved the text of the Convention on July 3, 2008.[30] The Convention will be presented to the U.N. General Assembly for its adoption in the fall of 2008, and it is expected that it will be open for signature after a celebratory signing ceremony in Rotterdam, hosted by the Government of the Netherlands and the Port of Rotterdam Authority in September 2009.[31]

The United States delegation supports the text of the Convention. We certainly did not agree with every provision, and there are some provisions that we strongly opposed. For example, the United States strongly preferred a lower limit of liability in Article 59, and we firmly believe that there is no commercial justification for the limit included in that Article. However, we recognized that the higher limit was extremely important to certain countries for political reasons to certain countries and we were willing to accept the higher limit as part of an overall compromise package. The Convention has to be viewed as a package: each country made concessions on some issues in order to gain what it wanted on other issues. The result is a balanced, but fragile, compromise. I think that the chances are excellent that the United States will quickly take the necessary steps to sign and ratify the Convention. It must be borne in mind that once the President has transmitted this Convention to the Senate for advice and consent, the role of the State Department, indeed the role of the Executive Branch, becomes less important. The federal government's interest in this Convention is derived from that of the private sector, and while the government can explain the merits of the Convention, the Senate will look to the private sector for support for U.S. ratification. Thus, in order for the United States to ratify this Convention, the strong, active support that the private sector has shown throughout the years of this negotiation will need to continue.

29. Convention, *supra* note 1, at art. 74.

30. *Id,* at para. 298.

31. *Id*.; United Nations Comm'n on Int'l Trade Law, *Report of the United Nations Commission on International Trade Law*, Annex II, U.N. GAOR, 63rd Sess., U.N. Doc. A/63/17 (July 3, 2008).