The UNCITRAL Convention on Carriage of Goods by Sea: Harmonization or De-Harmonization?

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SUMMARY

I. INTRODUCTION

The UNCITRAL Commission, at its 41st session from June 16 to July 3, 2008, adopted the Convention on the Contract of International Carriage of Goods Wholly or Partly by Sea.[1] The United Nations General Assembly passed the Convention in

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1. U.N. Comm'n on Int'l Trade Law [UNCITRAL], *Report of the 41st Session*, 4, U.N. Doc. A/63/17 (16 June–3 July 2008).

December of 2008.[2] The Convention is intended to replace the Hague Rules of 1924, the Hague Visby Rules of 1968, and the Hamburg Rules of 1978.[3] However, the following questions remain:

- Will UNCITRAL manage to create a new global standard for carriage of goods by sea or become nothing more than a fourth set of liability provisions for carriage of goods by sea?
- Will the work in UNCITRAL lead to an increased harmonization or will it actually lead to a further de-harmonization of the international liability regime for carriage of goods by sea?
- What factors are decisive in the ratification process to come—i.e., what factors might make the difference between failure or success?

Before detailing the ratification process and the possible future of the UNCITRAL Convention, it is necessary to highlight the decision-making and negotiation process in international organizations, especially in UNCITRAL, and on the controversial issues that arose during the work with the Convention. The result of the work in UNCITRAL will impact the ratification process. There are a number of other factors that determine whether a state will ratify an international convention rather than just the specific content of the provisions found in the instrument.

II. NEGOTIATION AND DECISION-MAKING

A. Consensus As a Goal in International Negotiations

The key to a successful result in international organizations is achieving *consensus*. This is the basic premise under which a majority of sovereign states ratify an international instrument. The only exception is the European Union. Because member states have transferred a part of their sovereignty, they have an obligation to implement and apply EC Directives and EC Regulations, regardless of whether they are satisfied with the content or not.[4] Otherwise, there is no possibility to force a sovereign state to implement or apply provisions in an international instrument that it has not chosen to ratify or accede.

Consensus should not be mistaken for a simple plenary majority. Voting in an international organization is usually seen as a last resort and a great failure. However, consensus does not mean that every state represented in the conference room has to support or even accept a proposed text. The concept is far more complex. Consensus has been reached when a significant majority of the participating states either support or accept the proposed text. In practice, this significant majority must include some of the more important states participating in the negotiations. In absence of consensus, the text discussed is either placed within

2. International Law Reporter, *UNCITRAL: Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (July 9, 2008), *available at* http://ilreports.blogspot.com2008/08/uncitral-convention-on-contracts-for.html.

3. Gard News 192, New Uncitral carriage of goods convention, http://www.gard.no/gard/Publications/GardNews/RecentIssues/gn192/art_3.htm, (last visited Feb. 20, 2009).

4. European Commission for Democracy Through Law, Seminar on the Implications of the New Century and Striving to Join European Structures for Constitutional Courts, *National Sovereignty and the European Union*, 7, CDL-JU 2000 (Dec. 14, 2000) (*prepared by* Rainer Arnold).

square brackets or possible alternative solutions are sought. If it proves impossible to reach consensus in a working group on a certain issue, the text may be submitted to a higher body for final consideration. This is often viewed as a failure in a working group and usually there is strong pressure for removing square brackets at the working group level. One reason for this is that the experts in a working group are aware of the fact that higher bodies have less knowledge of details, which might negatively affect the quality of the regulation of controversial issues. Another reason is that controversial issues always run the risk of becoming more politicized at higher levels because they overlap with controversial issues. In a worst case scenario, this might terminate the whole negotiation process.

B. Coalition Building—the Way to Reach Consensus

To reach consensus it is necessary to build coalitions between states and to work out compromise solutions. The vast majority of the work in international negotiations is carried out not in the plenary sessions but in the corridors outside the conference room or between the sessions in informal correspondence groups. There are several reasons for this. The most important reason is that rarely are enough significant states—in favor of a solution—present to reach consensus. Even if all significant states are present, it is often difficult to find a quick solution. Instead, issues need to be discussed in detail in a smaller group of interested states, especially if drafting of new text is necessary. Due to political considerations, it might be difficult for states to officially support or even accept a certain solution, while outside the room they may informally accept it and then stay silent in the plenary session debate. In practice, the official debate merely serves a purpose in the beginning and end of the debate of a specific issue. In the beginning, delegates make their basic positions known and in the end states formally adopt the compromise reached in the corridors. Thus, the debate in the room is solely for the official record.

The establishment of informal correspondence groups that work between the official sessions is often a very useful tool to speed up negotiations and reach consensus faster. This makes it possible to informally discuss and test different solutions between the sessions or at least to determine the controversial issues. As part of the UNCITRAL Convention an informal website was created to discuss specific issues, which led to compromise proposals that special rapporteurs developed. This working method saved time at the official sessions. Even if the Working Group held two-week sessions, it is unlikely the Group would have finished its work within six years without the establishment of the informal website and the work the special rapporteurs accomplished between sessions.

III. SOME CONTROVERSIAL ISSUES IN THE WORKING GROUP

A. General

The negotiations in UNCITRAL Working Group III concerned a number of complicated and sensitive issues, such as the scope of application, freedom of contract, and liability of carriers and shippers. Although the Working Group took six years to complete its work, some important issues remained unresolved at the

Working Group's final session and at the 2008 Commission session. These issues included the maritime plus approach, freedom of contract, and limitation levels.

B. Maritime-Plus Approach

According to article 26 of the UNCITRAL Convention, it is applicable also to transports ancillary to the maritime leg. Only where there is another international mandatory instrument governing the specific transport leg—in practice, the CMR Convention or the COTIF[5]—this instrument will prevail regarding the carrier's liability, limitation of liability, and time for suit. In this respect the UNCITRAL Convention establishes a limited-network rule. In case of non-localized damages, the limitation level in the Convention always applies.

However, it is important to remember that the maritime-plus approach only applies in relation between the contracting carrier and the sender/consignee. For example, if the consignee decides to sue the performing land carrier, the applicable transport-liability regime applies regardless of whether the ancillary transport is performed under an international mandatory liability regime. According to article 19, only maritime-performing parties are subject to the carrier obligations and liabilities under the Convention. For example, if an American consignee decides to directly sue an American railroad company because goods were damaged during a railroad transport in the USA from the port to the final inland destination, the applicable railroad liability regime will apply. Thus, performing land carriers will always operate under their own terms.

Many states heavily criticized the maritime-plus approach in the Convention—both states in favor of a multimodal approach and those in favor of only a port-to-port regime. Some states viewed the limited network rule as an anomaly, therefore favoring a fully multimodal approach. Other states stressed the fact that the maritime liability regime, especially with regard to the type of liability and limitation levels, differed from the existing mandatory international and national liability regimes applicable to land carriage. Many European countries have enacted CMR and COTIF clones for domestic road and rail transport.[6] In response, states concerned about only port-to-port transports stated that maritime transport had special characteristics and that the same liability and limitation levels were not applicable to land carriage.

Several articles represent the best possible compromise reached in Working Group III and later in the Commission, specifically, the combination of article 26 and article 19 on the liability of the performing carrier and article 59 on limitation levels. Regarding ancillary transports, the scope of application was made as broad as possible while respecting existing mandatory international instruments on land carriage. While the Convention is fully applicable to non-localized damages of goods, the general limitation levels are higher than those in the Hague Visby and

5. Michael E. Crowley, *The Limited Scope of the Cargo Liability Regime Covering the Carriage of Goods by Sea: The Multimodal Problem*, 79 TUL. L. REV. 1461, 1463 (2005).

6. Michael F. Sturley, *Sea Carriage Goes Ashore: The Relationship Between Multimodal Conventions and Domestic Unimodal Rules, Modern Law for Global Commerce*, July 11, 2007, at 2, *available at* http://www.uncitral.org/pdf/english/congress/Sturley.pdf.; *see also* International Road Transport Union, Conclusions From the 50th Anniversary of the CMR Convention, http://www.iru.org/index/en_events_2006_cmr_conclusions (last visited Feb. 20 2009) (describing the CMR as a legal model).

Hamburg Rules.[7] Performing land carriers will still operate under their own terms in relation to the shipper and consignee. Although the Working Group, and later the Commission, adopted this compromise, it is doubtful whether consensus was reached on this controversial issue. At the end of the negotiations in the Commission, several important states asked for a reservation clause to apply the Convention only port-to-port.

C. Freedom of Contract

One of the Convention's most important innovations is that under certain conditions it allows for freedom of contract. Article 80 states that "the carrier and the shipper… may provide for greater or lesser rights, obligations, and liabilities than those imposed by this Convention," provided that the conditions are individually negotiated or prominently specified in the volume contract. However, this right does not apply to the following: article 14(a) and (b) on the rights and obligations regarding seaworthiness; article 29 on the shipper's obligation to provide information, instructions, and documents; article 32 on the shipper's obligation to inform about and mark dangerous goods; and article 61 on loss of right to limitation.

These are super-mandatory provisions that cannot be derogated from in this way. It is also possible to bind third parties, *i.e.*, the consignee, to the derogations in the volume contract, provided that the third party is informed of and expressly consents to the derogations.

The extent to which parties in the market will make use of the possibility to derogate from the liability regime in the Convention remains unknown. Due to the third-party binding restrictions, parties will likely use the possibility to derogate from the Convention in two situations: (1) where there are large shipments between different industries, *i.e.*, in so called long term industry shipping; or (2) in relation between ocean carriers and freight forwarders shipping large amounts of consolidated goods, *i.e.*, in situations where goods are shipped under space charters. As shippers currently use these types of contracts to ship large amounts of liner cargo, shippers will likely use individually negotiated terms to ship almost all containerized goods in the future.

Several states were reluctant to allow for the parties to the transport agreement to derogate from the mandatory liability regime. An argument against freedom of contract was that small shippers, who have only one carrier to turn to, would be forced to enter into transport agreements under unfavorable conditions. However, this is unlikely. Rather, the freight forwarders, who consolidate goods and ship under space charters, are the ones who might suffer in this situation. They will face mandatory rules, because they will act as carriers to small shippers and consignees and have no or minimal ability to derogate from the Convention's liability. At the same time, depending on their bargaining power, they might be subject to

7. *Compare* UNCITRAL Convention, *supra* note 1, art. 59(1) (limiting liability to 875 units of account per package or 3 units of account per kilogram), *with* Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, art. IV(5)(a), Feb. 23, 1968, 2 U.S.T. 430, 1412 U.N.T.S. 128 (setting forth the Visby amendments to the Hague Rules) (limiting liability to 666.67 units of account per package), *and* U.N. Convention on the Carriage of Goods by Sea, art. 6(1)(a), Mar. 31, 1978, 1695 U.N.T.S. 3, 17 I.L.M. 608 (setting forth the Hamburg Rules) (limiting liability to 835 units of account per package).

derogations of the carrier liability in their space charter agreements with larger ocean carriers. Thus, a risk exists that freight forwarders will be squeezed between the industry and the carriers.

This might lead to a situation where freight forwarders refuse to take on carrier liability, and instead, return to the role of sole intermediaries because of the lack of back-to-back arrangements. In the long term, this would be detrimental to small shippers, especially when it comes to multimodal transports.

Ultimately, several states that initially were opposed to a freedom-of-contract solution accepted the text in article 80, after further guarantees against possible misuse were added to the provision. Even though consensus was reached, it is likely that this issue will pose a major obstacle to some states in ratifying the Convention.

D. Limitation Levels

The carrier's right to limitation in article 59 also turned out to be a controversial issue. Although the limitation levels were set at the last session of the Working Group, real consensus was never reached.

The existing figures in the Hague Visby Rules were the starting point for several states. These levels constituted a significant increase for some of those states. States arguing against amending the levels, as compared to the Hague Visby Rules, claimed that almost 90% of all cargo claims in maritime carriage were already covered. If the levels were raised, it would be meaningless to have a package or weight limitation in the Convention. The draft provision on future revision of limitation levels also concerned these states.

Other states wanted to raise the limitation levels considerably above the Hamburg limits for several reasons. First, the existing limitation levels in the Hague Visby Rules are not sufficient to cover 90 % of all claims for certain trades, *e.g.*, trades involving the export of heavy machinery. Additionally, it would be politically difficult for existing parties to the Hamburg Rules to accept lower figures.

The issue of limitation did not only concern the figures, but also, the scope of application of the carrier's right to limitation and the question of how to treat non-localized damages in multimodal transports posed problems. Some states thought that the carrier's right to limitation was too broad because they could limit their liability to all breaches of the Convention, especially since the shipper has unlimited liability. Other states opposed the right to apply maritime limitation in case of non-localized losses and damages. They objected because the maritime limitation levels appeared very low in comparison to the European mandatory liability regimes on road and rail carriage, at least regarding the weight limitation.

States reached a compromise formula at the last session of the Working Group. Several states accepted limitation levels above the Hamburg level. In return, the Working Group agreed to delete the draft provisions on the obligation to apply the highest limitation level for cases of non-localized losses and damages and on future revision of the limitation levels. However, a number of states at the Commission session declared that they were not satisfied with the result, with some of the more important trading nations being among these states.

IV. A FUTURE GLOBAL STANDARD FOR MARITIME CARRIAGE?

The time has come to answer the question: Will the UNCITRAL Convention become the future world standard for maritime carriage, replacing the outdated Hague Visby Rules?

Based on the Convention's content, this is unlikely. During the Working Group negotiations, several important trading states indicated that they would have difficulty accepting a "maritime-plus regime." Others are not satisfied with the limitation levels set out in the Convention. Another important trading state cannot accept that the Convention allows individual parties to derogate from provisions, to the detriment of the shipper.

It is also important to see how the European Commission will respond to this. Since the chapter on jurisdiction is not automatically binding on a ratifying state, the compliance is on the individual member states of the European Union. However, the Commission has indicated, in a logistics plan for the European Union, that it would like to work on a proposal for a liability regime for multimodal transport. As soon as such a proposal is presented, there will be Community compliance. There is a risk that member states, not satisfied with the content of the Convention, will try to block other European states from ratifying and implementing it. That requires only a minority of member states, since transport law directives and regulations must be adopted with a qualified majority.

However, as indicated in this paper's introduction, the ratification process is separate from the negotiations. This process involves factors beyond the Convention's content. One such factor is whether other states will ratify. For example, if the U.S. ratifies the Convention and there is not great dissatisfaction with the content, Asian economies like China, the Republic of Korea, and Japan might ratify. If these states ratify, it is likely that other states around the Pacific and Europe will follow. Another factor is that the views of different states on the Convention's content have shifted with time. Sometimes states that were unsatisfied with the end result of negotiations will ultimately ratify a few years later.

It is difficult to predict whether this Convention will enter into force and replace the Hague Visby Rules as the dominant international liability regime for maritime carriage. However, this much can be established: Provided that the U.S., China, and a few other important trading nations ratify the Convention in a few years time, it is likely to become a huge success; if not, it will end up at the UN cemetery for dead conventions.