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Anastasiya Kozubovskaya
Research assistant
Maritime Law Centre
Nantes University, FRANCE

Brief overview of the state of negotiations of the UNCITRAL Draft convention on the carriage of goods [wholly or partly] [by sea]

The current Draft convention on the carriage of goods wholly or partly by sea originates from the necessity to review the current practices and laws in order to eliminate the legal difficulties in the international transport of goods. It was also necessary to promote the uniform rules in the areas where no such rules existed, notably, to take into account the latest developments in technology, including electronic commerce, and so to achieve a greater uniformity of laws.

Indeed, since the entry in force of the Hamburg Rules in 1992, there are actually three different international conventions in force to govern the carriage of goods by sea (Hague Rules 1924; Hague-Visby Rules 1968/1979; Hamburg Rules 1978). Moreover, there is no uniform international legislative text on the multimodal carriage (Convention on International Multimodal Transport 1980 is not still in force).

The existing national laws and international conventions have significant gaps regarding various issues. These gaps constitute an obstacle to the free flow of goods and increase the cost of transactions.

There is a lack of the uniformity both on the international and national level. In response to the lack of the uniformity on the international level, some countries intend to extend the applicability of its national law outside of national borders. This is the case, for example, of the American Carriage of goods by sea act. USA COGSA 1999 covers the carriage by sea but also some multimodal issues. It is not only a domestic law, but rather a statute which legislates on carriage of goods and contracts far outside American borders.

Bearing all this in mind, the UNCITRAL entrusted the CMI with the task of preparing of the preliminary work identifying the areas where unification or harmonization was needed. The liability and multimodal issues, not initially intended to be included in the scope of the work, were however incorporated later in the preliminary draft text submitted by the CMI to the UNCITRAL in December 2001.

The UNCITRAL then reconvened Working Group III on Transport Law, composed of all States members of the Commission, in order to consider the project in a close cooperation with interested intergovernmental organizations involved in work on transport law (*such as the United Nations Conference on Trade and Development (UNCTAD), the Economic Commission for Europe (ECE) and other regional commissions of the United Nations, and the Organization of American States (OAS)*), as well as international non-governmental organizations representing the commercial sectors involved in the carriage of goods by sea (*such as the Comité maritime international (CMI), the International Chamber of Commerce (ICC), the International Chamber of Shipping (ICS), (IMMTA), the International Federation of Freight Forwarders Associations (FIATA), the International Union of Marine Insurance (IUMI) and the International Association of Ports and Harbors*). The Working Group has regularly had some consultations with the experts from other Working Groups, notably of the

Working Group II (International arbitration and conciliation) and the Working Group VI (Electronic commerce) in order to adopt the same approach on the relevant questions.

The Working Group started its deliberations on Draft convention on the carriage of goods [wholly or partly] [by sea] at its ninth session in New York in April 2002. From this date to present the Working Group met twice a year and many non official meetings took place meanwhile. The next twentieth session of the Working Group will be held in Vienna in October. The Working Group is expected to continue the third and final reading of the Draft convention at the end of 2007 - beginning of 2008, with a view to presenting it for finalization by the Commission in 2008.

The current writing of the Draft convention on the carriage of goods [wholly or partly] [by sea] is contained in the documents A/CN.9/WG.III/WP.81 and A/CN.9/WG.III/WP.81/Corr.1 and A/CN.9/WG.III/WP.94. It is the result of negotiations within the Working Group (WG) since 2002. It consists of 20 chapters. The Draft deals with some questions which have already been regulated by the existing international conventions, but it also address many new issues.

In its work the WG intends to provide an appropriate balance between the different interests of the carrier and shipper industries. It intends to resolve the difficulties which appear from the multimodal aspects of the Draft convention and from the potential conflict between the common law and the civil law concepts and terminology. The drafting of the current convention is guided by the golden rule of consensus. As underscored by the UNCITRAL Secretariat, for the purpose of the Working Group, the consensus does not mean unanimity, but a substantial consensus. This intends to encourage the future ratification of the convention.

While the WG is currently improving the clarity of the draft text which, as large majority of issues has been accepted in substance during the previous sessions; some of the important issues remain still under discussion.

At its eighteenth session the Working Group had continued and had largely completed its second reading of the Draft convention.

At the last 19th session the WG started its third reading of the Draft and a significant progress had been made in that regard. The WG examined a number of chapters of the draft convention, including related definitions, and namely the first 9 chapters and the chapter 19 and some other articles closely related to these chapters (namely, the art. 63, art. 84, art. 62 § 2). The third reading had been completed of the chapters regarding the scope of application, electronic transport records, the period of the responsibility of the carrier, the obligations of the carrier, the liability of the carrier, additional provisions relating to particular stages of the carriage, the validity of contractual terms, liability for delay in the delivery of the goods, the relationship of the draft convention with other conventions, and the obligations of the shipper and the transport documents and electronic transport records.

As for the review of the **definitions** contained in the article 1 of the Draft, the WG proceeds in the following manner: it defers its discussions until agreement had been reached on the substantive articles relating to the terms defined in the draft article 1.

Some definitions are already approved in substance. Notably, the definition of the contract of carriage, of the carrier, the shipper, the documentary shipper, the goods, the transport document (negotiable and non negotiable), of the electronic transport record (negotiable and non negotiable) are already agreed to be acceptable.

The definitions of the **performing party**, **maritime performing party** were searchingly reviewed at the last session.

In the revised text, "**Performing party**" was defined more narrowly. It included agents but excluded employees in order to solve the potential problem of the employee of the maritime performing party being held liable pursuant to the draft convention for the actions of its employer.

It was agreed that the last sentence of the definition of "maritime performing party" was intended to include only those inland carriers who perform its services exclusively within the port area.

The definition of "non-maritime performing party" contained in draft paragraph 8 of the article 1 has been purely and simply deleted. (*Because the term "non-maritime performing party" was only used once in the Draft, namely in article 20, paragraph 3, but this paragraph was deleted at the same session. In the light of this, there was no use any more to maintain the term "non-maritime performing party" in the article one*).

The Draft convention introduces for the first time, at least with regard to maritime conventions, the definition of the **controlling party**. It distinguishes between the right of the controlling party to give unilateral instructions to the carrier on the one hand, and the right of the controlling party to agree with the carrier on a variation of the contract of carriage, on the other hand.

Scope of application

The question of the scope of application of the Draft was subject to considerable debate. While the title of the Draft referring to the multimodal carriage remains still under the square brackets, at the present stage the application of the Draft to the door to door transport seems to be agreed in its substance.

The Draft convention mainly applies to the contract of carriage in liner transportation except to the charter parties and to the contracts for the use of a ship or any space thereon. In some particular cases it also applies in non-liner transportation. According to the agreement that its coverage should be at least as broad as what was already covered under the Hague and Hague-Visby Rules (*which also applied to contracts of carriage under bills of lading in non-liner transportation*).

The convention is mandatory in its majority**.** But there is a possibility to **derogate** contractually from some provisions of the Draft convention and notably in the case of the volume contracts (art. 89).

Some real concern was raised regarding the **freedom of contract in the volume contracts**. It was recalled that the freedom given to the parties to volume contracts in article 89 to derogate from some provisions of the draft convention constitute a significant departure from the prevailing regime in transport law conventions. Following the approach taken in previous maritime conventions, the draft had been originally conceived as a body of law incorporating essentially mandatory rules for all parties. The special rules for volume contracts and the notion of freedom of contract were incorporated in the Draft later, from its twelfth session (when it had been suggested that more flexibility should be given to the parties to so-called "Ocean Liner Service Agreements"), in order to take into account commercial reality, in particular the growing use of volume contracts. The 89 article treating of the volume contracts establishes the conditions under which it should be possible to derogate from some provisions of the draft convention. There are however some provisions from which there could never be derogation. The main concern raised during the negotiations was to provide an appropriate balance between necessary commercial flexibility to derogate from the draft convention in certain situations, while nonetheless providing an adequate protection for

the weaker contractual party, typically small shippers. It was argued that, in view of the broad definition of volume contracts in article 1 of the draft convention, freedom of contract might potentially cover almost all carriage of goods by shipping lines falling within the scope of the draft convention.

After extensive consideration of the various views expressed at the last 19th session, the Working Group rejected the proposal to reopen the previously-agreed compromise and approved in substance the text of draft article 89 as it is in the document WP 81. The WG considered that it would be highly unlikely that the Working Group would be in a position to build an equally satisfactory consensus around a different solution, and the Working Group was strongly urged not to make attempts in that direction at such a late stage of its deliberations.

Nonetheless, the Current Provisional agenda for the next 20th session comes back on this issue. It recalls that freedom of contract is an important element in the overall balance of the draft convention and that one delegation indicated that the treatment of the issue of freedom of contract in volume contracts would determine its position with regard to the adoption of the draft convention. Therefore the Current Provisional agenda for the next 20th session suggests that this issue should receive further examination prior to finalization of the draft convention.

The Draft convention pays a particular attention to the **transport documents** and the **electronic transport records** (negotiable and non negotiable). It treats about its issuance and transfer. It deals with qualifying clauses, with the contract particulars and its evidentiary effect.

While the chapter 9 on the transport documents and electronic transport records was approved in its substance, (*subject to some minor redrafting improvements, notably concerning the article 37 on the contract particulars and the article 38 dealing with the identity of the carrier*), the Working Group postponed the third reading of draft article 42 dealing with the evidentiary effect to its next session. The redrafted proposal of this article is already available on the UNCITRAL site in the document A/CN.9/WG.III/WP.94. It deals with the evidentiary effect of the negotiable and non negotiable transport document or electronic records.

The Draft convention dedicates a whole chapter (chapter 10) to the questions of the **delivery of goods**. It notably aims at eliminating the problems resulting from goods that arrived at the place of destination prior to the arrival of the negotiable transport document or electronic record. It establishes the procedure to follow when the delivery of goods arrived at its destination is not claimed and when the goods remain undelivered.

While initially the entire scheme of the draft convention was based solely on negotiable and non-negotiable transport documents and electronic transport records, a proposal had been made for the inclusion in the draft convention of provisions on non negotiable transport document or electronic transport record that requires surrender (*bills of lading consigned to a named person*). It was stated that the characteristics of this type of document fell somewhere between those two categories. At the present stage the draft articles (art. 47 and art.48) dealing with the delivery of goods when such documents or electronic records required surrender are issued are remaining under brackets.

Nothing of the Draft text affects a right of the carrier or performing party to retain the goods to secure the payment according to the contract of carriage or the applicable law. This chapter has been accepted in its substance and will be subject to the third reading at the next WG sessions.

The Draft also addresses the important issues of **the sub-contracts** and the protection of a so called **Himalaya clause**. At this regard, the Working Group agreed on the three guiding principles according to which:
- Carriers and subcontractors should have joint and several liability;
- Carriers and employers should be vicariously liable for their employees; and
- The protection of the so-called "Himalaya clause" should not be limited in operation by the principle of privity of contract and therefore should be extended to the employees, agents or subcontractors, but also to the master, crew or any other person who performs services on board the ship (art. 4 § 2).

The chapter 12 dealing with the **transfer of rights** is one of the complex issues of the Draft convention. The WG underlined at the previous sessions that this chapter constituted a novel approach, at least with regard to maritime conventions. It was noted that there were two principal reasons for the inclusion of a chapter on transfer of rights: first, to ensure that the provisions of the draft instrument were coherent throughout in terms of the issue of liability of the parties, and second, in order to set out the necessary rules to accommodate the electronic communication component of the draft instrument. The chapter on the transfer of rights was inserted into the draft convention as a response to problems that had been encountered in the preparation of the UNCITRAL Model Law on Electronic Commerce.

Chapter 12 of the draft instrument is said to deal with the essence if not core of the project. The Draft convention aims since its inception to clarify and harmonise the issues relating to transfer of rights and to a certain degree the transfer of some obligations from the contractual shipper to third parties under the contract of carriage.

At the present stage, this chapter remains entirely under brackets and is therefore open to the further discussion.

Obligations of the parties

The Draft convention settles down the obligations of the carrier in the chapter 5 and of the shipper in the chapter 8.

Under the chapter 8 the **shipper is obliged** to deliver the goods ready for carriage and to provide the carrier with certain information, instructions and documents. According to the draft article 14 the parties to the contract of carriage may agree that the loading, handling, stowing or discharging of the goods, normally being the carrier's obligations, are to be performed by the shipper.

Liability

The issue of the **basis of shipper's liability to the carrier** drew a particular attention of the Working Group at its last session. It is generally agreed that the liability of the shipper for the breach of its obligations is to be fault-based with an ordinary burden of proof. There are two following exceptions to this general rule: firstly, the shipper will be held strictly liable for the failure to inform the carrier of the dangerous nature of the goods or for failure to mark or label such goods accordingly. Secondly, the shipper will be held strictly liable for loss or damage due to the inaccuracy of information and instructions actually provided to the carrier. The shipper's liability remains for the moment unlimited. This important issue is still under discussion.

It has been agreed at the last session that the shipper should not bear any liability for pure economic loss or consequential damages arising from delay in delivery of goods (due to failure to find a suitable means to limit that liability). The **liability for delay in delivery of goods** appeared to be sensitive issue on the part of both shippers and carriers. At the last 19th session, a general preference appeared to emerge in favour of the decision that carrier liability

for delay should be limited to situations where the carrier had agreed to deliver the goods within a certain time.

Regarding the **carrier's liability**, it is close to but not the same that existing in the Hague Visby Rules. The **period of the responsibility** of the carrier begins when the carrier or performing party receives the goods and ends when the goods are delivered. The time and location of receipt and delivery of the goods can be agreed by the parties to the contract of carriage. But these moments can not start later of the commencement of the initial loading of the goods and ends earlier the completion of their final unloading.

The final decision as to **the liability limitation level** to impose upon the carrier will be decided later on the basis of an equitable balance of rights and obligations provided in the Draft convention. At the present stage, the question has been left to a so called "*final package deal*", but the majority seems to favour the increase of the level of the monetary limitation. In any way, the carrier will not be able to limit its liability if the claimant proves that the loss resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss would probably result.

The relationship of the draft convention with other laws and limited network system

The Draft convention provides a limited network system of liability for localized loss or damage, giving precedence to certain provisions of a **mandatory international convention** applicable to the stage of transport where loss, damage or delay occurs. In cases of non-localized damage, or where no mandatory international regime applies, then the maritime liability regime of the Draft convention applies to the whole multimodal carriage.

As for the **mandatory national law**, it was agreed at the last session that including of all mandatory national law would greatly detract from the uniformity and predictability of the draft convention as a whole. In the light of that, a compromise proposal was expressed to allow the Contracting States that wish to apply their mandatory national law to inland cases of loss or damage to do so by means of declarations at the moment of the approval of the Convention (*in accordance with draft article 94 dealing with the Procedure and effect of declarations*).

At the last session, the WG included in the Draft convention the article 84 governing the carriage of goods by air in order to ensure that it would be no conflict with the Montreal Convention and Warsaw Conventions (*as the both deal with multimodal transport*).

General average

As for the general average, the Draft convention expresses the agreed policy that it should not affect the application of provisions in the contract of carriage or national law regarding the adjustment of general average.

Procedure issues

It has been decided to delete the entire chapter dealing with **the rights of suit** and to leave this question to the national law.

Regarding the **time limit for suit**, the WG adopted a 2 years time limit for all claims, both against the carrier and the shipper. There will be no possibility to suspend the limitation period, unless it had been agreed by the parties. It has been decided to provide for a special extension of the time period with respect to recourse action. The draft article dealing with **counterclaims** has been deleted**.**

Concerning the **jurisdiction and arbitration** issues, the WG decided to include in the draft convention a reservation or a "opt in" approach. Thus the Contracting state shall declare at the moment of the approval of the Convention whether it would be bound or not by these chapters. The modalities of this "opt in" approach will be discussed at the next session.

The final clauses of the Draft convention deal with the "modus operandi" of approval and entry in force of the Draft convention. The moment of the entry in force of the Convention is not established yet. The Draft treats of the procedure of reservation and of declarations; revision, amendment and denunciation of the Convention. The Secretary-General of the United Nations is designed as the depositary of this Convention.

The Working Group intends to continue its third reading with the draft article 42 dealing with the evidentiary effect of the contract particulars (of the chapter 9), and with the chapter 10 of the draft convention. The WG will use as a basis for continuation of its deliberations the working documents A/CN.9/WG.III/WP.81 and A/CN.9/WG.III/WP.81/Corr.1; A/CN.9/WG.III/WP.93; A/CN.9/WG.III/WP.94; and A/CN.9/WG.III/WP.95. The most of them are already available on the UNCITRAL website.

The Working Group plans to complete its third and final reading of the Draft at the end of 2007 beginning of 2008, with a view to presenting it for finalization by the Commission in 2008.

The next WG sessions are scheduled to be held in Vienna in October 2007 and January 2008. Then the Draft document will circulate for comments to Governments prior to the forty-first session of the Commission. This session is currently scheduled to be held in Vienna in June-July 2008.

Finalization and adoption of the draft convention

Then the Draft convention will be submitted to the international conference of plenipotentiaries convened to finalize and adopt the convention and to open it for signature.

Once adopted, the current convention will be published in the six official (equally authentic) languages of the United Nations – Arabic, Chinese, English, French, Russian, and Spanish.