International Rules Applicable to Contracts of International Transport of Goods: Are Shippers Better Off?

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This paper analyses disparities existing in the current international cargo transport rules and efforts of international organisations to fill gaps and alleviate contradictions. Focus is put on international rules for the carriage of the goods by sea, air, rails and road; and multimodal transport involving carriage by sea and land. Further examination relates to the new rules of international transport in negotiation under the auspice of the United Nations Commission on International Trade Law i.e. the UNCITRAL. Before concluding the paper the author questions to what extent these new conventions are likely to improve international transport rules applicable in Africa.

INTRODUCTION

There exist four main modes of transport of the goods: carriage by sea, air, road and rails. In terms of global cargo shipping, carriage of the goods by sea is largely dominant (UNCTAD 2007). In practice, this mode of carriage is used in combination with other modes of transport in *combined* or *multimodal* carriage. Multimodal transport contract is a contract which contemplates the use of more than one mode of carriage during its performance (Glass 2006). However, though effective in international supply chain management, multimodal transport contracts are difficult to administrate. This is partly caused by the lack of international mandatory rules governing this mode multimodal transport (Wilson 2008). At first glance, it could be easy to assume that international *unimodal* transport contracts have a straight forward international legal framework. In practice, however, each mode of international carriage of the goods is governed by a multitude of international (and sometimes controversial) conventions and this makes their legal framework rather problematic. Example: there exist three different international conventions applying to the carriage of the goods by sea. Those conventions have been promulgated at different periods of time and under different international shipping contexts. This means that uniformity of international shipping rules remained complete utopia. However, some limited *harmonisation* became achieved (Tetley 2002; Honka 2004). Legal harmonisation deals with achieving roughly identical international legal regime on substantive issues with the possibility for contracting countries to make reservation(s) to the convention in question, when needed (Honka 1996). However, as it will be showed in this paper, there is a risk that by trying to harmonise an international legal framework by all means, *de-harmonisation* might reveal itself unavoidable (Smitthoff 1968; Honka 2004). The aim of this research paper is to discuss legal disparities existing in international shipping contracts. Regard is paid to all modes of carriage. A positive descriptive approach is used. In depth research questions concern grounds of cargo liability and limitation amounts. Substantive issues related to documentary liability (i.e. liability under transport documents used) and times to claim are left behind. Before concluding this paper, the author discusses to what extent the new UNCITRAL Draft Convention on transport law will contribute to the harmonisation of the law applicable to international transport contracts.

LEGAL FRAMEWORK OF INTERNATIONAL SHIPPING RULES

International carriage of the goods by sea is governed by three different conventions: the *Hague Rules* i.e. International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (HR), 1924; the *Visby Protocol* which amended the HR in 1968 i.e. the *Hague-Visby Rules* (HVR), the SDR Protocol which amended the HVR in 1979, and the *Hamburg Rules* i.e. the United Nations Convention on

the Carriage of the Goods by Sea, 1978 i.e. the HgR. It is not the purpose of this paper to analyse each of these rules in full detail. However, the reader should be advised that the Hamburg Rules are substantially different from the HR and the HVR (Selvig 1980). Carriage of the goods by air is regulated by the Warsaw Convention i.e. the Convention of Unification of Certain Rules Relating to International Carriage by Air, signed in Warsaw in 1929, and further amended by various Protocols. The rules contained in the Warsaw convention are to some extent identical to the rules applying to the carriage of the goods by sea under the HR and the HVR (Malcolm 1993). Carriage of the goods by road is governed by the CMR i.e. the Convention on the Contract for the International Carriage of the Goods by Road (1956), as amended by the Geneva Protocol in 1978. The rules contained in the CMR are somewhat different from the maritime ones; and they are largely applied in Europe (Schelin 2000). Carriage of the goods by rails is regulated by the CIM i.e. Uniform Rules Concerning the Contract for International Carriage of Goods by Rail, and Appendix B to that convention (CODIF), 1980. The CMR and the CIM have some identical rules concerning the basis of liability of the carrier (Malcolm 1997). Following the failure of the United Nations Convention on International Multimodal Transport of Goods i.e. the MT convention (1980), the UNCTAD (United Nations Conference on Trade and Development), in collaboration with the International Chamber of Commerce (i.e. the ICC), issued a package of standard contractual terms to be incorporated into multimodal transport contracts on voluntary basis. These rules are known as the UNCTAD/ICC Rules for Multimodal Transport Documents, 1992. However, as they are contractual rules, they can not displace mandatory transport rules applicable to each mode of carriage (UNCTAD 2003). Nevertheless, those multimodal rules received international support and became incorporated by the BIMCO (i.e. the Baltic and International Maritime Council) and the FIATA (i.e. the International Federation of Freight Forwarders Associations) into their standard contract forms i.e. Multidoc 95 and FBL 92 (UNCTAD 2003).

SUBSTANTIVE DIFFERENCES

It is appropriate to discuss this issue in a comparative manner. In this regard, *the period of responsibility of the sea carrier* under the HgR is longer than under the HR and HVR. See: 2.1(b) and (e) of the HVR, and article 4 of the HgR. This issue has repercussions on marine insurance costs. Moreover, the HgR apply to all types of cargo (article 5(5) of the HVR), whereas the HR and HVR do not apply to the carriage of live animals and deck-cargo, unless expressly agreed by the contracting parties (article 1(c) of the HVR). Furthermore, the HgR apply to any contract for the carriage of goods by sea in return for freight (article 2(1-2) of HgR), whereas the HR and HVR apply only to contracts for the carriage of goods by sea evidenced by bills of lading or other similar documents of title (article1 (b) of the HVR). All these conventions do not apply to charter-parties (article 2 of the HVR and article 2(3) of the HgR (Scrutton 1996). As to the basis of liability of the sea carrier, the starting point under the HR and HVR is that the carrier is bound at any time before and at the beginning of the voyage to exercise *due diligence* to make the ship *seaworthy* (article 3.1 of the HVR), and to *take care* of the goods from the time of loading until discharge (article 3.2 of the HVR). He/she is therefore presumed guilty for loss of or damage to the goods occurring during the time he/she has their custody, unless he/she proves no fault on his/her part and that of his/her employees (article 4.1 of the HVR). This is the *presumed fault rule* with a *reversed* burden of proof. However, provided that the ship was seaworthy before the beginning of the voyage, the carrier can be exonerated from his/her liabilities, if he/she proves that loss of or damage to the goods which occurred, resulted from errors in the navigation and/or management of the ship (nautical faults); or by fire, unless proved that the fire was caused by his/her "*actual fault or privity*": (article 4.2(a) & (b) of the HVR). Under the HR and HVR (article 4.2 (c to q), there are many other cases of no fault for the carrier. Further examination of this matter, is outside the scope of this paper. The situation is quite different in the Hamburg rules. In fact, in accordance with the provisions of article 5 of the HgR, cargo liability of the carrier seems to be decided on stricter bases but this assumption is not accepted in all jurisdictions (Scrutton 1996; Honka 2004). Concerning defence issues, it can be mentioned that the defence of navigational and management errors of the ship (nautical faults) are not available under the HgR. Moreover, contrary to the HR and HVR position, the fire defence is under a reversed burden of proof

under article 4(a) of the HgR. Moreover, the level liability of the carrier is placed to higher level under the HgR as compared to the HR and HVR. Furthermore, under article 5(1) of the HgR, the carrier is expressly liable for negligence of his/her servants and *agents*. However, it is not clear whether these provisions also include independent contractors and faults committed by carrier's servants or agents outside the scope of their employments. Albeit all this however, it is internationally accepted that liability of the sea carrier is based on *negligence* i.e. the duty to take care of the goods while they are in his/her custody in addition to seaworthiness requirements for the ship(s) used. The same conclusion is possible with respect to the carriage of the goods by air (articles 18-20.1 of the Warsaw Convention). The wording of these provisions is straight forward and does not give room to uncertainty as to whether the air carrier can be liable strictly (i.e. without fault) as long as cargo issues are concerned (Malcolm 2002). Alike the maritime carrier, the air carrier has also the possibility to be exempted from liability for loss of or damage to the goods or delay caused by pilotage, handling and navigational errors of the pilot or the crew (article 19 of the Warsaw Convention). The situation is a bit different in the field of carriage of the goods by land. In this regard, the wording of article 17.1 of the CMR, and article 38.1 of the CIM are identical to the effect that liability of the carrier is *strict* in certain circumstances (Schelin 2003). These provisions impose to the carrier a duty of "*utmost care*" for the goods and this leads to question of whether this duty is more demanding than that of *due diligence*. However, judging from English jurisprudence and doctrine on this issue, it seems that the utmost-care-requirement is, in fact, not different from that of "due diligence", except for linguistic preferences (Malcolm 2003). Nevertheless, it is well accepted that the road carrier remains strictly liable with respect to the vehicle's *road-* and *cargoworthiness* under article 17.3, of the CMR (Schelin 2000). Alike the air and maritime liability regimes, the road and rail carriers are also presumed at fault until they prove the contrary (article 18.1 of the CMR, and article 37.1 of the CIM). The road carrier can also be exempted from liability to some extent but not as much as the maritime carrier can do: (article 17-18 of the CMR). More or less identical exemptions are available for the carrier by rails (article 36.2-3 and 37.2 of the CIM).

Limitation of liability of the carrier is regulated as follows under relevant international transport conventions: 1) liability of the sea carrier in the HR (article 4.5(a)), can be limited to **£**100 per package or unit, whichever is higher, "unless the value or the nature of such goods have been declared by the shipper before shipment and inserted in the bill of lading". 2) Under the HVR, the limitation amount increases up to 666.67 SDR per package or 2 SDR per kilogramme of gross weigh of the goods lost or damaged, whichever is higher (article 4.5 (a) and (d) of the HVR, 1979). 3) However, the HgR increased this limitation further to 835 SDR per package or 2.5 SDR per kilogramme of the goods lost or damaged whichever is higher (article 6.1(a) of the HgR). The HgR provide further information on how to calculate limitations with respect to delayed goods or goods transported in containers (article 6.1(b-c) and 6.2-4). However, no substantial change has been introduced in this regard. The value of 1 SDR was equal to 0.616897 USD on September 3rd, 2008. So, if a container whose weight was 500kg, and the value of its content had not been not declared in the bill of lading (or other transport documents) was lost at that date, a carrier bound by the HgR could have considered it as one package and limit his/her liability to a minimum amount of 515,109 USD (0.616897 USD * 835 SDR). Of course, this limitation amount would be lower under the HR and HVR. It follows that, eventhough the aim of increasing the amount of limitation of liability of the carrier under the HgR was to protect cargo interest, it appears from the above example that shippers/senders still need to have cargo insurance for their cargo.

4) Limitation of liability of the air carrier follows the HVR approach. Nevertheless, the limitation amount in this field is lower than under the HVR i.e. 17 SDR per kilogram of gross weight of the package, unless special value of the package had been declared in advance and the sender /shipper had paid extra fee to that effect (article 22.3-4 of the Warsaw Convention). 5) Limitation of liability of land carriers is different from that of air and sea carriers. In fact, limitation of liability of the road carrier is limited to 25 francs (i.e. gold franc) per kilogram of gross weight. However, this limitation does not include custom duties and other charges sustained during the carriage of the goods. Furthermore, no full limitation amount can

be claimed, if special interest in the goods had not been declared in advance (Article 23-26 of the CMR). Identical approach is used in carriage of the goods by rails, except that the limitation can not exceed 17 units of kilogram of gross weight. The unit of account used is the same as under the CMR. The CIM contains more details regarding limitation of liability in all circumstances than the CMR (article 40-53 of the CIM). Whether lawyer's fee and other proceeding costs can be included in the limitation amount or not are left to the interpretation of the court seized according to applicable national law.
Other issues, which are decided differently in every convention analysed above, include liability for transport documents used, limitation times and recourse actions.

CARGO LIABILITY IN MULTIMODAL TRANSPORT
The MT convention established a liability system shaped at the model of the Hamburg rules, above. However, that convention has not reached international acceptance, and never will (Honka 2004). This is not mystic. In fact, the HgR introduced substantial changes into well accepted, though conservative, shipping rules. See for further details: article 3 and 4.2: a-b & c-p of the HR and HVR; compare the provisions of Article 4.2(5) of the HR, IV.2(5) of the HVR; 4.1 and 6 of the HgR. Therefore, when loss or damage occurs during a multimodal carriage, and it can be located to a given mode of carriage involved in the multimodal transport, the carrier(s) in question wishe(s) (by all means) to be protected by mandatory law applying to his/her mode of carriage or by his/her contractual terms. It follows that a multimodal transport system purporting to make *uniform law* of carriage in this field is less likely to attract global market acceptance, though it would be theoretically easy and cheaper to administer (UNCTAD 2003). In this context, the shipping industry developed the so called "*network system*" i.e. a system in which various rules apply depending on the unimodal stage of the carriage in which cargo loss, damage or delay occurred. In other words, when it is not possible to identify during which mode of carriage loss of or damage to the goods occurred, standard contract terms apply by default. However, those standard contract terms are often too favourable to their issuer(s) (DeWit 1995). It is quite clear that this liability system is not foreseeable and its extent depends on the rules which finally apply to the case. This lack of clarity leads to increased uncertainty on the part of the claimant. This causes insurance premiums to increase. Moreover, claims administration and recovery become more complex and expensive (DeWit 1995). In order to fill gaps existing in the various standard contract terms applying in this field, the UNCTAD/ICC rules (1992) were promulgated. These rules follow the liability system of the HVR as amended in 1979, and apply as such when a multimodal contract involves carriage of the goods by sea or inland waterway. When that contract does not have a sea leg but a road leg in addition to another mode of carriage, the rules of the CMR apply. Example: see rule 6.4 of the UNCTAD/Icc Rules. This approach is internationally known as a *modified system.*[6] However, the modified system does not solve all conflicting interests and the network system seems to still be attractive in the shipping industry (Glass 2006).

THE UNCITRAL DRAFT CONVENTION ON TRANSPORT LAW
On December 10th, 2001, the Commité Maritime International (CMI) introduced a draft instrument on transport law to the United Nations Commission on International Trade Law (UNCITRAL). This draft instrument became negotiated globally under the auspices of the Working Group III of the UNCITRAL. On January 24th, 2008, that instrument became adopted by the above-mentioned working group and has been circulated to Governments for further comments. It is scheduled to be presented at the annual session of the UNCITRAL in June-July, 2008, and later on to the General Assembly of the UN (UNCTAD 2007; UNCITRAL 2008). The starting point of this Draft Convention is maritime carriage (i.e. port-to-port) in addition to other modes of carriage connected to the sea leg (article 5-7 of the Draft Convention). It is not yet clear to what extent this convention will fill legal gaps existing in multimodal door-to-door transport contracts. However, in accordance with the provisions of article 13 of that Draft Convention, responsibility of the sea carrier can not go beyond the sea leg of carriage even when the

contract of carriage includes other modes of carriage. In this case, the maritime carrier who issues a multimodal transport document does it as *agent of the shipper* with respect to other modes of carriage. In practice, this does not improve the uncertainty existing in multimodal transport regarding cargo liability issues in the network or modified system, except when loss of or damage to the goods or their delay occurred during a traceable mode of carriage, be it by sea or otherwise (article 27 of the Draft Convention). The same approach is used in deciding limitation of liability of the carrier (article 62 of the Draft Convention). However, it seems that limitation amount in this Draft Convention will likely be higher than under the HVR as far as carriage of the goods by sea is concerned. Nevertheless, at the time of this writing, limitation of liability issues under the Draft Convention have not yet been settled in uniform manner (article 62 of the Draft Convention, above). In many other respects, liability of the sea carrier under this Draft Convention follows the liability framework of the HVR in addition to some minor changes based on the HgR. However, a close look at these provisions reveals no substantial changes of the relevant provisions of the HR and HVR (article 18-26 of the Draft Convention). This Draft Convention introduces many novelties which are absent in other transport conventions. These include information on the use of electronic transport documents, rights to control the goods in transit, conflict of law when more than one convention may be applicable to a case… It is clear, that if and when this draft rules become internationally accepted, the question of whether harmonisation will then be achieved can only be answered on guess based speculations.

MAJOR IMPLICATIONS AND CONCLUSION

It appears from the topics discussed in this paper that it would be "just a dream" to still think about unification of the rules applying to international transport contracts. Neither could it be taken for granted that harmonisation of those rules will be achieved one day. In fact, the legal framework of each mode of carriage evolved in isolation of all others, with less concerns about all transport rules being comparable, regardless of the mode of carriage in question. Even within a single mode of carriage, attempts to achieve harmonisation have, as a matter of fact, resulted in de-harmonisation. Transport of the goods by sea is a good example in this respect. The Warsaw convention has also been amended by various protocols. It follows that it does not remain less risky to think about uniformity of international rules applying in carriage of the goods by air. Carriage of the goods by land is regional by nature and there is not such a need to achieve its internationalisation, except for the sake of multimodal transport. Therefore, although the basis of liability of the carrier in each mode of carriage is based on the theory of negligence, this does not necessarily provide an easy way to achieve harmonic rules regulating international transport contracts. This statement is based on four following facts: 1) every carrier involved in international transport of the goods wishes to be protected by exemptions from liability clauses available under the convention regulating its unimodal carriage; 2) there is no international legal consensus regarding settlement of no-localised cargo claims in multimodal transport; 3) the question of cargo loss occurring during transhipment or during the time the cargo is in transit awaiting the next stage of its journey is also not yet regulated harmonically; 4) last but not least, this chaotic situation does not necessarily hinder multinational shipping and insurance corporations from reaching their business goals. All these factors lead to the failure of the MT convention. To this extent, it is appropriate to hold that the international shippers are not better off in this context. Africa is a shipper dominated market (as opposed to ship-owning dominated market). Moreover, many African countries apply the Hamburg Rules and these rules are not acceptable in major shipping markets. *This means that African shippers are even worse off*. The UNCITRAL Draft Convention tries to improve rules applying to contracts for international carriage of the goods by sea and other modes of transport having connection with the sea carriage. However, no substantial change of the traditional shipping rules based on the HR and HVR is expected. Moreover, multimodal transport contract issues are regulated in such a way as not to conflict with well established maritime rules. To some extent, this approach is reasonable. However, it remains to be seen whether this Draft Convention will bring about better harmonisation of the rules applicable to international transport contracts, rather than further de-harmonisation. I nevertheless end this paper by recommending African

shipping countries to take this draft convention serious, and start examining how to implement its provisions on regional basis in order to fill existing gaps.

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