CTM/G9635/CRA

Geneva, 17 August 2009

Position

IRU Position

IRU POSITION ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA (THE ROTTERDAM RULES)

IRU Position on the urgent need to oppose the entry into force of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea before the Signing Ceremony on 23 September 2009, Rotterdam, The Netherlands

I. ANALYSIS

The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("the Rotterdam Rules"), approved by the United Nations Commission on International Trade Law (UNCITRAL) Commission in July 2008 and adopted by the UN General Assembly in December 2008, which applies to the carriage of goods wholly or partly by sea, will be open for signature by States at the occasion of a signing ceremony in Rotterdam on the 23rd of September 2009. The Rotterdam Rules can be found at:

http://www.uncitral.org/pdf/english/workinggroups/wg_3/CTCRotterdamRulesE.pdf

Once into force (i.e. once 20 States have ratified the Rules), the Rotterdam Rules will apply not only to carriage of goods by sea, but also to land transport taking place before the loading of the goods on the ship and / or after their discharge from the ship.

II. IRU POSITION

The IRU has provided Members with its official position and detailed legal opinion on the Rotterdam Rules in documents referenced CAJ/G7471/CPI (13.10.2006) and CAJ/G7753/CPI (29.03.2007) in Annex. This official position was transmitted not only to UNCITRAL, but also to the Under-Secretary General for Legal Affairs and Legal Counsel to the United Nations, and to the Transport Division of the UNECE.

In brief, the Rotterdam Rules threaten the uniform application of land transport and in particular the regulations concerning national and international road transport contracts. More specifically:

- the Rotterdam Rules bypass certain currently applicable legislation. In particular, the Rotterdam Rules discard the application of national legislation to the national transport leg of a sea-road transport (Article 5). Furthermore, Article 26 of the Rules thrust aside the application of the CMR Convention (the only uniform legislation applicable to international road transport) to international road transport if the conditions of Article 26 are not fulfilled, (i.e. if the shipper had not made a separate and direct contract with the

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carrier applicable to the stage at which the loss, damage or delay occurred; if the CMR Convention does not specifically provide for the carrier's liability; and if the provisions of the CMR can be departed from by contract). Yet, Contracting Parties cannot, according to the CMR Convention itself, modify the text of the Convention by special agreements.

- the Rotterdam Rules do not create additional benefits for transport operators. In line with Article 59.2 of the Rotterdam Rules, compensation which is paid in case of loss or damage is limited to no less that 875 SDRs per package. However, in the case of goods placed in containers, the package limit can only be invoked if the packages are listed in the transport document. Thus, in such cases, if the goods are totally lost, the vehicle is considered as one shipping unit for which a total indemnity of 875 SDR is provided, including for all the goods on board. (For more details, please see annex, as well as the European Shippers' Council views at www.europeanshippers.com/docs/esc-position-paper-rotterdam-rules-march09.doc)

Such a situation results from the fact that the Rotterdam Rules were elaborated by UNCITRAL without the participation of organisations representing transport operators, contrary to the CMR Convention which was developed in partnership with the IRU, representing the road transport industry, the International Chamber of Commerce, representing the trade community and the UNIDROIT.

The UNCITRAL calls upon Member States to sign the Rotterdam Rules on the 23rd of September 2009. However, the 47 contracting parties to the CMR Convention will face a dilemma. In signing and ratifying the Rotterdam Rules, the contracting parties would exclude the application of their national law and would shatter the unity of the currently applicable transport legislation.

ANNEX 1

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Transport law:
Draft Convention on the Carriage of Goods
[wholly of partly] [by sea]

Infringement

of the Convention on the Contract for the international Carriage of Goods by Road (CMR Convention), done in Geneva on 19 May 1956

and

of the Convention of the Law of Treaties (Vienna Convention), done in Vienna on 23 May 1969

Transmitted by the International Road Transport Union (IRU)

I. Introduction

At its thirty fourth session (A/56/17, par. 345), held from 25 June to 13 July 2001, the United Nations Economic Commission on International Trade Law **" …decided to establish a working group to consider issues as outlined in the report on possible future work (A/CN.9/497)"**. By referring to these tasks, the Commission decided that this group (Working Group III) **"…should initially cover port-to-port transport operations; however, the working group would be free to study the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations…"**.

During its thirty-fifth session (A/57/17, par. 223), held from 17 to 28 June 2001, the Commission noted that **"…it would be desirable to include within its discussions also door-to-door operations and to deal with those operations by developing a regime that resolved any conflict between the draft instrument and provisions governing land carriage in cases where sea carriage was complemented by one or more land carriage segments".**

No document states that the Commission authorised Working Group III to prepare an instrument which, instead of "resolving any conflict" with "provisions governing land carriage", will, on the contrary, be a source of conflict with the latter and will expose potential contracting States to violations of the Convention on the Contract for the International Carriage of Goods by Road (CMR Convention), of 19 May 1956 as well as the Convention on the Law of Treaties (Vienna Convention) of 23 May 1969[1] .

In fact, the draft Convention on the carriage of goods [wholly or partly] [by sea], as it emerged from the work of Working Group III (A/CN.9/WG. III/WP. 56), contains articles 27, 89 and 90, which, following analysis, show an evident conflict with the CMR Convention and the Vienna Convention.

II. Infringement of the CMR Convention and the Vienna Convention

Briefly and without entering into the distinctions made by the authors of article 27, this new instrument subjects to the provisions of land transport law, including the CMR Convention, claims or dispute arises out of loss, damage to goods or delay occurring solely before the time of their loading on to the ship and/or after their discharge from the ships. Other claims, disputes or questions will then be submitted to the provisions of the new instrument.

Yet, by selecting the provisions of land transport law (including the CMR), which will apply and those which will not apply (when one knows that all the provisions of the CMR will imperatively apply), article 27 of the new instrument deliberately enters into conflict with the CMR Convention.

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[1] Among the 47 States, contracting parties to the CMR Convention, 39 States have also ratified the Vienna Convention. Considering that before their drafting , several provisions in the Vienna Convention already had customary rules status, their binding nature for all States, including those who haven't ratified it, is the result of numerous judgements and opinions of the International Court of Justice (cf. Judgement in the Case Concerning Avena and other Mexican Nationals, Mexico v. USA, Summaries of Judgements, Advisory Opinions and Orders, 2004, p.38; Judgement in the Aegean Sea Continental Shelf case, Reports 1978, p.39, Judgement in the Icelandic Fisheries Jurisdiction Case, Reports 1973, p. 14; Judgment on the Jurisdiction of the ICAO Council, Reports, 1972, p.67; p.14; Advisory Opinion on Namibia, Reports, 1971, p.47). This reminder is very important in cases where the issue of a State's non-adherence to the Vienna Convention or the non-retroactivity of the latter would possibly be brought up.

Indeed, Working Group III adopts article 89 which foresees that **"…nothing contained in this Convention prevents a contracting State from applying any other international instrument which is already in force…"** including the CMR Convention.

However, this provision, which, at first sight, appears to brush aside the application of article 27 of the draft on international carriage of goods by road, is largely toned down by article 90, which foresees that **"As between parties to this Convention, it prevails over those of an earlier convention to which they may be parties"**.

The provision of article 90 of the Working Group III draft exposes States, contracting parties to the CMR Convention to violations, both of the provisions of article 41, paragraph 1 of the Vienna Convention on the Law of Treaties and the provisions set out in article one, paragraph 5 of the CMR Convention.

Article 41, paragraph 1 of the Vienna Convention foresees that:

"Two or more of the parties to a multilateral treaty (in this case the CMR Convention) **may conclude an agreement to modify the treaty as between themselves alone if:**

a. the possibility of such a modification is provided for by the treaty, or

b. the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole."

Concerning letter (a) of article 41, paragraph 1 of the Vienna Convention, the CMR Convention allows derogation of its provisions in case of frontier traffic and, also, in cases where countries authorize the use in transport operations entirely confined to their territory of a consignment note representing a title to the goods.

It goes without saying that the draft developed by Working Group III is not limited to the two exceptions mentioned in the CMR Convention and that therefore it does not fulfil the condition mentioned in letter (a) of article 41, paragraph 1 of the Vienna Convention.

Concerning letter (b) of article 41, paragraph 1 of the Vienna Convention, it is useful to underline article 1, paragraph 5 of the CMR Convention, which prohibits further modifications aside from the ones mentioned in the preceding paragraph. To avoid the prohibition of modifications being circumvented, notably by the *inter se* agreement, the article in question contains the following commitments by States, contracting parties of the CMR Convention:

"**The Contracting Parties agree not vary any of the provisions of this Convention by special agreements between two or more of them…"**

The prohibition:

- of "any" of the provisions of this Convention does not lend itself to any restrictive interpretation;
- of modifying "by special agreements between two or more" contracting parties, excludes any agreement departing from the provisions of the CMR Convention, even an *inter se* agreement, as proposed in article 90 of the draft convention developed by Working Group III.

Moreover, even in the hypothesis that the CMR Convention would not prohibit *inter se* agreements – which is not the case – the two specific conditions ("I" and "ii" of article 41.1, letter (b) could not be respected cumulatively, which is also prohibited by letter (b) of article 41.1 of the Vienna Convention. In this regard, we will continue to repeat that the potential entry into force of the draft of Working Group III would deprive the States that have not adhered to this draft from benefiting from the rights they have under the CMR Convention.

For example, countries A, B and C are contracting parties of the CMR Convention and countries A and B are also contracting parties of the new instrument developed by Working Group III. Conforming to the principle of *pacta tertiis nec nocent nec prosunt,* confirmed by article 34 of the Vienna Convention, the new instrument developed by Working Group III must not create either obligations or rights for country C. Yet, the adhesion by countries A and B to the project of Working Group III would annul, because of article 90 of the draft, the right of country C to request that countries A and B apply to the carriers of country C, undertaking transport operations between countries A and B, the CMR Convention, conforming to their commitment with regards to each contracting party, including country C, as stipulated in article 1, paragraphs 1 and 5 of the CMR Convention.

The extension of the provisions of the draft of Working Group III on international carriage of goods by road would break the unity of land transport law, as it currently extends from the Atlantic to the Pacific. Following the entry into force of the mentioned draft, there will not be one single legal regime but two profoundly different legal regimes, both applying to the road. In this way, the fundamental objective of "standardizing the conditions governing the contract for the international carriage of goods by road", included in the preamble of the CMR Convention (which explains the reason for prohibiting the *inter se* agreements), would be destroyed, and, with it, the will of 47 States wishing to have uniform rules on the contracts of international carriage by road.

III. Conclusions

Maintaining the provisions of article 90 of the draft Convention on the carriage of goods [wholly or partly] [by sea] and their possible entry into force would expose the States, contracting parties of the CMR Convention to infringement of this Convention and the Vienna Convention and would, consequently, mean a double violation of public international law.

Therefore, whatever the reasons for developing this draft, they do not justify the violation of two International Conventions developed under the auspices of the UN.

The IRU invites the United Nations Commission on International Trade Law to limit the range of the future Convention on the carriage of goods [wholly or partly] [by sea] to port-to-port transport or, at least, to withdraw article 90 of the text of the draft convention and, if necessary, to adapt other provisions in order to avoid all infringements of the prohibition against modification of the CMR Convention.
