UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

COMMISSION DES NATIONS UNIES POUR LE DROIT COMMERCIAL INTERNATIONAL

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Dear Mr. Marmy,

It has come to my attention that the International Road Transport Union (the IRU) has broadly circulated and posted on its website a paper dated 17 August 2009, called "IRU Position on the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules)". The paper relies on, and reproduces in its entirety, an annex that was first drafted and sent to the UNCITRAL secretariat over three years ago, on 8 June 2006. In response to that paper, the UNCITRAL secretariat provided on 21 August 2006 a very detailed analysis of the concerns raised by the IRU, a copy of which I attach for your reference. The analysis in the 2006 UNCITRAL response continues to hold true, and it might be appropriate to reread our response. Please note that all UNCITRAL documents are available on our website at www.uncitral.org.

Preliminary matters – reliance on outdated and revised materials

The IRU 2006/2009 paper makes reference to version A/CN.9/WG.III/WP.56 of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("the Rotterdam Rules", or "the Convention"), which dates from 2006, and was superseded by four more recent iterations of the text (A/CN.9/WG.III/WP.81, A/CN.9/WG.III/WP.101, Annex to A/CN.9/645, and Annex to United Nations General Assembly Resolution A/RES/63/122). While interesting from a historical perspective, reliance upon such outdated versions of the text is somewhat problematic. In fact, the provisions in the Convention discussed by the IRU in its 2006/2009 paper were changed substantially in response to suggestions by States and industry groups, including the IRU. For example:

(1) what was referred to in the 2006/2009 IRU paper as "draft article 90" was completely deleted in later iterations of the Convention (see para. 235 of document A/CN.9/616);

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(2) what was referred to in the 2006/2009 IRU paper as "draft article 89" was deleted (see para. 235 of document A/CN.9/616), and a completely revised provision replaced it in the final text of the Convention (article 82); and

(3) what was referred to in the 2006/2009 IRU paper as "draft article 27" was also substantially redrafted and appears in the final text of the Convention as article 26.

The current text of the Convention

The changes to the current text of the Convention outlined in the paragraph above were made out of an abundance of caution and have clarified the conflict-of-convention scheme. That scheme now relies mainly on article 82 for its conflict provisions, which specifically state that, in cases where any vestigial possibility of conflict of conventions over regulation of the same contract of carriage remains in respect of a unimodal convention and the Rotterdam Rules, the Rotterdam Rules will give way in the face of the international unimodal convention in force, such as the CMR.

Moreover, the approach taken in current article 26 has also been adjusted from the one referred to in the IRU 2006/2009 paper to one adopting the 'hypothetical contract' approach, thought by States to be clearer. The IRU 2006/2009 paper suggests that "if the shipper had not made a separate and direct contract with the carrier applicable to the stage at which the loss, damage or delay occurred", the CMR will be "thrust aside". It should be noted that the shipper is not, in fact, required to have actually made a separate and direct contract of the sort referred to. On the contrary, a reading of the ***whole*** of the provision yields the information that conventions such as the CMR will, in fact, ***prevail*** over the Rotterdam Rules in cases where the provisions of an international instrument such as the CMR "***would have*** applied to all or any of the carrier's activities ***if*** the shipper had made a separate and direct contract with the carrier in respect of" the inland leg of the carriage where the loss, damage or event causing the damage took place (emphasis added to original text). In effect, the CMR will take precedence over the Rotterdam Rules in respect of the carrier's liability, limitation of liability or time for suit in every case where the loss, damage or event causing the delay can be localised to the road transport leg of the entire carriage, and where the CMR would have applied to that leg of the transport. This approach is, as you know, no great change to the system being used broadly by industry today, since it is fully in line with all existing network systems currently being used in many contracts of carriage, such as those created in the UNCTAD/ICC Rules and those promulgated by FIATA.

The IRU 2006/2009 paper also criticises the Convention for allegedly including provisions that would allow carriers to limit their liability to one package, i.e. to 875 SDR, if an entire vehicle loaded with goods were lost. This is a misreading of the Convention. In keeping with the Hague-Visby and the Hamburg Rules, the Convention requires that the number of packages must be enumerated in the transport documents in order for the 'per package' limitation to apply to each package in the container. As such, this is no innovation, and today's prudent and professional shippers are unlikely to ignore that requirement in making their shipments, in addition to such an enumeration being required for Customs purposes, in any event.

Further, article 59(2) of the Convention makes it clear that the per-package rule applies specifically to goods "carried in or on a container, pallet or similar article of transport used to consolidate goods, or ***in a vehicle*** (emphasis added)". The definition of "vehicle" in article 1(27) is "a road or railroad cargo vehicle." Thus, every package inside a road vehicle will be counted for the per-package limitation, and a vehicle cannot be counted as a single package.

Participation in the negotiation process

The IRU 2006/2009 paper also criticises the Convention as having been "elaborated by UNCITRAL without the participation of organisations representing transport operators". That is a charge which UNCITRAL takes seriously. In addition to the many leading transport experts negotiating on behalf of Member and Observer States, numerous transport industry groups participated regularly and actively in the negotiations leading to the adoption of the Convention. The IRU appears to suggest that the following groups that participated in the UNCITRAL Working Group do not qualify as organisations representing transport operators: the *Comité Maritime International*, the Association of American Railroads, OTIF (Organisation for International Carriage by Rail), the European Shippers' Council, the ICC (International Chamber of Commerce), IUMI (International Union of Marine Insurers), FIATA (International Federation of Freight Forwarders Associations), the International Chamber of Shipping, Bimco, the International Group of P&I Clubs, the International Association of Ports and Harbours and the International Multimodal Transport Association. The following organizations have also regularly participated: The European Commission, UNCTAD and UNECE.

The IRU itself participated in at least one of our two-week Working Group sessions (the 18th session in November 2006) at which it presented its position as reflected in the Report of the session (see para. 217 of A/CN.9/616), and was engaged in tracking the negotiations when it was unable to participate. As mentioned above, the IRU has been engaged enough to submit its concerns in 2006 and, in 2007, sent a proposal to the UNCITRAL secretariat, which was submitted to the Working Group considering the Convention as document A/CN.9/WG.III/WP.90. In that proposal, the IRU made specific suggestions on issues of concern to it. Each of the concerns expressed in 2007 was addressed by the Working Group in considering changes to the Convention:

(1) as requested by the IRU and other inland transport groups, the definition of "maritime performing party" was clarified so as to ensure that it excluded road and rail carriers from the definition, with the result that under the Rotterdam Rules no claim against a road or rail carrier that performs a part of a multimodal carriage can be instituted;

(2) the analytical approach for the limited network system of article 26 was considered by the Working Group in two separate sessions (see paras. 216-228, A/CN.9/621 and paras. 191-192, A/CN.9/621), and the 'hypothetical contract' approach, although not favored by the IRU, was the approach taken up by States in the final text of the Convention as being more likely to be interpreted clearly and accurately than the alternative approach, which relied on a conflict-of-conventions analysis; and

(3) following the IRU complaint that certain abuses had sprung from the practice of some maritime performing parties in the English Channel and the North Sea of considering the transport of containers or road vehicles "non-ordinary shipments" which counted only as a single package for the per-package limitation of liability, article 59(2) and the "vehicle" definition in the Convention were amended, as noted above.

Conclusion

I am certain that the IRU is as interested as UNCITRAL in providing sufficient material for a fair and balanced discussion among stakeholders of the advantages and disadvantages of the Rotterdam Rules. To that end, I would suggest you post on your website, in connection with your recent posting, the 2006 response made by the UNCITRAL secretariat, as well as a copy of this letter. Both documents are attached. I can assure you that we will post on the UNCITRAL website both your 2006 paper and your 2007 proposals to the Working Group, as well as our 2006 response and this letter, in an effort to ensure fairness and transparency. I am also sure that I can rely upon you to circulate this response and the reference documents attached to it to all recipients of your most recent paper.

I thank you for taking the time to review our concerns, and I am confident that appropriate action will be taken to rectify the current imbalance in information.

Yours sincerely,

Renaud Sorieul
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LA/TL KL/lr

21 August, 2006

Dear Mr. Marmy;

Thank you for your letter dated 8 June 2006 expressing the concerns of the International Road Transport Union (IRU) with respect to the work currently underway in Working Group III (Transport Law) of the United Nations Commission on International Trade Law (UNCITRAL) on the draft convention on the carriage of goods [wholly or partly] [by sea] (the Draft convention).

In your letter, you raise a number of concerns on behalf of your organisation, which I will discuss below, but first, please allow me to make a few clarifications regarding certain points expressed in your correspondence. Note that all documents to which reference is made in this letter may be found on the UNCITRAL website at www.uncitral.org.

Mandate

As a preliminary matter, you have raised the issue of whether the Commission has granted Working Group III the mandate to proceed with its work on the Draft convention on the basis of 'door-to-door' transport operations, as opposed to 'port-to-port' transport operations. In this regard, you cite two excerpts from the reports of the Commission of its thirty-fourth and thirty-fifth sessions that consider this issue.

Following thorough discussion of the proposed sphere of application of the Draft convention in the Working Group, the Commission has considered the issue of 'door-to-door' versus 'port-to-port' coverage of the Draft Convention on several occasions in addition to those cited in your letter. I make reference to all of those instances below in order to provide a complete record of those discussions.

At its thirty-fourth session in 2001, "the Commission decided to establish a working group to consider issues as outlined in the report on possible future work (A/CN.9/497). ... The Commission also decided that the considerations in the working group 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, and, depending on the results of those studies, recommend to the Commission an appropriate extension of the working group's mandate."[1]

The following year, at its thirty-fifth session, "The Commission noted that the Working Group, conscious of the mandate given to it by the Commission (A/56/17, para. 345) (and in particular of the fact that the Commission had decided that the considerations in the Working Group should initially cover port-to-port transport operations, but that the Working Group would be free to consider the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations), had adopted the view 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 (for considerations of the Working Group on the

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[1] Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17, (A/56/17), para. 345.

issue of the scope of the draft instrument, see A/CN.9/510, paras. 26-32). It was also noted that the Working Group considered that it would be useful for it to continue its discussions of the draft instrument under the provisional working assumption that it would cover door-to-door transport operations. Consequently, the Working Group had requested the Commission to approve that approach (A/CN.9/510, para. 32)."[2]

In response to that request, the Commission at that same session in 2002 "...approved the working assumption that the draft instrument should cover door-to-door transport operations, subject to further consideration of the scope of application of the draft instrument after the Working Group had considered the substantive provisions of the draft instrument and come to a more complete understanding of their functioning in a door-to-door context."[3]

This mandate was referred to by the Commission at its thirty-sixth, thirty-seventh and thirty-eighth sessions, in 2003, 2004 and 2005, respectively.[4]

The door-to-door scope of application of the Draft convention is thought to be of particular importance, as the Draft convention is intended to be a global instrument that must take into account the needs of worldwide trade and the requirements of modern international maritime container carriage.

IRU Concerns Regarding Potential Conflict of Conventions

With regard to the specific concerns of IRU in respect of possible conflicts that are thought to exist between the CMR and the Draft convention, Working Group III has taken a multi-pronged approach to safeguarding against conflicts between the Draft convention and any future and existing unimodal inland transport conventions.

1) No Conflict in Scope of Application

The Draft convention very carefully defines its general scope of application in draft article 8 to be to international maritime contracts of carriage, which are required, pursuant to the definition of "contract of carriage" in draft article 1, to be "for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage."

In contrast, the scope of application of the CMR is set out in article 1(1) to be to "every contract for the carriage of goods by road in vehicles for reward", and then goes on to define the international aspects of that particular contract of carriage by road.

Thus, as a preliminary matter, the Draft convention and the CMR are by the very terms of their scope of application intended to apply to different contracts of carriage: the Draft convention carefully limits its application to the master maritime contract of carriage under which the carrier undertakes to carry goods from one place to another and which *must* provide for international carriage by sea, while the CMR applies to international contracts of carriage by road, including to any subcontracts for international road carriage that may exist under the master maritime contract. The application of these two instruments is thus intended to be mutually exclusive.

2) Draft article 27

The second aspect of the approach taken in the Draft convention to safeguard against conflicts with future and existing unimodal inland transport conventions is found in draft article 27,[5] which is intended as a conflict of convention provision by establishing a type of 'network system' of liability in the Draft convention. This rule

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[2] *Ibid.*, (A/57/17), para. 223.
[3] *Ibid.*, para. 224.
[4] *Ibid.*, (A/58/17), para. 205; (A/59/17), para. 62, and (A/60/17), para. 180, respectively.
[5] "[*Article 27. Carriage preceding or subsequent to sea carriage*
"1. When a claim or dispute arises out of loss of or damage to goods or delay occurring solely during the carrier's period of responsibility but:
(a) Before the time of their loading on to the ship;
(b) After their discharge from the ship to the time of their delivery to the consignee;
and, at the time of such loss, damage or delay, provisions of an international convention [or national law]:
(i) according to their terms apply to all or any of the carrier's activities under the contract of carriage during that period, [irrespective whether the issuance of any particular document is needed in order to make such international convention applicable][4], and
(ii) specifically provide for carrier's liability, limitation of liability, or time for suit, and
(iii) cannot be departed from by private contract either at all or to the detriment of the shipper,
such provisions, to the extent that they are mandatory as indicated in (iii) above, prevail over the provisions of this Convention.]
"[2. Paragraph 1 does not affect the application of article 64(2).]
"[3. Article 27 applies regardless of the national law otherwise applicable to the contract of carriage.]"

operates so that as far as the loss, damage or delay giving rise to the claim occurs during carriage preceding or subsequent to the sea carriage, provisions of an international convention that provide for carrier's liability, limitation of liability or time for suit *prevail* over the provisions of the Draft convention to the extent that such other convention declares itself applicable and its liability provisions are mandatory. As such, the Draft convention has been carefully tailored to preserve to as great an extent as possible the application of the future and existing unimodal inland transport conventions.

The decision to adopt a limited network system was made following extensive discussion in the Working Group (see, in particular, A/CN.9/526, paras. 219-267), and after consideration of a detailed study of the issues prepared by the UNCITRAL Secretariat (A/CN.9/WG.III/WP.29).

Further, draft article 27 of the Draft convention is modeled on the approach taken in article 2 of the CMR, which makes the CMR applicable to the whole of the carriage in situations when "the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air" except where it can be proved that the loss, damage or delay could only have occurred in the course of, and by reason of, the carriage by other means of transport.

Of additional interest is the recognition in most existing unimodal inland transport conventions, including the CMR, that commercial reality dictates that the modern carriage of goods must often take into account carriage under two or more means of transport to include pre- and post-mode transport, and that some scheme for accommodating that commercial reality must be sought. In addition to article 2 of the CMR, reference may be had in this regard to articles 1(3), 1(4) and 38 of the Uniform Rules concerning the contract for International Carriage of Goods by Rail, Appendix to the Convention concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999 (CIM-COTIF 1999), article 2 of the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway 2000 (CMNI), articles 18(5) and 31 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, as amended by the Protocol signed at Le Hague on 28 September 1955 and by the Protocol No. 4 signed at Montreal on 25 September 1975 (the Warsaw Convention), and articles 18(4) and 38 of the Convention for the Unification of Certain Rules for the International Carriage by Air, Montreal 1999 (the Montreal Convention).

In fact, it is noteworthy that the maritime transport industry has already to a great extent developed its own network system, for example, by adopting for widespread use the 1992 UNCTAD/ICC Rules for Multimodal Transport Documents, and the COMBICON combined transport bill of lading adopted by the Baltic and International Maritime Council (BIMCO 1971, updated in 1995).[6]

These documents, and several others, adopt the network system, which has been widely accepted by the market as an effective way to govern liability issues. For example, while the Hague/Visby Rules do not apply to inland carriage, clause 11(1) of the COMBICONBILL, read with clause 9(1) thereof, applies the Hague/Visby Rules as a matter of contract law, and clause 11(1) adopts the network system to resolve any conflict with a mandatory international convention or mandatory national law that applies to the carriage covered by the COMBICONBILL. The Draft convention thus adopts the approach currently in use in industry, and for which the inspiration came from article 2 of the CMR.

3) No action against non-maritime performing parties under the Draft convention

Another aspect of the approach taken in the Draft convention to safeguard against any conflicts which could still arise with future and existing unimodal inland transport conventions, in spite of the two safeguards described above, is that the Working Group has decided to eliminate the possibility of making claims pursuant to the Draft convention against road haulers and other inland carriers. The introduction of the concept of the 'maritime performing party' in

[6] See A/CN.9/526, paras. 232 and 234. Reference may be had to the UNCTAD/ICC Rules generally, and to the relevant clauses of the COMBICONBILL as follows:

"9. Basic Liability

(1) The Carrier shall be liable for loss of or damage to the goods occurring between the time when he receives the goods into his charge and the time of delivery. ..."

"11. Special Provisions for Liability and Compensation.

(1) Notwithstanding anything provided for in Clauses 9 and 10 of this Bill of Lading, if it can be proved where the loss or damage occurred, the Carrier and the Merchant shall, as to the liability of the Carrier, be entitled to require such liability to be determined by the provisions contained in any international convention or national law, which provisions:

(a) cannot be departed from by private contract, to the detriment of the claimant, and

(b) would have applied if the Merchant had made a separate and direct contract with the Carrier in respect of the particular stage of transport where the loss or damage occurred and received as evidence thereof any particular document which must be issued if such international convention or national law shall apply.

(2) Insofar as there is not mandatory law applying to carriage by sea by virtue of the provisions of sub-clause 11(1), the liability of the Carrier in respect of any carriage by sea shall be determined by the ...Hague/Visby Rules. The Hague/Visby Rules shall also determine the liability of the Carrier in respect of carriage by inland waterways as if such carriage were carriage by sea. ..."

the Draft convention, and ongoing refinements to the definition of that party, serve to limit direct actions under the Draft convention to actions between the contractual parties to the overarching maritime contract of carriage, and to actions against the maritime performing party.[7] Non-maritime performing parties are left outside of the scope of the liability regime of the Draft convention for the very purpose of leaving the contractual relationships under the CMR and other unimodal inland transport conventions intact. Consequently, actions with respect to inland performing parties, including domestic road and rail carriers, will be subject only to any applicable national law or applicable inland transport convention, including the CMR.

Draft articles 27, 89 and 90 of the Draft convention

As a further matter of clarification, draft article 27 (as it appears in the most recent iteration of the Draft convention in A/CN.9/WG.III/WP.56) has been in the Draft convention since the outset, and is intended as the principal conflict of convention provision of the Draft convention, using a type of network system to eliminate or minimize any conflicts with future and existing unimodal inland transport conventions,[8] such as the Convention on the Contract for the International Carriage of Goods by Road, 1956, as amended by the 1978 Protocol (the CMR). As noted above, this approach is quite common in modern commercial transport, and is, in fact, also used in the CMR.

On the other hand, draft articles 89 and 90 of the Draft convention (in its most recent consolidated iteration in A/CN.9/WG.III/WP.56) were inserted into the text in the version of the Draft convention contained in A/CN.9/WG.III/WP.32 (these articles were then draft articles 83 and 84, respectively). Draft article 89 was inserted into the text in response to a suggestion by the Working Group to include for discussion an *alternative* approach to that of the article 27 network system approach for the resolution of possible conflicts between the Draft convention and future and existing unimodal inland transport conventions.[9] Draft article 90 was inserted into the text in response to a suggestion in the Working Group that it would be helpful to some States attempting to avoid conflicts with other transport conventions if article 91, as it currently appears in the Draft convention, were amended to add language stating that the Draft convention would prevail over other transport conventions except in relation to States that are not members of the Draft convention.[10] The drafting decision was made to make such additional text a separate provision, which is draft article 90 in the current version of the Draft convention.

Your letter assumes that articles 27, 89 and 90 will all be contained in the final text of the Draft convention. However, in addition to the clarifications noted in the paragraph above, it should be noted that the Working Group has not yet considered the text of draft articles 89 and 90, nor the extent of any relationship that may exist between articles 27, 89 and 90, and is expected to do so at its 18th session, currently scheduled to be held in Vienna from 6-17 November 2006. In anticipation of that discussion, the UNCITRAL Secretariat will be preparing a Working Paper for consideration by the Working Group on the issue of conflict of conventions. Concerns raised by the IRU will be reflected in that document.

Conclusion

These important safeguards in the Draft convention, along with ongoing efforts to further refine and clarify the text, show that every attempt has been made, and continues to be made by the Working Group, to exclude any conflict between the Draft convention and unimodal inland transport conventions, such as the CMR. Further, there should be no obstacle for any State to adhere to both the Draft convention and the CMR, since the scope of application of the Draft convention and of the CMR are clearly different: the Draft convention applies to the master maritime contract of carriage, while the CMR applies to any contract for the international carriage of goods by road, which may include the road carrier's sub-contract under the master maritime contract of carriage.

As noted above, the UNCITRAL Secretariat will be preparing a Working Paper for consideration by the Working Group at its next session in November 2006 on the issue of conflict of conventions, and full discussion of all issues relating to conflict of conventions is expected to take place at that session.

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[7] Article 1(f) "Maritime performing party" means a performing party that performs any of the carrier's responsibilities during the period between the arrival of the goods at the port of loading [or, in case of trans-shipment, at the first port of loading] of a ship and their departure from the port of discharge from a ship [or final port of discharge as the case may be]. In the event of a trans-shipment, the performing parties that perform any of the carrier's responsibilities inland during the period between the departure of the goods from a port and their arrival at another port of loading are not maritime performing parties.

[8] For a more complete explanation of the intended operation of draft article 27, reference may be had to paragraphs 49 to 53 of A/CN.9/WG.III/WP.21.

[9] See A/CN.9/526, para. 247.

[10] See A/CN.9/526, para. 196.

Finally, I have taken the liberty of sending a copy of this response to Mr. José Capel Ferrer, Director of the Transport Division of the United Nations Economic Commission for Europe, so that he may forward it to the States Parties to the CMR for their complete information, as he has with respect to the IRU position paper.

Yours sincerely,

Jernej Sekolec
Secretary
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the world road transport organisation IRU International Road Transport Union

By fax and by mail

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AD/G54885/CPI

Geneva, 26 March 2007

UNCITRAL WORKING GROUP III- 16-27 April 2007

Dear Mr Sekolec,

Your invitation letter dated 1 March 2007 addressed to Mr Marmy was passed on to me for reply.

Unfortunately, due to various meetings and business trips already scheduled at that time, I regret to inform you that the IRU will not be in a position to send a representative to the nineteenth session which will be held in New-York, from 16 to 27 April 2007.

I would like nevertheless to assure you that the IRU will continue to carefully follow the debates of the Working Group III and remains grateful for the opportunity to actively participate in its works, particularly on the draft Convention on the carriage of goods [wholly or partly] [by sea].

In this respect, and taking into account that the report of the last session which took place in November 2006 in Vienna has not yet been published, the IRU would like to submit herewith in French and English some proposals in connection with the last draft of the above-mentioned Convention which has been recently issued under ref. A/CN.9/WG.III/WP.81.

We thank you in advance for taking into account the enclosed considerations in the relevant discussions in connection with articles 1.7, 26 and 90 of the draft Convention at the forthcoming session.

Yours sincerely,

Christian Piaget
Head – Legal Affairs

Enc. mentioned

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ANNEX 1

AD/G54885/CPI
26.03.07

Proposals submitted by the International Road Transport Union concerning articles 1.7, 26 and 90 of the draft Convention the carriage of goods [wholly or partly] [by sea] (A/CN.9/WG.III/WP.81)

Article 1.7

1. The IRU shares the opinion expressed by the United States of America in the annex to their document A/CN.9/WG.III/WP.84, according to which a rail carrier should not be considered as a "maritime performing party".

   In addition to this opinion and for the same reasons as those pointed out by the US, the IRU proposes that the road carrier performing services within a port area should, like rail carriers, also not be considered as a "maritime performing party". The text proposed by the US could be slightly amended to also integrate road carriers, thus reading as follows:

   "A rail or road carrier, even if it performs services that are the carrier's responsibilities after arrival of the goods at the port of loading or prior to the departure of the goods from the port of discharge, is a non-maritime performing party."

Article 26

2. The IRU proposes to eliminate Variant B of subparagraph (a) of article 26 for the two following reasons :

   - if "another international instrument" is imperatively applicable, this imperative application is hindered if it is subordinated to the condition that the shipper made or did not make a separate and direct contract with the carrier for the non-maritime part of the transport ;

   - upholding the condition that the shipper made or did not make a separate and direct contract with the carrier for the non-maritime part of the transport contradicts also subparagraph (c) of Article 26, according to which the imperative provisions of other such international instruments "cannot be departed from by contract either at all or to the detriment of the shipper".

Article 90, subparagraph (b)

3. This provision, inspired by the provisions of Article 6 of the Hague Rules and the Hague-Visby Rules, has led to abuses by some maritime performing parties operating in the English Channel and the North Sea. According to these maritime performing parties, the containers or road vehicles – whose transport has become common in the past 50 years – are still considered as "non-ordinary shipments" for which the indemnity amounts to a maximum of SDR 666,67 per unit, the container or road vehicle being considered as a single unit. The fact that the transport document refers to a number of packages or a specific weight is considered, by these maritime performing parties, as not relevant. To avoid the extension of such abuses through the instrument now proposed by UNCITRAL, the IRU proposes to complete subparagraph (b) by adding at the end of the subparagraph the following words :
   "The containers or road vehicles, whose transport is made by a ship entirely or partially equipped to undertake such transport, cannot be considered as "non-ordinary commercial shipments" ".

* * *

Propositions soumises par l'Union Internationale des Transports Routiers concernant les articles 1.7, 26 et 90 du projet de Convention sur le transport de marchandises [effectué entièrement ou partiellement] [par mer] (A/CN.9/WG.III/WP.81)

Article 1.7

1. L'IRU partage l'avis des États-Unis d'Amérique, exprimé dans l'annexe au document A/CN.9/WG.III/WP.84, selon lequel un transporteur ferroviaire ne doit pas être considéré comme « partie exécutante maritime ».

   En complément à cet avis et pour les mêmes raisons que celles exprimées par les Etats-Unis, l'IRU propose que le transporteur routier fournissant des services dans une zone portuaire ne soit pas non plus, tout comme le transporteur ferroviaire, considéré comme « partie exécutante maritime ». Par conséquent, le texte proposé par les Etats-Unis devrait être légèrement et se lire comme suit :

   « *Même s'il fournit des services qui relèvent des obligations du transporteur après l'arrivée des marchandises au port de chargement ou avant leur départ du port de déchargement, un transporteur ferroviaire ou un transporteur routier est partie exécutante non maritime* ».

Article 26

2. L'IRU propose de biffer la Variante B du sous-paragraphe (a) de l'article 26 pour les deux raisons suivantes :

   - si « un autre instrument international » s'applique impérativement, cette application impérative est entravée du moment où elle dépend du fait que le chargeur ait conclu ou non un contrat séparé et direct avec le transporteur visant le trajet non maritime ;

   - la condition impliquant qu'il faille tenir compte du fait que le chargeur a conclu ou non un contrat séparé et direct avec le transporteur visant le trajet non maritime, est aussi en contradiction avec le sous-paragraphe (c) de l'article 26, selon lequel les dispositions impératives d'autres instruments internationaux « ne peuvent pas être écartées par un contrat soit en aucun cas soit au détriment du chargeur ».

Article 90, sous-paragraphe (b)

3. Cette disposition, inspirée par les dispositions de l'article 6 des Règles de La Haye et de Règles de La Haye-Visby, a conduit à des abus engendrés par certains transporteurs maritimes opérant dans La Manche et la Mer du Nord. Selon ces transporteurs maritimes, les conteneurs ou les véhicules routiers – dont le transport est devenu courant depuis 50 ans – sont encore considérés comme « cargaison non ordinaire » pour laquelle l'indemnité s'élève, tout au plus, à 666,67 DTS par unité, un conteneur ou un véhicule routier étant alors considéré comme une seule unité. Le fait que le document de transport énumère un nombre de colis ou cite un poids spécifique de marchandises est considéré, par ces transporteurs maritimes, comme sans pertinence. Pour éviter la propagation de tels abus par le biais de ce nouvel instrument élaboré à présent par la CNUDCI, l'IRU propose de compléter le sous-paragraphe (b) en ajoutant à sa fin les mots suivants :

   « *Les conteneurs ou les véhicules routiers, dont le transport est effectué par un navire entièrement ou partiellement construit pour les transporter, ne peuvent être considérés comme "cargaison non ordinaire"* ».

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