Freedom of Contract and Carriage of Goods

Report from the London Seminar 20 to 21 February 2004

I Introduction

The issue of freedom of contract in the law of carriage of goods by sea was discussed at the twelfth session of the negotiations on a new instrument on carriage of goods by sea in UNCITRAL, Working Group III. The session was held in Vienna from 6 to 17 October 2003. At the end of the session it was proposed by the Italian delegation that a special seminar would be arranged on this issue in order to identify the problems and to find out if there existed a common view in this field. Such a seminar could serve as a preparation for the future negotiations on this issue at the thirteenth session of the UNCITRAL negotiations, that is going to be arranged in New York from 3 to 14 May 2004. The seminar was arranged by Professor Francesco Berlingieri and was held at the law firm Ince & Co. in London from 20 to 21 February 2004.[1] At the seminar the author of this report was elected as rapporteur.

The idea behind this report is double: the first thing is that it is supposed to reflect the discussions that took place in London, the second thing is that it is supposed to serve as a tool for future negotiations on this issue. In other words the aim here is also to try to identify the problems in this field and to a certain extent analyze them. As a consequence of this the report is not written in the form of an exact protocol of the discussions, but rather in the form of a synopsis trying to highlight some of the key elements of the problem of freedom of contract that was discussed at the seminar. A number of proposals on how the scope of application can be regulated that were discussed at the seminar are included in the report as annexes.

II The Problem of Freedom of Contract

The Hague Visby Rules from 1924 and 1968 is applicable to carriage of goods by sea under bills of lading. On the other hand the Hamburg Rules from 1978 are applicable to carriage of goods by sea regardless of what type of transport document that is issued by the carrier. Charterparties are then expressly excluded from the scope of application of the instrument. In the present version of the draft instrument the same approach as

[1] On behalf of the participants to the seminar I would like to take the opportunity to thank Ince & Co. for kindly providing us with a conference room at the firm.

in the Hamburg Rules are adopted.[2] Both the provisions of the Hague Visby Rules and the Hamburg Rules are of a mandatory character in the way that every attempt to derogate from the liability regime to the detriment of the shipper or the consignee is considered null and void. Also the present version of the draft instrument includes such a regulation.[3]

At the seminar it was pointed out that the issue of freedom of contract in the law of the carriage of goods by sea could be divided into two separate problems. The first problem is the scope of application of the instrument; what types of contracts of carriage by sea ought to be covered by the in principle mandatory liability regime of the instrument and what type of contracts ought to be left out? The second problem is whether the parties should be allowed to agree to exclude or limit the liability for breach of any of the obligations of the carrier even if the contract of carriage of goods by sea is in principle covered by the instrument.

III Scope of Application of the Instrument

A Different Regulation Approaches

Regarding the scope of application of the instrument there seem to be two main alternative ways of regulating this problem. The first alternative is to adopt, in line with the Hague Visby Rules, what might be called a *"documentary approach"* and try to define what types of transport documents that are to be covered by the mandatory liability regime or possibly what types of transport documents that are not be covered. A variant of this seem to be to adopt, in line with the Hamburg Rules, what might be called a "*contract approach"* and focus on contracts of carriage itself (and not on the type of document that evidences the contract) and leave other contracts outside the scope of application. The second main alternative seem to be to adopt what might be called a *"trade approach"* and make the instrument applicable to all contracts of carriage used in the liner trade and leave the tramp trade completely outside the scope of the instrument.

B The Documentary and Contract Approaches

An advantage with a documentary approach that was mentioned at the seminar is that the industry is already familiar to that approach since it is used in the Hague Visby-Rules. It was suggested that a provision on the scope of application could include a list of documents as to which the instrument will apply such as bills of lading, seawaybills and ocean liner service agreements. A proposal mainly built on the documentary approach was also presented at the seminar.[4] An advantage with this approach is that it promotes predictability and stability. A problem here is however that the terminology

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[2] See A/CN.9/WG.III/WP.32, Art. 2, par. 3: "This instrument does not apply to charter parties [contracts of affreightment, volume contracts, or similar agreements]."

[3] See A/CN.9/WG.III/WP.32, Art. 88, par. 1: "Unless otherwise specified in this instrument, any contractual stipulation that derogates from this instrument is null and void, if and to the extent it is intended or has to its effect, directly or indirectly, to exclude, [or] limit [, or increase] the liability for breach of any obligation of the carrier, a performing party, the shipper, the controlling party, or the consignee under this instrument."

[4] See Annex 1, Proposal by Professor Charles Debattista, University of Southampton.

regarding documents differs between jurisdictions, for example is a seawaybill is in the US considered as sort of a bill of lading, while already in Great Britain, another common law country, these are viewed as two types of documents with different legal status and effects.

The major disadvantage with such an approach seems nevertheless to be that as new documents are developed on the market they will not be covered by the instrument and that it is often a difficult process to initiate a revision of such a list. The Hague Visby Rules is a perfect illustration of this. They apply only to transports under bills of lading, despite the fact that these documents in many trades have been replaced by seawaybills. Ending the list with an expression including "other similar documents" could solve this problem. But such an expression is in itself ambiguous and will probably give rise to litigation.

A variant of the documentary approach is to focus, not on the documents that evidence the contract of carriage by sea, but on the contract of carriage of goods itself. This seem to be a method more inspired by the continental law tradition than common law. A proposal built on this approach was presented at the seminar.[5] Such an approach has the advantage that it will become easier to adapt the instrument to the development of new commercial practice and documents on the transport market. Another important reason for using a general term as contract of carriage of goods is that it is decided that the instrument shall apply not only to sea transports, but also to door to door transports.

The major problem with this approach seem to be that there is a risk that certain types of maritime contracts that are not intended to be within the scope of the instrument anyway will be considered as contracts of carriage by the courts in certain jurisdictions. For example there might be a need for excluding charterparties since in many jurisdictions voyage charters are considered to be a sort of contract of carriage at the same time these contracts by tradition have not been governed by a mandatory liability regime.[6] There might also be a need to exclude other types of special maritime contracts, for example towage contracts.

The term contract of carriage of goods may be defined in a positive or negative way in order to exclude contracts that ought not to be covered by the instrument. The problem here is that it seems difficult to find a positive definition of the contract of carriage of goods that is distinct and clear. A definition that was suggested during the seminar was *contract of adhesion*. However, a problem with this definition is that it is in itself ambiguous. If the contract appears to a certain extent as individually negotiated between the shipper and the carrier, but still the shipper have had to accept the major part of the standard conditions; is the contract then to be considered as a contract of adhesion or not? On the other hand a negative definition, where the types of contract that ought to be excluded from the scope of the instrument are defined, might also give rise to problems. Regarding charterparties for example the problem is that this term covers a number of contracts, which fulfil very different purposes, and therefore differs a lot from each other. For example a voyagecharter seem to have much more in common with a contract of carriage evidenced by a bill of lading than with

[5] See Annex 2, Proposal by Karl-Johan Gombrii, Scandinavian Ship Owners' Defence Club, Oslo.

[6] Regarding timecharterparties it seems that in some jurisdictions it is doubtful whether these contracts are to be considered as contracts of carriage or not.

bareboatcharterparty. A definition of charterparties that was discussed at the seminar was the one in a paper produced by the British Maritime Law Association.[7]

C The Trade Approach

The alternative to a documentary or contract approach seems to be to try to restrict the scope of the instrument to the liner trade, leaving the tramp trade outside. A proposal based on this approach was also discussed at the seminar.[8] The advantage with such an approach is that the instrument regardless of how the different contracts are named will cover all contracts within a special area of the maritime industry. That means that the instrument would cover charterparties used within the liner trade, but charterparties within the tramp trade would be outside.

This alternative also gives rise to problems. One problem is that it might prove to be difficult to come up with a distinct definition of the concept liner trade. Of course this is not impossible, but there will always be a grey area. A more important problem is however that it is decided that the instrument is going to cover not only the ocean liner trade, but also door to door transports including ancillary land legs. There is a risk here that courts in certain jurisdictions would come to the conclusion that multimodal bills of lading are not to be considered as contracts within the liner trade and that the instrument as consequence are not applicable to them. Another important problem is that the contracts used within the liner trade are very heterogeneous. In the liner trade bills of lading, waybills, slot charters, volume contracts, etc. are used, but by different parties and for different purposes.

Another crucial question here is if there exist any reasons for treating charterparties within the liner trade in a different way compared to the tramp trade. Since there seem to be an almost common understanding that the latter trade ought not to be covered by the instrument, this would mean that the same standard documents will be treated differently depending on which trade they are used in. The last problem is that if the instrument would only cover contracts within the liner trade third parties that acquire tramp bills of lading will not be protected by any mandatory liability regime.

IV The Mandatory Character of the Instrument

As noted above both the Hague Visby Rules and the Hamburg Rules are mandatory in a way that it is impossible to derogate from the liability regime to the detriment of the shipper and the consignee. The idea behind a mandatory liability regime seem to be that especially small shippers often have to accept the standard conditions of the carrier without any possibility to negotiate individually. Another reason is that it is necessary to protect the buyer of the goods, i.e. the consignee, because of the fact that he will hardly have any possibility of influencing the conditions of the carriage. In other words a mandatory liability regime will in practise set a standard in the liner trade.

On the other hand there are sometimes parties on the transport market that are interested in individually negotiating the conditions of carriage. This is illustrated by the ocean liner service agreements that are used in the US. For example, where large

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[7] The definition is reproduced in Annex 3. It was presented by Mr. Anthony Diamond, United Kingdom.

[8] See Annex 4, Proposal by Mr. Armand M. Paré Jr., Nourse & Bowles, LLP, New York, USA.

amounts of low value goods are transported, the shipper and carrier will in this situation have the possibility to agree on lower limitation levels in return for lower freight rates to the benefit for both parties.

The problem here is that there is a risk of abuse from the carrier's side. Provided that the ocean liner service agreement would be covered by the instrument, but at the same time there would be a possibility for the parties to derogate from the mandatory liability regime, there is a risk that the carriers will take advantage of this to the detriment of the shipper. A way of avoiding this might be to regulate that such derogations must be individually negotiated and evidenced by an agreement in writing. This will probably reduce the risk of abuse, but not eliminate it.

Another problem is how this will affect a third party. It was mentioned at the seminar that third party holders of for example bills of lading would still be able to claim compensation for damages to goods on the basis of the liability regime in the instrument. But who is to be considered as a third party holder in this respect? This might vary between jurisdictions since the concept third party often are defined by national law. Another problem might be that at least in some jurisdictions the position of a third party is not clear in a situation where a seawaybill is issued instead of a bill of lading.

In order to include the ocean liner service agreement in the instrument and to exclude it from the mandatory liability regime there will also be need to try define this type of contract. However, no definition of this term was discussed at the seminar.

Stockholm, 6 March 2004

Johan Schelin
Rapporteur

Annex 1. Proposal by Professor Charles Debattista

Uncitral Draft Instrument on the Carriage of Goods by Sea

Draft Article 2: Scope of Application

1 This Instrument applies, in the cases set out at paragraph 2 of this Article, to all bills of lading and to documents, which, whether in paper or in electronic form, acknowledge the receipt of goods for shipment and constitute, are evidence of or incorporate by reference the terms of a contract of carriage.

2 The cases referred to at paragraph 1 of this Article are:

(there follow the cases currently described at variants AB and C of article 2 of WP.32)

a
b
c
d
e

3 Without prejudice to paragraphs 1 and 2 of this Article, Contracting States may, by special declaration to that effect made at the time of accession, apply this Instrument or any part of it to other transport contracts, unless otherwise agreed in such contracts, when used in the cases set out at paragraph 2 of this Article.

4 This Instrument does not apply to charterparties. However, where a document covered by paragraph 1 of this Article is issued pursuant either to a charterparty or to a contract covered by paragraph 3 of this Article, this Instrument will apply to such document from the moment at which it regulates the relations between the carrier and a third party to the said charterparty or to the contract covered by paragraph 3 above, as the case may be.

Annex 2. Proposal by Mr. Karl-Johan Gombrii

The Instrument shall apply to contracts for the transportation of goods such as contracts evidenced by bill of lading, waybills or similar documents whether in electronic or paper format where focus is on the promise to transport the goods in question as opposed to contracts for the use of a vessel, such as charter parties, volume contracts, towage contracts and similar contracts where focus is on the promise to put the vessel at the disposal of a user, which contracts shall be outside the scope of application of this instrument.

Annex 3. Proposal by the British Maritime Law Association

Definition of charterparty.

"Charterparty" means any agreement in writing executed by or on behalf of two or more parties whereby on party agrees to charter from another one or more ships [or any part of proportion of one or more ships] whether on a voyage, time or bareboat basis, whether the ship or ships are named in the agreement or are to be nominated subsequently and whether for the carriage of one cargo or for the carriage of a series of cargoes. [It also includes an agreement, executed as above, to supply space on a ship or ships for the carriage of goods or containers on terms under which the carrier undertakes to carry and the charterer or shipper undertakes to ship a minimum quantity of cargo and containers during a period, from loading ports or ranges and to discharging ports or ranges specified in the agreement.]

Annex 4. Proposal by Mr. Armand M. Paré Jr.

Article 2

1) Subject to the geographic scope set out in paragraph 2 below, this instrument shall apply to the following:

a) all bills of lading which represent a contract of carriage, and

b) any other contracts of carriage, whether written or electronic, which are issued by a carrier to a shipper in a liner service.

2) Bills of lading and other contracts of carriage referred to in paragraph 1 above shall be covered by this instrument only when the place of receipt and the place of delivery are in different States and:

a)-e) [follow current draft for these sub points but whenever the phrase "contract of carriage" is used replace with "bill of lading or contract of carriage"]

3) Except as provided above, this instrument shall not apply to any other contracts of carriage [if considered necessary, one could add here "including but not limited to the following forms of contract of carriage..."] although parties are free to incorporate the terms of this instrument, in whole or in part, into such other forms of contracts of carriage.

4) As used herein, the term "liner service" shall have the same meaning as in Article __ which addresses Ocean Liner Service Agreements.