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The Legislative Future of Carriage of Goods by Sea. Could It Not Be the UNCITRAL Draft? An Academic's View

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NOTE

The following paper is based on an introduction by the author at a seminar arranged by the Finnish Ministry of Communications and CMI-Finland on 30th September, 2002: "The Future of Carriage of Goods by Sea - Unimodal, Multimodal or Mixed Liability Regimes?" The author's views have thereafter been developed based on discussions during the seminar. Further, the paper takes account of a similar presentation by the author at a seminar arranged by the Institute of Maritime and Transport Law, Stockholm University, on 15th November, 2002: New Liability Rules for Loss of or Damage to the Goods" (Nya ansvarsregler för lastskador). Also, the discussions that took place during the seminar have had an influence on the final formulations.

1. Background

Rules on sea carrier liability are at a problematic phase. What should the substantive rules contain in future? Are we dealing with unimodal, multimodal or mixed liability regimes? Are we to expect global harmonization, regional harmonization or no harmonization of importance? Will the UNCITRAL Draft as originally proposed by the CMI on 10th December, 2001 and international work based on it solve the fundamental problems? The text of the UNCITRAL Draft is presumed to be known and no detailed references are made to the draft text in the following comments.

As everybody knows the international regimes dealing with the sea carrier's liability at present
consist of the Hague Rules 1924 (International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading), the Hague-Visby Rules (amendements to the Hague Rules by Protocol, 1968), the unit Protocol, 1979 to the previous convention, and of the Hamburg Rules (United Nations Convention on the Carriage of Goods by Sea), 1978.

2. Harmonization

Unification means that different sovereign states have adopted similar substantive rules concerning a certain matter. Harmonization is a milder version of unification, meaning that essential rules are the same without there being a possibility to control possible national variations of interpretation. In my view, it is normally more accurate to use the term "harmonization" when talking about conventions and their effect than the term "unification". Considering carriage of goods by sea, harmonization was one key element in the first set of rules - the Hague Rules, 1924. It is shown in the proper name: International Convention for the *Unification* [my emphasis] of Certain Rules of Law Relating to Bills of Lading.

In a general perspective one could say that the need to harmonize the liability rules concerning carriage of goods by sea is now stronger than ever. With rapidly increasing volumes in international trade, it is important to create a legal framework similar everywhere so that problems due to varying national solutions would be minimized. But, it seems also that achieving harmonization on a global level is more difficult than before. More states have nowadays their independent say and interest in the formulation of rules than, say, in the 1920's. This makes consensus or consensus of reasonable extent difficult. On the other hand, as will be seen later, harmonization by mandatory legislation is necessarily not the correct evaluation in present-day shipping.

The Hague Rules gained no serious impetus, until Great Britain with its dominions and Spain in 1930 ratified the Rules and when both France and the United States did the same in 1937. It really took more than ten years to establish the setting internationally, and more, considering that many nations ratified the Rules later or much later. The Hamburg Rules have now been available for ratification for 24 years, and they are not an international success. The time span is too long for anything fundamental to happen if the Hamburg rules are not made the target for adjustments, whatever those adjustments might be. By this, I am not saying that the substance of the Hamburg Rules would be unacceptable, only that the time factor seems to work against those rules in their original form.

In a time perspective it is understandable that there is pressure for new international rules, taking into consideration modern transport methods and logistics. Technical, commercial and legal circumstances have changed fundamentally from the days of the 1920's.

If and when the hypothesis is that the Hague and the Hague-Visby Rules no longer provide, and the original Hamburg Rules never will provide a proper basis to regulate liability in

carriage of goods by sea, a push for a new proposal is obvious. This push has come through the UNCITRAL Draft taken up for further debate in working groups and conferences.

3. Ideals and principles before and now

3.1. "Fairness"

The Harter Act, introduced in the United States at the end of the 19th century was a mandatory set of liability rules in order to prevent sea carriers from applying extensive exemption clauses as was usual in those days. The international community eventually took up the same issue and created the Hague Rules in order to protect cargo interests by way of mandatory minimum liability for the carrier. Obviously, the Hague Rules were based on a notion of "fairness", or more concretely on a better balance between carrier and shipper interests than what was in existence on the basis of freedom of contract.

But, was it really a question of "fairness" or could it be said that "fairness" was just a name-tag? A certain improved balance was undoubtedly achieved, but this conclusion is only historically true based on the notion that, due to exemption clauses, sea carriers were liable for practically nothing. Looking at general contract law today - and in the past for that matter - the mandatory liability system included in the Hague Rules seemed from the very start to be off a balanced contractual relation. Which contracting party concerning any contract type would, taking into consideration the behaviour of that specific party, be entitled to use extensive exemption possibilities or limitation rights *ex lege* leaving much of the economic loss to be born by the other contracting party without any real possibility to break through the lines of defence?

The other main idea for the Hague Rules was to improve and secure the negotiability value of the bill of lading. It was made the core document and the basis for application of the mandatory rules. For the bill of lading, the market has long since created its own sidetracks, considering how bills of lading are used in practice, and also considering the use of substitute documents (sea waybills). However, the need for regulation cannot be ignored due to the interests of shippers and consignees which might not have been concluding the original contract of carriage.

In spite of the above-mentioned somewhat exceptional approach to the concept of "fairness", courts may react in the way that interpretation of the liability rules leads to a different balance between the parties than what might have been originally anticipated by the convention fathers. This is of course difficult to verify, but, for example, in some jurisdictions the concept of unseaworthiness referring to the beginning of the voyage may be understood in an

extensive fashion, resulting in the fact that the *ex lege* exemptions in the Hague Rules of nautical error and fire lose out. The more extensive the concept of unseaworthiness is, the less room there is for those independent exemptions to apply.

I am trying to say that "fairness" is a very elastic concept to refer to and that mandatory liability systems are under pressure through interpretation should the courts and the market find those rules not in reality to represent a proper balance between different interests.

The Visby Protocol, 1968 was an additional episode to the Hague Rules. The Protocol made some necessary adjustments but the basic structures were hardly touched upon except that it was certainly an improvement as such to specify the limitation of liability rules.

The Hamburg Rules were created in 1978 in an atmosphere in which cargo interests were considered to need more protection than what was possible by means of the Hague and Hague-Visby Rules. Developing nations together with several industrialized nations promoted these aims. While it was the belief especially in the Nordic countries that the systematic framework of the Hague Rules was a failure, being a mere systematic copy of old bill of lading clauses, the Hamburg Rules were definitely a more stylish and a more familiar legal set of provisions in the eyes of those critics. At the time when the Convention containing the Hamburg Rules was concluded in 1978 there seems to have been quite a strong belief that a new regime really was to take over the old. That did not happen.

The notion of "fairness" of the Hamburg Rules was of course based on the fact that cargo interests were to be protected more than before, but then there was a comparison point to the Hague Rules, not to other liability regimes in the transport sector or to approaches within general contract law. "New fairness" was based on historical comparison points. No particular comparisons were made with other modes of transport.

The same observations are true for the UNCITRAL Draft. Harmonization is of fundamental importance, of course, as it is a question of a convention. The substantive rules are based on pragmatic views and efforts to compromise keeping in mind previous regimes. After compromises largely on an ad hoc basis, the name-tag "fairness" is given in order to provide the new convention its justification.

The political setting is not unimportant, and compromises are obviously based on the views of certain nations more than on the views of others. In sea carriage, there now seems to exist the concern that the United States will advance its own national rules should an international regime satisfying its interests not be found. Many others will find it a real dilemma on how to

pursue with the questions on sea carrier liability. Should one be part of the harmonization process with whatever substance or maintain one's own views on substance and "fairness"?

3.2. From mandatory legislation to non-mandatory legislation?

Everything expressed above is based on the hypothesis that there still exist arguments for harmonized mandatory legislation in the form of minimum liability for the carrier. But, in all this harmonization frenzy, would it still be possible to discuss some basic principles? It could be said that the U.S. Harter Act with a mandatory regulation of a specific market was perhaps somewhat of a surprise. Regulation took place in a nation that has always prided itself with applying the principle of the free market and with the non-involvement of Federal and State Governments. Of course, this is not true in specific areas such as consumer protection, product liability and medical malpratice, but in pure business relations, including contracts, the free market and non-interference by Government would be a value.

In any case, looking at shipping world-wide, the setting, as said above, is different today than before. From the point of view of legal development the following can be observed. Shipowners as common carriers had in the past often a position to dictate the conditions of carriage, but this is not true today. There are different types of carriers from traditional owners proper, to managers and to operators or non-vessel owning common carriers. Their bargaining strength on the whole is not the same as before, especially not in relation to multinational companies exporting and importing large amounts of goods. The potential for balanced contracts is better than before, but also the potential for weak bargaining power of the carrier is more prevalent than before. Corrective provisions of another type than those expressed in the Hague, Hague-Visby and Hamburg Rules can be applied. Competition law and general rules in contract law dealing with adjustment of contract will provide more protection against unbalanced contracts than ever before, be it on an individual level rather than on an abstract level. Protective action is possible for the benefit of both carriers and cargo interests.

Also, looking at multimodal operations, carriers with emphasis on sea carriage seem to have managed to self-regulate their liabilities. This self-regulation does not contain in any of the standard clauses that I have studied far-reaching exemptions from liability compared with mandatory legislation on specific modes of transport. On the contrary, fairly familiar options are used. Certainly there are some efforts to apply clauses for the benefit of the carriers, but clear extremes are not found. Of course, this is not only due to the good-will of the carriers, but is related to the fact that specific modes of transport do lie under mandatory law.

The arguments of free markets, general rules of competition law and contract law and self-regulatory balance of contract point to a new approach, which is not the maintenance of mandatory rules. Instead, future conventions should start from the notion of non-involvement in contractual affairs of purely commercial nature. This is the same as creating non-mandatory rules covering carrier liability. Simultaneously, this approach would make it possible to include several principles of maritime law as the risk of business interests being bound by them is not prevalent. Freedom of contract would allow other solutions than those found in legislation.

There is no conflict with what has been said earlier on. The criticism of mandatory legislation not going far enough in protecting cargo interests is connected with the hypothesis that the same values that have existed at least since the 1920's are accepted: to protect the potentially weaker party in the contract for the carriage of goods by sea, ie the cargo interests. But, should those values be considered, as I and many others do, to be out of date, there is then the need to argue with the aid of some new factors the case of what future conventions should. Those factors I have just mentioned: free markets, general rules of competition law and contract law and sound self-regulation.

There are, however, arguments speaking against this new non-mandatory legislative approach. Even if non-mandatory solutions might today work in sea carriage, the same might not be possible in other modes of transport. The comparison point of interest is international carriage of goods by road as regulated in the Convention on the Contract for the International Carriage of Goods by Road, CMR (Convention relative au Contrat de Transport International de Marchandises par Route), 1956. Small firms, comparable to consumers, often send their goods by contract with a road carrier. Road carriers are often, but not always, small firms themselves. As a matter of fact this was the idea in the creation of the CMR. For small enterprises there would be no true capacity or know-how to secure their legal position. Insurance cover would possibly not suffice in all circumstances. These arguments would favour mandatory solutions more than non-mandatory solutions. It would be a problem to have mandatory solutions for some modes of transport and not for others. What is said about road carriage would equally apply to cases where forwarding agents take on transport in the capacity of carriers by arrangement with small enterprizes representing cargo interests.

Further, as sea carriage is regulated upon on a truly global basis, development phases in different states vary bringing along different levels of both commercial and legal skills in order to regulate positions in a contractual relation. There might be a need to create legislative specifications on such basis.

A non-mandatory setting for at least sea carriage is not, however, an uninteresting point of debate.

3.3. Where must mandatory legislation still prevail? The case of loss avoidance

While previous regimes have not questioned a mandatory legislative approach, there now is a need to do so. Thus, presumptively, based on the arguments above, non-mandatory legislation is to be given priority, unless there are specific and weighty reasons not to do so.

Setting aside a pure non-mandatory liability regime and starting from and accepting the possibility of a continuous, but less extensive mandatory regime than what is in existence at present, there would have to be values more specified than the general need to harmonize, the use of the general concept of "fairness", and purely pragmatic solutions based on the views of the shipping market. One essential starting point would in my opinion be the notion of loss avoidance. What should the liability rules contain in order to prevent in the best possible way any loss of or damage to the goods or delay in their delivery? Loss avoidance is a common goal for all interests concerned: shippers, carriers, insurers etc. Loss avoidance is a concept dealt with by Michael Sturley already some ten years ago (Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments about Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence, Journal of Maritime Law and Commerce, Vol. 24 (1993) pp. 119-149).

The preventive effect of pure exemption rules of the type of nautical error in the Hague Rules and low limitation of liability without nuances hardly improve loss avoidance. Such rules need no support from the legislator, not even on a non-mandatory basis. Instead, one of the key factors would be the combination of preventive safety-at-sea rules, such as those found in the SOLAS Convention, STCW Convention etc, and the rules on the sea carrier's liability. Qualitative and organizational requirements are nowadays basic safety factors, especially due to the ISM Code, and one could presuppose that should organizational systems fail causing loss of or damage to the goods, the carrier would be liable in a way that would avoid similar failures in other cases. Also, there would be no argument to provide the carrier with the chance of exempting himself from liability by contract clauses. In a recent judgement in England, the *"Eurasian Dream*" [2002] 1 Lloyd's Rep 719 QB, fire on board had caused the loss of the goods. The spread of the fire could not be prevented due to mainly organizational failures on board. The Court found the carrier liable due to the unseaworthiness of the vessel at the beginning of the voyage, in spite of the fire exception in the Hague and the Hague-Visby Rules. Mounting pressure to give priority to unseaworthiness liability is also found in

the "*Torepo*" [2002] 2 Lloyd's Rep. 535 QB, even if the judge found no causative unseaworthiness that would have overtaken the exemption of nautical fault.

Could these lines be advanced, for example, in a way that liability rules would be diversified partly in accordance with the cause or presumed cause of the loss? Unsafe and substandard ships would not have the same status as up-to-standard ships. Detailed rules could even take into consideration causation rules, and in some cases make the carrier mandatorily liable for goods lost or damaged by the mere fact that the ship was substandard, causative to the loss or damage or not. By such diverse approach, the mandatory part of the liability rules would competitively support up-to-standard shipping. Also, limitation of liability could vary. Basically it would be by contract, but in certain situations it might be necessary for the legislator to provide mandatory lowest levels of limitation. Specification is not completely unknown even at present: In the Hamburg Rules, liability for deck cargo varies depending on what has been allowed and agreed.

3.4. The role of cargo insurance in advancing quality shipping

The emphasis on up-to-standard quality shipping could be channelled by alternative routes, not merely by those directly related to the contract shipper-carrier-consignee. Another loss avoidance aspect is connected with the role of insurance. It has nothing to do with traditional liability rules, but might, nevertheless, play a role put in its proper environment. Substandard shipping exists. It increases the risk of loss of or damage to the goods. Should shippers be placed with the obligation to check the standard to a reasonable extent with the risk of otherwise losing cargo insurance cover, it would become more difficult to use substandard ships for carriage of goods by sea. There would be no real option for cargo interests to accept cheap freight rates due to substandard operations, as that advantage would have to be compared with the risk of losing cargo insurance cover. The Cargo ISM Endorsement clause in cargo insurance, obliging cargo interests to check upon ISM Code certification, is an example of market regulation on these lines and so is the London-based Classification Clause, 2001, demanding certain quality in the classification of the ship and creating diverse limits on the age of the ship. Quality shipping would thus gain a competitive edge over substandard operations, decreasing the risk of loss or damage.

The suggestions on the role of especially cargo insurance sound perhaps better than they are. There are no reasonable methods for shippers to exercise particularly extensive control over liner ships. Often the ship's identity is more or less unknown until loading has taken place. For cargo interests the identity of the ship is in many cases of no concern at all, while efficient transport logistics are. Cargo insurance aspects play perhaps a more important role

in tramp shipping. If there is a will, information can be provided speedily enough, however. Transparency of information is in clear development in international shipping. If efficiency of transparent information still increases, and this has once more been emphasized in the wake of the *Prestige* tanker disaster on 19th November, 2002, shippers should in future have no great obstacles in taking part of this information. Any liner operator could in contracting, for example, provide information on the potential alternatives of ships intended to be used on the specific line.

Notwithstanding the above-mentioned necessities of mandatory legislation, added perhaps with a few others (where also the following debating points could be taken up: identity of carrier, performing carrier), freedom of contract would possibly be restricted based on commercial, even if not legal circumstances. Within a non-mandatory regime the cargo insurer would put forward insurance conditions, whereby the insured would have to contract the carriage on the basis of some minimum liability for the carrier. Without this, the cargo insurance might in accordance with the insurance conditions be inapplicable. A natural reaction for any cargo insurer would be to safeguard its interests by maintaining some possibility to proceedings against the carrier by subrogation.

4. The realistic presumption of continuous mandatory legislation with previous scope of application

It can fully be realized that any fresh approaches to the whole issue of the sea carrier's liability would at present be a secondary choice to that of maintaining an old basic order even if some rules would be new or changed and even if some non-mandatory additions would be made. In the following, therefore, ideals and principles of the kind mentioned above are left aside, and the UNCITRAL Draft is debated on the basis of maintaining at least the same scope of mandatory law as before. The concept of "fairness" is thus the starting point and it includes pragmatic solutions.

There are several reasons why international debate on liability rules is restricted to fairly traditional approaches. There could be time pressure, as seems to be the case at present, or there might exist concern of further deharmonization should too many novelties be brought into play. But, even with traditional approaches certain deharmonization seems to be a fact.

The UNCITRAL Draft is placed on the convention market with harmonization in mind and with the same fairly unspecified notion of "fairness" in the background as is the case with earlier conventions. Several of the rules in the Draft have been circulating in the convention and standard condition market for a number of years.

But, once the case on what is right or wrong in regulating liability is unspecified and is mainly based on pragmatic solutions, this situation provides an open field to state whether the UNCITRAL Draft really is “fair” or not. As far as the basis of liability, exemption from liability and limitation of liability are concerned, one must ask on what basis is the substance in the UNCITRAL Draft as good or any better than those solutions that were reached by the Nordic countries (Denmark, Finland, Norway and Sweden) in 1994 in their similar Maritime Codes after years of discussions. Our present system is based on the Hague-Visby Rules with national additions of the Hamburg Rules to the extent that those latter rules are not in conflict with the Hague-Visby Rules. The Hamburg Rules seem to have a bad international image, but that should not be the reason to throw them overboard. Instead, from a Nordic point of view, another option would be - or would have been - to analyse what is clearly unacceptable in the those Rules and make necessary changes. Some reservations by ratifying states could also be allowed, not possible according to the present wording of the Hamburg Rules. It would now become a necessity also to adjust the jurisdiction rules in the Hamburg Rules, as EU Member States must apply Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, according to which accepting jurisdiction rules in conventions is restricted.

In addition, from a Nordic point of view, the UNCITRAL Draft includes a number of problematic rules that might rather complicate the legal picture than to simplify it. I shall mention no details at this point. I can refer to the definition of the performing party. There are also problems with the provisions on multimodal transport and on mixed contracts of carriage and forwarding. There are problems in repeating the Hague catalogue of exceptions. Unreasonable deviation would no longer be an independent set of rules. There is no development or specification concerning limitation sums. The solution in the Draft concerning the failure to identify the carrier has no correspondence with contract law and to who is bound by contract. The UNCITRAL Draft has taken up items not regulated in a convention before. There is a clear need to look at these items and ask the question what exactly is the convention supposed to focus upon.

The UNCITRAL Draft contains several optional solutions, and there is no possibility of final criticism before those options have been specified. However, I can see no reason to accept the mandatory parts of the UNCITRAL Draft as a priority to the the Hamburg Rules or to Nordic law. A purely political evaluation might lead to another result. It must be emphasized though that acceptance of the Draft would be combined with a feeling of winding the clock back in time, not only by minutes, but by hours.

5. Multimodal transport

The UNCITRAL Draft suggests a solution to problems related to multimodal transport.

Multimodal transport was regulated by the UN Convention on International Multimodal Transport of Goods in 1980. The Convention never entered into force. The gap has been filled with rules created by the shipping market. Contract terms vary, but regulation seems to cover all the major issues, providing that the sea carrier is the main actor. Should the contract of multimodal carriage be concluded with a typical road carrier, specific contract clauses might not exist. The possibility of applying the CMR is a realistic option, and a practical point, at least as far as transport from and to Finland is concerned, Finland being on "island" in relation to Western Europe. Forwarding agents in the Nordic countries do have, however, a set of rules with the possibility of the agent acting as carrier. In many cases the forwarding agent takes on carriage, which by nature would in most cases be carriage of goods by road. The General Conditions of the Nordic Association of Freight Forwarders (NSAB 2000) cover liability for both localized an unlocalized damage.

Concerning road carriage, the CMR art 2 takes into consideration the possibility that the road carrier will carry the goods also by other means of transport. However, it only applies when the road vehicle is taken on another mode of transport without unloading the goods (piggy-back operations). It is inapplicable in case of transshipment, ie in case of unloading the goods from the vehicle. Even if such unloading took place and made art 2 inapplicable this is not to say that the CMR would be out of play. Application depends on whether it is a question of international road carriage. One should also remember that the road carrier in accordance with art 3 is liable for his agents and servants and any other persons of whose services the road carrier makes use for the performance of the carriage. Nevertheless, there might be a gap in the application of the CMR which might be problematic.

The liability conventions concerning sea carriage have so far not taken multimodal operations into consideration, but the UNCITRAL Draft includes a door-to-door possibility in articles 4.1. - 4.2. According to article 4, a network system is applied, nothing surprising in that. But, when damage is *unlocalized*, the most common possibility in practice, the sea carrier would be liable in accordance with the liability rules of the UNCITRAL Draft, and not in accordance with a pure multimodal set of liability rules and not in accordance with the strictest option. There seems to exist a view that the UNCITRAL Draft merely intends to cover ancillary services, but this is not found in the wording of the draft, not even in the definition of "contract of carriage" in article 1.4. Should it, however, be so, how is the line drawn between ancillary and non-ancillary services? If all road carriage is included, this

would mean that there is a possibility that hundreds of miles of road carriage would fall under sea carriage rules where damage is unlocalized.

A transport customer might create his transport contacts in accordance with prevailing commercial circumstances. It may happen that the first contact is a typical road carrier, but it may happen that it is a typical sea carrier. Should this kind of transport arrangement really be the decisive factor in establishing which specific liability regime is primarily applicable? Depending on commercial and often ad hoc choices, the same transport might on the basis of this choice fall under different sets of rules. The difference can simply be shown by reference to limitation rights. In sea carriage it would be around 2 SDR/kg (perhaps somewhat higher in the future), and in road carriage 8,33 SDR/kg. Random choices by transport customers should not create such legal variations, but this is exactly what the risk is in the UNCITRAL Draft.

The sea operator market and the Nordic forwarding agents have created their own rules for multimodal purposes. They do not seem to be in fundamental variation with mandatory rules concerning specific modes of transport. Market regulation might lead to the conclusion that mandatory regulation by the legislator is unnecessary. On the other hand, the market seems to have concerns about what the exact liability rules are. Any need to clarify the rules concerning multimodal transport would be satisfied by non-mandatory international legislation. Interestingly, case-law on multimodal transport problems in connection with cargo claims does not really exist. This might show that law as it is presently arranged functions, but it might also show that once cargo claims in connection with multimodal operations do arise, the liability question is settled amicably on the basis of the rules applicable to single mode transport or settled in court, but with the consensus between the parties of applying single mode transport rules.

What should be clear, be the approach mandatory or non-mandatory, is that multimodal transport should not be regulated in connection with specific modes of transport. Coordination of rules would be lacking, unless only one convention concerning one specific mode of transport would take over the others. This would not happen, for example, in view of the UNCITRAL Draft which might start competing with the CMR.
There is a strong argument for regulating only port-to-port carriage in a convention basically dealing with carriage of goods by sea, but there is no doubt that several actors in the market find it of great importance to have clarifying regulation on multimodal transport.

The best option would be a separate convention, and even better, a convention should be achieved where all modes are regulated in a coordinated fashion. The latter is utopia,however, and will remain so, unless there is sufficient ambition in the international

transport law community to start with an open mind and achieve full coverage of all modes of transport.

Should it happen that a new sea carriage convention would have to contain a door-to-door rule, then liability for unlocalized damage would have to be regulated independently and not by a mere reference to the pure sea carriage rules. Interesting comparison points can be found in the national solutions reached both in Germany (reform 25th June, 1998, of part of the HGB, in force 1st July, 1998) and Holland. Those solutions seem not to have been a consideration in preparing the UNCITRAL Draft.

5. Conclusions

There would be great possibilities to look at sea carriage rules from a fresh perspective. When this does not happen, the question is what "fair" liability rules really mean. When is a new proposal better than existing rules? The UNCITRAL Draft includes several rules which might create more problems than solve them. Any proposal should start from a port-to-port option, with separate ambitions to create a new multimodal convention. Should a door-to-door option be the only alternative then the UNCITRAL Draft is too aggressive in case of unlocalized damage. Some independent liability rules would have to be created.

Of course, in spite of reservations as to the UNCITRAL Draft there must be a constructive approach and there must be a standpoint to all issues taken up in the preparatory debate, should there be signs on conference level that the Draft is the line along which to pursue. Anyone issuing a proposal has a strong advantage to those that are merely prepared to criticize the creation of others. The basic question is nevertheless: to what extent is international harmonization as the all-covering guiding line more important than the urge to dismiss substantive rules that clearly offend the sense of "fairness" of a specific state and government, not to speak of real ideals and principles?