United Nations A/CN.9/WG.III/WP.25

General Assembly

Distr.: Limited
13 December 2002

Original: English

United Nations Commission on International Trade Law
Working Group III (Transport Law)
Eleventh session
New York, 24 March-4 April 2003

Transport Law: Preparation of a draft instrument on the carriage of goods [by sea]

Proposal by Italy

Note by the Secretariat

In preparation for the eleventh session of Working Group III (Transport Law), during which the Working Group is expected to proceed with its reading of the draft instrument contained in document A/CN.9/WG.III/WP.21, the Government of Italy, on 25 October 2002 submitted the text of a proposal concerning the scope and structure of the draft instrument for consideration by the Working Group. The text of that proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat.

V.02-60463 (E)

Annex

Proposal by Italy on the application door-to-door of the instrument

1. The first question that should be considered is whether it is right to approach the problem of the choice between a door-to-door and a port-to-port instrument as if these were really two alternatives. This would be the case if also a port-to-port instrument would likely obtain the support of the industry. It is felt, however, that this might not be the case and that certain sections of the industry (e.g. shipowners, P&I Clubs, insurers) might be prepared to leave the safe grounds of a well tested, albeit old fashioned, system such as that of the Hague-Visby Rules only if the new instrument would really constitute an answer to the reality of modern transportation. And the reality is door-to-door container transportation.

What is needed is to adopt a set of rules that apply throughout the door-to-door carriage in the relationship between the shipper and the carrier in order to ensure certainty in respect of the rules by which the contract is governed.

The type of carriage that demands such rules is the carriage by sea of containers preceded and/or followed by a carriage by road and/or railway: from the door of the shipper to the door of the consignee. This type of carriage, therefore, is a special category of multimodal transport.

The ideal solution would be to have a uniform set of rules applicable throughout the carriage, rather than a network system, even if limited in scope, because the network system creates uncertainty. The instrument however should apply only to the contract between the shipper and the carrier while the recourse action, if any, of the carrier against the performing carrier should remain subject to the specific rules applicable to the particular transport mode, be it carriage by sea, by road or railway. Nor ought the instrument to apply to claims of the shipper against the performing carrier, for that would again give rise to uncertainty, albeit in a different context: in that case the uncertainty would affect the performing carrier, who often would not even know what rules apply to the contract between the carrier and the shipper, a contract to which he is not a party.

The application of the instrument to the claims of the shipper against the performing carrier would, moreover, entail a possible conflict between the instrument and the transport convention applicable to the transport performed by the performing carrier.

This entails the restriction of the definition of “performing party” to persons other than performing carriers and the addition of the definition of “performing carrier”.

The above change could be obtained by adding to the present definition, after the words “Performing party means a person other than the carrier” the words “and the performing carrier(s)” and by adding the following new definition:

"Performing carrier" means a person that at the request of the carrier performs in whole or in part the carriage of the goods either by sea or by [another mode] [rail or road].

In order, however, to avoid possible actions in tort of the shipper against the performing carrier, it should be provided that the action of the shipper against the performing carrier is subject to the rules that would apply if the action against the performing carrier is brought by the carrier. If this principle is accepted, it will of course be necessary to find out what legal technique can be used in order to achieve that result: for example, a legal subrogation of the shipper into the rights of the carrier against the performing carrier.

2. In order to see whether this scheme is workable it is necessary, however, to find out whether the provisions of conventions applicable to modes of transport other than maritime would directly apply to the door-to-door transport under consideration, with the consequent application of Article 30 of the Vienna Convention on the Law of Treaties. This problem exists mainly if not exclusively, in Europe, where there are already conventions applicable to carriage by road (the CMR[1]), by rail (the COTIF-CIM[2]) and by inland waterway (CMNI[3]).

2.1 *CMR*

Article 1 of the CMR provides that the Convention shall apply to every contract of carriage of goods by road in vehicles for reward when the place of taking over of the goods and the place of delivery are situated in two different countries of which at least one is a contracting country.

It is thought, therefore, that a door-to-door contract such as that to which reference is made in article 4.2.1 of the Draft Instrument would not be subject to the CMR, first because it is not a "contract of carriage of goods by road" and, secondly, because the place of taking over of the goods and the place of delivery are not related to a specific contract of carriage by road, but rather to the door-to-door contract: the taking over in fact occurs at the place and time where the carrier (or a performing carrier) takes over the goods and delivery occurs at the time and place where the carrier (or a performing carrier) delivers the goods to the consignee. If there are two road legs, one before and one after the sea leg, the taking over and delivery are not related to the same road leg and if there is only one road leg, for example before the sea leg, delivery is wholly unrelated to a carriage by road.

Nor can the reference in article 1(1) of the CMR to the place of taking over and the place of delivery be read as a reference to the places which the contract specifies for the taking over and delivery by the carrier in its capacity as an international road carrier. In fact the carriage by road is followed by the carriage by sea, at the end of the carriage by road there is no delivery, since the goods remain in the custody of the carrier until delivery to the consignee at the final destination. In a door-to-door contract between Zurich and New York via Genoa, Genoa cannot be

---

19. [1] Convention on the Contract for the International Carriage of Goods by Road, 1956 as amended by the Protocol.

20. [2] Uniform Rules concerning the International Carriage of Goods by Rail, Appendix to the Convention concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999

21. [3] Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, 2001.

qualified as the place of delivery under that contract. It will only be the place of delivery in so far as the contract between the carrier and the performing carrier who has performed the road carriage is concerned. While, therefore, that contract would be subject to the CMR, the door-to-door contract would not.

The CMR would consequently apply to the contract of carriage by road between the carrier and the performing carrier if the conditions required by its Article 1 materialize. It would also apply to the claim of the shipper or consignee against the road carrier.

2.2 *CIM*

While CMR applies to any person who undertakes to carry goods by road irrespective of a consignment note having been issued or not, CIM in its 1980 version now in force only applies to contracts of carriage entered into by railways, covered by a through consignment note (art. 1). Its provisions, therefore, are not applicable to the contract of carriage covered by the Draft Instrument and consequently no conflict is conceivable. Of course the recourse of the carrier against the railway in respect of loss, damage or delay occurred during the railway carriage would be governed by the provisions of CIM.

The 1999 version of CIM instead provides (article 6 § 2), similarly to the CMR (article 4), that the absence, irregularity or loss of the consignment note shall not affect the existence or validity of the contract which shall remain subject to CIM. It is therefore necessary to find out whether CIM, in its 1999 version, would apply to a door-to-door contract of carriage covered by the Draft Instrument where one of the legs of the carriage is performed by rail between places situated in two different States members of COTIF. The relevant provision of CIM is Article 1 § 4 which so provides:

> *When international carriage being the subject of a single contract of carriage includes carriage by sea or transfrontier carriage by inland waterway as a supplement to carriage by rail, these Uniform Rules shall apply if the carriage by sea or inland waterway is performed on services included in the list of services provided for in Article 24 § 1 of the Convention.*

As previously stated, the first condition is, therefore, that the carriage by sea must be a "supplement" to the carriage by rail. It is thought that this condition materializes where the contract is made between the consignor and a railway and that, therefore, CIM does not apply where the contracting carrier is not a railway. A potential conflict between the Draft Instrument and CIM would thus be conceivable only if the "carrier", as defined in Article 1.1 of the Instrument, is a railway.

In any event, even in such a rather unlikely case, it would be necessary that the carriage by sea be included in the list of services provided for in article 24 § 1 of COTIF.

2.3 *CMNI*

Carriage by different modes of transport, and more specifically by inland waterway and by sea, is regulated only in case it is performed by the same vessel, without transhipment. Article 2(2) provides that in such a case CMNI applies except where a "marine bill of lading" has been issued or the distance travelled by sea is

greater than that travelled by inland waterway. Therefore, since normally both these conditions will materialize, CMNI would not apply. The case of a contract of carriage by sea and by inland waterway with transhipment of the goods from the seagoing vessel to the inland waterway vessel or vice versa is not contemplated. It is thought that such contract is not covered by the definition of "contract of carriage" in article 1(1) of CMNI, where reference is made to a contract whereby a carrier undertakes to carry goods by inland waterways. If this view is correct, CMNI would only apply to the relation between the person who has stipulated the door-to-door contract and the carrier who performed the carriage by inland waterway.

It appears, therefore, that if the individual legs of the door-to-door carriage are subject to the international convention or to the law applicable to each of them, the application of the future Instrument to the global door-to-door carriage would not give rise to any conflict.

3. Article 4.2.1 would consequently become unnecessary and of course the text of the Draft Instrument should be reviewed in the light of its application to different modes of transport, in order to identify the provisions applicable to all transport modes and those that instead are applicable only to carriage by sea.

Article 6.3.3 could be replaced by the following provisions:

6.3.3-A. The recourse action of the carrier against the performing carrier, as well as any action against a performing carrier brought by the person entitled to assert claims in respect of loss of or damage to or delay in the goods, shall be governed by the international convention or national law applicable to the contract between the carrier and the performing carrier.

6.3.3-B. If an action is brought against the servants or agents of the carrier or of a performing party, such servants or agents are entitled to the benefit of the defences and limitations of liability available to the carrier under this instrument if they prove that they acted within the scope of their contract, employment or agency.

6.3.3-C. If an action is brought against the servants or agents of a performing carrier, such servants or agent are entitled to the benefit of the defences and limitations of liability available to the performing carrier under the applicable international convention or national law, if they prove that they acted within the scope of their contract, employment or agency.

Article 6.3.4 could be amended as follows:

6.3.4. If more than one person is liable for loss of, damage to, or delay in delivery of the goods, their liability is joint and several, but the aggregate liability of such persons shall not exceed the overall limits of liability under this instrument or the applicable international convention or national law, whichever is the highest.