United Nations A/CN.9/WG.III/WP.40

General Assembly

Distr.: Limited
30 September 2004

Original: English

United Nations Commission on International Trade Law
Working Group III (Transport Law)
Fourteenth session
Vienna, 29 November-10 December 2004

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

Comments from Denmark, Finland, Norway and Sweden (the Nordic countries) on the freedom of contract

Note by the Secretariat

On 27 September 2004 the Secretariat received comments from Denmark, Finland, Norway and Sweden (the Nordic countries). Those comments are reproduced in annex I in the form in which they were received by the Secretariat.

V.04-57979 (E)

Annex I

Comments from Denmark, Finland, Norway and Sweden (the Nordic countries) on the freedom of contract

I. Background

1. The question of freedom of contract was debated at the 12th session of Working Group III in 2003 and in a round table meeting in London in February 2004. The representatives of Denmark, Finland, Norway and Sweden have since continued the discussions of the issue based on the discussions at the round-table meeting and the UNCITRAL Secretariat's provisional redraft presented in document WP.36.

2. The Nordic countries have similar Maritime Codes enacted in 1994. The provisions of carriage of goods by sea in the Nordic Maritime Codes are based on the Hague-Visby Rules, which the Nordic countries have ratified (including the 1979 Protocol). The Nordic countries have not ratified the Hamburg Rules, 1978, but they have on a national basis taken into consideration those rules in the Maritime Codes to the extent that they are not in conflict with the Hague-Visby Rules.

3. With a view to assisting in the preparation of the Draft Instrument, the Nordic countries have, in the following, outlined preferred solutions regarding the issue of freedom of contract for the present debate, pending further developments with regard to the issue. The envisaged changes to the draft text of article 2 of the Instrument, as contained in WP.36, are highlighted in appendix A.

II. Definition of contract of carriage

4. The UNCITRAL Secretariat's provisional redraft WP.36 includes in article 1(a) a definition of "contract of carriage" with an alternative formulation in footnote 14. Leaving aside the multimodal aspects of the Instrument at present, the Instrument's understanding of a contract of carriage is quite extensive and thus creates possibilities to include a number of different contractual situations in the Instrument, notwithstanding how possible exclusions are separately defined. The first part of the text presented in WP. 36 is not far from the definition included in the Hamburg Rules. The differences are merely due to the envisaged door-to-door setting of the Instrument. The Hague-Visby Rules also have an extensive starting point, be it that a bill of lading is required as a document in order for the Rules to become applicable.

5. In the previous discussions, including the round-table meeting, efforts have been made to specify the definition of what contractual situations would fall under the Scope of the Instrument. The different approaches can be described as the "contractual approach", the "documentary approach" and the "trade approach". Simultaneously, there has been no real suggestion that exclusions would not be included in the Instrument. This would mean that there might be provisions both with specifications on inclusions and specifications on exclusions.

6. Different proposals were drafted in the round table meeting, which all had merits and were based on serious efforts to make it clear what falls under the Instrument and what does not. However, in a careful analysis afterwards, the Nordic countries drew the conclusion that none of the proposals would provide for a satisfactory solution as a text in a Convention, which on a global level should take into account the different legal regimes. It was therefore felt that an uncomplicated and workable approach on a global level would be to accept the fairly extensive inclusive definition as formulated in the UNCITRAL secretariat's provisional redraft WP.36. The Nordic countries, in coordination with most other views expressed, aim to maintain the scope of freedom of contract basically on the same lines as now with some new specifications. The redraft is considered to largely reflect the approaches in both the Hague-Visby Rules and the Hamburg Rules. The issuance of a bill of lading is, however, not relevant.

7. *The Nordic countries support the text presented in the Secretariat's redraft in WP.36.*

III. Exclusions

8. As the inclusive approach is fairly general by nature, with no bill of lading necessary for application of the Instrument, it becomes important to concentrate on the exclusions. This is also relevant in view of the fact that there is no specific reason to have far-reaching specifications in the inclusive definition if the exclusions are clear enough.

9. With the development of transport logistics and new contractual arrangements due to practical and commercial needs, the traditional exclusion of charter parties from the scope of mandatory liability regimes does not suffice. It is necessary to express in the Instrument what other situations would be excluded from the Instrument, and thus, at least internationally, fall under freedom of contract. It is therefore in the light of this development considered necessary that in addition to the starting point of maintaining the present exclusion to enumerate other situations than charter parties as excluded from the scope of application of the Instrument. It is considered that the UNCITRAL secretariat's provisional redraft WP.36 also at this point presents a workable solution on a global level.

10. The exclusions as mentioned in the Instrument are not combined with definitions. There has previously been international debate on introducing definitions also as far as at least certain parts of the exclusions are concerned. Further definitions would, however, run the risk of making the Instrument unmanageable. A strong argument is that the exclusions are commercially familiar phenomena, and disputes would therefore be rare on which contractual situations are within the scope of application of the Instrument and which are not. Should problems arise, courts and arbitrators would have to provide clarifications. The grey zone would not be unreasonably problematic. Such zones always exist, also if further definitions on exclusions would be included.

11. The above-mentioned inclusive definition and the exclusions are much in line with present regimes. Any changes in familiar structures would run the risk that the Instrument would be interpreted differently than previous regimes, even if this would not in all respects be intended.

12. With the above-mentioned inclusive definition and considering the exclusions, the fact remains that liner operations where general cargo is carried would automatically fall under the Instrument, as intended and chartering and similar situations outside, as intended.

13. The issuance of a bill of lading (or a similar "document of title") is not required for the application of the mandatory provisions in cargo claims under the Instrument as between the carrier and the shipper. This solution reflects the development in the commercial market and is strongly supported.

14. *The Nordic countries support that article 2 paragraph 3 should be included in the Instrument without the existing brackets. The Instrument would thus not apply to charter parties, contracts of affreightment, volume contracts, or similar agreements. (The issue of OLSAs is dealt with in section 4.*)

15. *Article 2 paragraph 5 as it stands is also acceptable*.

V. Ocean liner service agreement (OLSA)

16. The proposal by the United States included in UNCITRAL WP.34 deals with OLSAs separately from the above-mentioned basic concepts. OLSAs, as further defined, would, according to the proposal, be regulated by the Instrument, but on a non-mandatory basis. OLSAs are in other words not excluded, but they may under certain conditions be excluded if the contracting parties wish to do so.

17. From the explanations given it seems that the concept of OLSA is increasingly growing in importance and the concept therefore deserves attention in the discussion of the Draft Instrument.

18. One of the main aims of the mandatory rules is to protect the cargo side from unfair conditions of carriage. Such a potential imbalance is, or at least has been, prevalent in many practical situations in liner operations. Also, an international mandatory liability regime enhances international predictability. On the other hand, not all situations in liner services and carriage of general cargo need to be potentially unbalanced. If there are undoubted situations in general terms where the parties can genuinely freely negotiate the conditions of carriage, there does not seem to be a fundamental necessity of applying mandatory law.

19. The Nordic countries are prepared to continue to work on a solution to the American *idea* of the non-mandatory approach to OLSAs, but with certain reservations. It is of utmost importance that the definition of an OLSA is clear in order to avoid any misunderstandings. The definition of OLSAs as it stands in the proposal included in WP.34 must still be developed. For example, the definition in subparagraph (a) includes "meaningful service commitment". Even if a specification is included in subparagraph (b), the concept remains unclear and creates doubts of application.

20. Also, volume contracts, which are excluded, might be understood to be covered at least partly by the definition of OLSAs. The Nordic Maritime Codes, for example, relate volume contracts (quantity contracts) to carriage on board ship of a definite quantity of goods divided into several voyages during a provided period. This framework contract is under freedom of contract, but for individual voyages

the provisions on carriage of general cargo or those of voyage chartering apply, as the case may be. As an OLSA would be a very specified contract situation it might be accepted that the provisions of OLSAs would prevail over those on volume (quantity) contracts. A similar question might arise as far as consecutive voyages are concerned. In that case there is the same solution as for OLSAs.

21. Technically, the provisions of OLSAs in the Instrument should be included in a separate article where it is also stated that the OLSA provisions prevail over the provisions of volume contracts and, if necessary, those of consecutive voyages. Possible consequential clarifications to article 2 paragraphs 3 and 4 should be made.

22. While the basic concepts (inclusions and exclusions) from a Nordic point of view will not change from what is familiar already, the OLSA non-mandatory regulation will create a change in the liability regime, as certain liner operations, which have been under mandatory rules, will be under freedom of contract. Such a change requires careful consideration in the future preparations.

V. The position of a third party

23. Both under the Hague-Visby Rules and under the Hamburg Rules the third party is under certain circumstances under the protection of mandatory law in spite of the original contractual situation being excluded from the scope of the mandatory liability regime. A precondition for the mandatory protection for the third party, for example, a consignee not being the charterer, is to possess a bill of lading.

24. The UNCITRAL secretariat's provisional redraft WP.36 regulates the position of the third party in article 2 paragraph 4. A requirement for protection is the issuance of a negotiable transport document or a negotiable electronic record.

25. The Nordic countries see no reason to change the basic concept in law as far as this third party is concerned. Consequently, the mandatory protection must prevail. The third party is protected in spite of what kind of basic contract was concluded. Thus the position of the third party should not be changed depending on the original arrangements. For example, a volume contract or an OLSA would not hinder the application of the mandatory liability regime in relation to the third party. Consequently, the brackets in the UNCITRAL secretariat's provisional redraft article 2 paragraph 4 can be removed, and explicit references made, not only to charter parties, but also to contracts of affreightment, volume contracts, and similar agreements. The open question is, on what basis will the third party be mandatorily protected. The Nordic countries have discussed the Instrument's present approach and the possible inclusion of sea waybills, even if this document would be non-negotiable. It was felt that the third party's position in relation to non-negotiable sea waybills is in need of further discussions.

VI. Multimodal aspects

26. Freedom of contract might have a multimodal angle, but this has not been addressed in this document.

VII. Summary

27. The common Nordic position is that

(a) the UNCITRAL secretariat's provisional redraft WP.36, article 1 (a), is supported (not footnote 14),

(b) the exclusions from the Instrument of contract situations mentioned in WP.36, article 2 subparagraph 3 are acceptable without the brackets and without further definitions,

(c) the work on the inclusion of OLSAs in the Instrument on a non-mandatory basis could continue with a special emphasis on clarifying the definition as such and also the relation to volume contracts and consecutive voyages,

(d) a third party, not being the charterer, must, in spite of what the basic contract between the shipper and the carrier is, be protected by the mandatory liability regime included in the Instrument at least when the relation between the carrier and the third party is regulated by a negotiable transport document or a negotiable electronic record, but possibly also in view of sea waybills which are non-negotiable.

28. Multimodal aspects might cause further adjustments. Also, different details might cause certain adjustments in the present wordings, but the basic concepts are found in this summary under (a) to (d) inclusive.

APPENDIX A

"Article 1. Definitions

"For the purpose of this instrument:

"(a) Contract of carriage means a contract under which a carrier against payment of freight undertakes to carry goods by sea from a place in one State to a place in another State; such contract may also include an undertaking by such carrier to carry the goods by other modes prior to or after the carriage by sea.

"Article 2. Scope of application

Paragraphs 1, 1bis and 2 as in WP 36.

"3. This instrument does not apply to charter parties, contracts of affreightment, volume contracts, or similar agreements [*with the exception of agreements referred to in article 2bis*].

"4. Notwithstanding paragraph 3, if a negotiable transport document or a negotiable electronic record is issued pursuant to a charter party, contract of affreightment, volume contract, or similar agreement [*such as an agreement referred to in article 2bis*], then the provisions of this instrument apply to the contract evidenced by or contained in that document or that electronic record from the time when and to the extent that the document or the electronic record governs the relations between the carrier and a holder or other than the charterer. [Sea waybills?]

"5. If a contract provides for the future carriage of goods in a series of shipments, this instrument applies to each shipment to the extent that paragraphs 1, 2, 3 and 4 so specify, [with the exception of agreements referred to in article 2bis]."

Article 2bis ***Maritime Liner Service Agreement (including OLSAs*****)**

Article 2 bis would include specific provisions on OLSAs qualifying the concept and its relation to volume contracts and consecutive voyages.