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Transport Law: Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]

Relation with other conventions

Note by the Secretariat*

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* The late submission of the document was due to the heavy workload of the Secretariat in connection with the documentation for this session.

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I. Introduction

1. In preparation for the eighteenth session of Working Group III (Transport Law) and with a view to facilitating the Working Group's consideration of chapter 21 containing the final clauses of the draft convention on the carriage of goods [wholly or partly] [by sea], the Secretariat has prepared a note on the relation between the draft convention and other international legal instruments, taking into consideration also various views and comments expressed on this topic, and, in particular, on the door-to-door scope of application of the draft convention. This note presents information on the relation between the draft convention and other instruments relating to international carriage of goods by sea; the relation between the draft convention and instruments relating to non-maritime international carriage of goods; and the relation between the draft convention and international legal instruments not relating to the carriage of goods.

2. The Working Group may wish to note that issues relating to door-to-door transport, and possible conflicts between the draft convention and other international instruments governing carriage by modes other than sea carriage were already discussed in document A/CN.9/WG.III/WP.29. The Working Group may wish to consider that document in conjunction with the present note, bearing in mind, however, that the analysis contained in document A/CN.9/WG.III/WP.29 was made at a time when the draft convention did not explicitly limit direct actions under the draft convention to actions between the contractual parties to the overarching maritime contract of carriage, which by itself has limited the scope for possible conflicts with other conventions, as compared to the situation contemplated in document A/CN.9/WG.III/WP.29.

II. Relation between the draft convention and other instruments relating to international carriage of goods by sea

3. The draft convention covers the entire subject matter of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924 (the "Hague Rules"),[1] of the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels on 25 August 1924, 1968 (usually referred to, in conjunction with the previous instrument, as the "Hague-Visby Rules"),[2] and of the United Nations Convention on the Carriage of Goods by Sea, 1978 (the "Hamburg Rules").[3]

4. As their subject matter coincides, the operation of the draft convention among its parties is incompatible with the operation, among the same parties, of other, pre-existing treaties relating to the international carriage of goods by sea. It was therefore deemed advisable to insert in the final clauses of the draft convention a provision requiring a State, which intended to become a party to the draft convention to denounce certain named treaties relating to international carriage of goods by sea, to which it might be a party. Accordingly, article 102 of the draft convention requires a State wishing to become a party to the draft convention to denounce the Hague Rules, the Hague-Visby Rules or the Hamburg Rules. Its text was inspired by articles 99, paragraphs 3 and 6, of the United Nations Convention

on Contracts for the International Sale of Goods (the "United Nations Sales Convention")[4] and by article 31 of the Hamburg Rules.

5. The approach adopted in draft article 102 has the advantage of providing maximum certainty on the applicable law, since after its denunciation a treaty would not have any force of law in the denouncing State. However, it has been suggested that this approach might have a potential disadvantage, since the denunciation of the Hague, Hague-Visby or Hamburg Rules would deprive the carriers and shippers in the denouncing State of the benefit of a uniform legal regime with a number of contracting partners in States which had not yet become parties to the draft convention, but were parties to another instrument relating to international carriage of goods by sea.

6. In that connection, the Secretariat brought to the attention of the Working Group the alternative approach that had been adopted in article 55 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1999 (the "Montreal Convention")[5] (see A/CN.9/WG.III/WP.56, footnote 302). The approach taken in article 55 of the Montreal Convention, which is based on article 30 of the Vienna Convention on the Law of Treaties,[6] does not require a formal denunciation of pre-existing treaties, but rather holds that the Montreal Convention should prevail between States parties that are also parties to another convention on the same subject. Under this approach, the State becoming a party to the draft convention would apply the new regime in respect of carriage originating from or destined to those States that had already become a party to the draft convention, in accordance with draft article 8. However, the same State would apply the previous regime in respect of contracts of carriage to which those previous conventions, under their own terms, would apply if the factors that determine their application were connected to other States that were still parties to the previous conventions. The new regime would progressively substitute the older ones, as the various States became party to the draft convention.

7. However, it should also be noted that, as a consequence of this approach, a dual uniform legal regime, corresponding to the new and the previous instruments, might come into existence in a State party to the draft convention. The approach taken in the Montreal Convention might also lead to some difficulties in countries that, according to their constitutional laws, provide for direct application of international treaties and conventions upon ratification and internal promulgation. In those countries, the later treaty would automatically become part of the domestic legal system, displacing the earlier regime.

III. Relation between the draft convention and instruments relating to non-maritime transport conventions

8. The relation between the draft convention and other instruments relating to international carriage of goods by modes of transport other than by sea has been discussed at length by the Working Group, with particular regard to the intended scope of application of the draft convention in relation to door-to-door transport (see A/CN.9/510, paras. 26-32; A/CN.9/526, paras. 219-267; and A/CN.9/544, paras. 20-50).

9. At its ninth session (New York, 15-26 April 2002), the Working Group considered the desirability and feasibility of a door-to-door scope of application in the draft convention (see A/CN.9/510, paras. 26-32). It was suggested that the inclusion of door-to-door operations would better serve the needs of the trade community since most contracts of carriage by sea, especially in containerized traffic in the liner trade, included a non-sea leg (see A/CN.9/510, para. 30). However, it was added that, in adopting a door-to-door approach, the draft convention should not displace non-maritime transport conventions of mandatory application, such as the Convention on the Contract for the International Carriage of Goods by Road, 1956 ("CMR"),[7] and the International Convention Concerning the Carriage of Goods by Rail, 1980 ("COTIF-CIM"),[8] and its subsequent revisions (see A/CN.9/510, para. 30). It was further indicated that, while it would be desirable that the draft convention should resolve conflicts with non-maritime transport conventions of mandatory application, at the same time, the draft convention should not become a fully-fledged multimodal instrument (see A/CN.9/510, para. 28).

10. After an exhaustive exchange of views, the Working Group considered that, in light of the needs of worldwide trade and the requirements of modern international container carriage, it would be useful to continue its discussion of the draft convention under the provisional working assumption that it would cover door-to-door transport operations, and requested the Commission to approve that approach (see A/CN.9/510, para. 30).

11. In response to that request, at its thirty-fifth session (New York, 17-28 June 2002), the Commission 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.[9]

12. The underlying reason for this decision was the particular importance of a door-to-door scope of application since a new instrument intended for global use must take into account the needs of worldwide trade and the requirements of modern international maritime container carriage. It was also recognized that modern carriage of goods often involves carriage under two or more means of transport to include pre- and post-maritime mode of transport. In fact, most existing unimodal inland transport conventions, including the CMR, had already recognized the need for some scheme to accommodate that commercial reality. In addition to article 2 of the CMR, reference may be had in this regard to article 1, paragraphs 3 and 4, and article 38 of the COTIF-CIM, as amended by the Protocol of Modification of 1999; article 2 of the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, 2000 ("CMNI");[10] article 18, paragraph 5, and article 31 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1929, as amended by the Protocol signed at The Hague on 28 September 1955 and by the Protocol No. 4 signed at Montreal on 25 September 1975 (the Warsaw Convention);[11] and articles 18, paragraph 4, and 38 of the Montreal Convention.

13. In opting for door-to-door coverage as a working assumption, the Working Group departed from the approach taken in the Hamburg Rules, which are limited to port-to-port carriage. At the same time, however, the Working Group agreed that the draft convention should not go so far as attempting to replace all unimodal transport

regimes by a single multimodal system. Thus, the expanded scope of application of the draft convention does not affect the general policy of safeguarding the application of existing conventions that apply to contracts of carriage of goods primarily by a mode of transport other than sea carriage, as reflected in article 25, paragraph 5, of the Hamburg Rules.

A. The limited network approach to carrier's liability in door-to-door transportation

14. At its eleventh session (New York, 24 March-4 April 2003), the Working Group discussed how best to deal with the door-to-door carriage of goods (see A/CN.9/526, paras. 219-239; see also A/CN.9/WG.III/WP.29). It was indicated that, in principle, such carriage could be regulated under a "uniform system", under a "network system", or under a combination of the two. It was further explained that under a uniform system, the same rules would apply to the carriage, irrespective of the stage or mode of transportation when the loss, damage or delay occurred. It was also explained that under a network system, different rules relating to unimodal transport could apply depending upon the different stages or modes of transportation when the loss, damage or delay occurred, while a set of uniform rules would apply in the case of non-localized loss or damage.

15. It was suggested that the adoption of a network system would better serve the needs of the industry, given the importance of non-maritime legs in door-to-door carriage, especially for containerized traffic, as witnessed by the fact that the maritime transport industry had already developed contractual versions of limited network systems, with the widespread adoption of the UNCTAD/ICC Rules for Multimodal Transport Documents, 1992,[12] and of the BIMCO COMBICONBILL Combined Transport Bill of Lading, 1995[13] (see A/CN.9/526, paras. 232 and 234).

16. However, support was also expressed for the adoption of a uniform liability system for door-to-door carriage of goods. It was suggested that a uniform liability system would best address the needs of door-to-door carriage, and was indeed the approach adopted in the United Nations Convention on International Multimodal Transport of Goods, 1980 ("Multimodal Convention").[14] It was added that the adoption of a uniform liability regime would also be in line with the wishes of the trade to extend to maritime carriage the trend in favour of the extension of the scope of unimodal conventions to other modes of carriage preceding or subsequent to its own mode of carriage (see A/CN.9/526, para. 223).

17. The Working Group considered extensively the advantages and disadvantages of both the network and the uniform liability system for dealing with door-to-door carriage. The consensus that eventually emerged at the Working Group's twelfth session (Vienna, 6-17 October 2003) favoured the retention of a limited network system, as reflected in draft article 27 as set out in A/CN.9/WG.III/WP.56 (previously draft article 8 in A/CN.9/WG.III/WP.32; originally draft article 4.2.1 in A/CN.9/WG.III/WP.21) (see A/CN.9/544, paras. 20-27). Draft article 27 provides that, when 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

should prevail over the provisions of the draft convention to the extent that such other convention declares itself applicable and its liability provisions are mandatory.

18. The network system in draft article 27, paragraph 1, is limited in a double sense. Firstly, the network system is limited to the issue of the carrier's liability. In all areas of the draft convention other than carrier's liability, limitation of liability and time for suit, the provisions of the draft convention would apply irrespective of any different provisions that may exist in other applicable conventions (A/CN.9/WG.III/WP.29, para. 72; see also paras. 73-105, for an analysis of the possible application of competing conventions on issues outside of carrier's liability, limitation of liability and time for suit). Secondly, the limited network system only comes into play in situations where, because of an expanded interpretation of the coverage of a given unimodal transport convention, there might be a conflict between the liability provisions of the draft convention and the liability provisions of the relevant unimodal transport convention.

19. The essence of such a limited network system, therefore, is that, in the event that both conventions are held applicable to a particular contract of carriage and damage to the goods occurred during a transport leg other than sea carriage, the relevant provisions mandatorily applicable to the determination of liability of the inland carrier "apply directly to the contractual relationship between the carrier on the one hand and the shipper or consignee on the other" (A/CN.9/WG.III/WP.29, para. 52). Thus, in respect of that relationship, the provisions of the draft instrument apply in conjunction with the provisions mandatorily applicable to the inland transport; whereas as between carrier and inland subcontracting carrier, the inland provisions alone are relevant (supplemented as necessary by any applicable national law) (A/CN.9/WG.III/WP.29, para. 52).

B. Scope of the network system in draft article 27

20. The limited network system contemplated in draft article 27 has given rise to some criticism by other organizations and scholars. In a letter addressed to the Secretariat, the International Road Transport Union (IRU) has expressed the view that, by adopting a limited network system, the draft convention would be in conflict with other international agreements, and contravene general treaty law.[15] The IRU argues, inter alia, that draft article 27 would run counter to article 1, paragraph 5, of the CMR Convention, which prohibits modifications to the CMR Convention other than those allowed for in that convention, as well as article 41, paragraph 1, of the Vienna Convention on the Law of Treaties, which prohibits modification of a multilateral treaty between only some of its parties, except in certain circumstances. A similar objection to the network system had already been raised at the Working Group's eleventh session, when it was said that the current draft article 27, paragraph 1, "did not solve the issue of conflict of conventions, since it gave preference only to specific provisions of applicable unimodal conventions" (see A/CN.9/526, para. 246).

21. Another line of criticism concerns the practical operation of the limited network system. It has been argued that draft article 27 might have the undesirable effect of derogating from inland treaties whose rules would have been better suited to regulate non-maritime carriage of goods than the rules contained in the draft

convention. Furthermore, to the extent that draft article 27 only defers to other mandatory law as regards the carrier's "liability, limitation of liability or time for suit", it has been argued that the applicable rules would consist of "a combination of some provisions of the applicable unimodal regime, as interpreted by the relevant court or arbitral tribunal, together with the remaining part of the [draft convention]".[16] This has been said to lead to an "obscure patchwork of different regimes which were not designed to complement each other", thus introducing elements of uncertainty on the law applicable to the contract of carriage.[17] It has been further said that a clear-cut distinction between rules that "specifically provide for carrier's liability, limitation of liability or time for suit" and other mandatory rules in an international convention or domestic law governing carriage of goods by a particular mode of transportation is not always feasible. In view of the divergences that already exist in the interpretation of some existing unimodal conventions, provisions on jurisdiction in other conventions, for example, have been said to have a significant practical impact on the claimant's position, thus affecting the carrier's liability.[18]

22. In considering the first level of criticism, this note will leave aside the theoretical question as to whether and to what extent a subsequent provision in a treaty dealing with a subject matter not expressly dealt with in an earlier treaty concerned with a different legal relationship might be regarded as a modification of the earlier treaty under public international law. To the extent that the draft convention deals with a type of contract different from the contract governed, for instance, by the CMR, article 27, paragraph 1, should be seen as a provision that coordinates the application of the liability regime provided for in the draft convention vis-à-vis the liability regime provided for in other conventions, such as the CMR, and not as a modification of the liability rules of any other convention.

23. The scope of application of the draft convention and of existing unimodal transport conventions should normally be mutually exclusive (see A/CN.9/WG.III/WP.29, paras. 54-71). Accordingly, draft article 27, paragraph 1, would be expected to apply only to situations where some of those other conventions, "according to their terms", were to be interpreted as covering a contract of carriage involving a portion of carriage by a mode other than the mode primarily governed by the convention in question. Except for those cases where such an expanded interpretation of the scope of a given unimodal transport convention might lead that convention to be held applicable to a door-to-door carriage involving a sea leg to which the draft convention, in accordance with draft article 8, would also apply, no conflict should be expected between the draft convention and existing unimodal transport conventions.

24. Furthermore, article 27 should be read in conjunction with other provisions that establish the scope of application of the draft convention. According to draft article 19, paragraph 1, the carrier is liable vis-à-vis the shipper and the consignee, for the acts and omissions of any performing parties and other persons that undertake to perform any of the carrier's obligations under the contract of carriage, in accordance with the liability rules of the draft convention. However, in the course of its deliberations, the Working Group has agreed to the proposition that only maritime performing parties (that is, generally those that would have been covered in a port-to-port instrument) will be covered by the draft instrument, and that non-maritime performing parties are excluded from the liability regime of the draft

convention, even though vis-à-vis the shipper and the consignee the carrier remains liable for their acts (see A/CN.9/544, para. 23).

25. Therefore, a conflict of conventions could not arise under the draft convention with respect to recourse action of the door-to-door carrier against a non-maritime performing carrier (i.e. of the carrier against the subcontracting inland carrier), which remains governed by other applicable law outside the draft convention. This circumstance alone represents an important safeguard to limit the possible scope for conflict between the draft convention and other international conventions or domestic law that mandatorily applies to the liability of the carrier in other modes of transport. The Working Group agreed to make this point evident and adjust the scope of application of the draft convention (see A/CN.9/544, paras. 20-27). The notion of "maritime performing party" was accordingly inserted in the draft convention to limit direct actions under the draft convention to actions between the contractual parties to the maritime contract of carriage and to actions against the maritime performing party (see A/CN.9/544, paras. 28-42).

26. As regards the criticism concerning the practical operation of the limited network system contemplated in draft article 27, paragraph 1, it should be noted that the approach taken in draft article 27, paragraph 1, is not novel. Indeed, the widely-used Bimco COMBICONBILL reads, in relevant part, 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 […]."

27. Unlike draft article 27, paragraph 1, the COMBICONBILL does not specify which mandatory provisions of the relevant "international convention or national

law" would apply instead of the Hague-Visby Rules. Nevertheless, the phrase "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" makes it obvious that the "network system" contemplated by the COMBICONBILL is limited to provisions directly relevant to the determination of the carrier's liability. Therefore, although the formulation of draft article 27, paragraph 1, differs from the relevant provisions in the COMBICONBILL, the practical operation of the limited network system, as contemplated in draft article 27, paragraph 1, is consistent with that industry standard.

28. The fact that draft article 27, paragraph 1, adopts a limited network system for the carrier's liability does not create a conflict with the liability system in existing or future unimodal conventions. On the contrary, such a system may be said to offer a solution, in the context of the type of carriage covered by the draft convention, for a conflict that would likely arise in the absence of such a provision, since a judge or arbitrator would be otherwise left with no indication as to which rules should be applied to establish the carrier's liability in case of localized loss or damage. The choice made in draft article 27, paragraph 1, gives full effect to those provisions of other conventions that specifically provide for carrier's liability, limitation of liability or time for suit that mandatorily apply. The reference to provisions that "specifically provide for the carrier's liability, limitation of liability or time for suit" is a logical corollary to the context of the provision, which is concerned with the determination of the carrier's liability. Provisions that in a concrete case would have no bearing on the determination of the carrier's liability should not displace the relevant provisions of the draft convention. As currently worded, the provision would seem to be sufficiently broad to leave it for the prudent discretion of the courts or arbitrators to decide which of the mandatory provisions in other conventions "specifically provide" for the carrier's liability, limitation of liability or time for suit, and should thus prevail over the draft convention.

29. However, should the Working Group consider that, for the avoidance of doubt, further clarification in this regard would still be desirable, the Working Group may wish to consider that it would be desirable to spell out clearly one of the basic elements of the compromise arrived at by the Working Group at its twelfth session, that, where the provisions in the draft convention "relate to the obligations and liability of performing parties, reference should be made only to maritime performing parties" and that the draft convention should be revised "to create a direct cause of action against maritime performing parties only" (see A/CN.9/544, para. 21). In that case, the Working Group may wish to consider inserting, at an appropriate place, a provision along the following lines:

> "This Convention does not establish a direct cause of action by the shipper, the consignee, or any other person against [any person other than a carrier or a maritime performing party] [a non-maritime performing party]."

30. It is submitted that the addition of a provision that expressly limits direct actions under the draft convention to actions between the contractual parties to the maritime contract of carriage and to actions against the maritime performing party (thus preserving the application of other mandatory law, if any, to the relations between the carrier and the non-maritime performing parties) might address

remaining concerns about the potential conflicts with other conventions that have been identified earlier (see A/CN.9/WG.III/WP.29, paras. 72-110).

31. Notwithstanding the above considerations, should the Working Group not be convinced that this would suffice to avoid conflicts with the liability regime in other conventions, two alternative options might be considered. One option might be to expand draft article 27, paragraph 1, beyond the matters referred to therein so as to encompass, for example, other matters, such as shipper's obligations, as has been suggested earlier (see, for example, A/CN.9/WG.III/WP.29, para. 84). Another alternative available would be for the Working Group to change the limited network system under draft article 27 into an "unlimited" network system, thus allowing for the application of all relevant mandatory provisions of unimodal transport conventions where those conventions would be applicable. Such an alternative, however, would require a revision of the policy direction earlier taken by the Working Group in favour of a limited network system, which in the view of the Working Group would promote greater uniformity than an unlimited one (see A/CN.9/544, paras. 23, 24 and 47).

C. Treatment of non-localized loss or damage

32. The draft convention complements the limited network system for localized damage with a uniform system for the case of non-localized loss or damage. Indeed, draft article 27, paragraph 2, refers to draft article 64, paragraph 2, which provides that, in case of non-localized loss or damage, the highest limit of liability found in the various international instruments that could govern the different legs of the transport should apply.

33. Draft article 64, paragraph 2, was inserted following a request made at the Working Group's eleventh session. At that time, the view was expressed that the liability limits set out in the Hague-Visby Rules were too low to be acceptable as a default rule in case of non-localized damage, and that higher limits of liability should apply in case of non-localized damage. It was also suggested that the draft instrument should be amended to reflect the policy that, should the carrier wish to avoid the higher limit of liability, it should bear the burden of proving in which leg of the carriage the damage had occurred (see A/CN.9/526, para. 264). The Working Group discussed draft article 64, paragraph 2, at its twelfth session, when it was decided to keep the provision in square brackets, pending the decision of the Working Group on the liability limit set forth in draft article 64, paragraph 1 (see A/CN.9/544, paras. 43-50).

34. At the time draft article 64, paragraph 2, was proposed, it was questioned why the draft instrument should apply as a default rule in case of non-localized damage. In response, the view was reiterated that the main consideration regarding that matter should be to ensure predictability and certainty regarding the liability regime applicable to non-localized damage (see A/CN.9/526, para. 262). This conclusion flows logically from the very wording of draft article 27, which was conceived as an exception to the overall regime of the draft convention. It is implicit in the liability system established by the draft convention that in cases where it cannot be established that loss of or damage to goods or delay occurred "before the time of their loading on to the ship" or "after their discharge from the ship to the time of

their delivery to the consignee" (i.e. if the damage is not "localized"), the regime of the draft convention will apply.

35. The Working Group might wish to note that, under a uniform system for non-localized damage, a conflict with unimodal transport conventions of mandatory application might arise, in theory, in cases where (a) any such convention were to be interpreted so as to cover a contract that included carriage by modes other than the mode primarily governed by that convention; and (b) one could argue that the liability provisions of such convention could apply even if it was not proved that the damage occurred during carriage by the mode specifically covered by the convention in question (i.e. non-localized damage). If the liability rules of the draft convention and of such competing unimodal convention differed, an action might lead to different outcomes depending under which convention it was brought. In practice, however, it is suggested that such a conflict would be unlikely to arise in view of the fact that the draft convention effectively limits direct actions under the draft convention to actions between the contractual parties to the maritime contract of carriage and to actions against the maritime performing party. As the shipper, consignee or other interested party would not be privy to a subcontract of carriage by a mode other than sea carriage that might be covered by other conventions, the shipper, consignee or other interested party would not normally be entitled to sue the subcontracting carrier directly under the draft convention.

36. In any event, the Working Group may find it desirable to coordinate more clearly the legal regimes governing localized damage under article 27, paragraph 1 and non-localized damage under article 64, paragraph 2, as has been suggested earlier (see A/CN.9/526, para. 266). Such a clarification might be useful even if draft article 64, paragraph 2, were not retained in the draft convention, as it would clarify the exceptional nature of the limited network system under article 27 and clearly spell out the fact that the draft convention would introduce a uniform liability system for door-to-door carriage, which even opponents of the limited network system have said to be one of the main contributions that the draft convention might offer.[19] A possible clarifying provision might read along the following lines:

> "Except where otherwise provided in [article 27, paragraph 1 and 64, paragraph 2], the liability of the carrier and the maritime performing party for loss of or damage to the goods, or for delay, shall be solely governed by the provisions of this Convention."

D. Other instances of possible derogation from mandatory regimes of non-maritime transport conventions

37. The combined effect of draft article 27, paragraph 1, with the implicit uniform system for the carrier's liability in respect of non-localized damage is that, at least as regards the determination of the carrier's liability, the applicable rules are generally clear: if the damage is localized, the provisions that specifically provide for carrier's liability, limitation of liability, or time for suit of other conventions of mandatory application shall apply; if the damage is not localized, the draft convention applies. Obviously, the question as to how much of the other convention needs to be preserved to govern the carrier's liability for localized damage still

needs to be further considered by the Working Group. As a matter of principle, however, the rules offer a workable solution for determining the carrier's liability. Combined with the limitation of actions under the draft convention only to actions against the carrier and the maritime performing party, the overall features of this system may avoid conflicts of liability regimes. It is submitted that the draft convention therefore already offers a workable means for dealing with what, in practice, is likely to be the main source of private disputes arising out of a contract of carriage under the draft convention (i.e. the carrier's liability for cargo loss or damage, or for delay).

38. However, as indicated above (see above, para. 18), the draft convention currently does not provide a system to avoid conflicts with other conventions in respect of matters other than the carrier's liability that may be governed by those conventions. Possible areas where the provisions of the draft convention may differ from those contained in some other conventions governing carriage by other modes of transportation have been identified earlier, and include certain aspects of matters such as obligations and liability of the shipper for damage caused by the goods; obligations of the shipper to furnish information; transport documents; right of control; delivery of the goods and transfer of rights (see A/CN.9/WG.III/WP.29, paras. 72-105).

39. It is assumed that the scope of conflict is already reduced by the way the draft convention circumscribes its scope of application. As stated in the reply by the UNCITRAL Secretariat to the IRU letter (see above, para. 20), 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."

40. These considerations may apply, mutatis mutandis, to carriage by other modes of transportation. However, as indicated earlier (see A/CN.9/WG.III/WP.29, paras. 115-116), this conclusion presupposes that the scope of application of conventions dealing with carriage of goods by other modes of transportation would not be interpreted in a manner that would lead those conventions to apply to the type of carriage that the draft convention is intended to cover.

41. Of course, it is not possible for the draft convention to dictate how the scope of application of other conventions must be read. While the possibility of some overlap between the draft convention and other conventions may not be entirely excluded, it is submitted that the likelihood of residual conflict has already been greatly reduced by the combined effect of the provisions on the coordination of liability regimes for both localized and non-localized damage and by the definition of the scope of application of the draft convention (draft art. 1, subpara. (a), in conjunction with and draft art. 8).

E. Relation between draft article 89 and draft article 90

42. At the Working Group's eleventh session, the Secretariat was requested to draft a conflict of conventions provision for possible insertion into the text of the draft convention should it be necessary in addition to draft article 27 to resolve conflicts with other transport conventions (see A/CN.9/526, para. 250). This request was made after the Working Group had heard concerns that current draft article 27, paragraph 1, might not solve the issue of conflict of conventions, since it gave preference only to specific provisions of applicable unimodal transport conventions. At that time, it was also said that certain States would find it impossible to be signatory to more than one multimodal convention, and that if the draft instrument was a multimodal instrument, ratification of it could preclude some States from ratifying broader multimodal conventions. A further concern was that States parties to other instruments that have multimodal aspects, such as the Montreal Convention and COTIF, might have to denounce those conventions in favour of the draft instrument (A/CN.9/526, para. 246). Further to that request, draft article 89, which is based on article 25, paragraph 5, of the Hamburg Rules, was provisionally inserted in the draft text to provide that the draft convention would not displace the application of other international instruments already in force at the date of the conclusion of the draft convention and which would apply mandatorily to contracts of carriage of goods by a mode of transport other than carriage by sea.

43. At the same session, the Secretariat was also requested, in connection with the discussion of what was then draft article 16.1 (in A/CN.9/WG.III/WP.21), and is currently draft article 91 (in A/CN.9/WG.III/WP.56), to clarify the prevalence of the draft convention over earlier transport treaties incompatible with the draft convention (see A/CN.9/526, para. 196). Thus, draft article 90, indicating the prevalence of the draft convention over other treaties to which the parties to the draft convention might also be a party, was inserted in the draft convention. It was further clarified that, in line with article 30, paragraph 4, of the Vienna Convention on the Law of Treaties, the provision would not affect those States which would not become a party to the draft convention (see A/CN.9/WG.III/WP.32, footnote 232).

44. When taken outside the context from which they originate, draft article 89 and draft article 90 seem to reflect two opposite approaches to dealing with conflict of conventions so that the joint operation of the two draft articles, as currently worded, would not appear to be possible.

45. Draft article 89 preserves the application of unimodal transport conventions of mandatory application. This provision may be understood as complementary to the adoption in the draft convention (and, in particular, in its draft article 27, para. 1) of a limited network system to deal with liability in door-to-door transportation. Draft article 89 could indeed be read to mean that the limited precedence given by draft article 27, paragraph 1, to mandatory liability provisions of other transport conventions in the relations between the carrier and the shipper or the consignee does not otherwise affect the operation of any other transport convention that may mandatorily apply to the relations between the carrier and a non-maritime performing party. However, draft article 89 might also be read as conflicting with draft article 27, paragraph 1, by giving general precedence over the draft convention to other transport conventions in respect of matters other than liability (to which draft art. 27, para. 1, already refers), even in the relations between the carrier and

the shipper or consignee, and not only in the relations between the carrier and the subcontractor whose activities would usually fall under the scope of the other transport convention.

46. Draft article 90, in turn, indicates the prevalence of the draft convention over all other conventions incompatible with its provisions, including those relating to non-maritime carriage of goods. It seems that draft article 90 is intended to facilitate the general adoption of a uniform system to deal with liability in door-to-door transportation. In its current formulation, however, and when read in isolation, draft article 90 might also be interpreted as a general clause relating to the prevalence of the draft convention over all treaties that might contain provisions incompatible with the draft convention.

47. In the light of the above, the Working Group may wish to reconsider both articles 89 and 90 in light of the provisions and policy options to which they are logically related.

48. The arguments that prompted the inclusion of draft article 89 show some similarity to the arguments voiced in favour of the inclusion of article 25, paragraph 5, of the Hamburg Rules during the United Nations Conference on the Carriage of Goods by Sea (Hamburg, 6-31 March 1978). Article 25, paragraph 5, was added to the Hamburg Rules following the adoption of the final definition of "contract of carriage by sea", in article 1, paragraph 6, of the Hamburg Rules, which provides that "a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea". At that time, it was said, that this slightly expanded notion of "contract of carriage" made it necessary to include a provision that preserved the application of other conventions that might cover transport by more than one mode because the Hamburg Rules could not solve "the general problem of the international regulation of multimodal transport", as it lacked "provision for cases in which the place where damage had occurred was unknown" as well as "uniform rules to regulate certain procedural matters".[20] Indeed it appears that most supporters of the inclusion of article 25, paragraph 5, of the Hamburg Rules were concerned with the fact of bringing carriage primarily conducted through means other than sea carriage under the umbrella of a convention that only applied to the sea-borne part of multimodal transport.[21]

49. The Working Group may wish to note the substantive differences between the Hamburg Rules, where the responsibility of the carrier only covers the period "during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge", and the draft convention, which may extend "door-to-door". Furthermore, unlike the Hamburg Rules, the draft convention expressly provides for the legal regime that should govern the carrier's liability for localized damage under multimodal transportation and extends otherwise its own liability regime for all cases where damage has not been localized. In the context of the Hamburg Rules, article 25, paragraph 5, served the purpose of dispelling possible concerns that the inland leg of a multimodal transportation under a contract of carriage to which the Hamburg Rules applied might be left in a legal vacuum. The Working Group may wish to consider that the context of the draft convention is quite different from the Hamburg Rules and that, accordingly, there might not be the same need for a provision along the lines of draft article 89, at least in the same formulation as in the Hamburg Rules.

50. Moreover, if the Working Group were to conclude that the intended purpose of draft article 89 was to complement the limited network system under draft article 27, paragraph 1, the Working Group might wish to consider that the provision, which was proposed before the adjustments made to the treatment of performing parties (see above, paras. 24 and 25) may not be needed. Indeed, the entire liability system of the draft convention is now limited to the carrier and the maritime performing party, and the draft convention is not concerned with the legal regime governing any subcontracts that may be entered into by the carrier for transportation other than sea carriage. The Working Group may wish to consider that it is not appropriate for the draft convention, which clearly defines its own scope of application, to venture into what law, pursuant to its own terms, should apply to the relations between the carrier and a non-maritime performing party. In any event, if the Working Group still felt a need for draft article 89, it would seem advisable to clarify the relationship between draft article 89 and draft article 27, paragraph 1.

51. On the other hand, if the Working Group were to conclude that the intended purpose of draft article 89 is to give general precedence to other transport conventions also in respect of matters other than liability (for which there is a specific rule in draft art. 27, para. 1), the Working Group might wish to consider that draft article 89 is incompatible with the limited nature of the network system provided for in draft article 27, paragraph 1.

52. Similarly, as regards draft article 90, if the Working Group were to conclude that the rationale for this provision was originally to offer a complementary solution for conflicts of diverging liability regimes in international conventions, the Working Group may wish to consider that this provision, too, is not needed, and would in any event conflict with draft article 89, if that provision is retained. Indeed, draft article 90 was inserted at a time when the draft convention did not explicitly limit direct actions under the draft convention to actions between the contractual parties to the overarching maritime contract of carriage, and may have become obsolete since the types of conflicts that draft article 90 was intended to settle might in the meantime have been avoided by the refined scope of application of the draft convention, following the Working Group's almost unanimous support for the exclusion of non-maritime performing parties from the liability regime of the draft instrument (see A/CN.9/544, paras. 20-27).

53. Should the Working Group, in turn, regard draft article 90 as a general rule aimed at solving possible residual conflicts with other conventions in areas other than the liability of the carrier (see above, para. 38), the Working Group may still wish to consider whether the range of possible conflict situations that this draft article would be intended to solve would justify the inclusion of such a far-reaching provision. The Working Group may wish to note that clauses of general prevalence are not common in international trade law treaties. They are in fact more frequent in other instruments, especially those that establish international intergovernmental organizations (see, for instance, art. 103 of the Charter of the United Nations).

IV. Relation between the draft convention and other international legal instruments

54. Draft article 16 of the draft convention in A/CN.9/WG.III/WP.21 contained a draft provision on the relation of the draft convention with conventions relating to: limitation of liability relating to the operation of vessels; carriage of passengers and their luggage by sea; and damage caused by nuclear incidents. Those provisions, whose content was inspired by article 25, paragraphs 1, 3 and 4, of the Hamburg Rules, are currently draft articles 91, 92 and 93 of the draft convention.

55. The Working Group may wish to consider that these provisions, by affirming the continued application of those other conventions, adequately avoid possible conflicts between them and the draft convention.

Notes

[1] League of Nations, *Treaty Series*, vol. CXX, p. 155.

[2] United Nations, *Treaty Series*, vol. 1412, No. 23643.

[3] United Nations, *Treaty Series*, vol. 1695, No. 29215.

[4] United Nations, *Treaty Series*, vol. 1489, No. 25567.

[5] United Nations, *Treaty Series*, vol. 2242, No. 39917.

[6] United Nations, *Treaty Series*, vol. 1155, No. 18232. Article 30, paragraph 3, of the Vienna Convention on the Law of Treaties provides that when all parties to an earlier treaty are parties to a later treaty on the same subject matter, "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty." Pursuant to paragraph 4 of the same article, the same rule applies as between states parties to both treaties, when the parties to the later treaty do not include all parties to the earlier one.

[7] United Nations, *Treaty Series*, vol. 399, No. 5742.

[8] United Nations, *Treaty Series*, vol. 1397, No. 23353.

[9] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17*, (A/56/17), paragraph 224.

[10] CMNI/CONF(99)2/FINAL-ECE/TRANS/CMNI/CONF/2/FINAL (treaty not yet in force).

[11] United Nations, *Treaty Series*, vol. 2145, No. 6943.

[12] ICC publication, No. 481 (ICC, Paris, 1992).

[13] *BIMCO Bulletin*, vol. 91, 1996.

[14] TD/MT/CONF/16 (treaty not yet in force).

[15] The text of the letter from the IRU, as well as the reply sent by the UNCITRAL secretariat, have been made available to the Contracting Parties of the CMR by the United Nations Economic Commission for Europe and can be found in http://www.unece.org/trans/main/sc1/sc1cmr.html.

[16] See, for instance, Mahin Faghfouri, "International regulation of liability for multimodal transport—in search of uniformity", *WMU journal of maritime affairs*, vol. 5, No. 1 (2006), pp. 95-114.

[17] Comments by UNCTAD on the draft convention (A/CN.9/WG.III/WP.21/Add.1, Annex II, para. 44).

[18] See, for instance, Krijn Haak and Marian Hoeks, "Intermodal transport under unimodal arrangements. Conflicting conventions: the UNCITRAL/CMI draft instrument and the CMR on the subject of intermodal contracts", *Transportrecht*, vol. 28, No. 3 (2005), pp. 89-102.

[19] "If the network system in the draft were to be expanded as suggested however, the draft instrument could do a lot of good in the field of intermodal transport. It would create more uniformity in the area of international sea carriage law, and it would fill up some holes concerning for example the liability in case of unlocalized loss under multimodal contracts by virtue of a complementary effect to existing unimodal conventions" (Krijn Haak and Marian Hoeks, op. cit., p. 102).

[20] *Official Records of the United Nations Conference of the Carriage of Goods by Sea (Hamburg, 6-31 March 1978)* (United Nations publication, sales No. E.80.VIII.1), part II, Summary records of meetings of the Second Committee, 7th meeting (A/CONF.89/C.2/SR.7), paragraph 50; see also ibid., 9th meeting (A/CONF.89/C.2/SR.9), paragraph 9.

[21] Ibid., 7th meeting (A/CONF.89/C.2/SR.7), paragraphs 39-62; 8th meeting (A/CONF.89/C.2/SR.8), paragraphs 4-30; 9th meeting (A/CONF.89/C.2/SR.9), paragraphs 2-34.