

The Legislative Future of Carriage of Goods by Sea: Could it not be the UNCITRAL Draft?

Hannu Honka¹

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¹ This article 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). The discussions that took place during the seminar have had an influence on the final formulations. Development with the Uncitral work has been followed up since and the situation prevailing on 1st March, 2004 is included, also the experience in the round table discussions in London on 21st and 22nd February, 2004.

1 Background

Rules on (sea) carrier liability are once again internationally discussed. What should the substantive rules contain? 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 Draft introduced by the Comité Maritime International (CMI) on 10th December, 2001 and international work based on it solve the fundamental problems? Since the completion of the work by the CMI, United Nations Commission on International Trade Law (Uncitral), Working Group III has discussed these matters, now in the form of an Uncitral Draft, but work by February, 2004 is still at a fairly early stage. In spite of sceptical voices concerning the substance in these drafts, there is now a serious possibility that a new Convention will be adopted. Whether it will have any impetus remains to be seen.

No detailed references are made to the Uncitral Draft text in the following comments. The existing draft will be called the *Instrument*.² The Instrument contains a number of provisions concerning carrier and shipper obligations and rights and liability rules. There are two major points to start with. First, the relationship between the scope of mandatory law and freedom of contract is important. Second, it is discussed whether the Instrument covers port-to-port or door-to-door carriage. If the latter alternative is chosen, the question arises to what extent should the substantive rules of the Instrument cover multimodal operations. In addition to these basic issues, there is of course the substance itself.

As is well-known, the international regimes dealing with the sea carrier's liability at present consist of the Hague Rules (International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading), 1924, the Hague-Visby Rules (including amendments 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. In addition, United Nations Convention on International Multimodal Transport of Goods, 1980 covers the combination of carriage by different modes of transport. This Convention has not entered into force, and judging from the time of its adoption, never will. From an international point of view multimodal transport, which includes or may include sea carriage, is in practice regulated by contract terms, unless other conventions take over. To some extent the Convention on the Contract for the International Carriage of Goods by Road (Convention relative au Contrat de Transport International de Marchandises par Route; CMR), 1956, article 2 deals with multimodal operations.

² The text of the Draft and other conference and secretariat information is found on Uncitral's website: "www.uncitral.org".

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. It is normally more accurate to use the term “harmonization” when talking about conventions dealing with civil law obligations and liability and their effect than the term “unification”.

Considering carriage of goods by sea, harmonization was of course a key element in the first set of rules - the Hague Rules, 1924. It is shown in the 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, harmonization by mandatory legislation should necessarily not be the correct evaluation in present-day shipping, even if commercial needs and public interest seem to demand the maintenance of such an approach.

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 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 25 years, and they are not an international success. The time span is too long for anything fundamental to happen, unless the Hamburg Rules are made the target for adjustments, whatever those adjustments might be. By this, it is not stated 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. The Hamburg Rules, rightly or wrongly, received the image of a political convention and thus their acceptance was seriously circumscribed. Now, with the Uncitral Instrument on the table, the Hamburg Rules are probably buried as a potential basis for an international liability system, modified or not.

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.

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. In negotiating new rules in a convention, the comparison was thus made with generally used contract terms. 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? Had freedom of contract been the prevailing view, it would perhaps not have mattered. But, as the whole exercise with the Hague Rules was to create a mandatory minimum liability for the sea carrier, the substantive rules that were achieved become problematic.

The other main idea for the Hague Rules was to improve and secure the negotiability value of the bill of lading³. It was made the core document and the basis for application of the mandatory rules. The shipping market has long since in liner and scheduled operations started to use other transport documents (sea waybills etc) than bills of lading. Electronic communications are also increasingly used. However, the need for regulation of the bill of lading as a negotiable document cannot be ignored due to the interests of shippers and consignees which might not have concluded the original contract of carriage. Also, clarifying the position of a third party is important in any case, whether a bill of lading is issued or not. A consignee, who has not concluded the contract with the carrier, is dependent on the conditions of carriage if the consignee wants to pursue a cargo claim. One of the issues would be to what extent a third person should be protected by mandatory law, whether a negotiable document, such as the bill of lading, has been issued or not.

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

³ The question of negotiability is not internationally unproblematic, but in this article a further discussion of the matter must be omitted.

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. As unseaworthiness at the beginning of the voyage prevails as the rule of liability over the exceptions in the Hague Rules catalogue, the question of causal links becomes important. Must the immediate cause of loss of or damage to goods be unseaworthiness (for example, the sinking of the ship) or is it appropriate to go beyond the immediate cause (for example, grounding of the ship due to faulty navigation, but faulty navigation caused by defective sea charts)?

Arguments of the above-mentioned nature mean 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. Interpretation rights are not, however, endless.

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 framework of the Hague Rules was a failure, being largely a 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 a 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. There was no talk of freedom of contract. “New fairness” was based on historical comparison points. It can also be questioned what effect the Hamburg Rules really might have had in rebalancing the risk for goods lost, damaged or delayed. Some research has shown that a move from the Hague Rules to the Hamburg Rules would have put pressure to increase freight rates by about 0.5 %. If true, the economic influence of the change-over would have been meaningless.

The same observations seem to be true for the Uncitral Instrument. 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, the name-tag “fairness” is given in order to provide the new convention its justification. This is the way to satisfy commercial needs and there is no further connection to

how states should independently guide development in a larger context of transport operations and logistics.

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 notion that the United States will advance its own national rules should an international regime satisfying its interests not be found. Many others find it a real dilemma on how to pursue with the questions on sea carrier liability rules. Should one be part of the harmonization process with whatever substance or maintain one's own views on substance and "fairness"? This question can possibly be answered in the way that the Uncitral Instrument at present has certain international impetus. The realistic approach is to accept this fact and see what can be done within that framework. If certain provisions are of utmost importance for certain nations, but not important for others, it might be a fair approach to accept the need to include those certain provisions in the Instrument. The provisions might do no harm for states and commercial interests for whom the provisions are merely superfluous.

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 a minimum liability system for the carrier, or as some sources now suggest a two-way mandatory⁴ liability system. But, would it still have been possible to discuss some basic principles? It could be said that the US 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 malpractice, 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 carriers (NVOCs). 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

⁴ A two-way mandatory system would mean that the carrier's liability can neither be decreased nor increased from what is stated in the Instrument. Such a system would correspond with the provisions of the CMR. Also, mandatory approaches are proposed for shipper liability, but this issue is not further dealt with here.

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 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.

Within freedom of contract, certain general principles apply whereby this freedom is not endless.

Interestingly, freedom of contract is a basic value in the European Principles of Contract Law (1:102, but also 1:201 and the Sales Convention art 7), be it that those Principles are no formal codification of law. The Principles, however, do verify that there still exists a kind of main rule, in spite of different debates on social contract law and suchlike matters. Once a contract has been concluded, in cases of dispute, the contract must first be interpreted. Certain principles can be found, applicable also in commercial contracts. The whole system of interpretation cannot be dealt with here (cf Principles of European Contract Law Chapter 5). I shall mention some of value in the Nordic countries of interest in question of contracts of carriage too.

– Standard contract terms are binding, but provided that the contracting party has had a fair possibility to receive information of those terms or that he has been aware of them from previous dealings; surprising and burdensome terms might be set aside; in practice, for example in chartering, in most cases professional parties are aware of the terms through references to well-known standard charter parties; I shall not mention specific problems involving carriage of goods or chartering or bills of lading

– The principle of *contra stipulatorem* is accepted, and so is the principle of *contra proferentem* (cf Principles of European Contract Law 5:103), but when a standard contract is in an “agreed form” (agreed document), *contra stipulatorem* or *contra proferentem* will probably not play a major role; also, other methods of contract interpretation often lead to a result, without the decision-maker having to rely in these fairly technical approaches to contract interpretation

– Exemption clauses in contracts are constructed in a restrictive fashion; for example, an old case, Nordic Maritime Cases 1929:401 (Supreme Court of Norway) – with a maritime connection – states that a very general and widely formulated exemption clause for the benefit of the shipowner did not relieve him from liability as the cause of the loss was unseaworthiness of the ship; breach of such a fundamental shipowner obligation resulting in loss, and liability could not be set aside with reference to a very general exemption clause; this principle would still be valid, but in a maritime context the Hague Rules have taken over as far as certain situations are concerned

– If the contract debtor himself has caused damage by intent or gross negligence, an exemption clause will not be applied; in cases of companies, “himself” would have to be the alter ego of the company (say the CEO); also, this principle of general contract law has been applied in an important maritime law decision, Nordic Maritime Cases 1993:57 (Supreme Court of Finland) concerning loss of cargo and exemption from liability for deck cargo; the exemption clause was not applied due to the principle in general contract law; the shipowner himself had caused the damage by gross negligence. Only after contract interpretation, including the above-mentioned principles, has been

finalized, would there be a possibility to consider the question of adjusting an unfair contract term or adjusting a contract term the application of which would lead to an unfair result.⁵ This would happen in rare cases concerning commercial contracts.

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.⁶ On the contrary, fairly familiar options are used. Certainly there are some efforts to apply clauses for the benefit of the carriers,⁷ but clear extremes are not found. 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 (shown in connection with multimodal operations) would have pointed to a new approach not including the maintenance of mandatory rules in the same way as now. Instead, future conventions could start from the notion of non-involvement in contractual affairs of purely commercial nature. Creating non-mandatory rules covering carrier liability becomes the fundamental value. Simultaneously, this approach would make it possible to include several principles of maritime law as the risk of business interests being bound by them in individual cases 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 reconsidered as being out of date, there is then the need to argue with the aid of some new factors the case of what future conventions should be based on. 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 CMR. 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

⁵ The right for the court to adjust an unfair contract term or a contract term the application of which would lead to an unfair result is based on the Contracts Act section 36 in the respective Nordic country.

⁶ Specific problems might arise due to contract terms. For example, a nine month time bar is often introduced and the carriers maintain that this is necessary in order to secure subrogation possibilities. In *Finagra (UK) Ltd v. OT Africa Line Ltd* [1998] 2 Lloyd's Rep. 622 QB this type of problem was dealt with.

⁷ Cf *Finagra (UK) Ltd v. OT Africa Line Ltd* [1998] 2 Lloyd's Rep. 622 QB on the relevance of a time-bar clause (a nine month time-bar).

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 or other NVOs take on transport in the capacity of carriers by arrangement with small enterprises representing cargo interests. Ralf de Wit expressed in the round table meeting on freedom of contract on February 20, 2004 that freedom of contract would result in hundreds of shippers having to study standard contract terms used by carriers. This is a practical concern, but the question is to what extent this is not true for many commercial relations. It is obviously and nevertheless a concern in shipping.

Further, as sea carriage is regulated 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.

Further, freedom of contract may well be in balance as between the original contracting parties, but in transport operations there are third parties involved, mainly the consignee who receives the goods after carriage and/or the non-contracting shipper who sends the goods off for carriage. Protection of third parties is dependent on the fact that a certain liability stays with the carrier in spite of what has originally been agreed upon. On the other hand, general contract law is based on the notion that transfer of rights by one contracting party to a third party does not improve the position of the third party. Third party rights are the same as those of the contracting party. The position of the third party in a non-mandatory system could be arranged through the contract of sale. The seller and the buyer would agree on what exact terms the contract of carriage is to be concluded. Thus a third person in a carriage situation would know the position in cargo claims. This knowledge would be passed further should a transfer of rights take place. Such a system would require legal know-how to an extent not perhaps possible in a global perspective. As a comparison, the American proposal contains the idea of an information chain, not in the context of the liability of the carrier, but in the context of forum clauses. Here, it is proposed that a third party (a subsequent party) to be bound by a forum selection clause must be provided written or electronic notice of the place where the action can be brought. This information would be provided in the bill of lading or otherwise.

In order to protect a third party, some mandatory liability for the carrier seems necessary. To combine the protection to a bill of lading would correspond with general law of obligations, but, on the other hand, it would be unnecessarily complicated. The position of the third party can be decided independently. It is quite another matter how such protection is arranged when the basic contract is excluded from the scope of the Instrument, but one possibility would be to provide similar rights to third parties in such situations as mentioned above.

The next discussion point in a non-mandatory system between the original contracting parties would be whether the carrier should have subrogation rights as against the contracting shipper to the extent that the carrier has been liable to

a third party on a mandatory basis to a further extent than what has been provided for in the original contract.

In spite of all the above-mentioned protective needs, an enlarged non-mandatory setting for sea carriage is not an uninteresting point of debate.

3.3 *Where Should Mandatory Legislation Still Prevail? The Case of Loss Avoidance*

While previous regimes have not questioned a mandatory legislative approach, there would have been a need to do so. The debate on the Uncitral Instrument introduces an idea of this nature through a U.S. proposal on service agreements, but first certain principles are dealt with before going to this part of the Instrument. 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 commercial and 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? Reparation by paying the loss is normally the primary concern in pragmatically emphasized situations, such as these, but prevention is not unimportant, be it that verification of the extent of the preventive effect of legislation is more or less impossible. 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.⁸

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 fairly 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

⁸ Michael Sturley, *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.

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. The “*Torepo*”, in fact, seems to reflect a fairly old-fashioned view concerning the expectations of safety at sea.

Could the emphasis on safety at sea 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 take into consideration causation rules. The content of causation could be specified in the way that not necessarily the immediate cause would always be decisive. By such diverse approach, the mandatory part of the liability rules would not only enhance loss avoidance, but also competitively support up-to-standard shipping. 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 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

Discussion has been concentrating on the obligations and rights of the parties involved in the chain of carriage of goods. In practice, most of the loss is placed in the insurance market, either cargo insurance or P&I, as the case may be.

It is clear that the role of the insurance market will not be included in the present debate on the carrier’s liability, but it is perhaps worth mentioning some insurance aspects just for the sake of argument.

The emphasis on up-to-standard quality shipping could be channelled by alternative routes, not merely by those directly related to the shipper-carrier-consignee relations. 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 different 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, except for requiring information of the safety documentation of the ship. Often the ship's identity is more or less unclear 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 basically 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.

As said, insurance aspects will not be involved in the present debate and they have not been the core debating point in cases of legislating on the carrier's liability for goods lost, damaged or delayed.

4 Continuous Mandatory Legislation and Exceptions

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 order where commercial and practical needs are in the forefront.

However, as said, the Uncitral Instrument takes a standpoint on freedom of contract, but not along the outlines scheduled above. The line between mandatory and non-mandatory law is drawn basically with the same aim in mind as in the Hague Rules, i.e. on the basis that potentially unbalanced contracting would fall under mandatory law. This would mainly mean liner traffic, but not chartering. It is quite another matter that the Instrument is thought to be more specified in this respect than the Hague, the Hague-Visby Rules or the Hamburg Rules. In the Hague and Hague-Visby Rules, the approach is that a bill of lading must be issued for the Rules to apply. Charter-parties are excluded, but the relation between the carrier and a bill of lading holder not being the charterer is covered. According to the Hamburg Rules article 1.6 a contract of carriage by sea means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another. In multimodal operations

only the sea leg is covered. Article 1.6 is given more content when combining it with article 2. Especially article 2.3 gives understanding to the definition on contract of carriage. According to article 2.3, the Hamburg Rules are not applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the Hamburg Rules apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer. According to the Hamburg Rules article 2.4, for future carriage of goods in a series of shipments during an agreed period, the Rules apply to each shipment. But, where a shipment is made under a charter-party, the above-mentioned requirement of a bill of lading prevails for the Rules to apply.

While the Hague Rules require a bill of lading for the Rules to be applied at all, it suffices for the Hamburg Rules to apply that a contract of carriage by sea has been concluded, unless excepted under the specific provisions on the Rules. It has to be decided, when necessary, what is more precisely understood by a contract of carriage by sea according to the description in article 1.6. The Uncitral Instrument as it stands on 1st Mars, 2004 includes the following provisions in Article 2:

“3. This instrument does not apply to charter parties, [contracts of affreightment, volume contracts, or similar agreements].

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], 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 other than the charterer

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”.

The difference to present conventions lies in the fact that the Uncitral Instrument discusses the addition of certain contract types being excluded as compared with the traditional charter-party provision (where reference is rather to document than the contract type), and also in addition to the provision of the series-of-shipments-contract first introduced in the Hamburg Rules. The basic idea of excluding a certain contract (or document) from the scope of application of the Instrument remains the same as before, but the coverage is suggested to be more specific than before.

Freedom of contract in view of the Instrument was extensively debated in a Round Table meeting in London on February 20 - 21, 2004 in which around 50 influential maritime lawyers took part. The points of debate can be summarized as follows:

- the scope of freedom of contract
- the definition of the contract or document that falls under the Instrument
- the definition of the contract or document that falls outside the Instrument
- the specific American proposal of including on a non-mandatory basis ocean liner service agreements (OLSAs) in the Instrument
- the position of the third party where the original contract (such as the charter party) is excluded from the scope of the Instrument

There is no possibility here to dwell on each of the items above. The scope of freedom of contract has been discussed above with a different starting point to that of the Instrument. The Instrument aims to cover “liner traffic”, but it is important to understand that this is merely a working term and will most probably not suffice as a definition in the Instrument itself. Several proposals concerning this matter were made in the Round Table meeting, but none of them would have been in a final form. For present needs, it suffices to characterize the Instrument as intending to deal with liner trade and this in the context of mandatory minimum liability for the carrier.

The Nordic approach to the issue is quite clear and it is based on present Nordic legislation. However, there is no detailed definition in the respective Nordic Maritime Codes of what falls under “liner trade” (“carriage of general cargo”) and what is chartering. The situation internationally is confused by the wording in the present liability systems where a “contract for the carriage of goods by sea” is understood to cover all contract types dealing with carriage of goods unless excluded by the wording found in the respective liability system. In the Nordic systematic approach there is one term for all different contract types dealing with the operation of the ship in relation to goods and cargo. This term could be described as “*contracts of freight or hire*”.

The above-mentioned contracts of freight or hire can be divided in a Nordic understanding into a) contracts for the carriage of goods, and b) chartering contracts (contracts of affreightment). a) The concept of “contract of carriage”, as used internationally is difficult in a Nordic context. The general understanding is that a “contract for the carriage of goods by sea” is a contract where goods are fixed in liner or similar traffic and where the ship as such is not chartered fully or for defined space by cargo interests. A typical situation is where an exporter sends some specific goods via a consolidating forwarding agent or via a carrier terminal from where they are taken on board a liner ship. The goods are received routinely. The voyage and this type of contract is what the Hague, the Hague-Visby and the Hamburg rules mainly intend to regulate as far as carrier liability for loss of or damage to the goods is concerned. Of course, there is the additional role of the bill of lading which I shall not go into here. It is the “journey of the goods” that is the focussing point. Nowadays, multimodal operations are often involved and the place of receipt and place of delivery become important. In the Nordic Maritime Codes, a contract of carriage by sea is regulated in Chapter 13 which includes the Hague-Visby Rules, ratified by the

Nordic countries, and additional mandatory rules on a mere national basis. The latter include those parts of the Hamburg Rules that are not in conflict with the international obligations of those states that have ratified the Hague-Visby Rules. To clarify, the Nordic countries have *not* ratified the Hamburg Rules. The Nordic Maritime Codes do not deal with multimodal liability issues.

b) The other main category of contracts could in a Nordic context be named as “chartering contracts” (contracts of affreightment). They include all kinds of variations, such as voyage chartering, time chartering, volume contracts etc. These contracts focus on the ship and her voyage(s), not only on taking the cargo from one place to another. A chartering contract may be based on a charter party, but it is not legally necessary. Such a contract might arise on the basis of general principles of formation of contract. The Nordic Maritime Codes Chapter 14, a separate chapter to that dealing with contracts for the carriage of goods by sea, deal with chartering issues. Chapter 14 includes provisions on voyage chartering, consecutive voyages, volume contracts and time chartering. All provisions are non-mandatory except to a certain extent those dealing with loss of or damage to the goods or delay in their delivery. Also, certain documentary liability issues are mandatorily regulated. However, the mandatory liability for the carrier in Chapter 13 in cases of loss of or damage to the goods is applied, where the basic contract is included in Chapter 14, when a bill of lading holder, not being the charterer, presents a claim against the “carrier” (“owner” in chartering terms, “bortfraktare” in Swedish; cf “Verfrachter” in German). There are some further Nordic details which I shall not go into at this point.

Volume contracts apply to carriage by ship of a specified amount of cargo divided into several voyages during a set period of time. This framework contract is different from each individual voyage performed under it. Each individual voyage will fall under either Chapter 13 or under voyage chartering in Chapter 14, as the case may be. There are no provisions in the Nordic Maritime Codes on bare boat chartering, nor on ocean liner service agreements (OLSAs). However, the definition of OLSA seems to or may fall under the Nordic understanding of volume contract as a framework contract. Summarising from the Nordic point of view, the concept of “contracts of carriage” should be used with care. It follows from the above-mentioned division of contract types that there is no understanding of the problem whether a contract of carriage would include charter parties or not. A contract of carriage, as understood above, would not include charter parties, nor does it include any of the specific other contract types enumerated under b) above. There is, however, one clarification concerning individual voyages under a volume contract. Individual voyages under a volume contract can be either contracts for the carriage of goods by sea as understood in a Nordic context or voyage chartering. Volume contracts as framework contracts may well cover either liner services or voyage chartering, as the case may be. In the end, the name-tagging can be anything as long as it is understood what is included, but the separation between “liner arrangements” and similar arrangements on the one hand and “chartering situations” on the other is still the one that matters.

The Instrument should be adjusted in accordance with the outlines indicated above. These outlines are familiar in a Nordic context. The division between contracts for the carriage of goods by sea and chartering has not caused any

practical problems. There does not seem to be a wide group of maritime lawyers that would speak for including in the Instrument charter parties and other contracts that have been mentioned above under b). There certainly exists no such intention as far as mandatory regulation is concerned, even if some voices have been raised in order to cover chartering contracts on a non-mandatory basis. At present, the exclusion alternative prevails. The intended division is thus not very different from that introduced already in 1924 by the Hague Rules.

The United States delegation has expressed its interest to further specify the approach to the scope of mandatory legislation by referring to “ocean liner service agreements” (OLSAs).⁹ By this contract type is meant that the carrier and the shipper have negotiated the contents of the contract. This contract is used merely for liner services, and not for bulk, tanker and suchlike services.¹⁰ The US proposal intends to create an opt-out system for the contracting parties. An OLSA would fall under the Instrument, unless the contracting parties have expressly opted out from it. Only the contracting parties could opt out, and the arrangement would not affect the holder of a bill of lading or other transport document issued under OLSA. There is an interesting comment in the US proposal and it seems to reflect the same idea as what has been expressed above as a more general evaluation. The US proposal states the following, page 7: “The experience of almost 20 years has shown that neither carrier nor shipper industries are particularly disadvantaged in terms of negotiating power with regard to basic transport terms”. It seems that the US experience has not resulted in a conclusion where a very strong shipper would have poured heavy conditions of carriage over the carrier. Further, the following is stated in the proposal, page 8: “Concern has been expressed that this provision might be unfair to smaller shippers. In practice, this has not been the case with regard to the ability of small shippers to enter into and negotiate the rate and service terms of liner contracts”. There is also a reference to the fact that carrier competition will enable shippers to choose appropriately should OLSA negotiations fail with one carrier.¹¹ The proposal includes a definition of OLSA that should be added to the Instrument.¹²

⁹ Uncitral A/CN.9/WG.III/WP.34.

¹⁰ In its proposal, the US has described OLSAs to contain the following elements, Uncitral document on page 7: “(1) they are agreed to by the parties in writing (or comparable electronic means), other than by a bill of lading or transport document issued at the time that the carrier or a performing party receives the goods; (2) they are used for liner services; (3) they involve a carrier service commitment not otherwise required of carriers under the Instrument (e.g. the obligation of the carrier to properly receive, load, stow, carry and deliver the cargo); (4) the shipper agrees to tender a volume of cargo that will be transported in a series of shipments (i.e., the contract covers more than a single shipment); (5) the shipper and carrier negotiate rates and charges based on the volume and service commitments”. Based on this requirements the United States has proposed the a specific wording to be included in the Instrument, see footnote 12.

¹¹ The US proposal, surprisingly to my mind, includes specifically regulating the relation between ocean carriers and non-vessel operating common carriers through OLSAs where liability limits would be mandatory. This part of the proposal seems to be entirely based on other US domestic legislation and it has nothing to do with international transactions.

¹² The definition is the following: “(a)An ‘Ocean Liner Service Agreement’ is a contract in writing (or electronic format), other than a bill of lading or other transport document issued at the time that the carrier or a performing party receives the goods, between one or more

The definition is extensive and might cause problems of interpretation. What seems to be customary business arrangements in the US is not necessarily the same elsewhere. The Instrument will cover both deep sea and short sea shipping. OLSA is intended for a specified sector of shipping. There also seems to be a need for the US to include OLSA in the Instrument due to national legislation, a point which is perhaps difficult to understand in an international context.

One of the debating points is that the Instrument does not apply to volume contracts. Volume contracts in Nordic law, according to each respective Maritime Code, is defined in the following manner (in the Finnish Maritime Code 14:42): “The provisions concerning volume contracts cover carriage by ship of a specified amount of cargo divided into several voyages under a specified period of time”.¹³ These provisions are, however, not applied if it has been agreed that the voyages are to be performed consecutively by a named ship. Consecutive voyages are thus regulated by general chartering rules and those rules that are specifically designed for consecutive voyages. Individual voyages under volume contracts are, according to the Nordic Maritime Codes (in the Finnish Maritime Code 14:47), regulated by the provisions dealing with voyage chartering or carriage of goods by sea, as the case may be.

A contractual arrangement may well simultaneously be both an OLSA and a volume contract as understood in Nordic law. The Nordic concept of volume contracts, however, also includes voyage chartering concerning each individual voyage, depending on how those individual voyages are agreed upon. The US proposal represents a problem compared with other types of contract that are planned to be excluded from the Instrument. The limits for each different contract type would have to be clear. This is not always the case in real life and certainly not when comparing the US approach to OLSAs as compared with the Nordic approach to volume contracts.

An opt-out system would be applied for OLSAs. These contracts would fall under the Instrument, unless the parties have agreed upon exclusion wholly or partly. The other contract types mentioned above will not fall under the scope of the Instrument. In this latter case the contracting parties are naturally allowed to include the Instrument through contract terms exactly in the same manner as has traditionally been done by including the Hague or the Hague-Visby Rules into a contract through Paramount clauses. Concerning the Instrument, the different treatment of OLSAs compared to excluded contracts is relevant for example in

shippers and one or more carriers in which the carrier or carriers agree to provide a meaningful service commitment for the transportation by sea (which may also include inland transport and related services) of a minimum volume of cargo in a series of shipments on vessels used in a liner service, and for which the shipper or shippers agree to pay a negotiated rate and tender a minimum volume of cargo”. (b) For purposes of paragraph (a), a ‘meaningful service commitment’ is a service commitment or obligation not otherwise mandatorily required of a carrier under this Instrument. (c) For purposes of paragraph (a), a ‘liner service’ is an advertised maritime freight transport service using vessels for the carriage of general cargo on an established and regular pattern of trading between a range of specified ports. (d) An Ocean Liner Service Agreement does not include the charter of a vessel or the charter of vessel space or capacity on a liner vessel”.

¹³ Thor Falkanger has long since clarified the problems in Nordic law relating to volume contracts, Falkanger, *Kontrakter om skipning av et bestemt kvantum* (Volume Contracts), Arkiv for Sjørett, Vol 8 (1965) pp 1 - 243, Oslo.

the following context: If the contract is defined as a volume contract, it falls outside the scope of the Instrument. National law may of course have specific rules for such contracts. If the contract is defined as an OLSA it falls under the Instrument. In each case the precondition is that the contract itself is silent on the issue. If the contract is both a volume contract and an OLSA there is no answer in the Instrument as to its application. For this reason it will become necessary to supplement the Instrument by interpretation, unless a new approach to the unclarity is found through a new wording in the Instrument. On the other hand, definitions should not be overemphasized.

The question is, whether it would be appropriate to streamline the question of the Instrument's applicability or non-applicability to different contracts types. One possibility would be to treat all the contracts mentioned in the Instrument as part of its scope of application in the same manner as suggested for OLSAs, i.e. to apply the Instrument, unless the contracting parties have opted out. The Nordic Maritime Codes have regulated both voyage and time charter-parties and contracts for consecutive voyages in this manner as far as cargo claims are concerned. It is a non-mandatory approach except for domestic and intra-Nordic traffic where voyage charter-parties fall under the same rules, but on a mandatory basis. There seems to have been no great difficulty commercially in applying this system. The position of the bill of lading holder, not being the charterer, is protected by mandatory law. This protection presupposes that a shipped on board bill of lading has been issued. The protection of the bill of lading holder is based on the obligations put on states, parties to the Hague, the Hague-Visby Rules or the Hamburg Rules.

The US proposal is problematic from the point of view that OLSAs are necessarily not known in different jurisdictions. The Instrument should approach international elements and not have emphasis on mere national issues. A further problem is that an OLSA would be defined in more detail in the Instrument while the excluded contract types would not.

Freedom of contract in view of cargo claims is in the Instrument, and added with the US proposal, not based on any new systematic approach as such, but by clarifying certain contractual situations not dealt with in previous conventions. Nevertheless, the introduction of OLSA will, according to the Americans, make a difference. As said above, this would be acceptable as long as no negative influence is felt elsewhere.

Due to the present development all that must realistically be done is, therefore, to leave ideals and principles of extensive freedom of contract (with certain exceptions) aside. Commercial needs and public interest do not seem to be in conflict in a context where the Instrument regulates legal relations. There are of course still a great number of questions which are completely open, but the question of freedom of contract seems to be on its way to be established.

5 Multimodal Transport

The Uncitral Instrument suggests a solution to problems related to multimodal transport. When the Hague, the Hague-Visby and the Hamburg Rules are clearly unimodal by nature, the Instrument is not. There is pressure to extend the provisions of sea carriage to cover other modes of transport as well, but under certain preconditions. Door-to-door seems to become preferable to port-to-port. The optimal solution is not to extend a sea carriage convention to multimodal transport, but to have an independent convention relating to multimodal transport, and even more, to also cover under the same roof all modes of transport. Such hopes are unrealistic, even if basically sound. Even a multimodal convention does not seem practically possible.

Multimodal transport is, as said above, regulated by the UN Convention on International Multimodal Transport of Goods in 1980. The Convention has not entered into force. The gap has been filled with contract terms created by the shipping market. These would include ICC and BIMCO documents (for example, Multidoc 95) and others (for example, North Sea Standard Conditions of Carriage).

Contract terms vary, but regulation seems to cover all the major issues in cargo claims, 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 regulating liability might not exist. 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 an “island” in relation to Western Europe. The same is largely true for all the Nordic countries.

Concerning road carriage, the CMR article 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 article 2 inapplicable this is not to say that the CMR would be completely 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 article 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.

Perhaps even more problematic is the fact that the CMR does not clearly state when it is applicable in a multimodal context. The concept of multimodal transport includes also taking a road vehicle on board a ship without discharging the goods from the vehicle. According to article 1.1 of the CMR, it shall apply to every contract for the carriage of goods by road in vehicles for reward.¹⁴ According to article 1.2 “vehicles” means motor vehicles, articulated vehicles, trailers and semi-trailers. In multimodal operations it may well happen that an NVOG gives a promise to carry the goods and that road carriage is more than just a technical transfer, for example, from terminal to ship. Is it then a question

¹⁴ The geographical specification in article 1.1 is not of interest in this connection.

of applying the CMR (providing, of course, that it is an international carriage) or, could the arrangement fall under another “aggressive” convention?

In many cases the forwarding agent takes on carriage which would be a multimodal operation. The General Conditions of the Nordic Association of Freight Forwarders (NSAB 2000) cover the forwarding agent’s liability both as carrier and as non-carrier. In case of carrier liability, a network principle for localized damage is applied. In case of unlocalized damage, the General Conditions apply an independent system which is practically the same as CMR liability.

The Instrument includes a door-to-door possibility in article 8 as formulated in the UNCITRAL Document WP.32 (September 4, 2003) (the previous article where the question was regulated was 4.2.1). In addition to regulating how the Instrument would operate in a multimodal context, there is the need to separate between the carrier who has given the original promise to carry the goods, and the performing party who will execute some part of the carriage.

As a first part, the liability of the carrier in a multimodal context is dealt with. According to article 8 of the Instrument, a network principle is applied, nothing surprising in that. The network principle means that in localized damage the liability rules concerning that specific transport apply. There are additional preconditions for the network principle to apply even in localized damage. At present, the starting point is that the transport leg in question must be regulated by an international convention with mandatory minimum liability for the carrier.

When damage is unlocalized, a common possibility in practice, or when the preconditions for applying the network principle are not otherwise fulfilled, the sea carrier would be liable in accordance with the liability rules of the Instrument, and not in accordance with a pure multimodal set of liability rules and not in accordance with the strictest option taking into consideration different legs of carriage. There seems to at least have existed a view that the Instrument merely intends to cover ancillary services, but this is not found in the wording of the Instrument, not even in the definition of “contract of carriage” in article 1(a).¹⁵ Should it, however, be so, how is the line drawn between ancillary and non-ancillary services? If, for example, 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. This question is further dealt with below.

There are several other proposals concerning the door-to-door aspects of the Instruments. These are explained in detail in other sources.¹⁶

In short, different alternatives concerning the basics have been proposed. Some of them are not at issue anymore, but it is still interesting to see how the carrier’s liability in multimodal operations has been approached. The main outlines of the various proposals are or have been the following:

¹⁵ Article 1(a) (WP.32): “‘Contract of carriage’ means a contract under which a carrier, against payment of freight, undertakes to carry goods *wholly or partly* by sea from one place to another”. The bold text is included in the Instrument in order to indicate that further discussions will take place.

¹⁶ Michael F. Sturley, [2003] 39 Texas L.J. 65 - 110, pages 82 - 89.

- a) *Canada's option 2.* This proposal simply suggests that in localized damage the network principle would be applicable also when national mandatory law for a specific leg is applicable, not only when mandatory law is based on a convention.
- b) *The Italian proposal.* The Instrument would be applied in all claims directed against the (contracting) carrier notwithstanding that the damage has been localized to a leg other than a sea leg. The Italian approach is based on the idea that the contracting carrier concludes a contract as a sea operator. When providing a task to a carrier in another mode of transport the original carrier really acts as a shipper. All maritime performing parties would fall under the Instrument. This latter aspect is only to be considered natural, while the first aspect provides room for criticism.
- c) *The U.S. proposal.* The original Instrument would prevail and would exclude within the network system reference to any mandatory national law.
- d) *The Swedish proposal.* It is included in article 2.1bis and seems to consist of an idea whereby reloading of goods from one mode of transport to another would mean that the Instrument takes over. There is no clarification as to what happens if no reloading takes place. Probably this would have to be decided in view of the CMR also considering article 2 in that convention. Reloading does not take place if a whole container is removed from land transport to sea transport, as compared with the definition of goods in article 1(j). The Swedish proposal included in article 18.2 presents the idea that in unlocalized damage the highest limitation of all alternatives would prevail as further specified in that article.

On the hypothesis that a pure multimodal approach is excluded, on the hypothesis that new alternatives are unnecessary and on the hypothesis that multimodal regulation is necessary in an instrument mainly dealing with sea carriage, the Canadian proposal is interesting. It would be the widest possibility of all proposals put forward in accepting other provisions for deciding the liability issue. The Swedish proposal of the highest limit is also interesting. Comparison points in this respect 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.

In spite of alternative solutions, there seems to be an inclination to accept the present wording in the Instrument, requiring, among other things, a mandatory international convention, and not merely national mandatory rules, to be applied in localized damage for the Instrument to subsidize. The highest limitation in unlocalized damage is still somewhat of an open question.

The second part of the multimodal issue deals with the liability of the performing party. This part complicates further the issue of how to deal with liability in multimodal operations. However, it is a necessary part of the system.

Three further issues have to be solved. First how is a performing party, a kind of “subcontractor”, understood, clarified and possibly defined. The second question is to decide, once there is a performing party in the sense of the Instrument, what liability rules should apply to this party in unimodal situations. The third question is to decide, what liability rules should apply to this party in multimodal situations. The concepts of “performing party” or “performing parties” have often in the debate been introduced as part of the multimodal problems, but this is too much a one-sided view as “performing party” has a specific definition as discussed below. In a multimodal concept (or in a unimodal for that matter) a cargo claim can be directed against the “performing party”.

Naturally, the carrier who originally concluded the contract with the shipper (the other contracting party) is liable for the whole multimodal operation, always provided that the carrier has by contract promised to cover a multimodal carriage. If the carrier has given a promise for one certain leg of carriage only, his liability cannot extend beyond that leg. Grey zones are possible, and one is taken into consideration in the Instrument article 9 where mixed contracts of carriage and forwarding are dealt with. The article can be understood either as an exemption or clarification of the carrier’s liability. It is stated that the parties may expressly agree that specified parts of the carriage can be performed by other carriers and that in such a case the original contracting carrier merely acts as an agent in arranging the transport. Thus, the original contracting carrier has no other liability except as an agent meaning that another carrier shall be chosen with the exercise of due diligence. From a Nordic point of view, article 9 mainly repeats what is true on the basis of general principles of contract and transport law. Certain specifics in article 9 would have independent relevance, such as the requirement of an express agreement in the contract of carriage between the carrier and the shipper. In other words, implicit agreements of the capacity of an agent would not exempt the original contracting carrier from liability. Express agreement also excludes any practices which the parties have established between themselves. Party practices are accepted as relevant, for example, in international sale of goods according to CISG article 9 (1).

Perhaps article 9 of the Instrument is not necessary as it might confuse more than clarify, but this is somewhat of a side issue in the comprehensive picture of liability in multimodal operations.

In addition to having to define a performing party, as said above, a performing party’s liability must be clarified in the Instrument, should cargo interests direct a claim against such party. In developing the multimodal rules, it has become clear and commonly accepted that the Instrument cannot deal with the liability of performing parties who are not maritime by nature. Consequently, a separation between a maritime performing party and a non-maritime performing party has been developed. The intention is to introduce specifications in the Instrument concerning the two groups. In rough terms, a maritime performing party performs the carrier’s responsibilities between ports. The proposed definition is much more detailed than this. A maritime performing party’s liability would be adjusted according to the provisions included in the Instrument. The Instrument does not deal with the liability of a non-maritime performing party. Any claim directed against a performing party (maritime or non-maritime) would have to be combined with localizing the loss of or damage

to the goods. A claim for unlocalized damage would have to be directed against the carrier.

The present concept in the Instrument concerning loss of or damage to the goods is that a (contracting) carrier is liable according to the Instrument, unless the damage can be localized. In the latter case the Instrument sets up certain preconditions for another liability regime to apply. Provided that these preconditions are fulfilled, the Instrument's liability provisions would not apply. Provided that the damage is localized, a maritime performing party is liable in accordance with the Instrument, but a non-maritime performing party's liability would be decided according to the provisions of that specific mode of transport. A maritime performing party's liability in localized damage is really based on through carriage, where the same mode of transport has been used.

One of the basic problems in multimodal operations is what rules shall apply in the first place. The Instrument starts from the fact that it is applicable and no other convention will take over. The matter is, however, not uncomplicated. A road carrier (or rail carrier or air carrier, but these possibilities are excluded from the discussion below) may be the first contact for the cargo-owner. The carrier would issue a road consignment note, even if the road leg is a minor part of the whole operation and, for example, sea carriage the major. Another scenario would be that the first contact is a typical sea operator who then applies standard conditions, such as the Multidoc 95, taking into consideration a multimodal possibility. Nevertheless, the road carriage may well be the dominant part while sea carriage is not, even if the standard conditions have emphasis on sea carriage rules. A third possibility is a first contact with a forwarding agent who will apply his standard conditions. In a Nordic setting, as said above, the forwarding agent's liability as a carrier in cargo claims is extensively based on road carriage liability rules where the damage cannot be localized. A clarification is necessary on the question of which mandatory convention has *primary application* in spite of how aggressively different conventions approach the substantive issue of the carrier's liability due to multimodal transport. Considering the Instrument's extensive definition of "contract of carriage", which includes also other modes than by sea, this question has not been clearly dealt with, except for the fact that the Instrument article 83 (WP.32) states the following:

"Subject to article 86 [dealing with passenger aspects; author's remark], nothing in this instrument shall prevent a contracting state from applying any other international instrument which is already in force at the date of this instrument and which applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than carriage by sea".

This article aims to solve conflicts of conventions. It is not easily understood as the wording appears. But, article 83 opens the possibility for the Instrument to subside for the benefit of other liability conventions provided that it is a question of a contract of carriage of goods *primarily* by another mode of transport than by ship. Does "primarily" mean distance or document? Or is the discretion to be used *in casu* taking these two aspects into consideration? And, what happens when a transport document is used which does not indicate the real multimodal operation? A forwarding agent might issue a FIATA bill of lading, but the

forwarding agent is not a typical sea operator. The document only carries a certain name and certain information, for example, in order to make it negotiable and give it certain characteristics.

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. The unit limitation alternative in sea carriage may well decrease the kg-based differences, but, in any case, wide margins remain. Random choices by transport customers should not create such legal variations, but this is the risk with the Uncitral Instrument.

Without specifying the potential conflicts between conventions, the result might be that courts apply different solutions in a way, for example, where one jurisdiction considers the CMR to apply, and where another jurisdiction considers the Instrument to apply, whatever the final solutions on multimodal transport in the Instrument might be. In *Quantum Corporation v. Plane Trucking Ltd* [2002] 2 Lloyd's Rep. 25 CA, the air carrier had promised to carry a consignment of hard disk drives from Singapore to Dublin. The goods were flown to Paris and from there they were reloaded on a trailer vehicle. In England the goods were stolen. The defendant air carrier maintained limitation rights according to air carriage rules, where loss of those rights is not possible, while the plaintiff maintained liability in accordance with the CMR according to which the road carrier might lose his right to limitation of liability under certain circumstances. The plaintiff considered that this loss of the limitation right was due in the present case. The focus, therefore, was directed on which liability system to apply. The damage (theft) was clearly localized to the road carriage leg. Due to this fact, the conclusions reached by the court will not necessarily cover applicable liability rules in unlocalized damage. There are many interesting points in the judgement and it is clear that the application of the CMR was given a wide range through the motivation that it was a road carriage from Paris to Dublin. Otherwise, the court found that a multimodal operation might have two separate aspects where it would be possible to sensibly combine liability systems from different modes of transport. Two of the arguments were the following (on pages 39 and 41 respectively):

“CMR was applicable to an international road leg of a larger contract where (a) the carrier may have promised unconditionally to carry by road and on a trailer, (b) the carrier may have promised this but reserved either a general or a limited option to elect for some other means of carriage for all or part of the way or (c) the carrier may have left the means of transport open either entirely or as between a number of possibilities at least one of them being carriage by road; CMR was also applicable where the carrier may have undertaken to carry by

some other means but reserved either a general or limited option to carry by road”.

“CMR should apply to the whole of any multimodal transport regardless whether any non-road leg was conducted by roll-on, roll-off transport; overall characterization of the whole contract would be to take agreed international carriage by road outside any Convention (Warsaw or CMR) in circumstances where the contract overall could not be characterized as primarily for road carriage; and it would be inconsistent with the general European approach; contracts could by their nature or terms have two separate aspects and the present despite the length of the air leg was just such a contract”.

The general approach in *Quantum Corporation* seems to be that the CMR must prevail under circumstances where the contract was not primarily for road carriage. In unlocalized damage this might mean that the CMR is possibly interpreted to be an aggressive convention and that the risk for conflict of conventions would further increase under the Instrument with the present options on regulating multimodal transport in it. The latter conclusion is, however, very uncertain. The *Quantum Corporation* case did not deal with this aspect.

What should be clear 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 Instrument* which might start competing with the CMR.

There are arguments 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 provisions on multimodal transport. The pragmatic way at present seems to be the implementation of appropriate rules in the Instrument.

6 Problematic Items

From a Nordic point of view, the *Uncitral Instrument* 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.

In article 1 (b) of the Instrument the “carrier” is defined as a person that enters into a contract of carriage with a shipper. This is a simple and viable starting point. Should it be unclear what has been promised, the ordinary rules of evidence and burden of proof apply. For example, is there a promise that has resulted in a contract of carriage? Has the person against whom a claim is directed given the promise in a final form or conditionally, for example, so that a bill of lading signature might change the original promise? Or, has a person merely acted as an agent and not on his own behalf? Nevertheless, in Chapter 8 of the Instrument there are rules on the issuance of a transport document or an electronic record. The consignor or the shipper is entitled to a transport document as specified in article 33 of the Instrument. The respective document

or electronic record shall contain contract particulars as specified in the Instrument. One of the contract particulars is the name and address of the carrier. The first question is, how binding such information is if evidence otherwise points to a certain person being the carrier, but not indicated in the transport document. The second question is, how should the carrier be identified if this specific contract particular has been omitted from the document. For the purpose of the latter question, article 36.3 of the Instrument includes the following proposal:

“If the contract particulars fail to identify the carrier but indicate that the goods have been loaded on board a named vessel, then the registered owner of the vessel is presumed to be the carrier. The registered owner can defeat this presumption if it proves that the ship was under bareboat charter at the time of the carriage which transfers contractual responsibility for the carriage of the goods to an identified bare boat charterer”.

There is a further option as well in article 36.3 but not repeated here. Contrary to general contract law in interpreting who has given a promise and what the promise contains, article 36.3 introduces a presumption that the registered owner of the vessel will be the carrier. This particular way of constructing a contractual relationship is not familiar in general contract law and it may in practice go far in the chain of different chartering and other contracts. A registered owner as carrier is a forced construction. It becomes even more so as the definition of a performing party may cover all persons that have undertaken to perform any of the carrier's responsibilities. A “performing party” is, according to article 1 (e) of the Instrument, another person than the carrier. Should then a person be unidentified as carrier, an original performing party may in some cases become a carrier. This will have implications both as far as applicable liability rules are concerned and as far as application of multimodal provisions in the Instrument are concerned. The inclusion of the registered owner as a party liable is a difficult legal construction. Even considering the aim to protect cargo interests, the difficulty remains.

The question of who is a “performing party” is not unproblematic either. According to article 1(e) of the Instrument the definition might end up in only covering persons that physically perform any of the carrier's responsibilities. At a later stage the precision has been made that it would cover a “person other than the carrier that physically performs or undertakes physically to perform any of the carrier's responsibilities under a contract of carriage”. Persons that have merely undertaken to perform those responsibilities are thus included in that proposal, but with the requirement included in the wording “physically”. Another alternative in the Instrument has been, however, to merely include persons who physically perform the carriage. If the latter option would be chosen, there is a serious risk that the cargo claimant might not easily find a proper defendant to sue. This is a situation that runs directly counter to the main aim of the Instrument, i.e. the aim to protect cargo interests by mandatory law to a reasonable extent. The liability of performing parties has been dealt with above.

In 1994, the Nordic countries omitted the Hague catalogue from their respective Maritime Codes as part of the rules concerning the basis of liability of the carrier. Only the independent exceptions “nautical error etc” and fire remained. The rest of the catalogue was only considered to include examples of causes of loss or damage that showed no fault on the carrier’s side. Of course, the last part concerning the presumed fault rule remained as the main rule. There are opinions according to which the catalogue is continuously important as an informative source of causes where the carrier would not be liable for loss of or damage to the goods, but this line of thought did not prevail in 1994. Should there be concurring causes, the Nordic approach is to divide liability in accordance with how much those causes have contributed to the loss. The rule is clear and simple and it provides the court with flexibility and discretion. Freedom of proof is not dealt with in the Nordic Maritime Codes, but there is the right for the litigating parties to produce evidence in accordance with ordinary rules of procedure. All these aspects now seem to be proposed in partly an old-fashioned and partly a complicated way in the Instrument. The old catalogue might remain, confusing the issue of presumed fault, and rebuttal of presumption is regulated in a way that does not necessarily belong to a convention dealing with civil liability. However, one change that seems to meet with great unanimity is the abolishing of nautical error as an *ex lege* exemption. Fire as an *ex lege* exemption would remain in a new form as specified in the Instrument. The relevance of concurring causes seems to be level with the ordinary way of regulating such matters. However, there are some further details here which will be debated.

The carrier’s right to limit his liability is based on the same structure as before. Limitation sums are left open for separate decisions. There is no further specification, for example, in relation to the seaworthiness question. Commercial needs seem to be satisfied by the maintenance of the traditional approach.

The Uncitral Instrument has taken up items not regulated in a convention before. For example, provisions on freight are introduced. The right to sue may well be a complicated matter in certain jurisdictions, but in a Nordic concept there seems to be no major problems even if no clear rules on the point are included in the Nordic Maritime Codes. There is a need to ask the question what exactly is the convention to focus upon.

The Uncitral Instrument contains several optional solutions, and there is no possibility of final criticism before those options have been specified. In an independent and uncompromising approach it would be difficult give priority to the mandatory parts of the Uncitral Instrument before the Hamburg Rules or existing Nordic law. A purely political evaluation or a very compromising mind will lead to another result.

7 Conclusions

There would be great possibilities to look at sea carriage rules from a fresh perspective. However, there might exist concern of further deharmonization should too many novelties be brought into play. 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 Instrument 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 Instrument 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. The present Nordic system is based on the Hague-Visby Rules with national additions taken from 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 have been the reason to throw them overboard. Instead, from a Nordic point of view, another option would have been to analyse what is clearly unacceptable in the those Rules and make necessary changes. Some reservations by ratifying states could have been allowed, not possible according to the present wording of the Hamburg Rules. It would now become a necessity also to adjust the jurisdiction provisions 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.

The Uncitral Instrument 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. This has turned out to be practically impossible, and the second -best solution in the international maritime law community seems to be to implement provisions on multimodal transport into a carriage of goods by sea convention. As has been observed above, the establishing of acceptable substantive provisions is not an uncomplicated matter.

Of course, in spite of reservations as to the Uncitral Instrument there must be a constructive approach and there must be a standpoint to all issues taken up in the preparatory debate, once there are signs that the Instrument 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.