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**UNITED NATIONS CONVENTION ON CONTRACTS FOR THE  
INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA**

**SCOPE OF APPLICATION AND FREEDOM OF CONTRACT**

by

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**1. Background<sup>1</sup>**

The Hague and the Hague-Visby Rules 1924/1968 were in many sources considered to be too old-fashioned to properly regulate in the 21 st century liability issues connected with carriage of goods by sea. The Hamburg Rules 1978, even if in force, had failed in the sense that important shipping nations were not prepared to ratify them. Multimodal issues were not regulated internationally in a satisfactory fashion and the Multimodal Convention 1980 had failed in achieving proper support. In these circumstances it was felt necessary to modernize international rules of carriage of goods by sea and to regulate multimodal issues to the extent reasonably possible, but considering that sea carriage was the starting point.<sup>2</sup> The CMI took an initiative in 1996 to produce a standpoint concerning new rules for the international carriage of goods by sea. The result was the “Draft Instrument for the Carriage of Goods [Wholly or Partly] by Sea” in 2001. This draft was not just an amendment to existing liability regimes, but a completely new regime.

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<sup>1</sup> This article is a somewhat modified version of the author’s presentation at the CMI Athens Conference in 2008 and the published article in CMI Yearbook 2009, Athens II.

<sup>2</sup> The reasons are more nuanced than what has been considered necessary to mention in the text above.

UNCITRAL initiated work on these matters in 2002 based on the fact that the CMI had produced the above-mentioned draft. After several years of preparation a final version on “UN Convention for the International Carriage of Goods Wholly or Partly by Sea” was approved by the UNCITRAL Commission during its 41<sup>st</sup> session in June-July 2008.<sup>3</sup> The UN Assembly has adopted the Convention in December 2008, meaning that it will be opened for signature and later on for ratification. The Convention was opened for signatures in Rotterdam on September 23, 2009 when on that day 16 States signed. It has been considered appropriate to state that the Convention contains the Rotterdam Rules (RR).

In view of the particular topic, it is necessary to mention that these matters are connected with the mandatory nature of the RR and the expansion of freedom of contract to a certain extent.

The RR article 1 includes a long list of definitions. At this point the important ones are article 1.1 to 1.4, all connected with scope of application and volume contracts. The substantive provisions on scope of application are found in article 5 to 7 and the mandatory nature and limits of the Convention are expressed in article 79 - 81. The references to article 1 are, nevertheless, not complete in view of the topic. In the following, I shall only deal with general outlines. A more detailed discussion has to take place elsewhere.

## **2. Scope of application**

For the scope of application of the RR, contract of carriage is defined in article 1.1 according to which it means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.

There is an important specification in the definition, whereby a sea leg can be combined with other modes of transport. The sea carriage is an absolute requirement, but other modes not, even if possible. The RR thus deal with multimodal issues. The RR reflect a maritime plus approach: always a sea leg, but other modes of transport can be added on. The definition

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<sup>3</sup> UNCITRAL Commission Report, 41<sup>st</sup> session 2008, A/63/17, Annex I. The references to different articles in the text are based on this document.

does not clarify whether the sea leg should be based on what has been agreed or what has factually happened. The first alternative is acceptable and, when necessary, the contract has to be interpreted in view of whether a sea leg has been agreed upon or not.

Volume contracts are defined in article 1.2. As can be seen, they are also considered to be contracts of carriage. This is important as it means that such contracts are considered to fall under the RR, unless the substantive provisions state otherwise.

Article 1.3 and 1.4 define liner transportation and non-liner transportation, important for understanding the scope issue.

Working Group III at UNCITRAL considered three main approaches to the scope of application question: 1) the documentary approach, 2) the contractual approach and 3) the trade approach. The first one referred to the possibility of basing application of the RR on the use of a particular transport document. The second focussed on what type of contract had been concluded between the parties and the third on what type of trade was intended by the contract of carriage. None of these alternatives was accepted as such. It can rather be said that the end result is a mixture of them all.

The scope issue starts with the RR article 5.1 where it is stated that the Convention applies to contracts of carriage. Clarification on what this reference means is found in the above-mentioned definitions in article 1.1. and 1.2. I shall return to the geographical scope later on, it also being a part of article 5.1.

But, the reference in article 5.1 does not suffice without necessary further specifications found in article 6. Without repeating the exact wording of this article, the main message is that contracts of carriage in liner transportation are within the Convention, while contracts of carriage in non-liner transportation are outside the Convention. The above-mentioned definitions again are necessary for the proper understanding of article 6.

One could presume that this setting would suffice, but as said above, a pure trade approach was not the proper way to go. It would have two major problems. First, it would leave unclear

specific transport arrangements within liner transportation where it would not be generally considered necessary to include those arrangements under the RR. Second, it was early on considered necessary not to decrease the scope of application of the RR compared with the Hague and the Hague-Visby Rules. As the latter two cover more than just liner transportation due to the requirement of a bill of lading or a similar document of title having been issued, as long as not based on charterparties, it was necessary to have a clarifying provision in the RR whereby the same result would be achieved. In this general setting it was also clear that what was outside the Hague and the Hague-Visby Rules would also be outside the RR. The main category in this respect includes charterparties. The result in the RR is more sophisticated and has more nuances than what was at one point of the work considered to be enough. Previous versions had in general terms excluded charterparties, contracts of affreightment and volume contracts, but such references caused more confusion than clarification.

Legislatively, liner transportation was clarified in article 6.1, considering that liner transportation was automatically included by the general definition of contract of carriage read together with article 5.1. Thus, the specific situations in liner carriage that would not, however, fall under the Convention were in consensus considered to be charterparties used in liner transportation and other contracts for the use of a ship or of any space thereon used in liner transportation. The type of trade yielded to these specific parts. For example, slot charters and space charters on a liner ship in liner trade would fall outside the RR.

Quite naturally and, one could say, fully in accordance with tradition, non-liner trade is as said outside the RR according to the chapeau of article 6.2. To coordinate with the Hague and the Hague-Visby Rules an addition was necessary as specified in the same article. Contracts of carriage in non-liner trade are within the RR provided that there is no charterparty or similar contract between the parties and a transport document or an electronic transport record is issued. This is the rule necessary for the Hague and Hague-Visby coordination. To recall, the Hague and the Hague-Visby Rules are applicable when a bill of lading or a similar document of title is issued. Those rules have no explicit exclusion of non-liner trade. It may well happen that a ship carries goods in non-liner trade where no charterparty is issued. The carriage could, for example, concern some specific goods where the carrier does not trade in line transportation, such as a return voyage where the incoming leg is liner based, but the

outgoing leg not. Cargo interests might need carriage on the outgoing leg. Some times this arrangement is called on-demand carriage. The above-mentioned addition of inclusion in the RR article 6.2 gives in principle the same result as by the Hague and the Hague-Visby Rules.

The relevant difference between the RR and the Hague system is that the RR do not require the use of a particular transport document or corresponding electronic transport record. In this way the RR are the same as the Hamburg Rules. The one exception in view of the RR is that the above-mentioned on-demand carriage does need a particular transport document or electronic transport record as clarified in article 6.2 after the chapeau. Transport document and electronic transport record are defined in article 1.14. and 1.18 respectively. The definition of transport document includes the requirements of the transport document being the receipt of the goods and evidencing or containing the contract of carriage as further specified in the definition. The corresponding requirements are found in article 1.18. In view of on-demand carriage there must not be a charterparty or similar contract underlying the arrangements.

There is no problem in the RR covering third party interests where they exist to the extent that the above-mentioned provisions make the RR applicable. Thus, in an ordinary liner trade situation where the RR apply, for example, the consignee is covered in addition to the contracting shipper.

Once outside the application of the RR in non-liner trade, but not being on-demand carriage, the status of third parties needs clarification. This is a policy matter - in other words should third parties be included at all. The Hague, the Hague-Visby and the Hamburg Rules all protect a third party bill of lading holder, not being the shipper, in non-liner trade where a charterparty has been concluded between the shipper and the carrier. The protective needs have long since been considered relevant. For the RR, there was no need to change this approach. A third party was to be covered by the RR. While the present regimes require the third party, not being the shipper, to possess a (shipped-on-board) bill of lading, discussion arose in Working Group III on the need to maintain such a requirement. Views were pretty much divided between keeping the traditional approach and a new approach where the protected party would be named in the RR directly. The latter view prevailed, partly based on

the fact that the bill of lading is not a guiding line in the RR in general. The name is not used once in this new setting. Also, by naming the third parties the rules were, at least to my mind, clearly simplified compared with the present regimes. With this background in mind, article 7 states that the RR apply as between the carrier and the consignee, controlling party or holder that is not an original party to the charterparty or other contract of carriage excluded from the application of the RR. However, the RR do not apply as between the original parties to a contract of carriage excluded pursuant to article 6. The basic traditional protective concept has been maintained, but the concrete solution on defining third parties is different compared with the present regimes.

As to the geographical scope of the RR, it is necessary to return to article 5.1. For the RR to apply the contract of carriage must include international carriage. As the RR are maritime plus by nature it has been held appropriate that in multimodal operations involving a sea leg both the overall carriage and the sea carriage must be international. The one and same sea carriage must be international. In other words, two separate national sea carriages in two different states under the same contract of carriage does not suffice. There is of course no hindrance for contracting states to extend the application of the RR to national carriage or to extend the application of the RR otherwise on national legislative basis.

The geographical scope has also to do with the fact that there must be a sensible connecting factor to a Contracting State. The place of receipt, the port of loading, the place of delivery or the port of discharge must be situated in a Contracting State.

In this context it has been felt that there is no possibility to deal with certain other issues that could at least relate to the scope of application issue. Multimodal regulation in view of conflict of conventions is regulated in article 82. This provision becomes understandable when looking at the maritime plus nature of the RR in view of article 1.1 and article 26. As said, these specific matters have to be dealt with elsewhere.

### **3. Mandatory rules and freedom of contract**

#### **3.1. General provisions**

Ever since the U.S. Harter Act was introduced in the 1890's the debate has revolved around the need to protect cargo interests by certain mandatory minimum liability rules for the carrier, thus enabling efficient trading. This is, as is well-known, reflected in the Hague and the Hague-Visby Rules. The Hamburg Rules developed the issue somewhat bringing more clearly in the shipper's status compared with the older regimes. The original basis for mandatory minimum liability for the carrier was not only the above-mentioned protective needs, but also, which fact is nowadays too easily forgotten, to enhance the negotiability value of the bill of lading. An issued Hague bill of lading gave certain protection in view of carrier liability for third party bill of lading holders in addition to the value of the negotiability nature of the document as such. Since the Hamburg Rules ended the requirement of the use of bill of lading for application of those Rules, this latter aspect is not a very strong argument anymore as basis for requiring mandatory rules. The same is true for the RR. Once the protection of cargo interests remains relevant, there is on this point the problem that not all carriage of goods by sea today can be combined with the basic fact that the carrier is the strong negotiating party, while the shipper is not. In many trades the situation is the opposite. The world-wide commercial picture as basis of a policy line is thus fragmentary. One would in these circumstances presume that maintaining a mandatory system for the benefit of cargo interests is not of world-wide interest. On the other hand, the present regimes are not necessarily described properly by putting mandatory name tags on them. The fact is that the carrier benefits from ex lege exceptions to liability, such as the nautical error exception in the Hague and the Hague-Visby Rules, and limitation of liability as found in all the above-mentioned regimes. This means that such benefits do not even have to be included in the contract of carriage for them to operate. Whatever the real balancing substance of the present regimes is, the fact remains that in Working Group III it was never seriously discussed to create full freedom of contract for the parties and interests involved. In this way the preparatory approach was traditional indeed, be it that with the concept certain changes were made, such as abolishing the nautical error exception (as was already done in the Hamburg Rules) and increasing the limitation levels. But, the core idea of maintaining the mandatory nature of the new regimes had extensive consensus. However, to certain parts there was a breakthrough. The mandatory system would not cover all situations where the RR are applicable as such. What in the RR are called volume contracts are now in a specific situation as explained below.

But, first the basic mandatory system is explained once it was decided to maintain the traditional policy basis. The setting is found in the RR article 79. This article separates between carrier obligations and liability on the one hand and obligations and liability of cargo interests on the other.

In view of the mandatory system for the carrier, there was discussion on whether a one-way or two-way system would be accepted. The traditional approach is the first where the carrier would be required to maintain minimum obligations and liability. In other words his obligations and liability could always be increased by contract. The two-way system would have based the carrier's obligations and liability completely on the RR in the same kind of fashion as is true for road carriage under the CMR. Working Group III clearly felt that the traditional approach was appropriate. No relevant basis was found to support another line of policy. Article 79 creates a minimum mandatory system for the carrier where his obligations and liability are separately and explicitly mentioned. The core of the provisions does not change what one is accustomed to on the basis of the present regimes. The provisions in the RR are, however, more specified than before and hopefully clearer to anybody having to apply the provisions than before.

The reference in article 79 to "indirectly" excluding or limiting obligations and liability is now a clear statement on the fact that the carrier cannot circumvent the mandatory system by certain arrangements in the contract. For example, the carrier might not be able to agree validly on an applicable law clause taking any dispute outside the RR that without such clause would be applied.

Certain subcontractors are included in the RR system and it is necessary to cover them under article 79 as well. The covered subcontractor is in the RR called maritime performing party, as defined in article 1.6 compared with the definition of the carrier in article 1.4. A performing party, not being a maritime performing party, is not under the RR regime, but it has been necessary to define the first-mentioned for other reasons. The definition is found in article 1.6.

The obligations and liability of cargo interests are under the mandatory RR system in

accordance with article 79. Cargo interests are enumerated as being the shipper, consignee, controlling party, holder or documentary shipper. These persons are defined in article 1. For cargo interests, the RR function as a two-way system. According to article 79.2 the obligations and liability of cargo interests can neither be decreased or increased. The two-way mandatory approach for cargo interests is familiar from the Hamburg Rules. Otherwise, what has been said above about the carrier side is to applicable parts true for cargo interests.

In spite of the core points of the RR being mandatory in the above-mentioned sense, article 79 allows for non-mandatory rules by the wording “[U]nless otherwise provided in this Convention”. Certain particular provisions are of non-mandatory nature. One example is article 56 making many of the right of control provisions non-mandatory.

Certain additional matters concerning the mandatory nature of the RR and freedom of contract should be taken into account. For example, there are specific provisions on such issues in article 81 not, however, dealt with at this point.

### **3.2. The particular case of volume contracts**

As stated above, it can be questioned to what extent the traditional approach to mandatory rules is still valid. In some sources views have been expressed according to which there is no need in typical commercial relations to provide protective legislative rules without the contracting parties having the possibility to agree between themselves what their mutual risks are. It is no more a dominating fact that the cargo side is the weaker party in relation to the carrier.

Article 80, dealing with volume contracts, reflects to a certain degree this background, but it does not expand freedom of contract without certain preconditions.

The debate on the possibility to restrict the application of the provisions in their mandatory capacity in relation to certain kinds of service contracts arose due to the U.S. Working Paper 34 put forward for the 12th session of Working Group III in 2003. In this document the U.S. explained the background for its proposal and how the regulation would look.

The introduction of that proposal reads in paragraph 18 as follows:

“A key issue in the United States (and we believe in other parts of the world as well) is how the Instrument should treat certain specialized and customized agreements used for ocean liner services that are negotiated between shippers and carriers. As part of the overall package, the United States believes that this kind of agreement, which we refer to as an Ocean Liner Service Agreement (“OLSA”), should be covered by the Instrument, unless the OLSA parties expressly agree to derogate from all or part of the Instrument. A decision to derogate from the Instrument, however, would be binding only on the parties to the OLSA. There are differing views, both within the United States and internationally, on the option to derogate down from the Instrument’s liability limits. Nevertheless, the U.S. view is that the parties to an OLSA should be able to depart from any of the Instrument’s terms.”

OLSAs were explained to have derived from the possibility in the U.S. of competitively negotiating liner service contracts, a possibility that opened up towards the end of the 1990's. OLSAs do not relate to the tramp trade. When studying the proposal more closely, the conclusion is that OLSAs are framework contracts aiming to solve the transport needs and obligations as a package. Any single transport would not be a service contract.

OLSAs were thought by the U.S to have a special status in the respect that these contracts were proposed to fall under the scope of the Convention, but that the parties could specifically agree to derogate from all or part of the Convention’s provisions. The concern for the U.S was also that OLSAs should not fall outside the scope of application of the Convention.

At that stage the scope of application of the proposed Convention was planned to exclude certain contract types. According to Working Paper 32 article 2 (3), the proposed Convention would not apply to charter parties, contracts of affreightment, volume contracts, or similar agreements. Additionally it was proposed in article 2 (5)<sup>4</sup> that if a contract provided for the

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<sup>4</sup> Cf. HamburgR article 2 (4).

future carriage of goods in a series of shipments, the provisions of the proposed Convention would apply to each shipment to the extent that other articles more specifically would so state. The latter above-mentioned U.S concern relates to the possibility that the proposed Convention would have excluded too much.

The concept introduced by the U.S. gave rise to concern among many delegations in that the proposal might cause a serious deterioration of the status of small shippers and in that the term OLSA was difficult for many to place in the concept of contract of carriage. But, clear support was also expressed not accepting the dangers to shippers as maintained by others.

At one stage the text proposal included the idea of a stand-alone provision with a separate regulation of the intended OLSA-system. Gradually through informal consultations the idea emerged that an OLSA as understood and intended by the U.S. really was a volume contract, whereby the contracting parties agreed on more than one consignment. It was a question of a kind of a package deal with a framework contract covering the comprehensive setting. Individual carriages might in that concept be arranged as appropriate, but mainly on two lines. Either they were arranged through liner trade or through a chartering concept.<sup>5</sup> With this concept in mind it became clear that volume contracts should be implemented into the scope of application rules in order to reach the goal where mainly liner trade was under the new Convention. The extent of freedom of contract would be adjusted by a separate provision.

This systematic concept eventually prevailed. It was quite another matter to achieve reasonable consensus for the freedom of contract aspect. Some delegations approached the matter as a non-starter. Efforts in this respect to allow expanded freedom of contract should not in other words be accepted at all. In spite of total opposition in some quarters there was support to develop the freedom of contract concept in view of volume contracts.

During informal and formal consultations there were various views. A common basis was that the shipper should be informed properly on the contract conditions deviating from the

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<sup>5</sup> This basic concept of separating a framework contract from individual voyages has been regulated upon in the Nordic Maritime Codes, see the Finnish Maritime Code Chapter 14 section 47.1.

provisions of the Convention. The same protective need was of course important also for any third party, such as a consignee. What exact preconditions would apply was the target of, sometimes, deep disagreement. One main line of opinion was that the carrier should be allowed alternative routes for such information. The other main line of opinion was that freedom of contract should not be allowed at all by a contract of adhesion where exemption clauses were implemented in the contract without proper individual negotiations having taken place. The first line prevailed at the beginning and reached a majority of support. It was felt, however, that in order to gain support in a wider range than achieved so far in a matter of principle, further specification was agreed upon taking the final solution close to or even covering the second line of opinion.

Due to the very difficult situation with opposing views where reasonable compromise was not readily found, the provision setting the above-mentioned preconditions for freedom of contract in view of volume contracts is fairly complex. It also provides protection “with belts and suspenders”. In other words, it would seem that one protecting rule covers another. This was well understood in the Working Group, but, nevertheless, a secure setting was chosen, be it that the result in legal-technical terms is somewhat clumsy.

Even if the emphasis was on protecting the cargo side, it must not be forgotten that article 80 also covers the possibility to affect the shipper’s status and any other relevant person on the cargo side. Under the same conditions that are applicable to the carrier, it is possible to deviate from the two-way mandatory rules covering cargo interests. It is true that it is a carrier perspective that mainly underlies the text. But, the shipper’s position can be affected and the rules in this respect must be applied with that concept in mind.

Outside the above-mentioned protective result, it was generally accepted early on that some provisions in the Convention were of the nature that they could not under any circumstances fall under freedom of contract, as long as the Convention by its own rules was applicable. As article 80 covers both carriers and shippers, so also would these absolute mandatory rules, or “supermandatory” rules take both interests into consideration.

The policy aspect is thus clear. Then comes the matter of how this policy materializes in

article 80 itself. Simultaneously it is important to take into consideration that for jurisdiction purposes there are special provisions for volume contracts in article 67. In the following, as already stated, only main outlines are mentioned, but details are left out.

Article 80.1 sets the tone for freedom of contract. It includes important messages. There is of course the necessary reference to volume contracts and also a reference that the Convention must apply to the respective volume contract.

In order to understand this setting in article 80.1, it is necessary to look at the definition of contract of carriage in article 1.1 and the definition of volume contract in article 1.2. It can be noticed from these definitions that a volume contract is one type of contract of carriage. A contract of carriage must in turn provide for carriage by sea and may provide for carriage by other modes of transport in addition to sea carriage. If no sea leg is involved, the Convention does not apply, nor in that case the specific provision on volume contracts.

In looking at the definition of the volume contract it provides the message that the contracting parties have further operations in mind than merely one sea carriage. There are three requirements for a contract to fulfil the definition in article 1.2, meaning that the contract provides for

- 1) a specified quantity of goods,
- 2) in a series of shipments,
- 3) during an agreed period of time.

The specification of the quantity of goods may include a minimum, a maximum or a certain range.

An unspecified amount of goods would not result in a volume contract. The series of shipments might be consecutive or not. The period of time is not limited. It can extend from a few days to several years.

Opponents to the definition have stated that the mandatory rules can too easily be pushed aside by mere contract formulation. Thus, the parties could agree to ship two containers one

the first day, the second the next day. This would be a volume contract. To this the sensible reply is that when a judge can draw conclusions that the intention is not to carry on the basis of a real package deal, but to enable a certain degree of freedom of contract by circumvention, any exemption clause could on that basis be set aside. In this case the reference in article 79 to indirect exclusion, limitation or increase is a sound basis for such discretion. There is no clear-cut line and the result is dependent on each individual case. Further, it is hard to believe that any carrier would make the effort to expand its freedom of contract for mere, say, two containers considering the numerous requirements set forth in article 80. It was proposed during the negotiations that the number of containers would be specified in the definition of volume contracts, but that kind of exercise is futile as individual situations vary.

As a volume contract in the sense of the RR is by definition a contract of carriage the ordinary provisions on scope of application are relevant for volume contracts as well. This means, for example, that a volume contract based on non-liner carriage is not under the RR at all, in accordance with article 6 (2), except for the protection of the third party. If a volume contract is based on liner carriage the RR will apply, in accordance with article 5 (1) compared with article 6 (1). The RR do not have any reply to a mixed volume contract, where the individual voyages are performed partly in non-liner trade and partly in liner trade, but the correct approach would in such cases be that the individual voyage will guide the application issue.

Article 80 applies only to volume contracts under the RR. Once applied, the RR give a certain range for freedom of contract as stated in article 80.1.

The possibility to deviate from the provisions in the RR, to the extent that those provisions otherwise would be mandatory, is regulated in article 80.2. Paragraph 2 covers the carrier and the shipper by reference to paragraph 1. The status of a third party is regulated in paragraph 5.

The exact wording in paragraph 2 was contentious at the preparatory stage. There are four preconditions and all of them must be fulfilled for the provisions in the RR not to apply in a mandatory fashion.

Article 80.2.a) requires that the derogation must be set forth in the volume contract in form of

a prominent statement. Thus, the statement must be clear. In comparison, the Oxford Concise Dictionary states that the word “prominent” means “particularly noticeable”.

In subparagraph b) there is the requirement that the volume contract is either individually negotiated or prominently specifies the sections of the volume contract containing the derogations. The formulation was discussed several times during the sessions. The alternative was whether instead of an “or” there should be an “and” the latter resulting in both requirements being fulfilled. The “or” alternative was finally accepted and did not leave much disagreement due to what was introduced in subparagraph c). The first part of subparagraph b) requires that any derogation must be properly negotiated and not just incorporated in standard form. The alternative second part of subparagraph b) requires a prominent or particularly noticeable specification of the sections of the volume contract containing the derogations.

Subparagraph c) was introduced at a very late stage of the consultations. There were strong demands aiming to guarantee that shippers, particularly small shippers, would not need to go along derogations that were standardised one way or another, or nearly standardised. Subparagraph b) was considered by many to produce sufficient protection, but others thought that more was needed in this respect. In particular, it was considered necessary to base the derogation on some individual show of will. It also became apparent that many delegations thought that a shipper should be left with a real choice in any case by either staying with the provisions of the RR or accepting derogation. These particular demands were met and the end result was considered satisfactory in the way that sufficient consensus existed. The result of the prevailing text in subparagraph c) is in practice that the shipper will be offered two freight rates, one in case of the RR provisions applying, the other in case of derogations. No other conclusion is possible from the text in subparagraph c).

According to subparagraph c), the shipper must be notified that he has a real choice as mentioned above and he must on the basis of that notification be able to choose. Whether such real choice has been provided or not must be decided upon separately in each individual case.

The same late result is true for subparagraph d). It was clear early on, however, that an incorporation of a derogation clause from another document should be disallowed. This is included in the first part of subparagraph d). While subparagraph b) requires individual negotiations only as an alternative and while the first part of subparagraph d) only disallows reference, the second part of subparagraph d) requires proper negotiations for derogation and as an only alternative. The second part of subparagraph d) will take away a lot of the relevance of the first part of subparagraph b), but this is the compromise and the result, whether it is in legal-technical terms appropriate or not. The use of the term “contract of adhesion” might be unknown or unclear in some jurisdictions, but it was included based on a fairly common understanding of the concept. This means that it is not according to article 80.2.d)ii) allowed just to use standard terms or boilerplate terms for derogation that are not freely bargained, but there must be a sufficient individual element involved for including a derogation clause in the volume contract.

In all respects the whole of paragraph 2 must be read in light of article 3 according to which the relevant communication has to take place in writing or by electronic communication as further specified in article 3.

Paragraph 3 seems to overlap many parts in paragraph 2. Again, this is a further clarification on the preconditions for freedom of contract.

It was mentioned in the background to article 80 above that certain provisions were thought to be of such fundamental importance that derogation would not be allowed in a volume contract even if all the requirements in article 80 would have been fulfilled. These supermandatory rules cover two references concerning the carrier and two references concerning the shipper. Perhaps the most important supermandatory provision is that the carrier has a non-delegable duty to provide and maintain a seaworthy ship according to article 14.a) and b). The other relates to limitation of liability in article 61.

There are supermandatory rules also concerning the shipper’s obligations and liability.

Paragraph 5 deals with the derogation possibilities in relation to any person other than the

shipper. At the preparatory stage it was considered understandable that the same preconditions that were valid for derogation between the carrier and the shipper could not prevail in relation to third parties who had had no power to exercise direct influence on the contract of carriage in form of a volume contract. It was not relevant what indirect influence could be exercised by the third party via the shipper, for example, through the contract of sale.

There are specific requirements in paragraph 5 aiming to take into consideration the specific status of third parties and to provide protection respectively. The chapeau shows that the requirements mentioned in view of the shipper - carrier relationship must be satisfied. Added to this, there are specific rules in the two subparagraphs.

Article 80.5.a) requires that prominent, i.e. particularly noticeable, information has been received by the third party on the fact that the volume contract derogates from the Convention. When this information has been received it is also required that the third party has given its express consent to be bound by such derogations. It does not suffice to interpret consent into this legal relationship, for example, by some kind of construction based on implied consent. The express consent is bound to form in accordance with article 3. Such consent must be given in writing or by corresponding electronic means and the consent must due to the requirement of “express” be clear.

Paragraph 5 has no specification on when the express consent shall be provided. This is up to the third party. From the carrier’s point of view it is wise policy to possess this consent at the time of conclusion of the contract of carriage, if possible. Any time subsequent to such conclusion gives the third party full option. He may at that time refuse express consent leading to application of the RR between the carrier and the third party.

Once there already exists a right to claim in damages the mandatory rules hardly need to govern the relationship between the parties. It is, for example, quite possible that the parties agree on compensation which does not reach the RR-based amounts that the third party would be entitled to. Such procedure is of course quite common in practice. A settlement agreement is not dependent on the provisions of the RR. Comparison can be made with article 72.1 in view of jurisdiction agreements after the dispute has arisen.

Paragraph 5 subparagraph b) sets up restrictions on the express consent stating that it does not suffice to set forth such consent in a carrier's public schedule of prices and services, transport document or electronic transport record.

In all respects the whole of article 80.5 must be read in light of article 3 according to which the relevant communication has to take place in writing or by electronic communication as further specified in article 3.

If there is dispute on the validity of any derogation it is important to clarify who has the risk of providing proper evidence and thus proving a particular point. Article 80.6 clarifies the matter of burden of proof. It is stated in the provision that the party claiming the benefit of derogation bears the burden of proof that the conditions for derogation have been fulfilled. It seems that in most jurisdictions such burden of proof would apply in any case. In order to enhance harmonization, a specific provision was, nevertheless, included in the RR.

The Hague and the Hague-Visby Rules have no similar exits from their mandatory systems to that of the RR. The Hamburg Rules article 4.4 has a reference to carriage of goods in a series of shipments, but that provision is not comparable with the RR article 80.

#### **4. Other issues and final remarks**

The explaining of scope of application and freedom of contract is not comprehensive. There are other principles and provisions that are important in order to understand the RR properly. These specific issues cannot be dealt with in detail.

It is, however, necessary to mention that the carrier's subcontractors called maritime performing parties are liable directly to the cargo interests as regulated in the RR. In addition to the definition of the maritime performing party in article 1.7 making, for example, stevedores and port operators to fall under the definition, the core provision is found in the RR article 19. According to article 19.1 a maritime performing party is subject to the obligations and liabilities imposed on the carrier under the RR and is entitled to the carrier's defences and limits of liability as provided for in RR. For this provision to apply there are

further conditions in article 19.1 connected with the geographical aspect. It was not possible to have the same provision for the carrier in article 5.1 and for the maritime performing party in this respect. The maritime performing party has to be linked to a Contracting State as specified in article 19.1. The basic substantive liability issues for the maritime performing party are also found in article 20.

Scope of application is also in a certain way linked with jurisdiction issues in the RR Chapter 15 and arbitration issues in the RR Chapter 16. The only observation at this point is that when a State ratifies the RR, Chapters 15 and 16 are not included. They are only included if a statement is made by the Contracting state in accordance with article 74 , 78 and 91.

As has been seen with scope of application and freedom of contract many controversial issues have been dealt with and a sufficient consensus has been reached. The same is true for other parts of the RR. It can be said that under the circumstances the best compromising result has been achieved at this point of time with the particular delegations that took part in Working Group III negotiations. All routes and alternatives were tested. Perhaps another time and another group might have concluded otherwise. The reality is, nevertheless, that the UNCITRAL Commission approved of a Draft and a Convention was since adopted by the UN General Assembly. This is what the international community now has to live with and adjudge in terms of what the next step is. Shall the Convention be signed or not? Shall the Convention be ratified or not? The underlying policy issues are not uncomplicated even at the last stages in deciding the fate of the Convention. The RR aim for global solutions. When sea or air carriage is involved I see the global approach as the only proper alternative. It would be totally undesirable for either of these forms of carriage going regional. Concern must be expressed on what particularly the European Union might do. Its only chance is to accept regional solutions - as said, not desirable for shipping.

The RR must be understood to be a compromise. There are always some other ideas on what the best solution should have been, but to implement one's own opinions, and one's own opinions only, on the global arena with real effect and consensus is more easily said than done. The RR are undeniably a complicated piece of legislation, but they are the only modern international approach now and for many years to come. Should the RR internationally fail,

one may ask what, if any, would come instead. Regional solutions? National solutions? A new global convention? To hope for the last-mentioned development now and after the RR have been adopted is to my mind completely unrealistic. The first two are not desirable. I hope that the RR are looked at with these serious macro perspectives in mind.

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