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S C H E L L E N B E R G W I T T M E R

A v o c a t s

## **New Convention to Replace the Hague Rules of 1924 on the International Law of Carriage of Goods by Sea**

On 26 June 2008, the UNCITRAL Assembly finalized the draft of a new Convention on the Carriage of Goods by Sea. This is intended to replace the existing Conventions such as the well known Hague Rules of 1924 (incl. their Protocols of 1968 (Visby) and 1979 [SDR-Protocol]) as well as the much debated Hamburg Rules of 1978, which are applicable today only to a very restricted geographical scope. The new Convention is much more than a mere revision of the old bodies of law, as it extends its scope of application to cover issues far beyond the topics covered in the existing Conventions: while the liability regime remains one of the key topics, the Convention will also deal with issues such as door-to-door transportation (e.g. for container transportation by sea and land), all current variations of transport documentation (such as bill of lading, sea waybill or electronic documentation). It will also regulate the liability of the shipper in more details and set new rules on the duties of the parties when controlling the goods in transit and when delivering the goods at destination. The list of the topics alone shows that the new Convention is sought to be a Convention not just on liability (as the prior Conventions were) but a Convention regulating the entire contractual relationship between the carrier and the shipper.

It will require 20 ratifications for this Convention to enter into force. The trade and shipping industry has therefore sufficient time to prepare itself for this new body of law. However, the earlier the industry engages in the process of possible adaptation of its trade terms and shipping documentation, the better.

The main novelties of the Convention are the following:

- **Scope of application:** The Convention extends to the entire period of control of the carrier over the goods, i.e. in container trade from “**door-to-door**”. One single international legal instrument will treat the contract as one and single contract and apply in principle the same rules throughout the period of the performance of the contract.
- The **liability system** follows narrowly the Hague Rules but clarifies the system of the burden of proof and enshrines in the body of the Convention many interpretations of The Hagues Rules that had been established by the courts of the major jurisdictions. An important development is the deletion of the “error in navigation” and the extension of “due diligence to make the ship seaworthy” to the entire period of maritime transportation, making this obligation a continuous one.
- **Maritime performing party:** Modern transportation law grants the right to the cargo claimant to include the “actual” carrier (i.e. the carrier actually (not just contractually) carrying the goods for all or parts of the transportation) into a cargo dispute. The new

Convention follows this line but restricts its application to all the entities having undertaken to handle and care for the cargo within the strict maritime period of transportation. This, on one hand, will bring these parties in the scope of the Convention (and thereby possibly in the cargo claims litigation) but on the other side will also protect them with the privileges provided by the Convention (i.e. the limitation of liability).

- **Limitation of Liability:** The level of limitation of the carrier's liability to be included under the new Convention was a subject of discussion during the assembly . While some delegations favoured the current Hague Visby Rules level (2 SDR / kg and 666.67 SDR per package), others pushed for a limitation of the levels of the CMR or Montreal Conventions applicable for road or air transport (8.33 SDR and 17 SDR / kg respectively). In a compromise, the level of 3 SDR / kg or 875 SDR per package was agreed and confirmed. This is slightly above the level of the Hamburg Rules of 1978 but still clearly in the range of a maritime Convention. First consultations with the international insurance industry show that such limits would be acceptable and also supported by the P&I Clubs (in exchange to other benefits and clarifications the shipping industry will be able to rely on).
- **Delay:** A new element of the Convention constitutes the carrier's liability for delay, an aspect of liability which so far under the Hague Rules was left to national law . The new Convention leaves it to the parties whether to agree on a time frame or not. If they set out such an agreement, then delivery after the agreed time will constitute a delay and the damages resulting from this delay would become recoverable.
- The **shippers' responsibilities** and liabilities are set out in more details particularly in connection with dangerous cargo.
- **Transport documents** admitted under the Convention are bills of lading, sea waybills or their electronic equivalent. The role of those documents in connection with the **transfer of rights** as well as with the **right of control** of cargo interests over the goods in transit are for the first time in maritime transport history co-ordinated on an international level.
- The rights and duties of the parties (shipper, carrier, holder, consignee) **at destination** are now regulated and harmonized on an international level. It is now clearly established that the cargo side has the duty to take over the goods, following the rules set up in the Convention. This includes (as currently established by most national laws) the presentation of one original bill of lading at destination. Where the consignee is not willing or able to take over the delivery pursuant to these rules, the carrier has now a clear agenda how he should receive instructions and discharge his duty in order to deliver the goods at destination. The much debated issue of "**LOIs for missing documents**" can now – at least on a documentary scale - be solved, as the parties have the right to specify in the bill of lading that the surrender of the documents is not necessary under all circumstances. Whether and how the trade and their banks will

make use of this possibility is however unclear and will only be answered by trade practice and trade finance practice after the Convention has entered into force.

- The new Convention provides rules for **jurisdictions and arbitration** and attempts to bar the possibility of exclusive jurisdiction clauses (see also our GSTA Newsletter of May 2007). The chapter is however optional at ratification; it will therefore depend on the Contracting State whether it intends to subject the issue of jurisdiction and arbitration to the mandatory regime or not. The delegation of Switzerland (of which the author of this short newsletter was a member) always defended the freedom of contract in relation to the contract of carriage and it is therefore likely that a Swiss ratification will not make use of this “opt in” option on this particular point.
- An interesting possibility for shippers handling regularly considerable quantities of goods is the option given by the new convention to enter into **volume contracts**, which grant a wide contractual freedom and constitute a good possibility to consider individual needs and expectations in a more flexible way than before.

The final version of the Convention will be put before the UN Assembly this fall. In September 2009 the Convention will be inaugurated in Rotterdam. There, the Member States are invited to sign the convention. This merely ceremonial event must however be followed by full ratifications by a sufficient number of States.

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