

# The Future of International Unification of Transport Law

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Already in 1973 I saw fit to express some thoughts as to the prospects of harmonizing the rules relating to the various modes of transport.<sup>1</sup> In particular it could be noted that maritime law differed considerably from the law of the other modes. The carrier of goods by sea enjoyed particular exemptions (such as the exemption for error in navigation and the management of the vessel and of fire) and further much lower monetary limits of liability than applied to the other modes. At that time, efforts to create a new régime had already been initiated under the auspices of UNCITRAL and this resulted in the so-called Hamburg Rules 1978<sup>2</sup> and somewhat later the 1980 UN Convention on Multimodal Transport of Goods. The Hamburg Rules have entered into force but on a limited scale and the multimodal transport convention has not entered into force and will presumably remain unsuccessful in its present form.

Within the law of freight forwarding the 1967 UNIDROIT Draft Convention met opposition by the freight forwarders' world organization, FIATA, and did not advance to a diplomatic conference. Efforts within FIATA were undertaken to create general conditions for worldwide acceptance. This resulted in the 1997 FIATA Model Rules for Freight Forwarding Services which, it seems, only serves as a model in order to indicate the desirable level of liability to be used in national freight forwarding conditions. In particular, it should be noted that the freight forwarder is liable as carrier when he actually performs the carriage or when "he has made an express or implied undertaking to assume carrier liability" (Art. 7.1). The efforts to further define what was meant by "implied undertaking" failed. Also, the so-called "per incident limitation", which may not exceed a certain total amount, has in the Model Rules been intentionally left open so it is for the freight forwarders in the country where the principles of the

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<sup>1</sup> Ramberg, J. *The law of carriage of goods – attempts at harmonization*, Scandinavian Studies in Law 17, Stockholm 1973 s. 211-252 and European Transport Law 1974 s. 2-43.

<sup>2</sup> *The 1978 UN Convention on the Carriage of Goods by Sea*.

Model Rules are to be applied to insert an appropriate amount (Art. 8.3.3).<sup>3</sup> Although there is a considerable reluctance on the part of freight forwarders to accept carrier liability,<sup>4</sup> they required more consistency between the marketing of their services and their liability. Thus, already in 1971, the first version of the FIATA Combined Transport Bill of Lading was introduced. By issuing that document the freight forwarder expressly undertook liability as carrier. The development in the Nordic countries followed the same path and already in the Nordic Conditions of 1974 the notion of the freight forwarder as a contracting carrier was accepted. The level of liability expressed in the FIATA Model Rules of 1997 has been accepted and even exceeded in the Nordic Conditions 2000 (NSAB 2000).

In the 1980s, it seemed as if the development pointed at a broader international unification within the whole field of transport law. But worrying signs were soon to appear. The failure of the Hamburg Rules to effectively replace the old system evidenced by the 1924 Brussels Convention on Bills of Lading (The Hague Rules) and the 1968 Protocol (The Hague/Visby Rules) as well as the total failure of the 1980 Multimodal Transport Convention triggered an unfortunate disunification of transport law. Therefore, in 1990, I had reason to put a question-mark after the title used for my contribution to a Festschrift to Professor Lars Hjern: *Unification of Maritime Law – a success story with happy end?* In closing my presentation I suggested that a fruitful co-operation between States, governmental and non-governmental organizations and affected interests will be required in order to maintain and further enhance what so far may be regarded as a success story within the field of the unification of maritime law.<sup>5</sup> But, unfortunately, the co-operation has since then been far from fruitful.

There is presently an on-going disunification of the international maritime law initiated in 1993 with the legislation of the People's Republic of China seeking to bridge the Hague and Hague/Visby Rules with the Hamburg Rules. A more modest approach is evidenced by the 1994 Scandinavian Maritime Codes retaining the Hague and Hague/Visby Rules system but with supplements taken from the Hamburg Rules.<sup>6</sup> Further, a completely new approach is evidenced by the proposed Carriage of Goods by Sea Act in the United States seeking to embrace in a new notion of “carrier” everyone involved in the transportation of the goods from point to point and restricting jurisdiction and also arbitration exclusively to courts and arbitral tribunals in the United States. The particular exemptions which the carrier enjoys under the Hague and Hague/Visby Rules, e.g. error in navigation and the management of the vessel as well as fire, have

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<sup>3</sup> See further Ramberg, J. *The FIATA Model Rules for Freight Forwarding Services*, *Il diritto marittimo* 1997 s. 284-291 and idem *Unification of the Law of International Freight Forwarding*, *Uniform Law Review* 1998 s. 516.

<sup>4</sup> See J.G.Helm, *Speditiionsrecht*, Berlin and New York 1973 s. 77 pointing out that “Die Anwendung des Frachtrechts auf die Spedition zu festen Kosten erweist sich angesichts seiner starken Zersplitterung als nicht sehr praktikabel”.

<sup>5</sup> *Festschrift to Lars Hjern, Studies in International Law*, Stockholm 1990 s. 513 at s. 524.

<sup>6</sup> See Ramberg, J., *New Scandinavian Maritime Codes*, *Il diritto marittimo* 1994, s. 1222-1224.

been deleted. But as a compromise the burden of proving negligence on the part of the carrier and his servants rests upon the claimant.<sup>7</sup>

The traditional system of liability, however, is retained in the 1991 UNCTAD/ICC Rules for Multimodal Transport Documents which have been incorporated in the 1992 FIATA Multimodal Transport Bill of Lading as well as the so-called MULTIDOC 95 issued by the Baltic and International Maritime Council (BIMCO).<sup>8</sup>

Needless to say, the situation as it appeared towards the end of the 1990s was far from satisfactory. The European Union (DG VII) initiated a study in order to assess the possibilities of finding appropriate solutions.<sup>9</sup> Also, the Economic Commission for Europe (Economic and Social Council), in September 1999, discussed the matter in a particular Working Party on Combined Transport (Trans/WP.29/1999/2). There, the need is stressed to achieve: “an international legal régime providing easily understandable, transparent, uniform and cost-effective liability provisions for all relevant transport operations, including transshipment and temporary storage, from the point of departure to the point of final destination”. It is hard to disagree with that objective.

Recent transport law legislation in Germany resulted in the reformed part of the *Handelsgesetzbuch* dealing with carriage, freight forwarding and warehousing in an Act dated 25 June 1998. This represents a considerable improvement.<sup>10</sup> However, the effect of the legislation is basically limited to domestic transports, since Germany retains its ratification of the international conventions relating to the different modes of transport. Also, in cases where it can be established where the loss, damage or event which caused delay in delivery occurred, the liability of the carrier shall be determined in accordance with the legal provisions which could apply to a contract of carriage covering this leg of carriage (Section 452 a evidencing the so-called “network liability”-principle). It should be observed, however, that when the freight forwarder is deemed liable as carrier (Sections 458-460 of the new Act dealing with “Selbsteintritt”, “Spedition zu festen Kosten” and “Sammelladung” respectively), he is according to Section 461 liable as carrier and, in such case, he cannot avoid that liability except according to Section 466 in the same manner as is possible for a carrier according to Section 449 (see further on this below).

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<sup>7</sup> See Asariotis and Tsimplis, *The proposed US Carriage of Goods by Sea Act*, *Lloyd's Maritime and Commercial Law Quarterly* 1999, s.126.

<sup>8</sup> See Ramberg, J. *the UNCTAD/ICC Rules for Multimodal Transport Documents – Genesis and Contents*, Essays in honour of Hugo Tiberg, Stockholm 1996 s. 513-523 and idem, *The Law of Freight Forwarding and the 1992 FIATA Multimodal Transport Bill of Lading*, publ. by FIATA, Zürich 1992.

<sup>9</sup> Asariotis, Bull, Clarke, Herber, Kiantou-Pampouki, Morán Bovio, Ramberg, de Wit and Zunarelli, *Intermodal Transportation and Carrier Liability*, June 1999.

<sup>10</sup> See Herber, R. *The New German Transport Legislation*, *European Transport Law* 1998 s. 591-606.

The aforementioned Working Party on Combined Transport set up by the Economic Council for Europe concludes that “a new attempt had to be made to arrive at internationally uniform and mandatory legislation on liability in international transport based on the existing unimodal liability régimes”. This, it is suggested, should be at the global scale and not restricted to sub-regional or regional areas. Also, the new régime should not exclude some modes of transport, such as air or maritime transport, given the increasing integration of all modes of transport into the international logistic chain. The new régime should be mandatory without possibilities for the parties to opt out. But, one may ask, is this objective really feasible? I had reason to consider this matter on some occasions in the 1990s. In a *Festschrift für Walter Müller*, Zürich 1993, I did recognize the need for protection against risks in so-called adhesion contracts which do not provide any real possibility for the customers to negotiate better terms but, at the same time, I suggested a departure from the traditional methodology considering the complexities and the unwillingness of merchants to subject themselves to mandatory régimes. Indeed, it is appropriate to show the carriers and their customers the same confidence as parties to international contracts of sale and to combat unfair contract terms by the “new right” of courts of law to do so.<sup>11</sup> If so, it would indeed be possible to establish a uniform common carrier liability régime.<sup>12</sup>

An interesting new methodology is signalled in the amendments to the *Handelsgesetzbuch* of 25 June 1998 mentioned earlier. Here, in Section 449, on “*Abweichende Vereinbarungen*” it is permitted to depart from the mandatory rules on liability but in principle “only by an agreement reached after detailed negotiations, whether for one or several similar contracts between the same parties” (“... im einzelnen ausgehandelt ist”). With respect to monetary limits a choice of limits between 2 and 40 SDRs per kilo is allowed if the amount “is given a prominent appearance by a special printing technique”. Also, an amount may be chosen if it is less favourable to the user of the standard form contractual conditions than the amount provided for in Section 431 where the monetary limit of the CMR Convention for International Carriage of Goods by Road (8.33 SDRs) appears.

Theoretically, the methodology to disallow agreements on limitations of liability by standard form contracts rather than by “detailed negotiations” is correct, since it quite rightly recognizes the disappearance of real contractual intent in modern contracting techniques with standard form contracts and the exchange of electronic messages. A re-establishment of the traditional requirement of real contractual intent is understandable and, if such real intent could be proven, the important principle of freedom of contract is recognized even in the field of transport law. But, one might ask, how is it envisaged that this would work in practice? Whether we like it or not we are quickly moving

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<sup>11</sup> See Ramberg, J. *Freedom of Contract in Maritime Law*, *Festschrift für Walter Müller*, Zürich 1993, s. 171 at s. 184 et seq.; see also P.S.Atiyah, *Freedom of Contract and the New Right*, The 1998 Cassel Foundation Lecture published as No. 20 of the series of publications edited by the Law Faculty of the Stockholm University, Stockholm 1989.

<sup>12</sup> See Ramberg, J. *Swedish Maritime Law Association*, Publ. 73, Stockholm 1997 s. 1-5.

into the “paperless society” and, as the 1996 UNCITRAL Model Law on Electronic Commerce demonstrates, we have to accept the consequences. In practice, the permitted departure from the mandatory liability rules becomes difficult to achieve if “detailed negotiations” are required, since carriers and their customers will normally not engage in such activity. Thus, the permitted exemptions from or limitation of the carrier liability laid down in the *Handelsgesetzbuch* for all practical purposes seem to represent a lip-service to the paradigm of freedom of contract without any significant practical importance. But if, which remains to be seen, a detailed “electronic data interchange” would qualify as “detailed negotiations” we seem to have reverted to a situation where real contractual intent is again extinguished simply due to the unwillingness of the contracting parties to lose time by digesting the mass of words appearing on the computer screen as the functional equivalency of words used to evidence “detailed negotiations”.<sup>13</sup>

By necessity the future methodology must rest upon standardized contracting techniques. Thus, it may be a better option to seek broad international agreement on an all-embracing convention setting forth an *over-riding* liability régime with a strict liability without monetary limits which both parties could accept by “opting in” or, alternatively, which would apply unless one of the parties would reject it by “opting out”.<sup>14</sup> An easily understandable, transparent, uniform, cost-effective and all-embracing system on a global rather than national, sub-regional or regional level is otherwise unattainable, since any mandatory convention with extended carrier liability, if at all possible to achieve, would share the unfortunate fate of the 1978 Hamburg Rules and the 1980 Multimodal Transport Convention.<sup>15</sup>

In my view, it would not be difficult to implement an international convention which, like the amendments of the German *Handelsgesetzbuch*, would permit the contracting parties to agree on a more workable system than under the contemporary unimodal conventions. There is no need to worry about a more stringent liability than a liability eroded by exceptions and limitations. If the carriers would like to enjoy such benefits they merely would have to opt out of the convention. It may well be that competition between carriers would induce them to abstain from opting out and that may in itself be a reason to dislike a non-mandatory convention as it would allow more sophisticated competitors to get the upper hand. This, indeed, explains the remarkable art. 41 of CMR which prohibits an extension of the carrier’s liability in favour of the customer. It would seem, however, that provisions such as art. 41 of CMR would be wholly incompatible with modern principles relating to restraints of trade, not only under the Treaty of the European Union but also under competition laws of other regions and countries.

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<sup>13</sup> See concerning the concept of “functional equivalency” required to replace paper documents, Hultmark, C. *Elektronisk handel och avtalsrätt*, s. 21 et seq.

<sup>14</sup> See Ramberg, J. op. cit. note 12.

<sup>15</sup> The solution to establish an over-riding régime with opting in or opting out possibilities is for this reason recommended in the EU study referred to in note 9 s. 25, 29 and 30.

Any carrier wishing to avoid exposure under an extended liability régime would, of course, nevertheless be subject to any traditional liability governing under national law or any international convention. Introducing a new “over-riding” liability régime as aforesaid would not hamper any necessary modernization of the unimodal conventions, such as the modernization envisaged by the CMI in co-operation with UNCITRAL i.a. dealing with transport documentation, replacement of paper with electronic transfer of data, the shipper’s liability and various other important issues. But any such modernization of unimodal conventions should as far as liability for loss of or damage to the goods is concerned rest on the present “liability level” in order to enhance worldwide ratification. There is no reason to follow the example evidenced by the 1999 Montreal Convention replacing the 1929 Warsaw Convention for carriage of passengers and goods by air, since with respect to air transportation the liability for carriage of passengers has strongly influenced the liability for carriage of goods as well. It may well be that the 1999 Montreal Convention would gain worldwide acceptance but, in my view, the probability that the same would apply to any other unimodal convention extending liability is remote.

A system based on the “opting out-technique” would have to define the situations falling under the convention. Here, as with the 1980 Multimodal Convention, it is necessary to avoid a scope of the convention overlapping the unimodal conventions. Provided that a definition making the contract of carriage *sui generis* could be achieved any such overlapping would be avoided. Possibly, the scope of the convention could be limited to cases where a person on his own behalf (as principal and not as an agent) agrees to perform or to procure the performance of transport without identifying the mode or modes to be employed in order to carry the goods from point to point (so-called “unnamed transport”). If the scope of the convention is defined as aforesaid it would also cover freight forwarders, if they fail to make a contract of agency rather than a contract where they act as principals in the transaction. Indeed, it would with such a convention be possible to kill two birds with one stone, since at least freight forwarders operating as logistic transport providers would finally be subjected to an international legal régime. In view of the involvement of UNIDROIT with the 1967 draft convention on forwarding agency as well as the so-called TCM-draft preceding the 1980 Multimodal Transport Convention it would, as a first step, be appropriate to initiate the envisaged international convention by Round Table conferences under the auspices of UNIDROIT.