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Geneva, 9 November 2007

## **IRU position on the proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations including those concerning road transport**

IRU Position adopted by the General Assembly held in Geneva on 9 November 2007.

### **I. ANALYSIS**

The IRU is concerned about the consequences on the road transport industry which could result from the adoption of a proposal for a Regulation of the European Parliament and of the Council aiming at replacing the Convention on the law applicable to contractual obligations (Rome, 19.06.1980). This proposal would, among other things, change rules for the conflict of laws in the framework of the application of a contract of carriage.

Indeed, the enclosed analysis demonstrates that the draft Regulation contradicts the provisions of:

- international private law (CMR Convention, CVR Convention, Vienna Convention of 1969),
- international community law existing in the area of transport (Regulations on cabotage of goods and passengers)
- national legislation of certain EU Member States which incorporated the CMR Convention into their national legislation.

Keeping the provisions of this project as such and their potential implementation could expose the EU Member States to an important violation of international private law rules and damage the satisfying rules which have existed in the area for many years.

### **II. IRU POSITION**

#### **1. INTRODUCTION.**

The International Road Transport Union (IRU) studied the draft Regulation of the European Parliament and of the EU Council aiming at replacing the Convention on the Law applicable to Contractual Obligations (Rome, 19.06.1980). This draft Regulation was published on 15.12.2005, under reference 2005/0261 (COD). Since then this draft is being revised, so the present observations of the IRU refer to the last public version of the proposed amendments to the initial draft. This version was published on 27 June 2007 under reference 11150/07.

IRU, as the road transport industry's world representative whose mandate consists in - among other things - contributing to the facilitation of road transport notably through the unification and simplification of the regulations and practices relating to domestic and international road transport, considers that it is its duty to react on certain points of the draft Regulation mentioned above dealing particularly with its application to contracts of carriage, because the current content of these points could seriously hinder the harmonized application of the existing provisions.

The first part of the present note lists the already existing provisions of international and community legal tools concerning particularly the choice of the laws applicable to the contract of carriage. The second part is dedicated to the analysis of the draft Regulation and to the impact that this draft could have on road transport. The third part contains the conclusions as well as IRU's proposals to modify the Regulation, in line with the already existing legal provisions applicable to road transport.

## **2. EXISTING PROVISIONS CONCERNING THE CHOICE OF LAW**

### **(a) International and national carriage of goods by road**

The 26 EU Members (except Malta) have joined the Convention on the Contract for the International Carriage of Goods by Road (CMR Convention) of 19.05.1956, elaborated under the auspices of the United Nation's Economic Commission for Europe (UNECE).

According to Article 1 of the CMR Convention, all the contracts for the international carriage of goods by road – destined to or coming from at least one of the Contracting Parties, are subject to this Convention irrespective of the place of residence and the nationality of the parties. Thus a uniform implementation of the law is ensured between the Atlantic and the Pacific.

It is important to note that several Contracting Parties, among which some EU Members, have made compulsory the implementation – either fully (for example Austria and Belgium) or essentially (for example Germany, Spain) – of the CMR Convention to the national contract of carriage, including the rules concerning the applicable law stipulated by the Convention.

As far as applicable law is concerned, the CMR Convention foresees in particular that:

- the liability of the carrier by road for damages caused to the goods by the other means of transport is subject to the law governing this other means of transport if the damages can be attributed neither to the road carrier nor to events that occurred during the road part of the journey (art. 2 of the CMR),
- the replacing of the signatures of the carrier and of the sender by stamps or printed signatures is governed by the legislation of the country where the CMR consignment note is established (art. 5.1 of the CMR),
- the sale of the goods refused by the consignee or that cannot be delivered to the consignee, in line with the contract of carriage, is governed by the law or custom of the place where the goods are situated (art. 16.5 of the CMR),
- the carrier may dispose of goods that were lost and recovered in accordance with the law of the place where the goods are situated (art. 20.4 of the CMR),
- the value of the goods lost or damaged is calculated according to the law at the place and time at which they were accepted for carriage (art. 23 of the CMR),
- the evaluation of the fault of the carrier equivalent to willful misconduct is made in line with the law of the court or tribunal seized of the case (art. 29 et art. 32.1 of the CMR). In the

absence of choice of law, he is competent (art. 31 of the CMR) if his place of residence is the place where:

- (i) the defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made,
  - (ii) the place where the goods were taken over by the carrier or the place designated for delivery is situated.
- the suspension and the interruption of the period of limitation shall be governed by the law of the court or tribunal seized of the case (art. 32.3 of the CMR)

**(b) International carriage of passengers**

Latvia, the Czech Republic and Slovakia have joined the Convention on the Contract for the International Carriage of Passengers and Luggage by Road (Convention CVR) of 01.03.1973, elaborated under the auspices of the UNECE. According to Article 1 of the CVR Convention, not only the contracts of carriage by bus between the three countries mentioned, but any transport by bus – whatever the place of residence or the nationality of the parties – at destination or coming from these countries, is submitted to this Convention. Thus for example a transport from Lyon to Frankfurt on the Lyon-Prague bus line, is subject to the CVR Convention, independently of the nationality of the carrier or of the place of residence of the passenger. Thanks to this Convention, all the carriers and passengers are subject to the same legal regime.

As regards applicable law, the CVR Convention particularly specifies that:

- the deposit of luggage not claimed by passengers shall be governed by the law of the place where the luggage has been deposited (article 10.3 of the CVR),
- the extent of the injury giving rise to compensation as a result of the death, wounding or out of any other doily or mental injury caused to a passenger is determined in accordance with the national law (including the rules relating to conflict of laws) of the place where the court or tribunal was seized (article 12 of the CVR). The latter is competent (art. 21 of the CVR), in the absence of choice by the parties, if its place of residence is situated:
  - (i) at the place where the defendant has his principal place of business, is habitually resident or has the place of business through which the contract of carriage was made,
  - (ii) at the place where the damage occurred,
  - (iii) at the place of departure or of destination of the carriage.
- where, in a country where the carrier has his principal place of business, the limit for compensation is higher than that foreseen by the CVR Convention or where there is no such limit, the law of this country shall apply (not including the rules relating to the conflict of laws) to determine the total amount of the damages (art. 13 de la CVR),
- the interests on arrears are calculated in accordance with the law judged applicable by the court seized (art. 13.2 and art. 16 of the CVR),
- the suspension and interruption of the period of limitation shall be governed by the law of the place where the court or tribunal was seized (article 22.4 of the CVR).

**(c) Road cabotage (passengers and goods)**

The Council Regulation (EEC) N° 3118/93 of 25 October 1993 (O.J. N° L 279/1993) fixing the conditions for admission of non-resident carriers to national carriage of goods by road in a Member State and the Council Regulation (EC) N° 12/98 of 11 December 1997 (O.J. N° 004/1998) fixing the conditions for admission of non-resident carriers to national carriage of passengers by road in a Member State foresee that:

*«The performance of the cabotage transport operations shall be subject, save as otherwise is provided in Community legislation, to the laws, regulations and administrative provisions in force in the host Member State»* (including the rules related to the conflict between laws).

**3. IMPACT OF THE DRAFT REGULATION ON THE EXISTING PROVISIONS OF ROAD CARRIAGE**

**(a) Conflict between the provisions of the draft Regulation and the existing international Conventions**

The provisions dealing with the law applicable to a contract of carriage of the draft Regulation (article 4a) do not correspond to the provisions of the CMR and CVR Conventions on the subject.

However, according to Article 23 of the draft Regulation:

1. *This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.*
2. *However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them insofar as such conventions concern matters governed by this Regulation.*

At first sight, it can be supposed that the Regulation will not enter into conflict with the existing provisions of the international Conventions that regulate conflicts of laws relating to contractual obligations. However, two important observations must be made:

1. Paragraph 1 of Article 23 applies only to international Conventions that are already in force in the Member States at the time of adoption of the Regulation. As a result, the rules established by the Regulation relating to contractual obligations must prevail over the norms established by the said Conventions in the case where a Member State joins one of those Conventions at a date after the entry into force of the Regulation. This drastically reduces the interest of a country to join existing legal instruments, the aim of which are yet to ensure a uniform implementation of the law.

Given the current distribution of the CMR Convention, this rule of the Draft Regulation will prevent Malta from joining the CMR Convention and will result in more difficulties in international road transports, which this country would like to develop, in particular from and to other EU Member States.

As regards the CVR Convention, since only 3 Member countries have joined yet, the adoption of the Regulation in its current state will prejudice the application of the material provisions and those regarding the conflict of laws of the Convention on the territory of any of the 24 other Member States should they join this Convention in the future, in particular if the Convention is modified in the framework of its revision by the UNECE.

2. The sentence “Conventions that lay down conflict-of-law rules relating to contractual obligations” can be interpreted in a broad or rather limiting manner. The broad manner would comprise any Convention, including Conventions that harmonize material law (notably the CMR and CVR Conventions) and that contain only a few specific provisions on applicable law, whereas a limiting interpretation would only concern Conventions on the conflict-of-law rules, such as, for example, the Convention on the law applicable to international sales of personal property, the Convention on the law applicable to road traffic accidents, the Convention on the law applicable to intermediaries and to representation, the Convention on the law applicable to international sales of goods and others.

Legal provisions must be written in such a way as to exclude ambiguous interpretations. However, the text of the concerned paragraph does not make it possible to deflect the limiting implementation of Article 23 and its application only to specific Conventions on conflicts of law and, consequently, excluding other international Conventions (including the CMR or CVR Conventions) from its scope of application. It means that this Regulation will have legal priority over the said Conventions.

Yet, in line with the Vienna Convention on the law of treaties (23.05.1969), the parties to a multilateral treaty may conclude an agreement aiming at amending the treaty in their mutual relations as far as such a treaty foresees it or does not forbid it.

However, Article 1.5 of the CMR Convention stipulates clearly that:

*“The Contracting Parties agree not to vary any of the provisions of this Convention by special agreements between two or more of them, except to make it inapplicable to their frontier traffic or to authorize the use in transport operations entirely confined to their territory of consignment notes representing a title to the goods”.*

A perfectly similar provision exists in the CVR Convention (Article 1.4).

**Consequently, if Member States accept the Regulation in its current state, they will be exposed to a situation of double, even triple violation of the international law, namely the Vienna Convention as well as the CVR and/or CMR Conventions.**

**(b) Conflict of the provisions of the draft Regulation with the national legislation in which the CMR Convention has been wholly or partially incorporated**

By modifying the rules relating to the conflict of laws established by the CMR Convention, the draft Regulation abolish efforts undertaken by several EU Member States which incorporated the CMR Convention to the national law for the contract of carriage with a view to aligning the law applicable to the national road transport with the law applicable to the international road transport and so to standardizing the contracts for the international and national carriage of goods.

**(c) Conflict of the provisions of the draft Regulation with the existing community regulations**

Article 22 of the draft foresees:

*This Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations.*

Here we can make the same remarks as regarding Article 23 of the draft and the Conventions “which lay down conflict-of-law rules relating to contractual obligations” (see point II/1 above).

It is unclear whether the scope of application of the mentioned provision will extend to the Community regulations such as the Regulations on cabotage.

**If the Regulation on the applicable laws would prevail on the provisions regarding the conflict of law contained in the Regulations on cabotage, article 19 of the draft Regulation excluding any “renvoi” will enter into conflict with rules already existing on the subject.**

**(d) Proposals of the draft Regulation concerning the law applicable to the carriage of passengers**

The proposal contains four options for the drafting of par. 2 of Article 4a concerning the law applicable to contracts of carriage of passengers. The adoption of options 2, 3 or 4 of the draft Regulation could lead to the implementation of different legal systems and finally lead to real chaos.

**Indeed, it would be possible that each passenger transported in the same bus would have a different legal status depending on his place of residence. Even several months after the end of the carriage (normally until the end of the period of limitation for claims), the carrier may not know which law shall be applicable to the contractual (claims) relations between himself and each of his passengers. As a result he will have problems finding an insurer ready to ensure the requirements of a law unknown in advance. Such a lack of legal security may lead to the selection of passengers based on their place of residence. With the exception of transports entrusted by organizations, such as public transport, bus carriers do not have any public service duty. Since they are free to choose their passengers, they may refuse those coming from countries where they are unwilling to or cannot find an insurer.**

**(e) Customs problems of goods transports, security and related insurance**

Article 1.1 of the draft Regulation concerns situations generating conflict of law in civil and commercial areas except for, notably, the customs area. Because of the vagueness of the latter exclusion and the principle according to which any exception should be interpreted in a restrictive manner, it is necessary to clarify the law applicable in all the relations existing in the framework of transports under cover of a customs regime. This is particularly relevant to the implementation of the Customs convention on the international carriage of goods under cover of TIR Carnets, having 67 Contracting Parties, 27 of which are EU Member States.

We can suppose that contractual relations concluded by virtue of this Convention between customs administrations and private bodies for the guarantee required by the TIR Procedure, do not enter into the scope of implementation of the draft Regulation since it does exclude customs matters. Nevertheless, since these contractual relations are subject to private law, it is not completely certain that they are undoubtedly considered as relating to customs matters.

But above all, it is not certain at all that the contractual relations between the private bodies providing, in the framework of this Convention, such guarantees/surety and the insurance companies are also outside the scope of implementation of this Regulation.

Indeed, par. 2 of Article 5a of the draft Regulation establishes that the insurance contracts covering risks for which a country imposes compulsory insurance are governed by the law of that country.

Thus, supposing that the insurance contract concluded in the framework of the TIR System is subject to the mentioned provision, this contract, contrary to the situation currently in force, becomes subject, in the EU only, to 27 different legal regimes of the 27 EU Member States (the situation is all the more absurd that the implementation of the TIR Convention on the territory of the EU is considered as a single customs territory).

**In practice, such an application would hinder the existing insurance system in the framework of the TIR Convention and lead to a risk to abolish the efforts of 67 Contracting Parties, including the EU Member States aiming at a uniform application of this Convention and, as a consequence, to disrupt, on a grand scale, the international exchanges to and from the EU.**

The same principle should apply to other customs regimes with guarantee systems.

#### **(f) Terminology**

The terminology used by the draft Regulation does not correspond to that adopted in road transport.

The liability of the carrier of goods by road starts at the place where the goods are taken over and ends at the place of delivery. However, Article 4a of the draft refers to the term "place of receipt" instead of "taking over". Only the last term is generally used in road transport.

## **4. CONCLUSIONS**

The work on the elaboration of the Regulation should take into account the above mentioned. Because of the complexity of the relations in a contract of carriage, and of the existing rules on the subject for almost a century, **the best solution would be not to create new rules in a field that already benefits on the global scale of norms having a vast application practice.** Yet, if the solution to exclude the contract of carriage of the scope of application of the Regulation is not accepted, it is at least necessary to ensure that the rules be as close as possible to the rules already existing in the Rome Convention 1980, which as regards transports of passengers and goods by road, are appropriate, sufficient and therefore satisfactory:

1/ the text of paragraph 1 of Article 23 of the draft Regulation should be copied exactly on Article 21 of the Rome Convention, 1980:

**"1. This Regulation does not prejudice the application of international conventions to which a Contracting State is, or becomes, a party."**

To be added:

**"2. The same will apply where a Member state has incorporated or will incorporate wholly or essentially, the provisions of international conventions including the conflict-of-law rules contained in such conventions, to the national legislation with the view to harmonize the national and international contractual relations".**

The existing paragraph 2 of Article 23 shall become its paragraph 3.

2/ Article 22 of the draft Regulation should be modified as follows:

**This Regulation does not affect the application of provisions of community law which, on particular subjects, admits application or contains conflict-of-law rules relating to contractual obligations.**

3/ The text of Article 4 of the draft Regulation must be conceived on the basis of the present Article 4 of the Rome Convention and modified as follows:

**« To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.**

**In the contract for the carriage of passengers, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his main place of business, his habitual residence, or the place of business through which the contract of carriage was made.**

**In a contract for the carriage of goods, if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place where the goods are taken into charge or the place of delivery of the goods or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. If it is not the case, the law of the country where the goods were taken into charge applies.**

3/ To safeguard the uniform application of international customs conventions and of common and community customs regimes, the draft Regulation shall clearly exclude contractual relations from its scope of implementation:

- between customs authorities and private bodies resulting from the application of these conventions and regulations,
- between private persons resulting from the execution of the above-mentioned conventions and regulations,
- between private persons and insurance companies aiming at the cover of the risks resulting from the above-mentioned conventions and regulations.

4/ The terminology must be adapted to the existing transport terminology.

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