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Working group to amend the
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WORKING GROUP TO AMEND THE PROCEDURE FOR REVISING COTIF

Legal assessment of the COTIF revision procedure and of possibilities for its
amendment - Dr. Catherine Brölmann

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1. INTRODUCTION

This report aims to examine, from a legal perspective, the need and the possibilities for an amendment of the COTIF revision procedure. After setting out the current legal regime established by the Convention (section 2.a), the report addresses the domestic law dimension (para 2.b), the regime of EU law (section 2.c) and aspects of the general legal context for the interaction between these regimes (section 2.d). At present, those modifications to the Convention and its Appendices that come under the competence of the OTIF General Assembly (GA) take on average six years to enter into force. Moreover, the precise time period is unpredictable as it is contingent on domestic legal and political processes in the member states. Meanwhile, the international environment of OTIF is rapidly developing, both in terms of law and in terms of the market. Given these circumstantial factors, the present report puts forth the proposition that an amendment is called for with the aim of accelerating the revision procedure of COTIF and its Appendices (section 3).

Consideration is then given to how a streamlined procedure for rule amendment, squared with the requirement of sovereign consent on the part of the member

states, has been a long-time interest in international legal relations and in intergovernmental organizations. Several examples exist of how international organizations have accommodated this two-fold objective. After an examination of the context of the law of treaties (section 4.a), the report looks at international institutional law and various institutional arrangements to be found in the practice of international intergovernmental cooperation (section 4.b).

The report concludes by presenting a number of possible amendments to the procedures for revising COTIF and its Appendices, accompanied by tentative text proposals for the pertinent COTIF provisions (section 5).

This *introduction* together with section 5 (*Recommendations as to possible amendments to the COTIF revision procedure(s), including text proposals*) may be used as an Executive Summary of the present report.

2. CURRENT LEGAL FRAMEWORK FOR REVISION OF THE CONVENTION AND APPENDICES

A. COTIF

The General Assembly (GA) decides on proposed amendments to COTIF and its Appendices, *unless* the Convention attributes such competence to – notably – the Revision Committee (RC). Article 33 COTIF sets out the division of competences in this regard.

Per COTIF 1999, as amended by the Vilnius Protocol, modifications to the Convention or its Appendices are no longer laid down in a protocol (that is, in technical legal terms, a treaty), as was the case in the regime of COTIF 1980. Consequently, the enactment of such modifications does not require the formal international legal act confirming ‘expression of consent to be bound’ to a – new-treaty, viz the Protocol, in the sense of Articles 11 and 14 of the 1969 Vienna Convention on the Law of Treaties (VCLT). Rather, in the current procedure the enactment of such a modification requires the ‘approval’ of the member state of the proposed modification to an existing treaty (COTIF plus Appendices) in accordance with its domestic law. Such approval is subsequently communicated to the OTIF Secretary General.

Leaving aside possible preparatory processes in national or European law, the decision procedure *in* the General Assembly has a predictable time frame, as amendments are directly adopted in the GA before being notified to member states for their approval (Art 34(1)). Within the category of modifications to be decided by the GA, modifications to the Convention as such enter into force twelve months after *approval* by two thirds of the member states (Art 34(2)). Modifications to the

Appendices enter into force twelve months after approval by half of the member states (Art 34(3)). Amendments to the Appendices may thus enter into force sooner than amendments to the Convention itself. It is noteworthy that the procedure applies equally to all amendments relating to a designated provision, whether it amounts to a simple change in wording or to a substantive adjustment of a technical requirement. By way of an example, the report of the OTIF Legal Department (2016 OTIF report) (p 4) recalls how the editorial amendment to replace “European Communities” by “European Union” in Article 3(2) COTIF was subject to the same national approval procedure as the amendment of the provision in Article 9 CUV concerning liability for agents and other persons in charge of maintenance.

Entry into force of the modifications according to the above-mentioned provisions does not apply to those member states which, before the entry into force, have submitted a declaration explaining that the State does not accept the modification(s). When decisions on modification take effect, the relevant Appendix or Appendices are suspended with and between the member states that have declared their rejection of the amendment within the deadline.

Member states do not therefore have to accept an amendment by which they do not wish to be bound (they must, however, communicate this expressly before the amendment in question enters into force). Moreover, Article 42(1) gives member states the right to declare *at all times* not to apply an Appendix in its entirety.

The envisaged ‘approval’ by States of the modification decided upon by the GA must be explicit. It is an individual legal act required to finalize the enactment of the modification.

The procedure set out by Article 34 COTIF does not stipulate a time period or time limit for the approval by the individual States. The establishment of such approval is contingent upon the constitutional requirements of the domestic legal systems (see section 2.b below) and may also be influenced by political circumstances. It is at this point that the process of the entry into force of modifications may become considerably lengthy, unforeseeable time-wise, and variegated among the member states.

In contrast, modifications decided upon by the Revision Committee (RC) are notified to the member states by the Secretary General (SG), and in principle enter into force twelve months after such notification. In the case of the RID Committee of Experts (Appendix C) and the Committee of Technical Experts (Annexes to the APTU Uniform Rules - Appendix F) the period is six months. While the procedure for effecting modifications decided by the GA is based on explicit approval of the state in each individual case, the procedure for modifications decided by the Committees

envisages an 'opting-out' mechanism. After notification by the SG to the member states, the latter may formulate an objection within four months from that day. In the absence of such an objection, the modification enters into force for all states. For the individual objecting state, application of the pertinent Appendix is suspended. If one quarter of the member states has objected to the modification, the modification as such does not enter into force (Art 35(4)).

When a State has declared that it does *not* approve a modification, the pertinent Appendix as a whole is suspended for that State (per Art 34(7)), with no previous version remaining in force for that State (this differs from the regime in certain other organizations, such as ICAO). This prevents the simultaneous application of several versions of the Uniform Rules among the member states, the aim of which is to safeguard the uniformity of international transport law.¹

The Committee of Technical Experts has a special position in so far as it has the competence to amend the Annexes to the APTU without the need for approval of the GA or the member states (COTIF Art 33(6)). Otherwise, the RID Committee of Experts (somewhat separate in the OTIF framework and collaborating with UNECE), has the competence to decide on modifications to the RID (Appendix C) without seeking approval of the General Assembly (COTIF Art 33(5)).

B. THE DIMENSION OF DOMESTIC LAW

As set out above, modifications to COTIF or its Appendices which come under the competence of the GA require the 'approval' of the member states (Art 34). In other words, there is no separate treaty (usually 'Protocol') containing the prospective amendment, to which the State is again required to 'express its consent to be bound' in the sense of Article 11 ff. of the 1969 Vienna Convention on the Law of Treaties (VCLT). Rather, the 'approval' is a sign that the member state consents to changes in the treaty to which it already is a party. Such approval is communicated to the Secretary General of OTIF by 'notification' (Art 34(4)), which is the decisive legal act at the international level. Member states have to perform that act in order for them to accept and be bound by the amended version of the Convention or Appendix.

The approval of the member states regarding the proposed modification is established in accordance with the States' respective domestic legal systems. 'Approval' in this sense (different from the 'expression of consent to be bound by a treaty' as in Art 14 VCLT) and its notification (cf Art 34(4) COTIF) to the depositary is form-free as a legal act, and in many domestic legal systems may require a less

¹ OTIF fourth General Assembly, AG 4/5.26 (2.6.1997), *Instructions quant à la poursuite des délibérations au sein de la Commission de révision*, Modification de la Convention et mise en vigueur des décisions de la Commission de révision, p. 4.

burdensome procedure than the classic ‘deposit of an instrument of ratification’ (of a treaty).

This is indeed confirmed by the preliminary survey of national approval procedures that was carried out by the OTIF Legal Department for a small number of member states (representing a certain variation of legal cultures and traditions), in the framework of the aforementioned 2016 OTIF report. In Switzerland, Spain, the United Kingdom and France, the establishment of State approval for an amendment falls under the government’s regulatory powers. On the other hand, in Germany approval for the amendments reportedly requires domestic legislation (as was also put forward by Germany during preparations for and negotiations on the amending protocol of 1999).²

The legal context in the Netherlands is somewhat different still, in that it hinges not necessarily upon legislation, but rather upon Parliamentary approval (in this case ‘approval’ as a domestic legal requirement). Decisions of an intergovernmental organization (IGO) that require additional ‘approval’ (at the international law level, in casu in the institutional setting of OTIF) on the part of the member states in order to come into force, are considered in Dutch law ‘IGO decisions of a treaty character.’³ Approval of such international decisions in principle requires Parliamentary approval, unless the exception envisaged in Dutch statute law for the category of ‘implementing treaties’ applies.⁴ This exception is frequently relied on.⁵ However, if and when Parliamentary approval is considered necessary, this is generally sought via the “tacit approval procedure,”⁶ which does *not* involve adopting legislation (and hence tends to take less time). Incidentally, as in many states, certain COTIF Uniform Rules have been declared applicable to domestic railway transport.⁷

The comments by Germany in particular on the need for domestic legislation are connected to the fact that certain COTIF amendments involve provisions which interact with domestic civil law, particularly principles in matters of liability. As

² As was a substantive element in the discussion on a simplified procedure (see e.g. OTIF Doc Rev. 10/3 24.1.1997 (‘Prises de position’); OTIF Doc Rev. 13/2.29, 15.10.1997, on draft Art 29; Procès-verbal Commission de révision, 22ème session, 1.-4.2.1999, p 42-45; Procès-verbal 5ème Assemblée générale de l’OTIF, 26.5 – 3.6.1999, p. 49-54).

³ Tweede Kamer, vergaderjaar 1988-1989, 21 214 (R 1375), nr. 3 (*Explanatory memorandum to the Statute on Approval and Publication of Treaties*), p 13.

⁴ *Rijkswet goedkeuring en bekendmaking verdragen*, Article 7(b).

⁵ *Ibid*, p 13, and *notification* to Parliament by the Minister of FA of the modifications in the RID enacted on 27 November 2012 (Tweede Kamer, vergaderjaar 2013–2014, 30 952, nr. 134).

⁶ Staten-Generaal, vergaderjaar 2015–2016, 34 540, nr. 1

⁷ See Dutch Civil Code 8:18, and Dutch Railway Act, Art 59, which in substance are adapted to CIM and CUI, respectively.

appears also from the *travaux préparatoires* for the Vilnius Protocol, provisions concerning the scope of application, or the basis of liability or the burden of proof, in some member states require approval by the national Parliament, and possibly, as in Germany, additional legislation so as to incorporate the COTIF rules into national law. Such national legislation might be difficult to adopt within a fixed and short timespan, as indicated by Germany.

On a general note, the time period required for the domestic procedure may also vary because the number of ministries involved varies considerably from one State to another - as all ministries may be involved or just one (see 2016 OTIF Legal Department report p. 5).

C. THE DIMENSION OF EU LAW

In accordance with Article 38(1) COTIF (“Accession to the Convention shall be open to regional economic integration organisations which have competence to adopt their own legislation binding on their member States, in respect of the matters covered by this Convention and of which one or more member States are members. [...]”), the European Union became a member of OTIF in 2011.⁸

In terms of the substance, European transport law and the regime established by COTIF and its Appendices overlap. It is sufficient here to mention the First Railway Package of 2001, which was an important set of European Directives; the Second Railway Package, adopted in 2004, geared specifically to creating a legally and technically integrated European railway area; the Third Railway Package of 2007, which aimed specifically to open up international passenger services to competition within the EU by 2010; a recast of the 2001 Directives that was finalized in 2012. The Fourth Railway Package was adopted and approved in 2016.⁹

At present the European Union, together with 26 of its 28 member states, constitutes almost 55 % of the current OTIF membership. However, either the EU member states or the Union (with an equal number of votes) will vote (Art 6(3) of the 2011 OTIF-EU Agreement).

The *disconnection clause* in Article 2 of the 2011 OTIF - EU Agreement confirms that EU law will be applied in lieu of COTIF law in the relations among EU OTIF Members. The conflict clause in Article 3(2) of COTIF stipulates that for OTIF member states that are at the same time EU Members or parties to the European Economic Area (EEA) Agreement (that is, all EFTA states except Switzerland), these

⁸ Agreement of 23 June 2011 between OTIF and the European Union (http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/04_recht/02_COTIF/AG_10-5_ad1_e.pdf)

⁹ https://ec.europa.eu/transport/modes/rail/packages_en and <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013DC0025>

regimes shall prevail over obligations arising under COTIF. By means of unilateral declaration, Switzerland has aligned its law and policy with the prevalence of EU and EEA rules in its relations with relevant OTIF states.¹⁰

The COTIF is a mixed agreement, and so are its amended versions when approved – with the variety in domestic law construal of such ‘approval’ as indicated under section b above. The division of competences between the Union and the EU member states¹¹ is not considered in this report. It is an area of occasional contestation, as also appears from the fact that the 2014 Council Decision, which formulated an EU position i.a. relative to amendments to COTIF and its Appendices to be adopted at the 25th session of the Revision Committee,¹² gave rise to an action brought by Germany against the Council (claiming that with its Decision, the Council had sought to develop a common position on provisions where it did not have competence to do so), and an infringement procedure brought by the Commission against Germany (for infringement of the common position in the same Decision) – both still pending at this time.¹³

D. INTERSECTION BETWEEN LEGAL REGIMES – GENERAL LEGAL APPRAISAL

COTIF operates in a relatively complex legal context. On account of the field of operation of COTIF and its Appendices, and the fact that these contain both public and private law provisions, the effectuation of the Uniform Rules very much depends on, and ties in with, the domestic legal order in the member states.

This is in itself unproblematic. As international and regional law are created bottom-up, emanating from sovereign States, States are free to decide how they arrange their domestic legal order within the outer boundaries of the rules of public international law to which they are bound. If and when States become a party to a treaty, they are free to decide *how* they implement their treaty obligations at a domestic level, provided the international obligations are respected; the latter aspect accounts for the implementation of a human rights treaty being a process more ‘invasive’ in domestic law than the implementation of, for example, a treaty deciding the trace of a boundary river.

¹⁰ 10th General Assembly, *Declaration of the Swiss Confederation with regard to the accession of the European Union to the COTIF* dd 23 June 2011 (on file with the OTIF legal department).

¹¹ 2013/103/EU: *Council Decision of 16 June 2011 on the signing and conclusion of the [OTIF-EU Agreement]*, OJ L 51, 23.2.2013, p. 1–7

¹² 2014/699/EU of 24 June 2014 establishing the position to be adopted on behalf of the European Union at the 25th session of the OTIF Revision Committee as regards certain amendments to the Convention concerning International Carriage by Rail (COTIF) and to the Appendices thereto (OJ L 293, p. 26)

¹³ *Germany v Council of the European Union* (Case C-600/14, 22 December 2014) and *European Commission v Germany* (Case C-620/16, 29 November 2016).

At the level of international law, on the other hand, it is a longstanding principle that states cannot rely on their national law to justify non-performance of their international (treaty) obligations. The Permanent Court of International Justice (PCIJ) has already famously held that "[f]rom the standpoint of international law [...] municipal laws are merely facts which express the will and constitute the activities of states".¹⁴ Today, this principle is reflected in Article 27 VCLT (*Performance*) and Article 46 VCLT (*Validity of consent to be bound*).

The prevalence of EU law (and in its wake to some extent of EEA law) is recognized by the conflict clause in COTIF, to which all states parties have expressly bound themselves (Art 26 VCLT). Non-EU OTIF Members would therefore not have a legal argument to demand that EU OTIF member states have COTIF prevail over EU law, for example to accommodate an OTIF-wide revision mechanism with a slower speed than that of EU decision-making.

Finally, as is clear from the previous paragraphs, the multilevel legal environment of COTIF involves different legal categories of 'approval'. Most important is the distinction between the state's 'approval' as an *international* legal act (sign of the member state's consent to changes in the treaty to which it is already a party; usually within the institutional framework of an organization, as also in OTIF) and 'approval' as a *national* legal act (approval under domestic law, usually by Parliament, of the prospective international legal act to be performed by the State).

Otherwise, the classic expression of 'consent to be bound' in the process of treaty-making, at the international legal level, which is traditionally termed 'ratification', may be also called 'approval' (see for example Art 3(2) of the 1999 Protocol – 'this Protocol shall be subject to ratification, acceptance or approval'; and see Art 14 VCLT). The technical legal difference between 'approval' as ratification on the one hand and the 'approval' as confirmation of a decision already prepared in an institutional framework, on the other, is relevant in that the latter in many national legal systems requires a less cumbersome procedure.

Thirdly, for maximum clarity this report in principle reserves the term 'ratification' for the international legal act of 'expressing consent to be bound' to a treaty; it does not use 'ratification' to denote, as is sometimes done (e.g. in UK constitutional tradition), the approval by Parliament at the domestic level. This said, in some IGOs it is customary to denote the opting-out mechanism by the term 'negative ratification' (see below under 4.B).

¹⁴ *Certain German Interests in Polish Upper Silesia case*, PCIJ, 1926, p 19.

3. COMPLEXITIES AND ADVERSE EFFECTS OF THE CURRENT COTIF REVISION PROCEDURE

The international context of OTIF is rapidly developing, both in terms of law and in terms of the market.

- In the first twenty years of its existence, COTIF 1980 was amended four times. Since COTIF 1999 entered into force in 2006, it has been amended three times. The speed of revisions is thus increasing, which is unsurprising in view of the intensification of international relations.
- An added factor is the dimension of EU law, where for the EU region EU transport law partly covers the same subject matter as OTIF, with EU legislative processes following their own – shorter - time frame.
- As for the market, there is an increase and an intensification of trade and transport across the globe; these require an ever more speedy response to the commercial environment;
- In this regard it is worth noting that in the draft constitutive text of the OSJD currently under discussion, the organization is considering speeding up its revision procedure.

Meanwhile, modifications to COTIF and its Appendices that come under the competence of the General Assembly take, *on average*, 6 years. The lengthy revision procedure of COTIF has several adverse effects, both legal and non-legal in nature:

- The extended time period that passes before important modifications to the Convention actually enter into force can have a negative impact on the further amendments needed, as the latter may be linked to the amendments whose entry into force is still pending.
- The fact that COTIF envisages two different procedures for modification of the Convention and its Appendices (see above para 2.A) may give rise to inconsistencies between Appendices or even within one single Appendix. See example in the 2016 OTIF report (p. 6).
- Long time periods before the entry into force of COTIF amendments¹⁵ have a direct effect on the railway market of the member states. The regulatory framework will not meet the market's needs for speed and adaptability - ultimately this may have a negative impact on the member states' market share in rail transport.
- What is said about the length of time before entry into force of COTIF amendments and its effect on the market, can also be said about the

¹⁵ Unless otherwise indicated “COTIF amendments” or “amendments to the Convention” are meant as including the Appendices, where applicable.

unpredictability of the precise time before entry into force. Domestic approval is dependent on legal and sometimes political aspects of the various national legal orders of the member states.

- Because of the parallel development of national and regional (notably EU, but also EEA) law, inconsistencies and discrepancies with COTIF regulations may arise. As a consequence, member states may feel obliged to make a declaration of non-application of certain COTIF Appendices. For instance, in 2006 the European Commission (followed by EEA states) advised that EU member states make a declaration of non-application of the entire CUI, APTU and ATMF appendices because these Rules did not comply with EU law. Most of the declarations were withdrawn only after the 24th Revision Committee in 2009 adopted the necessary amendments, which entered into force in 2010, and after the accession of the EU to COTIF in 2011.¹⁶

The 2016 OTIF report has stated that the Secretariat of OTIF is “convinced that a further step will have to be taken towards simplifying the revision procedure,” (p 6) for reasons of - briefly - internal coherence of the COTIF regime and its general adaptability. From a public international law and general institutional law perspective, this opinion appears legitimate.

4. INTERNATIONAL LAW AND PRACTICE ON THE ENACTMENT OF TREATY AMENDMENTS IN THE CONTEXT OF INTERNATIONAL ORGANIZATIONS

A. CONTEXT OF GENERAL INTERNATIONAL LAW AND LAW OF TREATIES

In the decentralized system of international law, obligations are traditionally construed as directly grounded in the consent of states (to leave aside other subjects of international law) - which accounts for the prominence of the treaty instrument and of the law of treaties in international legal relations. It follows that in principle, amendments to treaty obligations are subject to the same requirement of consent by parties (cf Arts 39-41 VCLT). This said, it is not uncommon in international law (and it is unproblematic in the law of treaties - see Art 39 VCLT) for states to give their consent *ex ante*. Thus sovereign states may choose to delegate certain competences to a treaty organ or an intergovernmental organization (cf Art 92 Dutch Constitution where this possibility is confirmed at the domestic law level). Such delegation constitutes a general consensual basis, from which an international body may proceed to take decisions – for example on the adaptation of rules – without going back to the member states for each individual case to obtain consent.

¹⁶ See declaration by EFTA EEA Member Norway d.d. 14 June 2014, whereby the suspension of Appendices E (CUI), F (APTU) and G (ATMF) is withdrawn.

International practice shows a range of such possible mechanisms (see below under B). Unsurprisingly, these mechanisms have emerged in the context of international organizations, which – themselves consent-based treaty regimes - have after all been created precisely to provide a somewhat centralized infrastructure in order to facilitate international cooperation. IGO regulatory activity runs from preparing or revising treaties in a classic process on the one hand, to ‘majority rule making’ on the other, in which the international body takes a definitive decision on the basis of previously given consent, while also operating in a non-plenary composition and/or taking decisions by majority rather than unanimity. Most often some form of member state involvement remains (see below under B and C). As to the legal instrument at issue, technically the IGO may create a new provision, or it may modify an existing treaty or its Annexes/Appendices. However, the prime legal question as to the basis of state consent remains the same.

The consensual foundation is not prejudiced by the fact that at some point on the spectrum of regulatory activity by the organization, international law may move *out* of the contractual (law of treaties) perspective *into* an institutional perspective, in which ‘treaty parties’ become ‘member states’. Thus a case before the Netherlands’ Council of State addressed the interpretation of the constitutive treaty of the International Labour Organization (ILO). The Dutch Seamen’s Welfare Foundation argued that ‘ratification’ of an ILO treaty by ILO member states pursuant to Article 19(5) of the ILO Constitution implied that the previous stage of ‘adoption’ by the ILO Plenary Conference (per ILO Constitution Art 19(1)) equalled ‘signature’ in terms of the law of treaties. As such, the Netherlands, as an ILO member, would have incurred a legal obligation under Article 18 VCLT not to defeat the object and purpose of ILO Treaty No. 163 (concerning Seafarers’ Welfare) after its ‘adoption’ in the ILO Plenary Conference – an obligation the Netherlands was claimed to have breached by terminating a subsidy to the Seamen’s Welfare Foundation. The Council of State, however, did not adopt such a *law of treaties* view of ILO treaty-making. Instead, it considered the adoption of ILO Convention No 163 to be part of an *institutional* legal process (see further under 4.B below on the concomitant reporting obligations for the member states), to which VCLT Article 18 would not apply.¹⁷

Along similar lines there has been discussion in scholarship on whether and when regulatory acts by IGOs should be considered under the rubric of ‘treaty practice’, as obligations deriving from the constituent treaty for the IGO member states, or, on

¹⁷ Dutch Seamen’s Welfare Foundation [*Stichting Zeemanswelzijn Nederland*] vs The Minister of Transport, Public Works and Water Management, 27 July 2005, Administrative Law Division of the Council of State (200410468/1, LjN No. AU0095, AB (2006) No. 177). Commentary in *Oxford Reports on International Law in Domestic Courts* (OUP 2009) <<http://www.oup.com/online/ildc/>>.

the other hand, as ‘legislative’ acts by an IGO binding its member states.¹⁸ The former was, for example, the approach of the International Court of Justice when it dealt with the conflict between the 1971 Montreal Convention and Security Council Resolution 748 - originating in the UN Charter - as a traditional case of conflicting treaties.¹⁹

In the context of the present report it is relevant to note that in either view there is agreement that the binding character of these IGO regulatory acts can, in international law, be soundly explained on the basis of an *advance* expression of consent on the part of states.

B. CONTEXT OF INTERNATIONAL INSTITUTIONAL LAW AND PRACTICE

Having considered the theory and doctrine of international law in relation to what was termed ‘streamlined procedures for rule amendment’, this report proceeds to consider some instances of rule making and rule amendment in international practice. A variety of regulatory activity is first of all found in organizations with a specialized or technical field of operation; the following non-exhaustive overview provides some examples.

International Civil Aviation Organization (ICAO)

1. The ICAO constitution provides for an ‘opting-out’ mechanism or ‘negative ratification’ for international civil aviation standards that may be annexed to the constitution (ICAO Constitution Articles 54(1), 90, 37 and 38).
2. When the period for contracting out has passed, the members that have failed to respond are legally bound by the provisions in question. This does not necessarily mean that they apply the decisions. Almost half of the members did not indicate whether or not they applied the international standards and recommended practices adopted by the organization. On many occasions, member states have not implemented international standards, but have nevertheless failed to notify ICAO as required under Article 38 of the constitution. The Secretariat therefore continues to campaign for express notification of application.²⁰

¹⁸ M. Fitzmaurice, who adheres to the first view (at 316-317), and, contrariwise, Alexandrowicz (at 152), on the regulatory acts of Specialized Agencies: “this is no doubt an extra-treaty process”.

¹⁹ *Case concerning Questions on Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Provisional Measures), 14 April 1992, ICJ Rep. 1992, at 126

²⁰ Schermers & Blokker, §1294.

3. In the ICAO, reservations are generally permitted, although members making reservations with regard to safety standards may be excluded from participation in international air navigation.²¹

International Labour Organization (ILO)

1. The ILO stands out for its strong executive secretariat and a constitutional mandate to prepare and adopt conventions in its plenary organ by a two-thirds majority (Art 19). Ratification of conventions is then considered essential for the organization. Not only do member states have to submit conventions to their competent authorities and to report on the result within 18 months, but, as long as they have not yet ratified, they must also periodically report on the position of their laws and practices with regard to the matters dealt with in the convention (ILO Constitution Arts 19(5)(a), (b) & (e)). These reports are examined by the ILO Committee of Experts on the Application of Conventions and Recommendations, which in turn provides information to the general congress of the organization, which again discusses the reports.²²
2. According to the ILO constitution the adopted text, *without* additional signature by the states, *must* be submitted by the governments to the competent national legislative body, whose eventual acceptance of the convention then entails an *obligation* for the State to ratify. Some commentators mention subsequent 'notification' by the Ministers for FA to the Organization, taking the place of deposit or even ratification. The direct address to the national legislature was considered far-reaching and it was not accepted, e.g. by the French government, until 1926.²³
3. In the ILO only roughly 1/3 of the 187 members comply with this obligation, but two-thirds of the members usually do so within five years.²⁴

International Maritime Organization (IMO)

1. IMO Conventions enter into force within an average of five years after adoption.²⁵
2. It is crucial that they remain up to date by periodically amending the text or the Annexes. However, the original amendments procedure in IMO proved very slow. For example, the 1960 Convention provided

²¹ *ibid*, §1309.

²² *ibid*, §1284.

²³ See Charles Rousseau, *Droit international public*, 1953, at 39; Paul Reuter, at 43

²⁴ Schermers & Blokker, §1286.

²⁵ *ibid*, §1281.

that amendments would come into force after (usually) 2/3 of the convention parties had accepted them. A newly devised amendment procedure was used for conventions as of 1972; it envisages (in the terminology of IMO) 'tacit acceptance'²⁶ or (in the terminology of Schermers & Blokker) 'negative acceptance'²⁷ of amendments by States.

3. For example, in the case of the 1974 SOLAS Convention, an amendment to most of the Annexes is 'deemed to have been accepted at the end of two years from the date on which it is communicated to Contracting Governments...' unless the amendment is objected to by more than one third of Contracting Governments, or Contracting Governments owning not less than 50 per cent of the world's gross merchant tonnage.²⁸
4. The 'tacit acceptance' procedure has greatly speeded up the amendment process. Amendments generally enter into force within 18 to 24 months.
5. With regard to this procedure the IMO has concluded that 'without tacit acceptance, IMO's ability to set safety and environmental standards for world shipping would have been seriously weakened'.²⁹

United Nations Educational, Scientific and Cultural Organization (UNESCO)

1. Members can be required to report periodically on any action taken on the basis of conventions submitted by the general Congress (UNESCO Constitution Article 8).
2. Members can be obliged to submit conventions to their competent authorities within one year of the close of the session at which they are adopted (UNESCO Constitution Article 4.4).
3. The degree of compliance within UNESCO does not seem impressive (an indicative figure of 10 per cent has been given).³⁰

World Health Organization (WHO)

1. Amendments to the WHO Constitution come into force for all Members in accordance with their respective constitutional processes (WHO Constitution Article 73).

²⁶ <http://www.imo.org/en/About/Conventions/Pages/Home.aspx>

²⁷ Schermers & Blokker, §1266.

²⁸ <http://www.imo.org/en/About/Conventions/Pages/Home.aspx>

²⁹ Schermers & Blokker, §1291.

³⁰ *ibid*, §1286.

2. The Health Assembly (plenary body has the regulatory function, in contrast to e.g. the ICAO Council) has the authority to adopt Regulations in some specified fields (WHO Constitution Article 21). The WHO provides for a negative ratification procedure³¹ of these Regulations (WHO Constitution Article 22).
3. Not only are the members of the WHO bound to submit conventions to their national authorities (within 18 months) and to report on the result, they are also obliged to provide an explanation for any failure to ratify (WHO Constitution Articles 20 and 62). Subsequent international publicity undoubtedly creates further pressure to ratify.
4. In the WHO, reservations on conventions are generally possible (WHO Constitution Article 22) but they require the approval of the General Congress.³²

Universal Postal Union (UPU)

In the context of this report the Universal Postal Union (UPU) deserves special mention for its complex institutional set-up and its variety of legal instruments, i.a. with provisions setting out rules of private law in the same way as some of the COTIF Appendices. The UPU works with different legal instruments (the 'Acts' of the Union):³³ the Constitution, the General Regulations, the Rules of Procedure, the Convention (comprising two 'manuals'), the (optional) Agreement, and the Regulations (which bring the Convention and, where applicable, the Agreement, into operation).

The 1989 UPU Congress had tasked the Executive Council with a study on the structure of the Convention, the Agreements and the Detailed Regulations. The result was a transfer of several operational provisions from the Convention and Agreements to the Detailed Regulations, which at the 1999 Congress were re-cast as 'Regulations' and split into i.a. the Letter Post Regulations and the Parcel Post Regulations. These are the rules of application necessary for the implementation of the Convention and the Agreement.³⁴ In other words, the common rules applicable to the international postal service and the provisions concerning the letter-post and parcel-post services are given in the Convention and its Regulations.

The Convention and its Regulations are binding on all (192) member states. Member States are to "ensure that their designated operators fulfil the obligations" arising therefrom. The 1999 Congress saw a transfer of authority of amendment

³¹ Ibid, §1265 for additional examples.

³² Ibid, §1309.

³³ See Article 22 UPU Constitution and pages IX-XII of the UPU Constitution.

³⁴ Article 22(5) UPU Constitution.

from Congress to the *Postal Operations Council* (POC).³⁵ The ensuing change in legal status of the Regulations was accompanied by the decision that ratification or approval on the part of the member states would no longer be required.³⁶ Since then, the Regulations of the Convention are agreements concluded by the member countries elected by the Congress to the POC. Proposals for amendments to the Parcel Post and Letter Post Regulations are to be submitted to the POC directly. Firstly however, they would be transmitted by the International Bureau to all member countries and all designated operators (DOs).³⁷ No support from other member countries is required in order to submit any proposal to amend the Regulations, but the proposal will only be considered if the POC agrees “to its urgent necessity”.³⁸ The member countries can send in written comments or attend the relevant POC meeting as observers, but they do not get to vote on the amendments.³⁹ The POC has the authority to amend the Regulations at its annual sessions. The POC convenes, in principle, once per year.⁴⁰ Adopted amendments are communicated to the member countries by the IB.⁴¹

The UPU Regulations are comparable to the COTIF Appendices to the extent that they contain operational and commercial rules to be applied by the postal services, including rules on contractual liability. The Commentary points to Congress’ “fundamental decision to place all provisions in the Regulations which are not intergovernmental in nature.”⁴² The term ‘intergovernmental’ in the UPU Commentary is meant to refer to provisions that are, in the classic way of treaties, addressed to States (cf Art 10 UPU Constitution,⁴³ to name but one example). Specifically, this means that in a legal technical sense the State is the ‘normative addressee’ (*Normadressat*) of a rule – the entity who is held to comply with a rule or who can rely on a rule for the protection of its interests.

The Regulations then contain all provisions with rules that do *not* have the States as normative addressee, hence are *not* of an ‘intergovernmental’ nature,⁴⁴ but rather

³⁵ Commentary on Article 29 (29.3) UPU Constitution.

³⁶ Commentary on Article 22 (22.5) UPU Constitution.

³⁷ Article 29 UPU Constitution; Designated Operators is the term used to describe national postal administrations.

³⁸ Article 142 UPU General Regulations.

³⁹ Commentary on Article 29 (29.3) UPU Constitution.

⁴⁰ Article 114 UPU General Regulations.

⁴¹ Article 143(2) UPU General Regulations.

⁴² Commentary on Article 29 (29.3) UPU Constitution.

⁴³ Art 10 *Relations with international organizations* “In order to secure close cooperation in the international postal sphere, the Union may collaborate with international organizations having related interests and activities.”

⁴⁴ “The new Conv approved by the 2004 Bucharest Congress contains only those provisions that are mainly intergovernmental in nature or which are so fundamental that they require Congress approval. [...] The regulations that derive from the Conv comprise all the rules that are not submitted to Congress.” Commentary on Article 22 (22.3) UPU Constitution.

are addressed to private parties, such as postal services and customers. Such rules may thus be said to have a private law character. Consider as one of several examples the provision stipulating that “Designated operators which undertake to cover risks arising from a case of force majeure shall be liable toward senders of items posted in their country for any loss due to a case of force majeure occurring at any time during transmission of the items”.⁴⁵

The newly specific character of the Regulations as containing rules of a private law character were then considered to mean that no ratification or approval of the Regs was necessary.⁴⁶ It also led to the conclusion “that it was no longer justified to formally submit to Congress proposals for amending the Regs.”⁴⁷ It is noteworthy that in the renewed UPU system one decisive factor⁴⁸ in the decision to put in place the ‘simplified procedure’ for enactment of (amendments to) the Regulations appears to have been precisely that the rules concerned were *not* of an ‘intergovernmental’ nature. It indicates that the possible interaction of the Regulations with private law provisions in respective national legal orders was not perceived as a problem by the member states.

Provisional application

Another notable feature of UPU legal practice is the prominent role of the mechanism of provisional application. The Constitution does not mention provisional application, but the Commentary on Article 33 provides that in accordance with the practice followed by the Union since its foundation, Congress fixes the date on which the Acts (i.e. the instruments mentioned above, including the Convention and Regulations) enter into force, irrespective of the number and dates of the ratifications or notifications of approval deposited by the signatory States. This procedure differs from the traditional practice (still used, but less frequently than before), in which treaties enter into force after a certain number of ratifications.⁴⁹

Conventions and Agreements come into force at the designated time and stay in force until the next Congress where new Acts are adopted.⁵⁰ They are thus renewed at every Congress and the corresponding Acts of the preceding Congress are abrogated.⁵¹ This is because of the very numerous amendments made to the Acts of the Union during Congresses. UPU member states are therefore required to approve

⁴⁵ Article RL 159(2) of the Letter Post Regulations.

⁴⁶ Article 22(5) UPU Constitution and Commentary.

⁴⁷ Commentary on Article 29 (29.3) UPU Constitution.

⁴⁸ As appears from the commentary on Article 25 (22.5) UPU Constitution.

⁴⁹ Commentary on Article 33 UPU Constitution.

⁵⁰ Articles 40 Parcel Post Convention and Letter Post Convention.

⁵¹ Article 31 UPU Constitution.

the Acts at each Congress, i.e. every four years. Despite delays in ratification and approval, it appears that the Acts of the Union have been consistently applied – in most cases ‘provisionally’ - by all member countries from the date of their entry into force.⁵² The result is that the Convention is stable and can function as the instrument in force between Congresses, regardless of how many countries have ratified or approved it. The rules governing the international postal service are not disrupted at any point. According to Schermers & Blokker, UPU is the organization that makes most frequent use of provisional application in order to ensure speedy application of its Acts. The book reports that ‘as a general rule’ the UPU (amended) Convention enters into force on a predetermined date, usually 12-20 months after its adoption.⁵³

Provisional application is used more often – for example the *Organisation for Economic Co-operation and Development (OECD)* aims partly to solve the problem of ‘watchful waiting’ (States only ratifying social conventions if their competitors accept the same limitations, as the acceptance of these conventions may have negative economic consequences) by allowing members to apply the rules provisionally as long as other members have not ratified them (OECD Convention Article 6(3)).⁵⁴ For the European Union the possibility of provisional application of international agreements with third countries is explicitly envisaged in Article 218(5) TFEU; and this possibility is often used by the Union. The 2016 Report on Provisional Application in the work of the International Law Commission (ILC)⁵⁵ contains an addendum with i.a. examples of recent European Union practice on provisional application, amongst others in the context of mixed agreements. These frequently specify in the text which parts of the agreement may apply provisionally; this is related to the fact that said parts are generally linked to the competence of Union, while the provisions that fall within the competence of the member states, and are subject to national ratification, are not normally eligible for provisional application.⁵⁶

Several organizations have the competence, and the function, to adopt in their plenary organs (usually by a two-thirds majority) *conventions* of general application within the organizations’ field of competence. In addition, “[t]he perceived desideratum to provide an expeditious and world-wide regulatory response to the challenges thrown up by technical and scientific progress, has led to the

⁵² *ibid.*

⁵³ Schermers en Blokker, § 1295.

⁵⁴ *ibid.*, §1289.

⁵⁵ UN Doc. A/CN.4/699/Add.1

⁵⁶ *Statement on behalf of the European Union* at the General Assembly Sixth Committee, United Nations New York, 1 November 2016

authorization being granted to some agencies to enact rules.”⁵⁷ The WHO, the ICAO, and the IMO offer conspicuous examples.

Certain treaty regimes that present centralized structures to some degree, without perhaps qualifying as traditional international organisations, show a similar practice. An opting-out mechanism is used for example in CITES⁵⁸ and the International Whaling Convention.⁵⁹ While the 1985 *Vienna Convention for the Protection of the Ozone Layer* envisages a procedure for amendments much like that of the ILO system, the procedure laid down in the 1987 *Montreal Protocol on Substances which Deplete the Ozone Layer* for the enactment of 'adjustments' to the original standards with regard to controlled substances, amounts to genuine 'legislation' within treaty regimes: such 'adjustments', failing consensus, are adopted by a two thirds majority; they do not offer the States the possibility to opt out and they are, contrary to e.g. ICAO standards, explicitly said to be binding on all parties.⁶⁰

The treaty practice in the Council of Europe showed a growing interest in 'streamlined' or 'simplified' procedures as early as the 1980s and the 1990s. A commentator in this regard concisely expresses the principle of freedom of contract when confirming that the rules of international treaty law concerning amendments are flexible and that states have the freedom to adapt these rules to new circumstances, “as long as some basic principles of *jus cogens* are not violated.”⁶¹

C. GENERAL LEGAL APPRAISAL

International legal practice thus shows a variety of mechanisms employed in international organizations and treaty regimes for the enactment of new rules or the amendment of existing ones, while at the same time safeguarding State consent as a legal basis. These range from definite state consent given in advance, with the organization or organ proceeding without further consultation of the member states, to the States (re)confirming their explicit consent for each individual decision. This will depend on the organization or treaty regime, and on the nature of the rule or amendment to be enacted. In some cases rules and their modifications

⁵⁷ E Klein MPEPIL, para. 74

⁵⁸ 1973 *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, UNTS, Vol. 993, 243

⁵⁹ 1946 *International Convention for the Regulation of Whaling*, UNTS Vol. 161, 72.

⁶⁰ (Article 2(9) d of the Montreal Protocol stipulates that decisions (possibly taken by majority) are binding on all parties and enter into force 6 months after notification by the Secretariat. An analysis of the procedural aspects of the 1985 Ozone Convention (1513 UNTS 3) and the 1987 Montreal Protocol (1522 UNTS 3), in M Fitzmaurice, 'Modifications to the Principles of Consent in Relation to Certain Treaty Obligations', ARIEL 1997, 275-317.

⁶¹ See the helpful overview in J Polakiewicz, *Treaty-Making In The Council Of Europe*, Council of Europe Publications 1999, pp 161-172, quotation at p 169.

may be enacted by the decision of an organization or treaty organ only - under COTIF this is the case for the Committee of Technical Experts with regard to the Annexes to the APTU. In most instances, however, formal approval on the part of the member states per decision – be it explicit or implicit – is required.

In the practice of many organizations, as with COTIF 1999 in contrast to COTIF 1980, the requirement for a classic act of treaty ‘ratification’ for the enactment of amendments has been replaced by the requirement for ‘approval;’ these are generally linked to a decision, as e.g. in OTIF, no longer to set out amendments to constitutive treaties and connected instruments in a ‘protocol’. This mostly leaves State consent to be expressed as a form of ‘approval’ on the part of the individual member states (see also section 2.D above).

Such approval may be required in an explicit form (as is currently the case for Convention revisions decided upon by the OTIF General Assembly). Alternatively, for procedural optimization, it may be arranged for states to become bound after they have not objected within a specified period of time. This mechanism is sometimes construed as ‘tacit approval’ (or ‘tacit consent’), and sometimes as ‘opting-out’ (or ‘contracting out’, or ‘negative ratification’). There is some conceptual difference between the two: in the case of *tacit approval*, States become bound at some point by tacitly demonstrating their legal assent, possibly in combination with provisional application (as in UPU); in the case of an *opting-out procedure*, States become bound from the adoption of an act onwards, *unless* they free themselves from the obligations by objecting within a specified period of time. This said, in practice the mechanisms work out the same way. As mentioned, in the light of present day demands on the flexibility of treaty regimes and the effectiveness of process management by international organizations and treaty bodies, tacit approval and opting-out are widely used in international practice. In this respect, moreover, “it has become common practice to separate basic treaty provisions from regulations or standards of a technical, scientific, or administrative nature.”⁶²

‘Approval’ by states does involve the respective national legal orders of the member states. However, as international approval and the international legal act of its ‘notification’ is procedurally less cumbersome (and from the perspective of international law: form-free), domestic approval is also generally organized via a simple(r) procedure.

As for provisional application, Article 25 VCLT provides that this is possible if “(a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed.” With all due reservation vis-à-vis the equation of conduct of the

⁶² D König, ‘Tacit Consent/Opting Out Procedure’, Max Planck EPIL, para 4.

organization with conduct of the member states, it would seem that, for example in the case of UPU, the longstanding practice of provisional application under the auspices of the Organization may count as an additional agreement of ‘the negotiating States’.

5. RECOMMENDATIONS AS TO POSSIBLE AMENDMENTS TO THE COTIF REVISION PROCEDURE, INCLUDING TEXT PROPOSALS

An adjustment and streamlining of the COTIF revision procedure could take different forms. The following proposals do not include ‘pure’ international legislation, but represent options – in line with prevailing international practice - that would increase both the speed and the predictability of the revision procedure, while safeguarding (in a streamlined manner) the consent of member states in relation to a particular amendment.

1. ***Appendices under the competence of the Revision Committee*** A preferable solution, for reasons of speed, predictability and systemic clarity, would be if the Appendices in their entirety were to fall within the competence of the Revision Committee, except where Appendices or Annexes to them fall under the RID Committee of Experts and the Committee of Technical Experts, where they would remain. All modifications to all Appendices would then be subject to the simplified (opting-out) revision system as set out in Article 35(2) and (3) COTIF. This would require a change of approach vis-à-vis rules with a ‘private law character’ (similar to the normative re-shuffle performed by UPU in the early 2000s – note that in that system civil liability provisions do not constitute an obstacle to a simplified procedure). Thus, rules of a private law character (including on issues such as contractual liability) and rules of a technical character would be set apart from the basic treaty provisions. It may be recalled that in terms of public international law, all provisions in the Appendices are of the same nature and status. General international law would therefore not pose any obstacle to the application of one single procedure to all Appendices in their entirety.

Text proposal

Article 33 § 4

Subject to decisions taken by the General Assembly in accordance with § 3, first sentence, the Revision Committee shall take decisions about proposals aiming to modify:

- a) Articles 9 and 27 §§ 2 to 5;
- b) the CIV Uniform Rules;
- c) the CIM Uniform Rules;

- d) the CUV Uniform Rules;
- e) the CUI Uniform Rules;
- f) the APTU Uniform Rules;
- g) the ATMF Uniform Rules.

When modification proposals are submitted to the Revision Committee in accordance with letters a) to g), one-third of the States represented on the Committee may require these proposals to be submitted to the General Assembly for decision.

2. ***Additional role for the General Assembly*** In connection with 1 – if all (or more than is currently the case) provisions in the Appendices were made subject to the simplified regime, consideration could be given to adding a role for the General Assembly, especially in the procedure for revising the CIV, CIM, CUV and CUI Appendices. After the decision of the Revision Committee the General Assembly as such could be required to *approve* (without a right to propose modifications) the amendment adopted by the Revision Committee; no approval by the individual member states would be required. This procedure would provide an additional check for the member states in the context of the plenary organ, and would thus safeguard the opportunity for informed consent, while the Organization could maintain the necessary control over the time frame of entry into force of the amendments. At a practical level, the time period (because of the regular scheduling of meetings of the various OTIF organs) between a decision of the Revision Committee and consideration by the General Assembly, would enable member states to examine the possibilities and preferences as to implementation in their domestic legal systems.

Text proposal

Article 33 § 4

Subject to decisions taken by the General Assembly in accordance with § 3, first sentence, the Revision Committee shall take decisions about proposals aiming to modify:

- a) Articles 9 and 27 §§ 2 to 5;
- b) the CIV Uniform Rules;
- c) the CIM Uniform Rules;
- d) the CUV Uniform Rules;
- e) the CUI Uniform Rules;
- f) the APTU Uniform Rules;
- g) the ATMF Uniform Rules.

When the Revision Committee has taken a decision on modification in accordance with letters a) to g), this decision shall be subject to the approval

of the General Assembly; the General Assembly may not under any circumstances modify it.

Article 35 § 3

Modifications of Appendices to the Convention, decided upon by the Revision Committee and approved by the General Assembly, shall enter into force for all Member States on the first day of the twelfth month following that during which the Secretary General has given notice of them to the Member States. Modifications decided upon by the RID Expert Committee or by the Committee of Technical Experts shall enter into force for all Member States on the first day of the sixth month following that during which the Secretary General has given notice of them to the Member States.

3. ***A fixed time period for the entry into force of the amendments*** If, contrary to the preferred scheme, some provisions of the Appendices were to remain under the competence of the General Assembly, a fixed time period (of two or three years – depending on the cycle(s) in the Organization) could be prescribed for the entry into force of amendments to these provisions. This would amount to a mechanism of ‘tacit approval’ or ‘opting-out’ (see 4.c above). Thus, no explicit ex post approval on the part of member states would be required, but member states would have the right to file a declaration of non-application before the entry into force. This is without prejudice to the member states’ right to declare *at all times* not to apply an Appendix in its entirety (Art 42(1)).

Text proposal

Article 34 § 3

Modifications of the Appendices to the Convention, decided upon by the General Assembly, shall enter into force for all Member States [twenty-four/thirty-six] months after the modifications have been notified to the Member States by the Secretary General, with the exception of those which, before the entry into force, have made a declaration in terms that they do not approve such modifications and with the exception of those which have made a declaration pursuant to Article 42 § 1, first sentence.

4. ***Provisional application*** In the preferred scheme (No. 1) the provisions that remain under the competence of the General Assembly would be of such a fundamental nature that arguably, a fixed period for their entry into force imposed by the Organization would not be appropriate. However, in the case of enactment of this category of provisions, provisional application – upon decision

of the GA, subsequently to be notified by a circular - could be a helpful mechanism to streamline the effectuation of modifications.

Incidentally, this could risk creating legal uncertainty – how and when to modify the Convention and maintain a coherent regime if part of the member states are applying provisionally, thus without considering themselves to be legally bound? (One reason for the success of the practice of provisional application in UPU is that at each Congress (every four years) all existing UPU acts, except for the Constitution, are abrogated and have to be adopted anew. This prevents the protracted existence of a ‘fuzzy’ legal regime. OTIF on the other hand has a permanent legal instrumentarium, and it does not seem likely the Organization is willing to change this).

Text proposal

Article 34 § 8 (new)

The General Assembly may decide on the provisional application of modifications to the Convention.

5. ***Provisional application combined with a fixed time period for the entry into force of amendments*** In connection with option No. 3 – entry into force of such amendments could be combined in a fruitful manner with a practice of provisional application.

Text proposal

Article 34 § 3

Modifications of the Appendices to the Convention, decided upon by the General Assembly, shall enter into force for all Member States [twenty-four/thirty-six] months after the modifications have been notified to the Member States by the Secretary General, with the exception of those which, before the entry into force, have made a declaration in terms that they do not approve such modifications and with the exception of those which have made a declaration pursuant to Article 42 § 1, first sentence.

Article 34 § 8 (new)

The General Assembly may decide on the provisional application of modifications to the Convention.

6. ***Rapportage*** In those cases in which the explicit ‘approval’ procedure by member states remains in place, a ‘soft compliance mechanism’ of compulsory *rapportage*, such as employed e.g. in the ILO, might be put in place in order

to expedite the process.

Text proposal

Article 34 § 9 (new)

Member States shall endeavour to start the national approval procedures referred to in §§ 2 and 3 within 6 months after the notification of modifications to the Member States by the Secretary General. Member States which have not notified approval to the Secretary General shall provide an annual report to the Secretary General on the measures which they have taken with a view to being able to approve modifications adopted by the General Assembly. The Secretary General shall inform the Member States about ongoing national procedures.

7. **New Appendices** The creation of new appendices should logically follow the same time frame as the amendment of existing appendices (see No. 1 above). Assuming such new appendices would contain rules of either a technical character or a private law character, their creation should be subject to the same simplified approval procedure as the enactment of amendments to existing appendices. This includes the right to 'opt out', that is, to formulate an objection within four months from the day of notification by the SG to the member states.

Text proposal

Article 33 § 4

Subject to decisions taken by the General Assembly in accordance with § 3, first sentence, the Revision Committee shall take decisions about proposals aiming to modify or to set up:

[.....]

- h) new Appendices containing provisions with a technical or private law character;

When proposals for modification of Appendices or creation of new Appendices are submitted to the Revision Committee in accordance with letters a) to h), one-third of the States represented on the Committee may require these proposals to be submitted to the General Assembly for decision.

Article 35 § 3

Adoption of new Appendices in accordance with Article 33 § 4, letter h), and of modifications of Appendices to the Convention in accordance with Article 33 § 4, letters a) to g), decided upon by the Revision Committee, shall enter into force for all Member States on the first day of the twelfth month following that during which the Secretary General has given notice of them to the Member States. Modifications decided upon by the RID Expert Committee or by the Committee of Technical Experts shall enter into force for all Member States on the first day of the sixth month following that during which the Secretary General has given notice of them to the Member States.

8. ***Amendments to the base Convention*** The procedure for revising the Appendices would be relevant to the revision of the general Convention as well, as the latter comprises several provisions for which the simplified procedure may be appropriate – for example in the case of amendments to administrative provisions which would not impact the existing Member States’ obligations. The simplified procedure in this case could be applied by the Revision Committee (Art 33 § 4 (a)) or, alternatively, by the general Assembly (new Art 34 § 2 *bis*).

Text proposal

Article 33 § 4, letter a

a) Articles 9 and 27 §§ 2 to 5; **and**

or

Article 34 § 2bis

The General Assembly may decide that modifications to the general Convention which do not impose new obligations on Member States [shall] enter into force for all Member States on the first day of the twelfth month following that during which the Secretary General has given notice of them to the Member States, with the exception of those which, before the entry into force, have made a declaration in terms that they do not approve such modifications.

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