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Draft convention on contracts for the international carriage of goods wholly or partly by sea

Compilation of comments by Governments and intergovernmental organizations*

Addendum

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* Submission of this note was delayed because of its late receipt.



II. Comments received from Governments and intergovernmental organizations

A. States

16. United Kingdom

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Introduction

1. The United Kingdom Government is grateful for the opportunity to comment on the draft Convention for the international carriage of goods wholly or partly by sea.
2. The United Kingdom Government welcomes and supports the work of UNCITRAL and the CMI in seeking to produce an instrument which will replace existing sea carriage conventions and give effect to a more up-to-date bargain between carrier and cargo interests as to the incidence of risk in the carriage of goods than is to be found in existing instruments.
3. The United Kingdom also welcomes and agrees with the policy of UNCITRAL that the instrument should introduce new rules governing current and anticipated developments in the transport industry, such as “door-to-door” transport and the use of electronic transport records.
4. The United Kingdom, moreover, is strongly supportive of the aim of UNCITRAL and the CMI that the new instrument should be one that is likely to achieve greater harmony of national laws relating to sea carriage than has been achieved in the past and that, so far as this is possible, the instrument should bring about uniformity in this area. Indeed, the view of the United Kingdom Government is that it is essential to the viability of a new sea carriage convention that the text should be capable of achieving this.
5. Finally, the United Kingdom sets great store on the importance of achieving a reasonable degree of legal certainty. By this is meant a text whose provisions are formulated with sufficient clarity to indicate the intention of the draft and that its effect should be workable in practice. It is considered that all the potential benefits of a new Convention will not be achieved if the price of introducing it turns out to be an unacceptable increase in complexity and legal uncertainty, leading to unnecessary, costly and, perhaps, inconclusive litigation. Given that there will be no single appeal court capable of giving binding decisions on the interpretation of the instrument, the effect of legal uncertainty could be to perpetuate disharmony.

The overall comment of the United Kingdom on the text as a whole.

6. The Government of the United Kingdom has no comment to make on what may be called the commercial balance of the draft Convention. It has not been seen as any part of the function of the United Kingdom Government to advance the interests of carriers, shippers or other parties affected by a contract for the carriage of goods. At this stage, moreover, in the view of the United Kingdom, it would be

wrong to seek to make changes which might disturb compromises that have already been made on particular commercial issues.

7. On the other hand, the United Kingdom considers it important to address technical legal issues which, if not solved now, may prevent the Convention from being ratified, or, if ratified, may prevent it from working well in practice or lead to difficulty, uncertainty or the expenditure of unnecessary legal costs later.

8. In general, the United Kingdom considers that, while the text of the draft Convention is undoubtedly complex and in places lacks clarity, still the draft Convention should function reasonably well in practice. There are, however, two main areas where exceptional problems are likely to arise and where it is important that the text should be amended before it is approved by the Commission. It is considered that, unless this is done, these problems are likely to prove, at worst, an obstacle to ratification, and, at best, a fertile source for disputes and litigation later. The two areas will be shortly discussed.

Definition of “Contract of carriage”

9. By its terms the draft Convention applies to “contracts of carriage” (art. 5). A “contract of carriage” is defined (art. 1.1) to mean: “a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage”.

10. It is thus apparent that, on a literal construction of the text, it is essential to the application of the Convention that the contract, either expressly or by implication, provides for the goods to be carried by sea. As has been pointed out from time to time, many contracts, for good commercial reasons, leave the means of transport open, either entirely or as between a number of possibilities. If the contract is not “mode specific”, then on one view it would seem that the Convention will not apply, unless perhaps a requirement for carriage by sea can be implied.

11. At various stages it has been proposed to add some words to indicate that a contract which permits carriage by sea shall be deemed a “contract of carriage” in cases where the goods were in fact carried by sea. These proposals have so far been rejected. The United Kingdom is of the view that without such words the Convention would apply to goods carried wholly or partly by sea, so long as the contract permits such carriage. But the Convention is not clear on this point.

12. The result is thus unsatisfactory. It leads to the distinct possibility that, if the Convention were adopted, it would have a partial and uncertain field of application. The likelihood of this is increased by the requirement in article 5 that, according to the contract of carriage, one of the following places must be located in a Contracting State; namely, the place of receipt; the port of loading; the place of delivery; or the port of discharge. It follows that, if neither the place of receipt nor the place of delivery are in a Contracting State and no port of loading or port of discharge is specified in the contract, then the Convention may not apply even though in fact the actual ports of loading and discharge were in Contracting States.

13. It is important in the view of the United Kingdom, that, before the draft Convention is approved by the Commission, the definition of “contract of carriage” and the terms of article 5 are amended so as clearly to bring within the ambit of the

Convention all carriage by sea where the actual port of loading or the actual port of discharge is in a Contracting State and so as to entitle a court to have regard, not just to the contract of carriage, but also to how the goods were in fact carried.

14. The United Kingdom considers that so crucial a matter as the field of application of the Convention should be settled now and cannot properly be left to be determined later.

Chapter 9. Delivery of the goods; Chapter 11. Transfer of rights

15. The draft Convention contains a new and problematic chapter on “Delivery of the goods”. This has the laudable aim of providing legal solutions to questions, such as the following: At what stage does the consignee come under an obligation to accept delivery of the goods? What is the carrier’s remedy if the consignee is in breach of this obligation? What steps must be taken by the carrier to ensure that the goods are delivered to the proper person? What is the carrier’s remedy if no consignee comes forward to claim the goods or if the holder of a negotiable transport document does not claim the goods or requires delivery but does not, or cannot, surrender an original transport document?

16. In the view of the United Kingdom Government this chapter is likely to create more problems than it solves and, in its present form, is far from satisfactory. In particular, article 49, which is designed to provide a solution to the problem of delivery without production of bills of lading will tend to undermine the function of a negotiable transport document as a document of title without absolving the carrier from the risk of liability; will tend to facilitate fraud; will still require the carrier to demand security before acting on the instructions of the controlling party or shipper; and in the last resort will be of little benefit to any party.

17. It is accepted that some reform of the current law may be needed to mitigate the long-standing problem of delivery without production of bills of lading. The United Kingdom is not opposed to reform as such. The disadvantage of the proposed article 49 is that it achieves little beyond making the current legal position much more complicated and uncertain than it is at present. It has the further disadvantage that, were it to be adopted, it would stand in the way of a more satisfactory and comprehensive reform of the relevant law. Finally, the United Kingdom cannot support a reform which would tend to facilitate fraud.

18. The United Kingdom considers that further work needs to be done by UNCITRAL on the issues covered by Chapter 9 of the draft before a developed text is put forward for adoption. Chapter 9 should be used as the basis for further study. In the view of the United Kingdom this chapter has not been sufficiently worked out and, if adopted, it would prejudice the ratification of the draft Convention.

19. As regards Chapter 11 on Transfer of Rights, the United Kingdom considers that the draft text is at present too skeletal to achieve either certainty or the harmonization of national law. In addition, it should not be subject to the same conditions of applicability as the remainder of the Convention. Further clarification and modification to this chapter is required if it is to be of benefit to future shippers, consignees and carriers.

Conclusion

20. The United Kingdom is grateful for the opportunity to comment on the text of the draft Convention. While it supports the efforts of UNCITRAL and considers that the draft Convention has a number of potential benefits, it considers that, before the text is approved by the Commission, a number of important amendments need to be made to it, viz:

(a) The definition of “contract of carriage” should be changed so as to take some account of whether in fact the goods were carried by sea;

(b) Chapter 9 on Delivery of the Goods and Chapter 11 on Transfer of Rights should be excluded from the Convention and be the subject of further study. It is suggested that it would be beneficial to the whole shipping and commercial community if UNCITRAL would then prepare a separate instrument (whether a Convention or a Model Law can be decided later) dealing with the topics of Delivery of the goods, Transfer of rights and perhaps some others (such as Rights of the Controlling Party). It is considered that this approach is far more likely to produce harmony of national law than is the current text.

21. If the suggestion at (b) above is not accepted, then the United Kingdom suggests, in the alternative, that Contracting States should be permitted to “opt-out” of these chapters, or at least out of Chapter 9.
