United Nations A/CN.9/658/Add.7

General Assembly

Distr.: General
7 May 2008*

Original: English

[Start1]

United Nations Commission on International Trade Law
Forty-first session
New York, 16 June-3 July 2008

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 due to the necessity of translating it into English prior to submission.

V.08-53420 (E) 130508 140508

II. Comments received from Governments and international organizations

A. States

10. China

[Original: Chinese]
[15 April 2008]

(a) Article 15 of Chapter 4 (Specific obligations applicable to the voyage by sea)

1. This article provides that the carrier must, before sailing, at the time of sailing and during shipping, act with care:

> to ensure that the ship is in, and will remain in, a state of seaworthiness. This provision extends the obligation of the carrier to maintain the seaworthiness of ship to cover the whole voyage. It also means that the carrier has the obligation to take reasonable measures to speedily restore the ship to a state of seaworthiness no matter what causes the ship's unseaworthiness, and the carrier will be liable for compensation for any loss of or damage to goods as a result of the carrier's failure to restore speedily the seaworthiness of the ship.

2. China's view is, since paragraph 1 of Article 14 of the Convention provides for the carrier's responsibility for the goods, and Article 18 provides for the basis of liability of the carrier, an article that would change or extend the period of the seaworthiness of ship will, under the current state of development of carriage by sea, greatly increase the burden on carriers, which will be overly demanding for carriers. China would propose that the obligation of seaworthiness should continue to be limited to before sailing and at the time of sailing, and should not be extended to cover the whole of the voyage.

(b) Article 18 of Chapter 5 (Basis of Liability)

3. The fact that paragraph 3 of this article does not provide for "the exemption of carrier from the liability for nautical faults", i.e. the liability of the captain and the pilot for faults in piloting and managing the ship, will greatly increase the responsibility of the carrier, and will severely affect the relatively balanced relationship of rights and obligations between the carrier and the owner of the goods. However, the Hamburg Rules abolished the exemption from liability for nautical fault, and adopted a system of assumed liability for faults in an attempt to establish a fair relationship of rights and obligations between the carrier and the owner of the goods. But since the shipping industry in practice has not reached the point to be able to abolish the exemption from liability for nautical faults, the Hamburg Rules have yet had any substantive and wide-ranging effect.

4. China suggests that full consideration be given to the characteristics of the risks of carriage by sea, and that the provisions of the Hague-Visby Rules for the exemption of the carrier from liability for nautical faults should be maintained.

(c) Article 27 of Chapter 6 (Carriage preceding or subsequent to sea carriage)

5. A section on the parts of the transport other than carriage by sea in multi-modal transport was added to Article 27 of the Convention. As far as the applicable law is concerned, priority should be given to those other international instruments or the national laws that govern the stages of carriage wherein loss or damage to goods occurs. But many maritime countries including China are not parties to the international instruments on rail and road transport, which are governed by national laws. If national laws are not included, the result would be the application of the provisions of the Convention, yet these provisions are designed for the carriage of goods by sea, and are not suitable to rail and road transport.

6. China would propose to add "or national law" after "international instruments" in Article 27 of the Convention.

(d) Article 33 of Chapter 7 (Special rules on dangerous goods)

7. Article 33 of the Convention provides:

> When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment:
>
> (a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and […]

8. In today's extremely highly-developed information society, if the above provision is interpreted in a strict manner, the carrier has almost no way to prove that he "does not otherwise have knowledge of their dangerous nature or character", and therefore is deprived of almost all the possibility to pursue the shipper for liability. At a time when dangerous goods carried by sea continue to increase and new products continue to emerge, this provision would greatly increase the burden of proof on the carrier and make him shoulder extra costs for verification, resulting in higher ship-operating costs.

9. China would propose to delete from paragraph 1 of Article 33 "and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character,"; or, by referring to the wording of other articles, to change it to "that the carrier or performing party does not have knowledge of their dangerous nature or character by any other reasonable means".

(e) Article 49 of Chapter 9 (Delivery when a negotiable transport document or negotiable electronic transport record is issued)

10. In view of the widespread practice of releasing goods without the bill of lading by carriers, the Convention seeks to address the issue of releasing goods without the bill of lading, i.e. when the bill of lading reaches the destination later than the goods, or, due to other reasons, the holder of the bill of lading fails to request the delivery of goods at the time when the goods reach the destination, the carrier is entitled to seek instructions to discharge the goods in the following order from the party controlling the goods, the shipper and the shipper of the bill of lading. Such

discharge of goods is viewed as the carrier having honoured his obligation to the holder of the bill of lading to deliver the goods, and therefore is not liable for discharging the goods without the bill of lading. The Convention's legislative thinking on discharging goods without the bill of lading is desirable, but this provision of the Convention weakens the function of the bill of lading as the document of title, damages the credibility of the bill of lading, and tends to legitimize the discharge of goods without the bill of lading. This provision can lead the consignee (the controlling party) to maliciously take advantage of the Convention's provision on discharging goods without the bill of lading, to carry out commercial fraud, which would place the interests of such concerned parties as the consignee, the holder of the bill of lading, banks and the carrier in a disadvantageous or uncertain position.

11. In addition, the following issues are raised in practice: under what circumstances does the carrier not have to assume responsibility for discharging the goods without the bill of lading? How can "in the order of" be understood? If the holder of the bill of lading fails to take delivery of the goods, how long after the goods reach the port of destination will it be seen that the holder of the bill of lading has failed to request the discharge of the goods? The bill of lading, along with the resale of the goods, is in circulation – how long does the carrier have to locate the consignee?

12. China believes that, on the one hand, the current provision in Article 49 is not capable of effectively enabling the carrier to address the issue when the holder of a transferable bill of lading has failed to take delivery of the goods, and on the other hand, it is very different from the laws and practices of international trade that are currently widely followed, and would bring great uncertainty into and a strong impact on the practices and the system of international trade. Hence, caution must be exercised in order to find the solution for the above mentioned issues.

(f) Article 61 of Chapter 12 (Limits of liability)

13. Article 61 of the Convention provides that the package limitation is 875 Special Drawing Rights per package or 3 Special Drawing Rights per kilogram. It is higher respectively by 31 per cent and by 50 per cent than the levels (666.67 Special Drawing Rights per package or 2 Special Drawing Rights per kilogram) adopted by the currently most widely applied Hague-Visby Rules.

14. China is one of the largest maritime trading nations of the world. Her long-standing maritime trading practices (maritime container transport in particular) prove that the average value of goods carried by sea has not yet exceeded the package limitation set in the Hague-Visby Rules. The package limitation provided for in Article 61 of the Convention will not have any practical significance for maritime container transport either for now or in the foreseeable future.

15. As part of the package consideration on the liability of the carrier, and in view of the fact that the carrier's liability has already been heavily increased by the Convention in terms of the seaworthiness of ships, and the revocation of the exemption from liability for nautical faults, the package limitation should not be set at a level too high to meet any practical need, to avoid a large imbalance between the interests of carrier and the owner of the goods, and to prevent the Convention from ending up like the Hamburg Rules.

16. China would propose that the package or kilo limitation in the Hague-Visby Rules be maintained. Even if a limit higher than that in the Hague-Visby Rules is adopted, it should not be higher than that in the Hamburg Rules, i.e. 825 Special Drawing Rights per package or 2.5 Special Drawing Rights per kilogram, whichever is higher.

(g) Article 69 of Chapter 14 (Choice of court agreements)

17. Paragraph 2 of Article 69 of the Convention provides for the conditions under which an exclusive choice of court agreement will come into effect for the third party to non-volume contracts. These conditions do not include "the consent of the third party", and it is therefore not enough to protect the interests of the third party, and is in contradiction with the basic principles of the effect of the provision in the agreement on selection of forum in the Chinese Law of Civil Procedure. This provision affects the right of the consignee or the holder of the bill of lading to select the forum for legal proceedings in accordance with the Convention. And the clauses for foreign jurisdiction mentioned on the transport document or electronic transport record are helpful for the concerned party to start legal proceedings. In addition, the provision in subparagraph (d) of this paragraph would hinder the Convention to achieve trans-national harmonization in the jurisdiction for the settlement of dispute in carriage of goods by sea.

18. Since the Convention includes the "express consent of the third party" amongst the conditions for the entering into force of the volume contract for the third party (see paragraph 5 of Article 82), China proposes that the following clause should be added to paragraph 2 of Article 69 in order to be consistent with the provision on volume contracts of Article 82, i.e. "That person gives its express consent to be bound by that agreement", and delete subparagraph (d) of paragraph 2.

(h) Article 82 of Chapter 16 (Special rules for volume contracts)

19. The main objective of an international convention on carriage of goods by sea is to lay down mandatory rules for carrier's obligations and liability in order to protect the interests of the owner of goods, and in particular those of the third party consignee. The Convention's provision on volume contract legitimizes the departure from the mandatory rules. Strict restrictions should therefore be imposed on such departure, and, in particular, should provide that the validity of such departure needs to be based on the agreement between the parties to a contract. Otherwise, it would harm the interests of numerous small and medium owners of goods, who negotiate from a position significantly weaker than that of the maritime container shipping companies, and the interests of third party consignee.

20. Since the text of (ii) of subparagraph (b) of paragraph 2 of Article 82 does not state clearly the requirement for the agreement between the parties to the contract, China suggests that the word "or" in subparagraph (b) should be changed to "and".

(i) On the Text

21. The Convention is huge in its size and complicated in its content. A large amount of the text is abstract, and is therefore less than satisfactory in terms of the readability and ease of understanding. As it is a code of conduct for the carrier and the owner of goods involved in carriage of goods by sea, rather than a mere basis for courts to pass judgments, China suggests that the text of the Convention should be as straightforward and easy to understand as possible.