



General Assembly

Distr.: General
20 May 2008*

Original: English

[Start]

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 because of its late receipt.



II. Comments received from Governments and international organizations

A. States

12. The Netherlands

[Original: English]
[19 May 2008]

(a) General Comment

1. The Government of the Netherlands highly appreciates the efforts of UNCITRAL to arrive at a new convention on contracts for the international maritime carriage of goods. The current conventions date from 1924, 1968 and 1978 and are outdated. In addition, these conventions leave important areas of maritime transport law untouched and do not address certain particular problem issues.

2. Therefore, it is most welcome that the new draft convention:

(i) provides for a modernization of maritime law, among others, by:

(aa) introducing a more balanced system of the carrier's obligations and its liability for loss, damage or delay to the goods,

(bb) taking duly into account that the modern contract for maritime carriage often is a multimodal one and that much cargo nowadays is containerized, and

(cc) providing for much-needed rules that could legally underpin e-commerce business models to the benefit of cargo interests, carriers and other parties interested in the carriage alike;

(ii) fills important gaps in current international maritime law, such as new rules on shippers' obligations, documentation and the right of control; and

(iii) addresses specific problem areas such as the delivery of the goods by the carrier, the identity of the carrier, the position of the FOB seller under transport law and the legal consequences of the FIO(S) clause.

3. Overall, the draft convention provides for a substantial improvement of international maritime law, which may be expected to foster worldwide trade and, therefore, deserves global acceptance. As a consequence, during the 41st session of UNCITRAL in June/July 2008 the utmost should be done to achieve that, in particular, the main trade-generating countries from various geographical areas are able to subscribe to the new convention. If it would turn out that, for that purpose, further compromises on a very few issues are needed, serious efforts to that effect should be made.

(b) Specific comments

4. In addition to the general comment above, we submit hereunder a few specific comments of a legal technical nature that are not intended to be major substantive

changes but only to clarify or better express the decisions that the Working Group has already made.

Article 1, Paragraph 24. Definition of “goods”

5. This provision to be examined in terms of whether the extension of “container” to “road and rail cargo vehicles” fits in the context of the article or not. See our proposal regarding the definition of “container” hereunder.

Article 1, Paragraph 26. Definition of “container”

6. In A/CN.9/WG.III/WP.102, the Netherlands proposed extending the definition of “container” to “road cargo vehicles” as well. In addition, the delegation of Sweden supplemented this proposal so as to include “rail cargo vehicles”. The discussion on these proposals is reflected in paragraphs 73 to 80 of the report of the latest session of the Working Group (see A/CN.9/645).

7. Paragraph 76 of this report states that, generally, broad support was expressed for both proposals and it was noted that if the proposals were to be approved, the drafting group should review the entire draft convention on the use of the terms “container” and “trailer”. After continuation of the discussion it was agreed – see paragraph 82 of the report – that the Working Group should revert to the proposed amendment of the definition of containers after it had examined draft article 61, paragraph 2. However, the Working Group, occupied as it was with other matters, did not revert to the proposed amendments of the definition of container and, consequently, the entire convention was not reviewed on the use of the term “container” and “trailer”.

8. As a result of this procedure, the term “container” has been supplemented by the term “road and rail cargo vehicle” in articles 26 (1) (b), 28 (3) and 61 (2) only, and the other articles where the term “container” appears, were not reviewed at all. (The word “trailer” was only referred to in article 28 (3), which has been adjusted properly.)

9. Therefore, we propose that the other articles of the draft convention that include the term “container”, should also be reviewed in order to assess whether an extension of the term “container” with “road and rail cargo vehicles” fits in the context of the article or not. After this review, it may be decided whether it is appropriate to extend the definition of “container” with “road and rail cargo vehicles”, or to use these latter words in any individual article as appropriate.

Article 15. Specific obligations applicable to the voyage by sea

10. The current text of subparagraph (c) may easily be read as if “any containers supplied by the carrier in or upon which the goods are carried” are an intrinsic part of the ship. This is clearly not the intention. Therefore, a better text would be:

“(c) make and keep the holds, ~~and~~ all other parts of the ship in which the goods are carried and including any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.”

11. If the above is acceptable, a consequential redrafting must be made in article 18, paragraph 5, subparagraph (a).

12. A second issue in respect of this subparagraph is that this provision must be reviewed regarding whether the extension of “container” to “road and rail cargo vehicles” fits in the context of the provision or not. See our proposal on the definition of “container” in paragraph 9 above.

Article 18. Basis of liability – Paragraph 5 (a)

13. If the word “including” in article 15 (c) is replaced by “and”, a similar change must be made in this provision.

14. A second issue in respect of this subparagraph is that this provision must be reviewed regarding whether the extension of “container” to “road and rail cargo vehicles” fits in the context of the provision or not.

Article 42. Qualifying the information relating to goods in the contract particulars – Paragraph 3

15. In the chapeau of this provision, the word “container” is used twice. Therefore, it must be reviewed regarding whether the extension of “container” to “road and rail cargo vehicles” fits in the context of the provision or not. See our proposal on the definition of “container” in paragraph 9 above.

Article 42. Qualifying the information relating to goods in the contract particulars – Paragraph 4

16. In article 42 (4) (chapeau), (a)(i), (b)(i) and (b)(ii) the word “container” is used five times. Therefore, it must be considered whether the extension of “container” to “road and rail cargo vehicles” fits in the context of these provisions or not. See our proposal on the definition of “container” in paragraph 9 above.

Article 43. Evidentiary effect of the contract particulars – Paragraph (c)(ii)

17. Because this subparagraph uses the word “container” twice, it must be reviewed regarding whether the extension of “container” to “road and rail cargo vehicles” fits in the context of this provision or not. See our proposal on the definition of “container” in paragraph 9 above.

Article 49. Delivery when a negotiable transport document is issued

18. Two basic legal principles are behind the draft of article 49 as a whole. The first is that a negotiable document legitimizes the person entitled to the goods upon their arrival at destination and the second is that the deliverability itself of the goods is the responsibility of the cargo side. Therefore, taking into account that practices have developed that seem to ignore these basic legal principles, article 49 aims to provide an incentive to the holder of the negotiable document to make itself known to the carrier in time. Furthermore, the article provides that the carrier is under a duty to exercise reasonable efforts to locate a holder if the latter fails to make itself known.

19. Since, the controlling party is always a holder if a negotiable transport document is issued, paragraph (d) of this article may be clearer if it is drafted as follows:

~~“If the goods cannot be delivered because either the name or address of the holder is not known to the carrier and the carrier is, after reasonable effort, unable to locate the holder in order to request delivery instructions, or the holder, after having received a notice of arrival, does not claim delivery of the goods at the time or within the time referred to in article 45 from the carrier after their arrival at the place of destination, the carrier shall so advise the controlling party, and the controlling party shall give instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier shall so advise the shipper, and the shipper shall give instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party or the shipper, the carrier shall so advise the documentary shipper, and the documentary shipper shall give instructions in respect of the delivery of the goods.”~~

20. The above-suggested draft is not intended to effect any change in substance to the current draft. If the above draft is acceptable, a further consequential redrafting is to delete the words “the controlling party” in the first line of subparagraph (e).

Article 50. Goods remaining undelivered – Paragraph 1 (b)

21. If the proposal relating to article 49 is accepted, a consequential amendment should be made in article 50 (1) (b) because in the event that more than one original negotiable transport document is issued, not all holders are necessarily controlling parties. Therefore, the word “holder” should be inserted in subparagraph 1 (b), so as this provision to read:

“(b) The holder, ~~the~~ controlling party, the shipper or the documentary shipper cannot be found or does not give the carrier adequate instructions pursuant to articles 47, 48 and 49.”

Article 50. Goods remaining undelivered – Paragraph 2 (b)

22. Because this subparagraph refers to a container, it must be reviewed regarding whether the extension of “container” to “road and rail cargo vehicles” fits in the context of this provision or not. See our proposal on the definition of “container” in paragraph 9 above.

Article 53. Identity of the controlling party and transfer of the right of control

23. In A/CN.9/WG.III/WP.81, a new paragraph 2 was inserted in this article. However, a necessary consequential adjustment to the chapeau of paragraph 1 was overlooked. Therefore, the chapeau of paragraph 1 should make exception to paragraph 2 as well. Further, in view of the fact that paragraph 1 is the main rule, the better text of the chapeau of paragraph 1 might possibly be as follows:

“1. Except in the cases referred to in the paragraphs 2, 3 and 4:”