United Nations A/CN.9/658/Add.11

General Assembly

Distr.: General
26 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 because of its late receipt.

V.08-53886 (E) 290508 300508

II. Comments received from Governments and intergovernmental organizations

A. States

14. Germany

[Original: English]
[26 May 2008]

(a) General comments

1. The Federal Government welcomes UNCITRAL's efforts to harmonize transport law at the international level. However, Germany deplores that there was only a few weeks to review the comprehensive and rather complex draft convention that the UNCITRAL Working Group III (Transport Law) adopted in January 2008 and transmitted to Member States at the end of February. It was not possible to look into all the details of the UNCITRAL draft in the given period of time. The Federal Government therefore suggests that the deliberations within UNCITRAL be continued in 2009 if it becomes clear at the meeting in June 2008 that many issues require further clarification and it may be anticipated that the convention may not be ratified by a number of States, particularly by States parties to the Hague Rules of 1924, to the Visby Rules of 1968 or to the Hamburg Rules of 1978. Anything perhaps leading to the convention being ratified only by States that are not party to the conventions mentioned above and only adding another legal regime to the existing ones should be avoided as this would mean a setback in the efforts to promote international unification in the field of transport law.

2. Below, the Federal Government states its views on some provisions of the draft convention which, in its opinion, should be improved. The comments are not to be regarded as exhaustive. The Federal Government reserves the right to make further proposals at the next UNCITRAL meeting.

(b) Specific comments

Article 5 (General scope of application)

3. According to articles 5 and 1 (1), the convention not only applies to contracts for carriage by sea, but also to contracts for carriage by sea and other modes of transport. The Federal Government wishes to express its concern about establishing special rules within the convention applying to one part of multimodal transport contracts, namely multimodal transport contracts that provide for carriage by sea. This will lead to a fragmentation of the laws on multimodal transport contracts.

4. Germany has reservations also vis-à-vis the contents of the provisions on contracts for multimodal transports including sea carriage. The draft suggests that basically all provisions of the convention apply to such multimodal transport contracts. The only exception provided for shall apply in cases where damage can be localized. For such cases, article 27 states that the provisions of another international convention concerning carriage on land or by air shall prevail if the damage occurred on land or in the air. As outlined below, article 27 is, however, not satisfactory because of its restrictions to provisions of international conventions.

Furthermore, article 27 presupposes that the shipper can prove where the damage has occurred. In many cases, however, the shipper will not be in the position to provide that proof. Article 27 is therefore of minor significance.

5. Hence, it must be assumed that contracts for multimodal transports including sea carriage are covered by the general provisions of the convention. This result does not seem to be very convincing. A comparison between the provisions of the draft and provisions of other conventions dealing with the carriage of goods such as the CMR, COTIF or the Montreal Convention reveals not only that the draft convention was designed almost exclusively with a view to sea carriage – this is apparent in particular from article 18, paragraph 3, and its exemptions from liability – but it also makes provision for considerably diminished liability of the carrier compared to the other conventions mentioned above. There is no justification to be found in the draft convention for making these provisions applicable not only to contracts of carriage by sea only, but also to contracts providing for the performance of part of the carriage on land.

Article 12 (Period of responsibility of the carrier)

6. Pursuant to paragraph 3, a provision is void to the extent it provides that the time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage or that the time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage. Conversely, the provision can be taken to mean that a provision is valid that provides for an exemption of the carrier's responsibility for the time when the carrier or his servants or agents have custody of the goods, but when the goods are not located on the means of transport. The Federal Government is concerned about allowing such a limitation of the carrier's liability. No justification can be found for changing the preceding conventions and providing for an internationally binding rule that allows the sea carrier to exclude liability for damage prior to loading the goods onto the vessel and subsequent to the discharge of the goods from the vessel. Most notably, the provision gives reason for concern in view of the introduction of the figure of the maritime performing party in the draft convention, because in accordance with article 20, paragraph 1, the maritime performing party is subject only to those liabilities that are imposed on the carrier. A clause exempting the carrier from liability for damage occurring prior to loading onto the vessel and subsequent to the discharge from the vessel would be beneficial for the maritime performing party too. Neither the carrier nor the maritime performing party would thus be liable even if the preconditions of article 63 were fulfilled.

7. In order to avoid this result, Germany proposes to word article 12, paragraph 3, as follows:

> "3. For the purposes of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:
>
> "(a) The time of receipt of the goods is subsequent to the time when the carrier or any person referred to in article 19 has actually received the goods or

"(b) The time of delivery of the goods is prior to the time when the carrier or any person referred to in article 19 has actually delivered the goods."

Article 13 (Transport beyond the scope of the contract of carriage)

8. According to article 13, it is possible to state in a single transport document that the transport is undertaken not only by the carrier but also by another person. The meaning of this provision is not clear. The Federal Government has fundamental reservations about this, in particular if the transport document is a negotiable one. The questions arise whether the holder of the document can be confronted with a limitation of the liability as agreed upon among the carriers, from whom the holder of the document can require the delivery of the goods, and to whom the document has to be presented pursuant to article 49 of the draft convention.

Article 20 (Liability of maritime performing parties)

9. In accordance with article 20, the maritime performing party is subject to the same liabilities that are imposed on the carrier. Article 1, paragraph 7, stipulates that an inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area. Linking the definition to the place where the service is performed is not appropriate, because seaworthy packing can also be performed inland. Additionally, cargo companies located in seaports are more and more frequently performing services that do not fall under the obligations of the carrier. This shows that a mere spatial reference could cause definition problems.

Article 22 (Delay)

10. The wording in article 22 deliberately leaves the question open as to whether implied delivery times need to be taken into consideration too. As long as it remains impossible – as has hitherto been the case – to agree that implied arrangements are sufficient, this provision should be deleted and the question if and to what extent the carrier is answerable for delays should be left to applicable national law.

Article 27 (Carriage preceding or subsequent to sea carriage)

11. The rule that article 27 establishes for multimodal transports stipulates that the present convention does not prevail over provisions of another convention under certain circumstances if it is known where the damage has occurred. This provision seems insufficient. If the place is known where the damage has occurred, the national law applicable to that stage of the carriage should also apply. This shall at any rate be the case if the liability provisions of the draft are not changed, for they are almost exclusively tailored to sea carriage. This is particularly apparent from article 18 and its grounds for exemption from liability, for which provision is made in paragraph 3. There is no reason to refrain from applying the relevant national law when damage occurs during the inland part of a carriage that covers both land and sea carriage, just because the carriage on land is followed by a sea carriage.

12. Furthermore, the wording "do not prevail" can be misunderstood, because it might suggest that article 27 regulates a conflict in the convention whereas article 84 of the draft convention is envisaged for that event. Instead of the wording

above, article 27 should stipulate that the present convention "does not apply" to cases described under letters (a) to (c), but that the provisions of the conventions referred to shall be applicable in those cases.

Article 32 (Information for compilation of contract particulars)

13. The shipper is subject to unlimited – and pursuant to article 81, paragraph 2, not to be limited – strict liability, if the information provided for the compilation of the contract particulars is not accurate (article 32, paragraph 2). This liability regime leads to considerable and unjustifiable detriment to the shipper's position when compared to the liability rules for which provision has been made in respect of the carrier (article 61 et seq.). Hence, it seems to be necessary at least to delete the word "limits" in article 81, paragraph 2, and, by doing so, to allow the parties to the contract of carriage to agree on a limitation of the shipper's liability.

Article 33 (Special rules on dangerous goods)

14. The comments on article 32 apply mutatis mutandis to the rules in article 33 concerning the shipper's liability for providing insufficient information in the case of carriage of dangerous goods.

Article 34 (Assumption of shipper's rights and obligations by the documentary shipper)

15. See the comments on articles 32 and 33. The Federal Government is of the opinion that the provision to impose the same obligations on the documentary shipper that apply to the contractual shipper and thus make the documentary shipper fully liable for non-compliance alongside the shipper, is going too far. This is clearly shown in the provision on the shipper's obligation with respect to the delivery of the goods (article 28). It is important also to take into account that this provision would generate a considerable need for legal counsel for hauliers and logistics companies, because they would need to inform their customer about the legal consequences of this, in particular about the unlimited joint and several liability.

Article 36 (Cessation of shipper's liability)

16. The standard, set in article 36, for the shipper's obligatory liability unreasonably curtails the shipper's rights. This provision should be deleted without substitution.

Article 40 (Signature)

17. According to article 40, paragraph 2, an electronic transport record needs to include an electronic signature of the carrier or a person acting on its behalf. The provision does not make any specific requirements with respect to the electronic signature. It remains unclear whether, under national law, more specific requirements can be made for the electronic signature within the meaning of article 40. In the interest of legal certainty, the Federal Government suggests that there be clarification to the effect that this possibility exists.

Article 45 (Obligation to accept delivery)

18. According to article 45, the consignee is obliged to accept the goods. According to the wording of this provision, this also applies to cases when goods are apparently damaged and when the consignee does not require delivery. This seems to be going too far. The consignee should be obliged to accept the goods only if delivery was required.

Article 61 (Limits of liability)

19. According to article 61, the carrier's liability for breaches of its obligations under this convention, with the exception of delay in delivery, is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods. This is different from other conventions on transport law as the total amount for limitation of the carrier's liability not only applies to lost or damaged goods, but also, for instance, to cases where the carrier does not provide the means of transport, where the carrier is in breach of the obligation to supply information as required in article 29 or where it provides inaccurate information in the transport document. The Federal Government has substantial reservations about seeing such an extension of the limitation of liability. This concern also holds sway in the light of the shipper's obligatory and unlimited liability in comparable cases.

Article 81 (General provisions)

20. According to paragraph 2 of this article, any term in the contract is void that excludes or limits the obligations and the liability of the shipper, the consignee, the controlling party or the documentary shipper. The Federal Government does not see the need for such a comprehensive provision. This is particularly true in view of the fact that the draft convention does not provide for any limits of liability in respect of the said parties, but it does do so for the carrier. The parties to the contract of carriage need to be entitled to at least limit the shipper's liability and the liability of those parties equated with the shipper.

Article 82 (Special rules for volume contracts)

21. The rules providing for freedom of contract under volume contracts tie in with the definition in article 1, paragraph 2. This definition is very vague. In view of the scope of article 82 it seems advisable for the definition to be made more precise.

Article 84 (International conventions governing the carriage of goods by other modes of transport)

22. In article 84, only conventions are given priority that were set up for unimodal carriage of goods on land, inland waterways or by air, and that are already in force at the time of the present convention's entry into force. Restricting the provision to conventions in force is too narrow. Instead, a provision is needed that encompasses giving priority to future amending protocols to existing conventions as well as to new conventions on the carriage of goods on land, on inland waterways and by air and to conventions on multimodal transport contracts. As the provisions of the draft convention have been mainly designed with a view to sea carriage, it is advisable to leave room for further development of the law with respect to other modes of carriage.