United Nations A/CN.9/658/Add.1

General Assembly

Distr.: General
15 April 2008
English
Original: French

[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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V.08-52841 (E) 280408 290408

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Comments of countries of West and Central Africa

[Original: French]
[8 April 2008]

1. After reviewing the draft convention on contracts for the international carriage of goods wholly or partly by sea, some African States indicated the desire to express a common viewpoint to the UNCITRAL General Assembly [**Commission?**] in order to defend their interests. These countries were Angola, Benin, Burkina Faso, Cameroon, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Ghana, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Nigeria, Senegal and Togo.

2. We were particularly concerned about five of the articles, and we propose that they be re-examined as set forth below, in order to prevent serious hindrance of the development of our maritime trade.

1. Article 14: Specific obligations

3. Article 14 consists of two paragraphs. The first recalls the traditional obligations that maritime carriers have always been required to fulfil, especially loading, stowing and unloading, something which is, moreover, formally confirmed by the relevant provisions of article 12.3 of the draft; this expressly prohibits any clauses whereby the receipt of goods by the carrier might occur after loading and delivery prior to unloading. This means that the minimum duration so established of the carrier's responsibility falls immediately prior to loading and after unloading.

4. Accordingly, it is easy to see that the obligations recalled in the first paragraph of article 14 are in no way "specific" and, for that reason, the title of article 14 is inappropriate.

5. The second paragraph of article 14, on the other hand, constitutes a true exception to the principle set forth in the first paragraph by establishing genuinely "specific" obligations. However, when one realizes that in the practice of international maritime transport the contract for the carriage of goods is an actual contract of accession, there is reason to fear that what is envisaged as an exception will become, through mere editorial changes, the rule, and that the consignee, which becomes involved only when the goods are delivered, will be forced to assume obligations of which it was unaware or the conditions of which it has not discussed.

6. Moreover, whenever it is a case of a consignee importing goods under an international sales contract, one must recognize that the consignee is wearing two hats, and that, in such a case, the purpose of the draft convention is not to cover international sales but only the carriage of goods. As a party to the contract of carriage, the consignee should not have to assume exceptional obligations imposed

on it in its absence. Its acceptance of the contract of carriage should be based solely on the normal commitments that the shipper can enter into on its behalf, vouching for it.

7. Accordingly, the second paragraph of article 14 cannot be justified and for that reason, the African States submitting these comments request the General Assembly [**Commission?**] of UNCITRAL to delete it.

2. Article 18: Basis of liability

8. Article 18 deals with the carrier's liability. It establishes a composite system of liability with resurgence of the exceptions that most African States saw disappear from their positive law when they ratified the Hamburg Convention. This text, which is likely to adversely affect the legal situation of the party entitled to the cargo, might result, as a normal practical consequence, in higher insurance premiums, which would obviously be reflected in the price of the goods. This snowball effect would ultimately reach the final consumers, with all the obvious implications for their purchasing power and hence for our national economies.

9. After nearly a century without those exceptions, their resurgence seems even less justifiable in that the shipping industry has made tremendous technological strides, with the appearance of new generations of vessels, of container ships, of ships specializing in the carriage of hazardous or highly perishable goods, etc.

10. If, in spite of everything, the shipowner's liability remains what it was nearly a hundred years ago, this is simply unfair to the user. The world maritime order should not be based on rules that, like these, are so unconducive to contractual balance.

11. For all these objective reasons, the list of exceptions should be reconsidered, as most of them are unjustifiable in this day and age. Deletion of the third paragraph would necessitate a restructuring of article 18.

12. The new wording might read as follows:

"Article 18. Basis of liability

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4.

2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 19.

3. When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which is liable pursuant to this article."

3. Article 38: Contract particulars

13. This article relates, really, to the particulars that the transport document must contain. Here one is dealing with contractual provisions essential for ensuring that there is sufficient information about the nature of the goods, the identity of the parties interested in the implementation of the contract and the means necessary for its implementation. In its present formulation, however, article 38 is very incomplete in that it relates only to the goods and the carrier. Information about, in particular, delivery and means of transport is not mentioned, although these are essential aspects.

14. We suggest, therefore, that the current list be supplemented by the following: the name of the ship, the name and address of the consignee, the date of delivery (even if only approximate), and the ports of loading and unloading.

15. The text of article 38 could, then, read as follows:

"Article 38. Contract particulars

1. The contract particulars in the transport document or electronic transport record referred to in article 37 shall include the following information, as furnished by the shipper:

(a) A description of the goods as appropriate for the transport;

(b) The leading marks necessary for identification of the goods;

(c) The number of packages or pieces, or the quantity of goods;

(d) The weight of the goods, if furnished by the shipper; and

(e) <u>The name and address of the consignee</u>.

2. The contract particulars in the transport document or the electronic transport record referred to in article 37 shall also include:

(a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage;

(b) The name and address of the carrier;

(c) <u>The name of the ship</u>;

(d) <u>The ports of loading and unloading</u>;

(e) The date on which the carrier or a performing agent received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued;

(f) <u>The approximate date of delivery</u>; and

(g) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.

3. For the purposes of this article, the phrase "apparent order and condition of the goods" in subparagraph 2 (a) of this article refers to the order and condition of the goods based on:

(a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party; and

(b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or the electronic transport record."

4. Article 65: Extension of time for suit

16. Article 65 formally prohibits any suspension or interruption of the time for suit, which weakens the legal situation of the claimant. The direct practical consequence of that will undoubtedly be an effect on the attitude of the insurance companies, especially as the present wording makes any extension of the time for suit depend solely on the goodwill of the maritime carrier. It is true that in practice, the insurance company, exercising by subrogation the rights of the insured party, can obtain such an extension, but it would be fairer if this occurred as the result of objective events inherent in the mechanisms of procedural law.

17. Accordingly, it would be fairer to maritime transport users and in line with all legal systems if, without any change in the characterization of the time for suit, the first part of article 65 were deleted.

18. Article 65 would then read as follows:

"Article 65. Extension of time for suit

The person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations."

5. Article 92: Reservations

19. Article 92 of the draft convention rules out all reservation; States would have no choice but to accept or reject the text – an "all or nothing" situation. While it is easy to understand the reason for such a legislative policy option, the desire to achieve the broadest possible application of the convention, other concerns should be taken into account with a view to ensuring a proper balance between legal systems, satisfying some without detriment to others.

20. Making the draft convention applicable to door-to-door operations could have serious legal consequences in many countries, including a heavier burden of proof for the claimant in most cases, while small-scale operators, especially transport intermediaries, would simply be squeezed out by the major operators.

21. Furthermore, the "revolutionary" nature of the rules applicable to "carriage preceding or subsequent to sea carriage" could create inextricable legal problems regarding their implementation. The strong statement by the delegate of the URU [**?**] in November 2006 at the Vienna meeting of Working Group III is a perfect illustration of this, and the way article 27 of the draft convention is worded does not allay the existing concerns.

22. For the above reasons, we believe that those States which do not wish to see the rules of the future convention regarding pre- and post-carriage applied in their case should be allowed to make a declaration that those rules will not apply to them. Those States which would not have any problem with the application of the rules could simply ratify the text as it now stands.

23. Such reservations are not unknown in maritime contexts. Indeed, they appear in quite a few conventions – for example, the Convention relating to the Carriage of Passengers and their Luggage by Sea, adopted in Athens on 13 December 1974 (cf. article 22, "Declaration of non-application") and the Convention on the Limitation of Liability for Maritime Claims, adopted in London on 19 November 1976 (cf. article 18, "Reservations").

24. Article 92 should be worded as follows:

"Article 92. Reservations

1. Any State may, upon signature, ratification, acceptance, approval, or accession, reserve the right to exclude the application of article 27 of this Convention and all other provisions concerning carriage preceding or subsequent to sea carriage.

2. No other reservation is permitted to this Convention."