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Summary record of the 866th meeting
Held at Headquarters, New York, on Monday, 16 June 2008, at 3 p.m.

Chairperson: Mr. Illescas . . . . . (Spain)

Contents

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*)

08-38260 (E)

The meeting was called to order at 3.15 p.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13)

Draft article 6 (Specific exclusions) and definitions of "liner transportation" and "non-liner transportation"

1. **The Chairperson** noted that the definitions of "liner transportation" and "non-liner transportation" contained in draft article 1, paragraphs 3 and 4, were relevant to the content of draft article 6. He took it that the Commission wished to retain the current wording of the draft article and the related definitions.

2. *Draft article 6 and draft article 1, paragraphs 3 and 4, were approved in substance and referred to the drafting group.*

Draft article 7 (Application to certain parties) and definitions of "holder" and "consignee"

3. **The Chairperson** noted that the definitions of "holder" and "consignee" in article 1, paragraphs 10 and 11, were related to the content of draft article 7. He took it that the Commission wished to retain the current wording of the definitions as well as the draft article.

4. *Draft article 7 and draft article 1, paragraphs 10 and 11, were approved in substance and referred to the drafting group.*

Draft article 82 (Special rules for volume contracts) and the definition of "volume contract"

5. **The Chairperson** suggested that the Commission should proceed to discuss draft article 82 out of numerical order, in order to complete consideration of the provisions relating to the scope of application of the draft convention. He noted that the definition of "volume contract" contained in article 1, paragraph 2, was related to the content of draft article 82.

6. **Ms. Downing** (Australia) said that her delegation had consistently opposed the wording of draft article 82 and the policy behind it, both in debate and in writing (A/CN.9/658, paras. 11-15 and 66-67, and A/CN.9/WG.III/WP.88, annex). The draft convention was intended to harmonize the law on the carriage of goods by sea; that aim would be undermined by draft article 82, since even its proponents anticipated that the volume contract provisions would apply to as much as 70 per cent of the container trade.

7. Moreover, the ultimate test of the convention would be whether it struck a fair balance between the commercial parties, and draft article 82 failed that test. There were good public policy reasons for Governments and international law in general to provide protection for the weaker party. All other international conventions dealing with the transport of goods offered such protection, for example, by providing for mandatory but capped liability. Draft article 82, however, allowed for an unprecedented amount of freedom of contract, bringing with it the possibility of abuse of the weaker bargaining party, generally, though not always, the shipper. Her delegation was dissatisfied with the text in its current form and continued to advocate the drafting changes proposed in its written comments (A/CN.9/658, paras. 14 and 67).

8. **Mr. Elsayed** (Egypt) said that his delegation supported the statement by the representative of Australia.

9. **Ms. Talbot** (Observer for New Zealand) expressed her delegation's agreement with the statement of Australia and drew attention to her country's written comments on the definition of "volume contract" (A/CN.9/658/Add.2, paras. 4-6).

10. **Mr. Schelin** (Observer for Sweden) said that his delegation supported the provision as it stood, believing that it provided adequate protection for the shipper. To link the issue of freedom of contract to a specified number of containers or shipments would result in a lack of flexibility.

11. **Mr. Oyarzábal** (Observer for Argentina) said that his delegation supported the Australian position that draft article 82 as currently worded was unacceptable, because it provided inadequate protection for shippers in small countries. Although under draft article 92 no reservation to the convention was permitted, one solution to the impasse, if positions were inflexible, might be to allow States to formulate a reservation specifically to draft article 82.

12. **Ms. Chatman** (Canada) said that her delegation supported the Australian position and had been consistently concerned about draft article 82 and an overly broad definition of "volume contract".

13. **Ms. Czerwenka** (Germany) said that, although her delegation was not totally opposed to allowing freedom of contract in certain circumstances, it was concerned, as it had stated in its written comments (A/CN.9/658/Add.11, para. 21), that the definition of "volume contract" in draft article 1, paragraph 2, was too vague to enable a judge to decide whether draft article 82 applied in a given case.

14. **Mr. Miller** (United States of America) said that, although the United States had many shippers, his delegation was interested in striking a good balance between shipper and carrier interests. It believed that the current draft met the concerns expressed. In Working Group III (Transport Law), more than 30 delegations,[1] including some that had originally opposed the provision, had supported the final draft as part of a compromise package.

15. **Mr. Hu** Zhengliang (China) said that his delegation had repeatedly expressed its dissatisfaction with draft article 82, in part because of the insufficient protection provided for small shippers. Moreover, the definition of "volume contract" was so broad that it could cover, for example, an arrangement for the shipment of three containers over the course of three voyages. It was practicable for the draft convention to allow derogation, but freedom of contract should be based on equality of bargaining power, which was often not the case in reality.

16. **Ms. Slettemoen** (Norway) said that her delegation preferred to retain the current text of the draft article and the definition of "volume contract".

17. **Mr. Delebecque** (France) said that, although the provision had been controversial from the start, his delegation found the compromise reached in the Working Group acceptable, even if not perfect, and advocated retaining the current wording of draft article 82.

18. **Mr. Cheong** Hae-yong (Republic of Korea) said that his Government had organized several meetings with national industries and maritime law experts on the issue of volume contracts. In the light of their opinions, his delegation advocated a more cautious approach towards volume contracts in order to protect small shippers and carriers from undue pressure from large carriers and shippers. If the draft convention allowed freedom of contract with regard to volume contracts, a large shipper could, for example, impose an absolute liability clause on a carrier with weaker bargaining power, depriving it of the protection of the liability limits under the Hague-Visby Rules. To maximize the carrier's liability while reducing the amount of cargo constituting a volume contract would only benefit the shipper. Even if public policy in a given jurisdiction disallowed a contract unfairly detrimental to the carrier in that respect, once the convention was signed, the national courts could no longer regard such a contract as unlawful. Moreover, the volume contract provisions undermined the uniformity and predictability of commercial law aimed at by the draft convention. His delegation agreed with the representatives of Australia, Canada and China that the definition of "volume contract" should include a threshold figure.

19. **Mr. Zunarelli** (Italy) said that he associated himself with the views expressed by the representative of France; the subject had been discussed extensively and he was satisfied with the compromise reached in Vienna.

20. **Ms. Eriksson** (Observer for Finland) said that the draft article had been studied by her national authorities, who believed that the current wording had sufficient safeguards to ensure equitable treatment for both parties to a contract; she would prefer to leave it unchanged.

21. **Ms. Peer** (Austria) said that while she would prefer not to change the wording of draft article 82, she could support efforts to clarify the definition of "volume contracts" in draft article 1, paragraph 2, as proposed by the representatives of Australia and Germany.

22. **Mr. Sato** (Japan) said that he agreed with the representatives of Finland and France; draft article 82, particularly with the recent addition of paragraphs 2 (c) and (d), gave shippers adequate protection. Any effort to clarify the definition of "volume contract" would be controversial. To set specific parameters would make the definition inflexible and it was unlikely that agreement on an amount would be reached; wording

[1] Angola, Benin, Brazil, Burkina Faso, Cameroon, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Denmark, El Salvador, Equatorial Guinea, France, Gabon, Ghana, Guinea, Guinea-Bissau, Italy, Mauritania, Namibia, Niger, Nigeria, Norway, Poland, Senegal, Slovenia, South Africa, Spain, Switzerland, Thailand, Togo, United Kingdom, United States of America and Venezuela (Bolivarian Republic of).

such as “substantial volume” would be even vaguer than the current text.

23. **Mr. Mayer** (Switzerland) said that he associated himself with the statements made by the representatives of, inter alia, France and the United States of America.

24. **Mr. Lebedev** (Russian Federation) said that while he was prepared to consider any proposals for a new definition of “volume contracts”, he saw little hope of a solution acceptable to all members of the Commission. Draft article 82 was important for traders, shippers and other parties, especially in the context of container shipping. It also suggested the manner in which the convention, once adopted, would be applied in the future. By including the reference to “greater or lesser rights, obligations and liabilities” in paragraph 1, the drafters had sought to ensure that if a future case involving abuses by a shipper or carrier came before the courts, the presumption would be that the purpose of the convention was to prevent arbitrary increases or decreases in liability.

25. The Commission had approved in substance draft article 2 (Interpretation of this Convention), which stressed “the need to promote uniformity in its application and the observance of good faith in international trade”. That statement was intended to provide guidance for the courts in cases embodying the concerns raised by the representative of Australia. In the absence of a clear proposal for a new definition of “volume contracts”, he would prefer to leave draft article 1, paragraph 2, and draft article 82 unchanged.

26. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that draft article 82 was of great interest to the States of his region. Its current wording reflected the concerns expressed by delegations and he saw no reason to return to that sensitive issue; the text was acceptable as it stood.

27. **Mr. Bigot** (Observer for Côte d’Ivoire) said that he associated himself with the views expressed by the representative of Senegal.

28. **The Chairperson** said it was clear that the proposed amendments to the draft article did not have the support of the majority of delegations.

29. *Draft article 82 and draft article 1, paragraph 2, were approved in substance and referred to the drafting group.*

Draft article 8 (Use and effect of electronic transport records)

30. **The Chairperson** said that the definitions contained in draft article 1, paragraphs 14 to 16 and 18 to 22 all related to chapter 3 (Electronic transport records); however, he suggested that the Commission should begin by considering draft articles 8, 9 and 10 and then discuss the definition of “electronic transport record” contained in draft article 1, paragraph 18, leaving the other definitions to be considered in connection with the draft articles in chapter 8 (Transport documents and electronic transport records).

31. *It was so decided.*

32. *Draft article 8 was approved in substance and referred to the drafting group.*

Draft articles 9 (Procedures for use of negotiable electronic transport records) and 10 (Replacement of negotiable transport document or negotiable electronic transport record)

33. *Draft articles 9 and 10 were approved in substance and referred to the drafting group.*

Definition of “electronic transport document”

34. *Draft article 1, paragraph 18, was approved in substance and referred to the drafting group.*

Draft article 11 (Carriage and delivery of the goods)

35. *Draft article 11 was approved in substance and referred to the drafting group.*

Draft article 12 (Period of responsibility of the carrier)

36. **Ms. Czerwenka** (Germany) drew attention to paragraph 7 of her delegation’s comments on the draft convention (A/CN.9/658/Add.11), which contained proposed amendments to draft article 12, paragraph 3 (a) and (b). Those subparagraphs, in their current form, gave the impression that the parties to a contract of carriage could exclude the liability of the carrier if the goods were received prior to the time of their initial loading under that contract. Her delegation believed that the carrier should be liable from the point at which the goods were received and should not be able to escape liability by redefining the period of responsibility.

37. **Mr. Tsantzalos** (Greece) said that his delegation considered that the words "on the ship" should be added after "loading" and "unloading" in draft article 12, paragraph 3 (a) and (b), respectively, in order to prevent the carrier from contracting out of the minimum period of responsibility between the time that the goods were loaded onto the ship and the time of their unloading.

38. **Mr. Morán Bovio** (Spain) pointed out that the Spanish text of draft article 12, paragraph 3, contained the words "sin perjuicio de lo dispuesto en el párrafo 2", whereas the reference to paragraph 2 had been deleted from the other language versions.

39. He did not think that the majority of delegations were in favour of the amendments proposed by the representative of Germany; the current wording conveyed the drafters' intent and should be left unchanged.

40. **Ms. Downing** (Australia) drew attention to her delegation's comments on the draft convention (A/CN.9/658, paras. 20-21), in which it had expressed the concern that draft article 12, paragraph 3, might enable carriers to confine their responsibility to the tackle-to-tackle period, thereby affording shippers less protection than existing Australian law. Her delegation would prefer to delete the paragraph entirely but could accept the amendment proposed by the representative of Germany.

41. **Mr. Blake-Lawson** (United Kingdom), supporting the German proposal, said that draft article 12 in its current form did not take sufficient account of the fact that receipt and delivery, or even possession, were concepts rather than occurrences like loading and discharging. The responsibility of the sea carrier did not necessarily start with loading nor end with discharge. It was the carrier's assumption of effective control of the goods that was crucial. What draft article 12, paragraph 3, aimed to do was to prevent contractual devices that would artificially deny that the carrier had assumed effective control of the goods.

42. The current text also did not take account of a situation where the consignee, contrary to draft article 45, chose not to take such effective control by refusing to accept delivery. His delegation believed that the German amendment better served the principle underlying paragraph 3 and also shared Germany's concerns in respect of draft article 20.

43. **Mr. Elsayed** (Egypt) said that, as it stood, paragraph 3 was unacceptable because it was open to differing interpretations and because it took into account only the obligations of the carrier, without considering the possible responsibilities of a third party under a prior contract concluded between the two.

44. **Mr. van der Ziel** (Observer for the Netherlands) said that he found draft article 12, paragraph 3, quite acceptable. The intention was to retain in the draft convention the established Hague-Visby Rule that the carrier was liable for loss of and damage to goods during the tackle-to-tackle period. Thus, paragraph 3 (a) said that the time of receipt of goods, while negotiable, must not be subsequent to the beginning of loading — in other words, the moment when the goods had been hooked on to the tackle — and that the time of delivery could not be stipulated to be prior to the completion of unloading. He disagreed with the German delegation that the provisions of paragraph 3 were incorrect.

45. Since the draft convention applied to both multimodel and port-to-port shipment, the text referred to "initial loading" and "final unloading", which in the case of port-to-port shipment automatically meant on and from the ship. The additional wording suggested by Greece was therefore unnecessary.

46. **Ms. Chatman** (Canada) proposed that paragraph 3 should either be deleted or replaced by the German proposal.

47. **Mr. Miller** (United States of America) said that he largely agreed with the Netherlands. The draft convention should facilitate whatever the industry was doing and should therefore cover the whole range of possibilities, from tackle-to-tackle responsibility to port-to-port or door-to-port. The purpose of draft article 12, paragraph 3, was to ensure that abuses did not occur; and yet the very delegations most concerned about the possible abuses were the ones arguing against it. The German proposal was not a clarification but a complete reopening of discussion on one of the fundamental provisions determining the kind of convention that would be produced. His delegation believed that the Commission should defer to the Working Group, which had spent so much time to produce the acceptable compromise text that was before it.

48. **Mr. Sato** (Japan) observed that his delegation's reading of draft article 12, paragraph 3, was similar to that of the United States. The intention was to ensure

that, while it prohibited agreement on a period of responsibility shorter than from tackle-to-tackle, the agreed period could also be broader, including port-to-port or even door-to-door. The German proposal subverted the provision and totally changed its nature.

49. **Ms. Czerwenka** (Germany) said that her delegation's proposal was not intended to change the nature of paragraph 3, which it interpreted along the lines of the proposed amendment, namely, as not intending to revert to the Hague-Visby tackle-to-tackle rule but rather as following the Hamburg Rules approach under the United Nations Convention on the Carriage of Goods by Sea. She herself felt that there was a major difference between the Hague-Visby Rules and draft article 12, paragraph 3, which contained a provision that would allow the carrier to exclude liability even while in physical possession of the goods. If, as the Netherlands had contended, the intention of the text was to retain the tackle-to-tackle principle, that should be handled as it had been in the Hague-Visby Rules, namely, by leaving it to national legislation to regulate freedom of contract to exclude liability outside the tackle-to-tackle period.

50. Moreover, in draft article 20, the draft convention developed a totally new concept, equating the position of the maritime performing party to that of the contract carrier and making them both liable to the same extent. That meant that, for the purposes of draft article 12, paragraph 3, if the contracting carrier could exclude responsibility for damages in port, then no one would be liable for what happened in port; whereas under the Hague-Visby Rules, at least one party remained liable.

51. If in paragraph 3 the tackle-to-tackle principle was to be replaced by the broader principle of the period of responsibility, it must be made clear that once the carrier had taken possession of goods on land or in a transport vehicle in the port area, the carrier's responsibility started and the carrier could not seek exemption via a definition of the period of responsibility.

The meeting was suspended at 4.55 p.m. and resumed at 5.15 p.m.

52. **Ms. Mbeng** (Cameroon) supported the gist of the German proposal and agreed that the current wording of draft article 12, paragraph 3, did not reflect its purpose. It would be unfortunate to revert to the Hague-Visby approach in defining the period of responsibility.

53. **Mr. Zunarelli** (Italy) observed that the current text was a clear improvement over Hague-Visby. He disagreed with the reading of the German and other delegations: the text did not allow the carrier to limit the period of responsibility, but, simply for the protection of the shipper, allowed the parties to agree that the time and location of receipt and delivery could differ from the time when a person other than the carrier received the goods, as long as it was after initial loading or prior to final unloading. Under no circumstances could the carrier deny liability after having already received the goods. The carrier could only declare that another person who had received them had done so on behalf of the shipper. Under the current text, the carrier would also still be liable if it warehoused the goods.

54. **Mr. Delebecque** (France) observed that if past proposals to define delivery in material rather than legal terms — for example, as effective transfer or effective placing at disposal — had been adopted, there would now be no problems. Paragraph 3 (b) sought to protect consignees against abuses. France had protective legislation to the effect that a tackle-to-tackle clause would apply only once the goods had effectively been placed at the disposal of the consignee, but other countries might not have such legislation, and that made their concerns understandable.

55. **Mr. Miller** (United States of America) thanked the German delegation for explaining the rationale behind its proposal, but said that his delegation read the current text very differently. The carrier's period of responsibility would be stipulated in the contract of carriage; if the carrier assumed functions outside the scope of the convention, its liability would be determined by other national rules and regimes, which often entailed an even higher degree of responsibility. Persons other than the carrier in possession of the goods were covered as appropriate under national laws. It would be unwise to try in the draft convention to impose rules on the carrier when it was acting in a capacity other than as a provider of carriage. Therefore, Germany's concerns were needless.

56. **Mr. Alba Fernández** (Spain) said that the inclusion in draft article 12, paragraph 3 (a) and (b), of a reference to the persons referred to in article 19 would obscure rather than clarify the issue, since it would distract the reader and could create problems in specific practical instances in the future. In his

delegation's view, draft article 12, paragraph 3, was sufficiently clear as to the carrier's responsibility for the goods and should therefore be left as it was.

57. **Mr. Schelin** (Observer for Sweden) pointed out that draft article 12, paragraph 3, could be interpreted in two different ways. On the one hand, it could be understood to mean that the carrier's liability began when he received the goods and ended when the goods were delivered; paragraph 3 simply prevented the contract of carriage from providing a time of receipt subsequent to the beginning of the initial loading or a time of delivery prior to the completion of the final unloading. On the other hand, it could be construed as the old tackle-to-tackle principle, according to which a carrier could avoid liability by denying responsibility for the goods during their warehousing, either before their receipt or after their delivery. Sweden subscribed to the first interpretation and considered paragraph 3 to be a mere clarification; other delegations, however, seemed to interpret the provision differently. The current wording, though ambiguous, could not be easily changed; his delegation therefore accepted draft article 12, paragraph 3, as it stood.

58. **Mr. Cheong** Hae-yong (Republic of Korea) said that his delegation, too, supported the current version of draft article 12, paragraph 3.

59. **Ms. Czerwenka** (Germany) expressed appreciation for the Swedish delegation's explanation. She disagreed with the representative of Spain that the meaning of paragraph 3 was clear; it seemed to be clear to different delegations in different ways. That was why it would be helpful to find a way of clarifying the provision, perhaps in informal consultations; first, though, she would need some instruction as to the exact meaning of paragraph 3. Her delegation could accept the Italian interpretation, as endorsed by Sweden. If that interpretation was supported by the Working Group, she was open to making the provision itself more precise or, at least, to making its meaning clear in the report of the current session. To end the discussion in dissent would be extremely unfortunate.

60. **Ms. Slettemoen** (Norway) said that her delegation interpreted paragraph 3 as Sweden did.

61. **Mr. Sato** (Japan) wondered whether a clarification to the effect that nothing in paragraph 3 prevented a contracting State from introducing mandatory regulations covering the period before loading and after discharge would address the concerns raised by Germany.

62. **The Chairperson** asked the representative of Japan whether he wished that clarification to be included in the report of the session or in the text of the draft convention.

63. **Mr. Sato** (Japan) said that he had been referring to the report. However, if other delegations wished to include a clarification in the draft convention itself, his delegation would consider that possibility.

64. **Mr. Miller** (United States of America) said that, if the Japanese representative meant that nothing in the draft convention prevented a contracting State from introducing mandatory regulations covering the period before the carrier's period of responsibility began, which could be at loading, and after the carrier's period of responsibility ended, which could be at discharge but for a door-to-door or port-to-port shipment would be at those respective points, his delegation had no objection to including such a clarification in the report of the session.

65. **Mr. Sato** (Japan) confirmed that that was what he had meant.

66. **Mr. van der Ziel** (Observer for the Netherlands) said that he was somewhat confused. Surely it was obvious that the period before loading and after unloading could be regulated by national legislation. He agreed with the representative of Germany that the text as it stood was ambiguous; every effort must be made to remove that ambiguity. The differences of opinion did not seem all that far apart to him.

67. **Mr. Morán Bovio** (Spain) endorsed the comment made by the representative of the Netherlands. It was not clear to him why they were discussing issues that fell under national law and were therefore outside the scope of the draft convention.

68. **Mr. Zunarelli** (Italy) proposed retaining the current wording of paragraph 3, minus the phrase "for the purposes of determining the carrier's period of responsibility", and placing it directly after, or even making it part of, paragraph 1. It would then be clear that paragraph 3 did not derogate from the general provision stated in paragraph 1, but simply placed limitations on the parties at the time of drawing up the contract of carriage.

69. **Mr. Alba Fernández** (Spain) proposed placing paragraph 3 directly after paragraph 1 and adding an introductory phrase along the lines of "without prejudice to paragraph 1". The minor change proposed by the representative of Italy could be the solution.

70. **Ms. Eriksson** (Observer for Finland) supported by **Mr. Miller** (United States of America) and **Mr. Hu** Zhengliang (China), suggested that a smaller group should consider the issue in informal consultations. She hoped that a solution would be found so as to remove the current ambiguity for future generations.

71. **The Chairperson** said he took it that the Commission wished to leave the issue open and hold informal consultations.

72. *It was so decided.*

Draft article 13 (Transport beyond the scope of the contract of carriage)

73. **Mr. Elsayed** (Egypt) said that he failed to understand how the Commission could allow a carrier to issue a document that included transport that was not covered by the contract of carriage and in respect of which it did not assume the obligation to carry the goods. Such a provision ran counter to the spirit of the draft convention, which aimed to secure the rights and define the obligations of the parties concluding a contract. Draft article 13 should therefore be deleted.

74. **Ms. Downing** (Australia) agreed that draft article 13 should be deleted.

75. **Mr. Delebecque** (France) said that draft article 13 was problematic because it was not clear, at least not in the French version, and because it was contrary to the general objective of the draft convention. France had already stated its reservations on the subject and was in favour of deleting the draft article.

76. **Ms. Czerwenka** (Germany) said that her delegation, too, had a number of concerns regarding draft article 13. At the Working Group's twenty-first session, the German delegation had sought clarification. The current version was slightly better, but a great deal of uncertainty remained. Referring members to Germany's written comments (A/CN.9/658/Add.11, para. 8), she said that her delegation was concerned, above all, that in the case of a negotiable transport document it was not clear from whom the holder of the document could require the delivery of the goods. Article 1, paragraph 14, defined transport document as "a document issued under a contract of carriage". Article 13, however, dealt with something else altogether, hence the uncertainty. The simplest option would be to delete the draft article, since it was not necessary for the purposes of the draft convention.

The meeting rose at 6 p.m.