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Summary record of the 867th meeting
Held at Headquarters, New York, on Tuesday, 17 June 2008, at 10 a.m.

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

Contents

08-38630 (E)

The meeting was called to order at 10.15 a.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, A/CN.9/658 and Add.1-13)

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

1. **Mr. Kim** Bong-hyun (Republic of Korea) said that his delegation had withdrawn its objections to the current wording of draft article 13 and supported its approval.

2. **Mr. Egbadon** (Nigeria) said that draft article 13 was meaningless since the carrier's responsibility did not extend beyond the period covered by the contract of carriage. His delegation therefore agreed that the draft article should be deleted.

3. **Ms. Carlson** (United States of America) said that it was actually in the interests of shippers for draft article 13 to be retained, since the carrier could only agree to transport beyond the scope of the contract of carriage "on the request of the shipper". Consequently, there was no basis for the arguments of some delegations that the deletion of draft article 13 would be beneficial to the shipper. On the contrary, draft article 13 should be retained in its current form.

4. **Mr. van der Ziel** (Observer for the Netherlands) recalled that draft article 13 was closely related to draft article 12, paragraph 3, which determined the carrier's period of responsibility for the carriage of goods as being from the time of their unloading until the completion of their unloading under the contract of carriage. Draft article 13 provided two exceptions to the carrier's period of responsibility: in relatively infrequent cases when the shipper required a document to a particular destination not served by the carrier; and in far more frequent cases of "merchant haulage" when, for operational reasons, the consignee, instead of the carrier, wished to take responsibility for the final part of the carriage of the goods from the port of discharge to the inland destination.

5. It was therefore in the interests of the consignee for draft article 13 to be retained, since its deletion would not allow the carrier to honour a request for merchant haulage, since the carrier would become responsible for the goods in the final part of the carriage in accordance with draft article 12, paragraph 3. Moreover, draft article 43 provided that the transport document constituted conclusive evidence of all contract particulars, whereas under the Hague-Visby Rules it was conclusive evidence as to the goods only, so that the matter of who was responsible for the goods during the final part of the carriage could be dealt with contractually.

6. One possible solution was to delete draft article 13 and add a sentence to the second paragraph of article 14, stipulating that the consignee and the carrier could mutually agree on merchant haulage. However, in view of the existing objections of some delegations to the wording of draft article 14, paragraph 2, that proposal would not appear to be acceptable either.

7. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that his delegation was in favour of the deletion of draft article 13 in view of its problematic nature.

8. **Mr. Hu** Zhengliang (China) said that his delegation was in favour of retaining draft article 13 in its current form since there was a practical need for such provisions, particularly in cases of multimodal transport. It was clear that the interests of third parties other than the shipper would be sufficiently protected, since the draft article required a transport document or an electronic transport record to specify the transport not covered by the contract or carriage. The retention of draft article 13 would facilitate maritime trade, especially with regard to multimodal transport.

9. **Mr. Mayer** (Switzerland) said that his delegation supported the retention of draft article 13, which reflected a long-standing practice that required shippers to hold documents to prove that they had actually shipped goods to their final destinations.

10. **Mr. Elsayed** (Egypt) said that his delegation advocated the deletion of draft article 13 because its wording was not consistent with the other provisions of the draft convention: it did not specify the rights or liabilities of the contracting parties and was actually detrimental to the shipper.

11. **Mr. Imorou** (Benin) said that the French version of draft article 13 was unclear. Moreover, the draft article itself was irrelevant since it referred to transport beyond the scope of the contract of carriage.

12. **Mr. Zunarelli** (Italy) said that the current wording of draft article 13 was not in keeping with the definition of "transport document" in the draft

convention, although it reflected the practical needs of international trade. It might therefore be useful to retain the current wording, followed by a clarification that the carrier would act as a forwarding agent on behalf of the shipper for the remaining part of the carriage of the goods.

13. **Mr. Tsantzalos** (Greece) said that his delegation supported the retention of draft article 13 in its current form in order to clarify the period of responsibility of the carrier.

14. **Mr. Ndzibe** (Gabon) said that his delegation was in favour of the deletion of draft article 13 since it gave rise to such confusion.

15. **Mr. Bigot** (Observer for Côte d'Ivoire) said that the provisions of draft article 13 presented a number of difficulties. First, while practical reasons existed for including provisions to address transport beyond the scope of the contract of carriage, the current wording failed to indicate clearly whether or not the single transport document required was a multimodal contract. A definition of "single transport document" in the draft convention might allow delegations to better measure the scope of the draft article and to draw conclusions with respect to the carrier and the shipper requesting the transport of the goods. Second, the interests of the shipper were not necessarily protected merely because it was the shipper that requested the transport of the goods. Third, there was a lack of clarity regarding the legal relationship between the carrier issuing the single transport document and the party providing the transport but not assuming full responsibility for it. In view of those difficulties, draft article 13 should not be retained.

16. **Mr. Sato** (Japan) said that delegations had expressed both theoretical and practical concerns about draft article 13. From a theoretical standpoint, the proposal put forward by the Italian delegation had already been discussed and discounted by Working Group III (Transport Law) because delegations had opposed the regulation of forwarding agency relationships under the draft convention. With regard to the practical aspects, the purpose of the current provisions of draft article 13 was to maintain existing commercial practices under the Hague-Visby and Hamburg Rules. It was regrettable that many delegations were still unable to interpret the provisions in that light but encouraging to see that the delegation of the Republic of Korea had come to appreciate the need for such provisions.

17. While his delegation supported the retention of draft article 13, its deletion would not imply that the relevant commercial practices had been abolished. For that reason, his delegation would not strongly object to the deletion of the draft article. Nevertheless, such a deletion could lead to a degree of uncertainty in current commercial practices. In any event, it was vital to ensure that any deletion did not imply the abolition of current merchant haulage practices, as had been mentioned earlier by the delegation of the Netherlands.

18. **Ms. Malanda** (Observer for the Congo) agreed with the reservations expressed by the observer for Côte d'Ivoire concerning the unclear scope of the single transport document issued by the carrier. Her delegation was therefore also in favour of the deletion of draft article 13.

19. **Mr. Møllmann** (Observer for Denmark) said that his delegation saw the provisions of draft article 13 as an attempt to codify commercial practices in order to ensure that shippers obtained the transport documents that they required. While the deletion of draft article 13 would not imply the abolition of current practices, it would be preferable to retain the current text in order to have a clear rule, particularly in view of the concerns expressed by the observer for the Netherlands. References to matters of agency had specifically been removed from previous draft texts, following a policy decision by the Working Group. For that reason, the proposal of the delegation of Italy to refer to the forwarding agency would not be an acceptable compromise and it would be better to retain the current wording.

20. **Mr. Sharma** (India) agreed that draft article 13 was based on current commercial practices pursuant to the Hague-Visby and Hamburg Rules, but pointed out that a rather different approach had been adopted in the draft convention. Whereas under the Hamburg Rules the carrier acted as the agent of the shipper for the carriage of goods not covered by the original carrier, under draft article 13 the period of responsibility of the carrier was the term of reference used to clarify that the carrier was not responsible for the portion of carriage beyond the contract of carriage.

21. The specific merit of draft article 13 was that it allowed the shipper to request a single transport document when the carrier was not in a position to

carry the goods or was unwilling to do so. The retention of that principle in the draft convention would not harm the interests of any parties. His delegation was therefore in favour of retaining draft article 13 as it stood.

22. **Ms. Czerwenka** (Germany) said that one way to solve the dilemma regarding article 13 would be to state that only a non-negotiable transport document was acceptable. In her view, it was a question of proof, and restricting the scope of the article was a possible way to compromise, although her delegation favoured its deletion.

23. **Ms. Sobrinho** (Observer for Angola) said that her delegation also favoured deletion.

24. **Mr. Sato** (Japan) said that if the article was redrafted as proposed, that would be a clear indication that the issuance of a negotiable document was totally prohibited, which would represent a complete departure from current practice. In that case, his delegation would prefer to delete the article, as the proposal of the delegation of Germany could have a drastic effect on current practice.

25. **Mr. Mayer** (Switzerland) said that he supported the view expressed by Japan, as he also failed to see the benefit of such a restriction.

26. **Mr. Kim** Bong-hyun (Republic of Korea) said that his delegation favoured leaving the text of article 13 as it was drafted.

27. **The Chairperson** said that the Commission faced a question of policy with regard to article 13. At the current stage in the discussion, a slight majority of members of the Commission appeared to favour deletion of article 13, the text of which had been arrived at by consensus in the Working Group. For the first time, however, the Commission faced the situation of having a majority decision overturn a consensus reached in a Working Group. From the tone of the interventions during the debate, most delegations appeared to accept the substance of the article but found that it was poorly expressed or difficult to understand. Deletion of the article would, however, lead to the prohibition of a long-standing commercial practice.

28. **Mr. Zunarelli** (Italy) said that his concern was that deletion of article 13 might imply that the current practice ran counter to the convention. In his view, there were two possible solutions. First, the article could be deleted but the Commission could put on record in its report that it had no intent to condemn the long-standing commercial practice covered by that article. Second, a small group of members could attempt to redraft the article in order to clarify its intent, perhaps by adding a new definition of the type of contract required.

29. **Mr. Elsayed** (Egypt) said that he supported the first option, deletion of the article accompanied by a declaration regarding current practice.

30. **Mr. Schelin** (Observer for Sweden) said that in his view, deletion of the article along with a declaration of intent was a better option than attempting to redraft it.

31. **Mr. van der Ziel** (Observer for the Netherlands) said that he had difficulty with the first option proposed by Italy because it was unlikely that the report of the Commission would be read by practitioners, whereas the convention would be widely available. His concern regarding deletion of the article was that some practices would thus become legally impossible, allowing no latitude for deviation from the minimum period of responsibility of the carrier. The Commission must either improve the text or accept the legal consequences of deletion.

32. **Mr. Delebecque** (France) agreed that the language of draft article 13 was ambiguous. The text should specify that the express request of the shipper was required and should state the action positively.

33. **Ms. Carlson** (United States of America), supported by **Mr. Serrano Martinez** (Colombia), said that her delegation, too, had concerns about deleting the article and supported the proposal to attempt to redraft it.

34. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that his delegation advocated deletion of draft article 13.

35. **Mr. Hu** Zhengliang (China) said that, since the purpose of the debate was to improve the draft convention, a small group in informal consultations should attempt to redraft the article in order to achieve that objective.

36. **Mr. Egbadon** (Nigeria) said that in order to elevate trade practice to the level of a legal rule, liabilities and sanctions must be clearly spelled out; the current text of the draft article did not do so and should be deleted.

37. **Ms. Slettemoen** (Norway) and **Ms. Talbot** (Observer for New Zealand) supported the proposal to redraft the article in an attempt to reach consensus.

38. The Chairperson said he took it that the Commission vested to hold informal consultations on draft article 13. If it was still unable to reach consensus, the draft article would be deleted.

39. *It was so decided.*

The meeting was suspended at 11.35 a.m. and resumed at noon.

Article 14 (Specific obligations)

40. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that draft article 14 had been debated at great length in the Working Group. His delegation, along with other African States, had expressed reservations with regard to the title and paragraph 2 of the draft article. The title "Specific obligations" did not reflect the content of paragraph 1, which described obligations that were traditionally performed by the carrier; therefore, the title should read "General obligations". Paragraph 2 should be deleted because it made the consignee, who was not a party to the contract of carriage, subject to provisions to which it had not consented.

41. **Mr. Imorou** (Benin) endorsed the statement made by the representative of Senegal and suggested merging draft articles 14 and 15 under the single title "General obligations". Neither article mentioned any specific obligations; the obligations listed in article 14 were standard.

42. **Mr. Elsayed** (Egypt) endorsed the suggestion made by the representative of Senegal, calling for deletion of draft article 14, paragraph 2. He also proposed adding marking of goods to the obligations defined in paragraph 1 and noted that loading, stowing and related obligations were the responsibility of the master of the ship.

43. **Ms. Slettemoen** (Norway) said that her delegation continued to prefer retaining the current version of paragraph 2.

44. **Ms. Malanda** (Observer for the Congo) and **Mr. Egbadon** (Nigeria) joined the delegations of Senegal and Egypt in calling for the deletion of paragraph 2.

45. **Mr. Delebecque** (France) noted that paragraph 2 addressed the issue of clauses under which the carrier did not perform certain obligations, particularly loading and unloading. Paragraph 2 might settle the question that arose under the Hague-Visby Rules as to whether such clauses were valid. The British House of Lords had recognized such clauses, while elsewhere, supreme courts, particularly in France, had expressed serious reservations about them. Paragraph 2 took an innovative approach to the matter and generally recognized the validity of those clauses. Though such clauses were perfectly acceptable in so-called "tramping" operations where ships did not operate on a fixed route or schedule, his delegation expressed the hope that, after careful consideration, the clauses would not apply to regular liner transportation.

46. **Mr. Zunarelli** (Italy) said that the title "Specific obligations", meaning obligations that were specifically formulated, accurately represented the content of the draft article and should therefore be retained. The proposed title "General obligations" was incorrect. No reference to marking should appear in paragraph 1, as had been suggested, because marking the goods was the responsibility of the shipper, not the carrier.

47. Paragraph 2 reflected normal practice in the tramping trade, but not in the liner trade. Any contract in the liner trade that precluded the responsibility of the shipper for obligations such as loading and stowing of the goods onto the ship should be regarded with suspicion; therefore, his delegation joined the French delegation in suggesting that paragraph 2 should be restricted to the tramping trade.

48. **Ms. Mbeng** (Cameroon) agreed with the Senegalese delegation that the obligations listed in draft article 14 were traditionally assumed by the carrier and therefore should not be referred to as "specific" in the title. Her delegation also wondered why the consignee should assume responsibility for a contract to which it was not a party and joined other delegations in calling for the deletion of paragraph 2.

49. **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo) said that his delegation aligned itself with the other African States calling for the deletion of paragraph 2 and echoed the suggestion made by the delegations of Senegal, Nigeria and Cameroon regarding amendment of the title. The Commission should keep the draft convention from establishing exceptions to the rule in practice as a result of overusing standard clauses.

50. **Mr. Blake-Lawson** (United Kingdom) said that his delegation supported the retention of paragraph 2, which allowed for the shipper and the carrier to reach an agreement as to who loaded the goods. When that paragraph was read in conjunction with draft article 18, paragraph 3 (i), the carrier was relieved of any liability. His delegation considered those provisions helpful and satisfactory in overcoming problems that had arisen under previous conventions with "free-in-and-out" and "free-in-and-out, stowed"(FIO(S)) clauses.

51. **Mr. Sato** (Japan) said that his delegation fully supported the current wording of draft article 14, paragraph 1, and was grateful for the French delegation's statement, which clarified why draft article 14, paragraph 2, was necessary, and how it represented an improvement over the current situation. Although the French proposal to restrict the application of paragraph 2 to non-liner trade was interesting. FIO(S) clauses were also used in the liner trade, particularly for the carriage of large machinery or other special equipment. Therefore, it would be best to retain the current formulation of paragraph 2. In such a situation, draft article 83 (b) might be helpful, but the requirements under draft article 82, paragraph 2 (b), were too strict and provided inadequate protection.

52. **Mr. Møllmann** (Observer for Denmark) stressed that liner trade was not restricted to container transport. Generally, the FIO(S) clause represented a sound solution when the shipper had better knowledge of how to handle the goods than the carrier did. An example of FIO(S) application in liner trade cited by Danish industry representatives was the carriage of coffee in bags, which had specific ventilation requirements. His delegation favoured the retention of draft article 14, paragraph 2, in its current wording, with no distinction between liner and non-liner trade.

53. **Mr. Bigot** (Observer for Côte d'Ivoire) endorsed the proposal made by the Senegalese delegation to change the title of draft article 14 from "Specific obligations" to "General obligations", as the obligations mentioned were those typically assumed by the carrier and could not be considered specific. He noted that draft article 14, paragraph 2, described a possible agreement between the shipper and the carrier, under which the shipper assumed some of the obligations mentioned. If such arrangements were only common practice in the tramping trade, which the draft convention had not been designed to regulate, it followed that paragraph 2 should be deleted. It should also be stressed that the draft convention had been designed to regulate transport, not sales. Lastly, given the economic circumstances of developing countries like his own — where shippers were in the majority — and the burden that extra obligations represented, it was important to strike a fair balance between the responsibilities of shippers and carriers.

54. **Mr. Mayer** (Switzerland) said that the current title of the draft article should be retained, as it concerned specific obligations, not special obligations. With regard to paragraph 2, he agreed with the proposal to add marking to the shipper's obligations, since marking had always been one of the shipper's main tasks, as reflected in the Hague-Visby Rules and other instruments. He was strongly in favour of keeping paragraph 2 as a whole. It was not an escape clause: it reflected a long-standing practice not only in the tramping trade, but also in the liner trade, albeit to a lesser extent. For commercial, technical or logistical reasons, shippers often undertook some of the carrier's responsibilities. Where the shipper had agreed to carry out restricted FIO(S) shipments, it would be unfair to impose responsibility on the carrier for damage that occurred during loading merely because paragraph 1 made it mandatory for such responsibility to fall to the carrier.

55. **Mr. Ndzibe** (Gabon) said that he supported deleting draft article 14, paragraph 2, because it posed a genuine danger to shippers, especially small shippers. He would also like to see the title changed as suggested by the representative of Senegal.

56. **Ms. Traoré** (Burkina Faso), supported by **Mr. Ousseimi** (Observer for the Niger) and **Ms. Sobrinho** (Observer for Angola), endorsed the statement made by Senegal.

57. **Ms. Downing** (Australia) said that her delegation endorsed the proposal to delete draft article 14, paragraph 2, for the reasons set out in its written comments (A/CN.9/658, paras. 24-25).

58. **Mr. Morán Bovio** (Spain) said that it was crucial to maintain paragraph 2 because it reflected an existing commercial practice, even in liner trade. In some cases in liner trade it was important for the shipper, rather than the carrier, to be able to handle cargo, such as coffee, cranes and yachts, which required special care. To delete paragraph 2 would be to impede the small shipper's ability to have certain goods transported.

59. **Mr. Schelin** (Observer for Sweden) said that he supported changing the title of draft article 14 because the obligations set out were of a general rather than a specific nature; he suggested replacing the current title with "Obligations in relation to the goods". However, he was in favour of retaining the contents of draft article 14 in its current version. Furthermore, paragraph 2 should not be restricted to non-liner trade. Indeed, a gray area existed between liner and non-liner transportation; such transportation was often referred to as "industry shipping", in which ships entered and left ports on a specific schedule and loaded specific types of cargo, and shippers often made use of FIO(S) clauses.

60. **Ms. Carlson** (United States of America) said that her delegation was in favour of maintaining draft article 14 as currently formulated, including the title. Paragraph 2 reflected current, useful commercial practice. As the purpose of the draft convention was to facilitate industry, it would be inappropriate to attempt to restrict a practice that had existed for decades.

61. **Mr. Sharma** (India) said that he supported the title of draft article 14 as it stood, since the general nature of the obligations of the carrier was clear from the title of the chapter containing article 14. The current formulation of paragraph 1 was adequate, with no need for reference to marking, as that was usually the responsibility of shippers, not carriers. As for paragraph 2, while the Working Group had not considered non-liner trade in its discussion of the paragraph, a shipper wishing to enter into a contract with a carrier in order to take over some of the latter's standard duties should not be prevented from doing so.

62. **Ms. Peer** (Austria) said that her delegation strongly supported retaining draft article 14, paragraph 2.

63. **Mr. Cheong** Hae-yong (Republic of Korea) said that his delegation was in favour of maintaining the current version of draft article 14.

64. **Mr. Sandoval** (Chile) said that draft article 14 should be retained as it stood. As an exporter of copper and other goods, Chile did not take issue with paragraph 2, since the carriage of goods was usually based on an agreement between the shipper and the carrier.

65. **Ms. Eriksson** (Observer for Finland) expressed support for maintaining draft article 14 as currently formulated, including paragraph 2, which reflected a commercial practice in both non-liner and liner trade.

66. **Mr. Hu** Zhengliang (China) said that his delegation strongly supported retaining draft article 14 in its entirety. The words "may agree" in paragraph 2 implied that the paragraph was in fact about a matter of freedom of contract. As such, it should not pose a problem, as the shipper was in no way obliged to enter into such a contract.

67. **Mr. Tsantzalos** (Greece) reiterated that his delegation wished to see draft article 14 maintained in its entirety, but had no strong feelings regarding the title and would welcome an alternative if the majority of Commission members found it more satisfactory.

68. **Mr. Egbadon** (Nigeria) pointed out that paragraph 2, extended responsibility to the consignee, a particularly objectionable proposition since the consignee was not a party to contracts between the shipper and the carrier. If the draft convention was to be acceptable to shipping and cargo interests, that paragraph should be deleted.

69. **Mr. van der Ziel** (Observer for the Netherlands) said that the title of draft article 14 was acceptable in its current version. The word "consignee" was used in paragraph 2 merely because the clauses involved in agreements between the shipper and the carrier were FIO(S) clauses; however, the agreements themselves were only between the shipper and the carrier. Paragraph 2 as such placed no obligation on the consignee with regard to unloading.

70. **Mr. Berlingieri** (Italy) said that he questioned the compatibility of draft article 14, paragraph 2, and draft article 12, paragraph 3. He feared that those two articles might give rise to differences in interpretation in the future, particularly within the context of a free-in clause, where receipt of the goods was usually assumed to take place on board the ship, whereas under article 12, paragraph 3, receipt must be assumed to have taken place prior to loading.

71. **Mr. Lebedev** (Russian Federation) said that it was important to discuss not only the legal aspects of draft article 14, but also the economic, technical and financial implications of the carriage of goods by sea. The question was not merely one of obligations regarding loading and unloading, since other articles of the draft convention also dealt with those, but rather of financial responsibility for property, which would pose

no problem if all loading and unloading operations were carried out by the carrier alone and not the shipper or consignee. Unfortunately, it was not always that simple, as loading and unloading by the carrier often incurred additional costs. Draft article 14 in its current version took account of the great variety of situations that arose in maritime transport. As argued by other speakers, it also reflected actual current practice. For all those reasons, his delegation was in favour of keeping draft article 14 as it stood.

The meeting rose at 1.05 p.m.