

AUSTRALIAN COMMENTS ON THE UNCITRAL DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA

1 General Comments on the Text as a Whole

The Australian delegation acknowledges and appreciates the hard work done by the UNCITRAL Secretariat, by the Chair and by the Working Group in producing the draft Convention on contracts for the international carriage of goods wholly or partly by sea. The Australian delegation was an active participant in the Working Group sessions and recognises the efforts that were made to produce a workable and modern instrument on the carriage of goods by sea. The Australian delegation is also extremely grateful to the Comité Maritime International for their work in producing the first draft of the convention.

Whilst acknowledging all the work that has been put into the draft Convention, the Australian delegation has a number of concerns with the text. The Australian delegation welcomes the opportunity afforded by the Secretariat to air these concerns prior to the Commission meeting in June 2008.

Australia has three general concerns with the text and a number of more specific concerns. The three general concerns are the complexity of the instrument, the perception that the text could favour carriers at the expense of small shippers and the shift, via the volume contract provision, from a mandatory liability regime to one based on freedom of contract. The more specific concerns are recorded against the particular provisions.

Complexity of the instrument – It is inevitable in drafting a new international instrument that new and improved wording will lead to changes in the law which will create uncertainties over interpretation. Australia is of the opinion that the current text is so different from current international law and so complicated that the potential for lengthy and costly litigation is high. As this litigation will be domestic, there remains the potential for the uniformity of the international law to be undermined by having provisions interpreted differently in different countries.

Balance of the instrument — The Australian delegation considers that the draft convention may be read as giving greater weight to carrier interests rather than striking an equitable balance between the interests of shippers and carriers. Whilst some shippers have sufficient negotiating power to be able to conclude fair contracts, Australia's primary concern is how the draft convention will impact on small and medium shippers.

Volume contract exception — The Australian delegation has consistently expressed its concerns relating to article 82 and the definition of volume contract in article 1. The Australian delegation maintains that the current text allows too broad an exemption from the mandatory regime. It will be possible for a significant majority of contracts for the carriage of goods by sea to be drafted in such a way as to fall within the definition of 'volume contracts'. As such, derogation from many of the fundamental obligations of the carrier and from provisions such as the limits of liability will be possible and, we believe, widespread. In particular, the Australian delegation has concerns with the effect such a broad exemption will have on the small shipper. The Australian delegation also notes that the current text amounts to an erosion of a long-standing, international, mandatory liability regime and recognises the potential for such an exemption to increase the cost of cargo insurance for shippers.

2 Comments on Specific Provisions

Article 1: Definitions

1 'Contract of carriage'

This definition is wider than previous conventions as it applies to goods carried partly by sea. The second sentence requires that the contract 'provide for carriage by sea' which might technically exclude contracts which do not specify the mode of transport to be used. On the other hand, there is no actual requirement in the draft Convention for the goods to be carried by sea. In theory, as long as the contract of carriage provides that the goods will be carried by sea, the draft Convention will apply even if the goods are not actually so carried. This might lead to problems in some jurisdictions.

2 'Volume contract'

The definition, as it now appears, is too wide and will result in too much contracting out of the Convention. This definition undermines the uniformity of international law by leaving it open for each shipment to be a one-of-a-kind. The Australian delegation would like to confine the scope of the exemption to those cases where there is a genuine volume contract individually negotiated between parties of comparable bargaining power.

This definition of a volume contract is distinguished by its lack of limitation, whether in terms of the duration of the two parties' commitment, the number of shipments or the quantities carried. The term 'specified quantity' has no particular legal meaning and gives the parties and ultimately the courts no guidance as to what is intended. It is quite conceivable, from a legal point of view, that the carriage of two containers over a period of one year could be governed by a volume contract and thereby avoid many of the mandatory liability provisions.

A mandatory regime of liability is found today, in highly comparable terms, in all of the international conventions on the different modes of carriage. The draft Convention is the only one to contain provisions that offer considerable scope to freedom of contract. The Australian delegation views the shift from a fundamentally mandatory regime to a largely derogative regime, through the mechanism of volume contracts, as a major change. Our concerns are the breadth of the current exemption may well result in the erosion of a long-standing, international, mandatory liability regime and at the potential for such an exemption to increase the cost of insurance for shippers.

This provision should be deleted. If deletion is not possible, then the Australian delegation proposes the following alternate text:

'Volume contract' means a contract that provides for the carriage of at least 500 containers of cargo (or equivalent in revenue tonnes) in a series of 5 or more shipments during a set period of time of no less than one year.

The Australian delegation prefers this text as it is certain and requires a reasonable quantity of cargo to be shipped in order to derogate from the mandatory liability provisions, which would protect the small to medium shipper.

CHAPTER 2: SCOPE OF APPLICATION

Article 5: General scope of application

The Australian delegation supports the aim of Article 5 which is to achieve wide coverage of cargo and negotiable or non-negotiable transport documents. However, the Australian delegation notes that Article 5 places an emphasis on what is in the contract of carriage, which may or may not differ from what actually occurs when the goods are conveyed. In theory the contract could identify a port of loading and a port of discharge in different States and therefore the Convention would apply, but in fact there is no requirement for the goods to actually have been loaded or discharged at those named ports. Alternatively, if the contract of carriage fails to mention any of the places or ports listed in Article 5(1)(a)-(d) then it is possible to interpret the text such that the Convention would not apply, even though the goods might, in fact, have been carried by sea in a manner which would have complied with the Convention requirements. In other words, the emphasis is on what is in the contract rather than what actually happens. This is a change from previous regimes which all applied to the sea-leg regardless of what was in the contract particulars.

A concern with this provision is that in theory it provides opportunity for unscrupulous parties to draft the contract of carriage in such a way as to avoid the Convention or, alternatively, to apply it in cases where it should not apply. However, for clarity, we would prefer Article 5 to be amended.

The Australian delegation proposes the following alternate text:

1. Subject to article 6, this Convention applies to all contracts of carriage by sea between two different contracting States, if:
 - (a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or
 - (b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State,or

- (c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or
 - (d) the transport document or other document evidencing or containing the contract of carriage by sea is issued in a Contracting State, or
 - (e) the transport document or other document evidencing or containing the contract of carriage by sea provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.
2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.
 3. Notwithstanding subparagraph (1) where the carriage of goods differs from the carriage described in the contract of carriage and where there is an actual international sea carriage which would otherwise have complied with subparagraph (1), this Convention does apply.

As an alternate suggestion, the Australian delegation could support deleting the words ‘according to the contract of carriage’.

Article 12: Period of responsibility of the carrier

The Australian delegation has previously voiced its concerns with Article 12(3) on the basis that it could lead to tackle-to-tackle coverage, which might afford less protection to shippers than existing Australian law. This provision would enable carriers to confine their period of responsibility to tackle-to-tackle and exclude liability altogether outside of that period, including whilst the goods are on the wharf, in the hand of stevedores etc. Article 12(3) applies to contracts of carriage generally and is not confined to volume contracts.

The Australian delegation would support the deletion of Article 12(3).

Article 13: Transport beyond the scope of the contract of carriage

The Australian delegation recognises that the issuing of a single contract of carriage is of practical advantage to shippers but nevertheless has concerns with the wording of Article 13. The current wording ‘... the carrier may agree to issue a single transport document or electronic transport record that includes specified transport that is not covered by the contract of carriage...’ would allow a transport document and the contract of carriage to indicate different modes of carriage. This could potentially conflict with article 43 which provides that the transport document is prima facie evidence of a carrier’s receipt of the goods.

The Australian delegation could support the deletion of Article 13.

Article 14: Specific obligations

The Australian delegation has concerns with Article 14(2). This extends freedom of contract provisions to what previously has been a traditional responsibility of the carrier. This would not pose a problem for parties of comparable bargaining power, or possibly for the bulk trade, but may potentially be problematic for small shippers in a liner trade.

It is not clear that the consent of the documentary shipper or the consignee is required prior to them being responsible for, among other things, the unloading of the goods. This may raise practical issues if consignees do not have the necessary equipment or skills to fulfill their obligation to unload the goods.

The Australian delegation could support the deletion of Article 14(2).

Article 15: Specific obligations applicable to the voyage by sea

The Australian delegation welcomes the decision to make the obligation of due diligence a continuing one.

Article 17: Sacrifice of the goods during the voyage by sea

The Australian delegation is concerned with the inclusion of this article in the text. It affords a lesser degree of protection to shippers than current international law.

The Australian delegation is concerned that the words ‘Notwithstanding articles 11, 14 and 15’ could be taken to mean that a carrier could sacrifice goods even if the peril was due to negligently caused unseaworthiness.

The Australian delegation would support deleting Article 17 as its first preference. As an alternative, the Australian delegation could support deleting the words ‘Notwithstanding articles 11, 14 and 15’.

Article 18: Basis of liability

Article 18 is one of the key provisions in the draft convention. It represents a departure from previous regimes and the Australian delegation is concerned by the altered burden of proof that now falls on the claimant. The Australian delegation understands that the party who has the onus of proof must produce the evidence to support their claim. However, it may be more difficult for the shipper to discharge their burden of proof under this article than under existing law. Evidence about the causes of a loss of cargo is often difficult to obtain, particularly for the consignee or shipper as they will not have access to all (or any) of the relevant facts.

Under the previous regimes (the Hague Rules, the Hague-Visby Protocol and the Hamburg rules) once a cargo claimant had established a loss, the burden of proof with respect to the actual causes of the loss was on the carrier. This is based on the carrier being in a better position than the shipper to know what happened whilst the goods were in the carrier’s custody. If there were more than one cause of loss or damage, then under those regimes the carrier had the onus of proving to what extent a proportion of the loss was due to a particular cause. The current text changes this and puts part of the onus of proof on the shipper. For example Article 18(5) states:

5. The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:
 - (a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by
 - (i) the unseaworthiness of the ship;
 - (ii) the improper crewing, equipping, and supplying of the ship; or
 - (iii) the fact that the holds or other parts of the ship in which the goods are carried (including any containers supplied by the carrier in or upon which the goods are carried) were not fit and safe for reception, carriage, and preservation of the goods; ...

Australia argues that the shipper (ie the claimant in this case) would have difficulty proving unseaworthiness, improper crewing, equipping or supplying, or that the holds were not fit for the purpose of carrying goods. This change to the general rule on allocation of liability is expected to affect a significant number of cargo claims and shippers will be disadvantaged in cases where there is more than one cause of the loss or damage and a contributing cause was the negligently caused unseaworthiness of the vessel. In such cases, the shipper will bear the onus of proving to what extent unseaworthiness contributed to the loss.

In relation to the list of exceptions in Article 18(3), the Australian delegation notes that this has been expanded. The Australian delegation acknowledges that the deletion of the nautical fault defence will impose greater restrictions and risks on carrier interests but nevertheless supports such deletion.

In Article 18(5) the phrase ‘the goods are properly stowed’ is missing and needs to be inserted.

Article 18(6) introduces the concept of proportionate liability with the words ‘the carrier is liable only for that part of the loss...’. Article 31(3) similarly introduces proportionate liability. The Australian delegation has concerns with these articles on the basis that they might create evidentiary hurdles for claimants in litigation. Unless the onus of proof can be put on the carrier, the Australian delegation supports the deletion of Article 18(6).

Article 18 is not appropriate for claims brought by the carrier against the shipper, such as for dangerous cargo. In a case where both dangerous cargo and unseaworthiness contribute to the loss or damage suffered by the carrier, the existing text provides no guidance as to who bears the onus of proof. Wherever unseaworthiness is alleged, it seems fair that the burden of proof should be on the carrier. Accordingly, the Australian delegation proposes the addition of the following text:

Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

Article 22: Delay

The Australian delegation had favoured a limitation on the amount recoverable for delay in delivery and had suggested the existing formula from our domestic law as a possible solution. The current provision is, however, unsatisfactory as it offers less protection than our existing domestic law, which does provide for capped liability for delay, and leaves the issue entirely to freedom of contract.

The Australian delegation supports the deletion of Article 22.

Article 24(6): Notice in case of loss, damage or delay

The Australian delegation particularly supports Article 24(6) as being a provision that addresses the practical problem identified by Australia with respect to temperature sensitive goods. Article 24(6) should assist with the issue of temperature records held by the carrier for temperature-controlled goods.

Article 27: Carriage preceding or subsequent to sea carriage

The Australian delegation considers that the functioning of Article 27 needs to be clarified following the deletion of the previous draft Article 62(2). As the text stands, Article 27 may have little practical effect, as the shipper will have to first prove where the damage occurred. Only if the shipper is able to prove this will Article 27 have any impact. The Australian delegation considers that it will often be difficult for a shipper to prove exactly where the damage occurred and so Article 27 will have little practical effect.

The Australian delegation would support additional text placing the onus of proof upon the carrier to determine where the damage occurred. It would also support text to clarify that if the carrier is unable to discharge this onus, the highest liability limits would apply. The deleted version of variant A of draft article 62(2) would be acceptable to be reinserted in article 62:

Notwithstanding paragraph 1 of this article, if (a) the carrier cannot establish whether the goods were lost or damaged during the sea carriage or during the carriage preceding or subsequent to the sea carriage and (b) provisions of an international convention would be applicable pursuant to article 27 if the loss or damage occurred during the carriage preceding or subsequent to the sea carriage, the carrier's liability for such loss or damage is governed by any international convention that would have applied if the place where the damage occurred had been established, or pursuant to the limitation provisions of this Convention, whichever would result in the higher limitation amount.

Article 30: Shipper's obligation to provide information, instructions and documents

The Australian delegation welcomes the move to facilitate the exchange of information between the parties and to make parties responsible for their own actions and supports the substance of Articles 29 and 30. Article 29 encourages the provision of relevant information or instructions:

The carrier and the shipper shall respond to requests from each other to provide information and instructions required for the proper handling and carriage of the goods if the information is in the requested party's possession or the instructions are within the requested party's reasonable ability to provide and they are not otherwise reasonably available to the requesting party.

However, the Australian delegation notes that the application of Article 29 to carriers and to shippers is markedly different and considers that both Articles 29 and 30 are examples of provisions where the balance of the draft Convention is perceived to have shifted as between shippers and carriers. In particular, the Australian delegation is concerned at the discrepancy between the carrier enjoying capped liability and the shipper being exposed to uncapped liability for breaches of the same obligation. If the carrier breaches Article 29, their liability is capped under Article 61(1). Were the shipper to breach Article 29, their liability would be uncapped and uncappable. An example would be the shipper making an erroneous declaration with respect to the goods, even if in good faith, which results in the vessel being delayed because the carrier could not comply with local port regulations. Such a misdeclaration would place the shipper in breach of Article 30(b) and expose the shipper to uncapped liability for the resulting immobilization of the vessel. The shipper could be liable not only

for the damages due to the detention of the vessel but also, on an indemnity basis, to the carrier for any compensation claims made by other shippers of goods on the same vessel.

The Australian delegation is concerned that the liability of the shipper remains uncapped whereas the carrier enjoys capped liability, particularly as the shipper now has more onerous obligations than under previous regimes.

Article 36: Cessation of shipper's liability

The Australian delegation considers Article 36 unacceptable and asks that it be deleted.

The draft Convention is generally very liberal in the contractual freedom it purports to give to the parties. However, in Article 36 there is an imbalance. The parties are not free to put a time limit on when the shipper's liability will cease. This provision is at odds with the freedom of contract provisions, disadvantages the shipper and should be deleted.

Article 49: Delivery when a negotiable transport document or negotiable electronic transport record is issued

The Australian delegation is sympathetic to the practical problem faced by carriers which Article 49 tries to solve. The issues of the cargo owner turning up without the requisite documentation, or not turning up at all, are real and practical problems for carriers.

Nevertheless, Article 49 attempts to remedy this situation by undermining the function of a negotiable transport document as a document of title. The system envisaged by Article 49 whereby carriers may seek alternative delivery instructions from the 'original shipper' or the 'documentary shipper' (eg CIF sellers) has the effect of removing the requirement to deliver on the production of a bill of lading. The Australian delegation is of the view that Article 49(d) will increase the risk of fraud and impact on banks and others that rely on the security offered by negotiable transport documents.

The statutory indemnity in Article 49(f) will be problematic for cargo insurers. For example, in a CIF shipment, insurance is arranged by the seller and the policy is assigned to the buyer where the risk of shipment transfers. If the seller unwittingly provides an indemnity to the carrier by providing alternative delivery instructions, this will impact on any recovery action the insurer might have had against the carrier. This will result in the loss of one avenue for cargo claimants recovering for misdelivery.

In addition, the combined effect of subparagraphs 49(d)-(f) is that a carrier who seeks alternate delivery instructions from a shipper (or documentary shipper) will be relieved of liability to the holder. Yet the shipper has given an indemnity to the carrier. So the net effect is that the shipper has given an indemnity to a party who has no liability. This is not sound in law and must be amended in the final text.

The Australian delegation regards the flaws in Article 49 as very serious and the relevant subparagraphs need amending to address these flaws. Unless Article 49 is amended, the function of a bill of lading as a document of title will be lost in the draft Convention.

Article 60: Liability of holder

The Australian delegation would support the deletion of the opening words to Article 60(1) 'Without prejudice to article 57'.

The Australian delegation has concerns with the language in Article 60(2) on the basis that there is a risk that a trivial exercise of a right under the contract of carriage might trigger an assumption of liability. Article 60(2) will place additional risks on banks. In practice negotiable transport documents may be consigned to a bank without prior notice or agreement. So the effect of Article 60(2) would be to increase the risks on banks or other holders.

The Australian delegation would like articles 59 and 60 to be drafted such that the transfer of liabilities under the contract of carriage coincides with the transfer of the rights under the contract. This is a complex area of the law and the Australian delegation is of the view that if it is to be dealt with in the draft Convention then other

complex issues regarding the transfer of liabilities, whether a third party holder of the document is bound and under which circumstances a transferor is relieved of its obligations also need to be addressed.

Article 61: Limits of liability

Article 61(1) contains a significant change to previous international law in that the limits of liability now apply to all actions against the carrier, not just those for loss or damage to the goods. The words ‘the carrier’s liability for breaches of its obligations’ would apply to actions in tort against the carrier. The Australian delegation regards this as a significant change which will disadvantage shippers. For example, if a carrier negligently provided the wrong documents to customs and, as a result, the shipper incurred a heavy fine or other penalty, the carrier would still be covered by a limited liability, even though there may have been no loss or damage to the goods. The Australian delegation also notes that carriers have a general cap on liability under the *Convention on Limitation of Liability for Maritime Claims* (LLMC Convention). The LLMC Convention allows shipowners to limit their liability to pay compensation for general ship-sourced damage. Accordingly, the amount of compensation that a court is able to award against a carrier is limited by the LLMC Convention.

The Australian delegation notes the increase in the limits of liability from the Hamburg Rules to ‘875 units of account per package or other shipping unit, or 3 units of account per kilogram’. The problem is that the draft Convention covers more than carriage by sea, as it will now apply to some multimodal contracts. The figures in Article 61 are considerably lower than other non-maritime conventions and this may cause a problem in some multimodal contracts of carriage where the damage is non-localised.

The Australian delegation is also concerned that the volume contract exemption (discussed elsewhere) will undermine these liability limits by making them subject to freedom of contract.

Accordingly, the Australian delegation could support a lower figure, such as the figures from the Hamburg Rules, if the volume contract exception were reduced and if there were a rule applying the higher limits of applicable road and rail conventions in cases of non-localised damage.

The Australian delegation would also prefer the draft Convention to contain a mechanism for amending the liability limits.

Overall, the Australian delegation has serious concerns about Article 61. As a minimum, the Australian delegation would like the phrase ‘for breaches of its obligations’ deleted. The wording in Article 4bis of the Hague-Visby Rules is preferable:

The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.

In addition, the draft Convention needs a rule on what happens in a multimodal contract where it is not ascertainable where the damage occurred.

Article 69: Choice of court agreements

The Australian delegation has concerns that the interests of the consignee are not protected under Article 69. Any claim for loss of or damage to the cargo is most likely to be made by a consignee. However, under this article a consignee may be bound even where it does not agree or consent to the exclusive jurisdiction clause. There is no good policy basis for this and it may be expected that the Article 69(2)(c) in particular will lead to a lot of litigation to clarify the meaning of the provision.

Article 70: Actions against the maritime performing party

The Australian delegation is concerned that this article, together with Article 73, would make it more difficult for an Australian cargo claimant to sue both the carrier and the maritime performing party in a single venue. If the carrier and maritime performing party are to be both sued by the claimant then this may only be done in a court that satisfies both Article 68 and Article 70. The Australian delegation is not satisfied with this change to the law.

Article 77: Arbitration agreements

The Australian delegation also has concerns with Article 77 and its potential effect on consignees. A consignee may be bound to arbitrate in the selected venue even in the absence of the consignee's agreement, provided only that the arbitration agreement is in the transport document and that the consignee received timely and adequate notice. The Australian delegation does not support this provision or the policy behind it.

Article 82: Special rules for volume contracts

The main disadvantage to shippers and consignees is the potential application of Article 82 on volume contracts. The Australian delegation has articulated its concerns with previous versions of article 82 on many occasions and most formally in A/CN.9/WG.III/WP.88. These concerns are maintained with the current text.

The Australian delegation is of the view that both Article 82 and the definition of volume contract need to be amended in order to solve the problem. The Australian delegation would prefer Article 82(2)(b) to state:

The volume contract is

- (i) individually negotiated *and*
- (ii) prominently specifies the sections of the volume contract containing the derogations;

Other Matters

The Australian delegation favours the inclusion of a mechanism for increasing the limits of liability.