

Summary for Australian Industry of United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

Report to Industry by Australian Government delegation

The United Nations Commission on International Trade Law (UNCITRAL) met in New York from 16 June-3 July 2008 to conclude work on a draft Convention on contracts for the international carriage of goods wholly or partly by sea (the Convention). The Australian delegation comprised Susan Downing (Attorney-General's Department) and Charles Gibbons (Department of Infrastructure, Transport, Regional Development and Local Government). The Commission made some changes to the text presented by the Working Group and then adopted the final text of the Convention on 3 July 2008. The Convention was then adopted by the United Nations General Assembly on 11 December 2008. The Convention will be open for signature by countries following the signing ceremony, which is to be held in Rotterdam, on 23 September 2009.¹

This paper outlines the background to the Convention, the changes that were made in the final meeting (June/July 08) and likely future developments. The current official text of the Convention is available via the UNCITRAL website:

http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods.html

Background - The Convention

The original draft of the Convention was prepared by the Comité Maritime International and adopted as a basic text by the Working Group in 2002. The Working Group has been revising and amending the text since then and a final text was adopted by the Working Group in January 2008. This text was then sent to the UNCITRAL Commission for consideration at its June/July 2008 session. The Convention represents the outcomes of a Working Group that operated under 'consensus rules'. It is the result of many compromises and the inclusion of some wording that was requested by specific countries. It is considered to be lengthy, complex and, in some areas, to be ambiguous.

The general aims of the Convention are to:

- end the multiplicity of regimes (ie the 1924 *Hague Rules*, the 1968 *Hague-Visby Rules*, the 1978 *Hamburg Rules* and the various regional arrangements);
- receive widespread international support;
- reflect modern transport & shipping practices (eg e-commerce); and
- achieve a limited network liability regime or 'maritime plus' regime.

The Convention will introduce a new legal liability regime for the international carriage of goods where there is an international sea leg. It is based on a 'maritime plus' concept² but is not intended to be a multimodal Convention.

¹ The Convention will be opened for signature and ratification from 23 September 2009. Australia will have to consider whether it will sign and ratify the Convention. This will be a decision for the Australian Government. If Australia does not ratify the Convention, its terms will not be binding on Australia. If the Convention is widely ratified and Australia's major trading partners are parties, Australia may be subject to external pressure to become a party to the Convention.

² After much debate, the Working Group decided that achieving a true multimodal and uniform liability regime would present too many difficulties. These difficulties included conflicts with existing transport conventions and with regional and national law. The Working Group settled on a limited network system or a 'maritime plus' approach. In other words: a maritime liability regime that is extended to cover incidental non-maritime transport. This approach takes into account that a large proportion of marine transport is either immediately preceded by, or immediately followed by, a land transport leg.

The Convention is lengthy and ambitious. Complex issues are covered including: electronic communication; the period of responsibility; the obligations and liability of the carrier; the obligations and liability of the shipper; freight; transfer of rights; jurisdiction and arbitration; and rights of suit. Some of these topics have never been comprehensively dealt with in an international treaty before. Signatories to the Convention would not be able to opt out of most of its provisions.

UNCITRAL, which has a mandate to reduce barriers to trade and harmonise international law, has outlined the possible benefits of the Convention:

It is expected that harmonization and modernization of the legal regime in this area, which in many countries dates back to the 1920s or earlier, will lead to an overall reduction in transaction costs, increased predictability when problems are encountered, and greater commercial confidence when doing business internationally.³

Summary of key changes made at the Commission

The text of the Convention was not significantly changed at the Commission session from the draft previously adopted by the Working Group. The main changes were the deletion of Article 13 (a provision which was intended to validate the traditional 'through' bill of lading), the deletion of Article 36 (concerning the contractual limitation of shipper's liability) and amendments to Article 49 (concerning delivery without the production of the bill of lading). The formal report of the meeting notes that, by deleting Article 13, the Commission did not intend to prevent the current practice of using 'through' bills of lading. There were other minor amendments as well, including a renumbering of the Convention.

Summary of key changes in the Convention

The key changes the Convention will make to the existing regimes include the following:

The Scope of the Convention - The Convention is wider in scope than previous regimes and will cover carriage by modes of transport other than sea transport. It expands the number of parties subject to Convention provisions, including land-based service providers (such as stevedores, truck operators and rail operators) that are links in an international transport chain involving a sea leg component. Therefore, the Convention is based on a 'maritime plus' concept rather than being truly multimodal. The scope is broadly drafted and tackle-to-tackle, port-to-port and door-to-door contracts could all fall within the scope of the Convention. The terms of the contract itself will determine whether or not the Convention applies;

Electronic Commerce - The Convention provides for e-commerce and alters existing terminology (for example a bill of lading is now called a 'negotiable transport document'). The Convention aims to achieve functional equivalence between paper documents of title and their electronic equivalent so that the issuance, possession and transfer of a negotiable document has the same effect as the issuance, control and transfer of an electronic transport record. Many of the articles will need to be assessed for clarity and balance. Many of the more important provisions in the Convention are capable of various interpretations and will provide fertile ground for litigation;

The freedom of contract provisions - The Convention is contract based with 'freedom of contract' being an important principle. The Convention allows significant freedom of contract in a number of respects. For example, parties are given the contractual freedom to restrict the carrier's liability to tackle-to-tackle coverage;

For Australian stakeholders, if Australia were to become a party to the Convention, it would mean moving from a mandatory and well-understood regime to a scheme that includes broad freedoms to contract out of previously mandatory provisions;

The Volume Contract Exception - The Convention also provides a degree of freedom of contract

³ UNCITRAL press release of 7 July 2008.

to parties to a volume contract. The definition of 'Volume contract' is broad and could be interpreted to be as low as 2 TEUs.⁴ Parties to a volume contract may contract out of some of the mandatory liability provisions including agreeing to higher or lower limits of liability. The majority of Australia's trade by value is currently carried in containers and most likely could utilise this exemption;

There are safeguards in the Convention to minimise abuse of the volume contract provision. The volume contract must contain a prominent statement that it derogates from the Convention or be individually negotiated. The shipper must be given notice that they have the option to ask for a contract on Convention terms. In addition, certain fundamental provisions may not be varied by contract. For example, in a volume contract, the carrier may not contract out of their obligation to make and keep the ship seaworthy or their obligation to properly crew, equip and supply the ship. A shipper may not contract out of their obligations to provide all necessary information, instructions and documents to the carrier. Neither may a shipper contract out of their obligations with respect to dangerous goods;

Continuing Obligation of Seaworthiness - The 'nautical fault' defence has been removed and the carrier will have an ongoing duty of due diligence to make and keep the ship seaworthy;

Increased Limitation of Liability - The limits of liability have been increased to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher; and

New Provisions on Jurisdiction and Arbitration - The Convention contains chapters on Jurisdiction and Arbitration but both of these chapters are on an 'opt-in' basis. It is anticipated that a large number of countries will not opt-in to these chapters.

Future Timing

The Convention was adopted by the UNCITRAL Commission and transmitted to the United Nations General Assembly. On 11 December 2008, the United Nations General Assembly adopted the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. The General Assembly authorized the opening for signature of the Convention at a signing ceremony to be held on 23 September 2009 in Rotterdam, the Netherlands. The General Assembly also recommended that the rules embodied in the Convention be known as *The Rotterdam Rules*.

The Convention requires 20 States to ratify it before it enters into force.

Will Australia Become a Party?

Like any international convention, the new Convention contains a number of compromises made by the Working Group to accommodate the tensions between competing interests. There are some provisions which may improve the existing law and others which could be considered less desirable. The Australian Government would need to make an overall assessment as to whether or not it is in Australia's interest to become a party to the Convention. This would be done in consultation with industry and other relevant stakeholders.

⁴ TEU stands for 'Twenty-Foot Equivalent Units' in container shipping.