



General Assembly

Distr.: Limited
16 December 2005*

Original: English

**United Nations Commission
on International Trade Law**
Working Group II (Arbitration)
Forty-fourth session
New York, 23-27 January 2006

Annotated provisional agenda

Addendum

7. Other business

1. In the course of its sixteenth session (Vienna, 28 November-9 December 2005), Working Group III (Transport Law) considered the inclusion in the draft convention on the carriage of goods [wholly or partly] [by sea] ("the draft convention") of a chapter on arbitration (draft chapter 17). A suggestion was made that views of Working Group II (Arbitration) should be sought on the draft chapter.
2. For consideration by the Working Group, excerpt from the report of the sixteenth session of Working Group III that concerns the arbitration provisions (A/CN.9/591, paras. 85 to 103), as well as other relevant provisions of the draft convention are reproduced in the annex attached hereto. Earlier discussions of Working Group III on that matter may be found in documents A/CN.9/572 (paras. 151 to 157), A/CN.9/576 (paras. 176 to 179), and earlier text on arbitration may be found in chapter 16 of A/CN.9/WG.III/WP.32 and chapter 17 of A/CN.9/WG.III/WP.56. A proposal of the Netherlands, which was the basis of the provisions on arbitration reproduced in the attached annex, may be found in document A/CN.9/WG.III/WP.54.

* The late submission of this document is due to the fact that it incorporates extracts of the report of the Working Group on Transport Law (Working Group III) on the work of its sixteenth session (Vienna, 28 November-9 December 2005), which was finalized mid-December only.



Annex

Chapter 17 and draft articles 75 and 76 of the draft convention—Excerpt from the report of the sixteenth session of Working Group III that concerns the arbitration provisions (see A/CN.9/591, paras. 85 to 103)

Arbitration—Chapter 17

General discussion

85. The Working Group was reminded that it had considered the chapter on arbitration during its fourteenth (see A/CN.9/572, paras. 151 to 157) and fifteenth sessions (see A/CN.9/576, paras. 176 to 179). It was recalled that during those sessions of the Working Group, two strong views were expressed. One view was that the principle of freedom of arbitration was deeply rooted and that existing arbitration instruments such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention) and the UNCITRAL Model Law on International Commercial Arbitration provided an adequate framework for arbitration, thus obviating the need for such a chapter in the draft convention. Another view was that arbitration should be available to the parties to a dispute, but that it should not be capable of being used by parties in order to circumvent the bases of jurisdiction set out in draft article 75 of the draft convention.

86. The substance of the proposal contained in A/CN.9/WG.III/WP.54 was explained to the Working Group. It was said that the proposal was intended as an effort to reach a compromise between the views expressed on arbitration during the fourteenth and fifteenth sessions. The main aspects of that compromise were said to be the deletion of the entire chapter on arbitration (see A/CN.9/WG.III/WP.54, para. 5 (e)), and the addition in the draft convention of draft paragraph 78 (2) (see A/CN.9/WG.III/WP.54, para. 5 (b)), intended to ensure that the rules in the draft convention on jurisdiction could not be circumvented. An additional aspect of the proposal was to include a reference in draft article 81 to make effective any agreement made by the parties to refer a dispute that had arisen to arbitration. Finally, it was explained that the intention of the compromise was to preserve the status quo with respect to the use of arbitration in the maritime transport industry by providing minimal arbitration rules with respect to the liner industry, but providing for freedom of arbitration in the non-liner industry through the addition of draft article 81 bis ((see A/CN.9/WG.III/WP.54, para. 5 (e)).

87. In addition, the comments expressed in A/CN.9/WG.III/WP.59 were explained by reference to the final paragraph of that document, which suggested that, in light of widespread reliance on arbitration by the maritime industry in general, the most appropriate solution in the draft convention would be the inclusion of a provision permitting the enforceability of arbitration agreements in contracts of carriage without qualification.

Unqualified freedom to arbitrate

88. There was support for the view that the draft convention should permit the untrammelled enforceability of arbitration agreements in contracts of carriage. It

was stated that arbitration was an extremely popular form of dispute resolution throughout the world for disputes regarding contracts of carriage. Scepticism was expressed regarding whether it was necessary to safeguard the jurisdiction regime set out in the draft convention by reducing the freedom to arbitrate in the liner industry, which had never made broad use of arbitration, and, it was suggested, was unlikely to do so to thwart jurisdiction. In addition, caution was raised with respect to the possibility of over-regulating arbitration, thus affecting its effectiveness.

Arbitration provisions in the Hamburg Rules

89. The view was also expressed that the Working Group should consider the adoption of arbitration rules similar to those found in article 22 of the Hamburg Rules, and already included for consideration in the arbitration chapter in A/CN.9/WG.III/WP.32 and A/CN.9/WG.III/WP.56. One advantage of those rules was said to be that they were already the product of a compromise that took place during their negotiation. There was some support for this view. However, one difficulty with the approach in the Hamburg Rules was said to be that they reduced commercial certainty by allowing the arbitration to take place in one of a number of different possible locations. An advantage of the proposal in A/CN.9/WG.III/WP.54 was thought to be that it allowed for the resolution of the dispute either through arbitration at the specific location cited in the arbitration provision, or in a court in a location designated pursuant to draft article 75. However, it was also observed that the variety of potential locations for arbitration could be seen as an advantage of the Hamburg Rules in terms of promoting the development of arbitration by providing for it in different locations, but with reference to the same set of rules.

The compromise proposal in A/CN.9/WG.III/WP.54

90. A number of delegations made clear that their starting position when arbitration had first been discussed during the fourteenth session of the Working Group had been in favour of unqualified freedom to arbitrate. However, these delegations had, in the spirit of compromise, come to support the proposal in A/CN.9/WG.III/WP.54, particularly due to its deference to the existing international arbitration regime, and to its maintenance of the status quo in regard to arbitration practices in the maritime transport industry. Some reservations were raised regarding whether the compromise proposal might in fact limit the development of arbitration in the liner trade, since commercial enterprises would not be likely to include an arbitration provision in a contract unless they could be certain of where the arbitration would take place, and that might not be possible if that choice were subject to the draft article 75 list. Ultimately, while a number of delegations suggested that further refinements in the drafting of the proposal were necessary, not the least in the face of the new provisions considered for the jurisdiction chapter, there was support for the proposal as a compromise intended to further the efforts of the Working Group and as a basis for future discussions.

Clarifications of the intended effect of the compromise proposal

91. A question was raised with respect to the interaction of draft subparagraphs 78 (2) (a) and (b), and whether the claimant should be required to provide a short time period in which the carrier would have to decide whether to transfer the proceedings from the place in the arbitration clause to a place designated by draft

article 75. In response to a question regarding which parties could be asserting a claim against the carrier under draft article 78 (2) (a), it was suggested that this and other answers might best be addressed during the Working Group's consideration of the chapter on rights of suit, and perhaps the chapter on time for suit, both anticipated at its next session.

Suggested modifications to the compromise proposal

92. In addition to general adjustments to the proposal made necessary in light of changes under consideration for the jurisdiction provisions in the draft instrument, certain specific modifications to the proposal were suggested. In light of the thrust of the discussions in the Working Group with respect to jurisdiction and choice of court clauses under draft article 76, the view was expressed that exclusive arbitration clauses should be permissible and should be enforced on the same grounds as exclusive choice of court clauses. There was some support for the suggestion that the effect of an arbitration agreement on third parties to the contract of carriage should be made clear and should be harmonized, rather than being left to national law as in draft article 81 bis. A model for this approach was suggested to be draft article 83 of the draft convention. In response, concern was raised that creating rules regarding third parties could amount to impinging on the domain of the New York Convention regarding the enforceability of arbitration agreements. In addition, there was some support for the inclusion of a provision along the lines of draft article 85 of the current chapter on arbitration requiring an arbitrator to apply the rules of the draft convention. It was suggested in response that such a rule was unnecessary, since an arbitrator would look to the contract of carriage to decide which rules to apply, and that inquiry would either lead the arbitrator to the draft convention or it would not.

93. Some specific drafting changes were suggested to the text. There was support for the view that the word "solely" in proposed draft article 81 bis should be placed in square brackets or be eliminated. A suggestion was also made that the bracketed text "[a jurisdiction or]" should be deleted in its entirety from draft article 81 bis, since jurisdiction clauses were not common in the non-liner industry, and the intention of the proposal was to preserve the status quo. Other views were expressed in favour of keeping the text and deleting only the square brackets. Support was expressed for the following alternate text intended to replace and clarify draft paragraph 78 (2) (b):

"The carrier may demand arbitration proceedings pursuant to the terms of the arbitration agreement only if the person asserting the claim against a carrier institutes court proceedings in a place specified in the arbitration agreement."

Conclusions reached by the Working Group regarding provisions on arbitration:

94. After discussion, the Working Group decided that:
- There was broad consensus for the compromise proposal presented in A/CN.9/WG.III/WP.54; and
 - The proposal should form the basis for future work following modification in light of the discussion in the Working Group as noted above, and with respect to the anticipated revision of draft article 76 on jurisdiction.

Proposed revised text for chapter on arbitration

General discussion

95. The Working Group continued its discussions on the basis of the following text proposed by some delegations, to be placed in a new draft chapter on arbitration of the draft convention:

“Article 83. Arbitration agreements

“Subject to article 85, if a contract of carriage subject to this Convention includes an arbitration agreement, the following provisions apply:

“(a) The person asserting a claim against the carrier has the option of either:

“(i) commencing arbitral proceedings pursuant to the terms of the arbitration agreement in a place specified therein, or

“(ii) instituting court proceedings in any other place, provided such place is specified in article 75 (a), (b) or (c);

“(b) If a person asserts a claim against a carrier, then the carrier may demand arbitration proceedings pursuant to the terms of the arbitration agreement only if that person institutes court proceedings in

“(i) a place specified in the arbitration agreement, or

“(ii) a court that would give effect under article 76 to an exclusive choice of court agreement specifying the place named in the arbitration agreement that is exclusive with respect to the action against the carrier.

“Article 84. Arbitration agreement in non-liner transportation

“Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the terms of this Convention apply by reason of:

“(a) The application of article 10,¹ or

“(b) The parties’ voluntary incorporation of this Convention as a contractual term of a contract of carriage that would not otherwise be subject to this Convention.

“Article 85. Agreements for arbitration after the dispute has arisen

“Notwithstanding the provisions of this chapter and chapter 16, after a dispute has arisen, the parties to the dispute may agree to resolve it by arbitration in any place.”

96. It was reiterated that proposed draft articles 83, 84 and 85 were aimed at reaching a compromise between those delegations that favoured the broadest application of the principle of freedom of arbitration in the draft convention and those delegations that felt that, while arbitration should be available to the parties to a

¹ The reference might be modified depending on the future revision of draft article 10 of the draft convention.

dispute, it should not be used in order to circumvent the bases of jurisdiction as set out in draft article 75 of the draft convention. The Working Group was reminded that the goal of the draft provisions was to reflect the needs of practitioners with respect to the use of arbitration in the maritime transport industry by providing limited freedom of arbitration with respect to the liner industry, where arbitration was not frequent, while allowing broad freedom of arbitration in the non-liner industry, where arbitration was, on the contrary, the standard method of dispute resolution.

97. It was indicated that the new proposed draft amended the text contained in A/CN.9/WG.III/WP.54 by introducing a new draft subparagraph 83 (b) (ii); by deleting the word “solely” in draft article 84, subject to review upon revision of draft article 10; by deleting the bracketed phrase “[a jurisdiction or]” in draft article 84, and by introducing new draft article 85, which created a separate article for a principle that had been reflected in paragraph 5 (c) of A/CN.9/WG.III/WP.54. There was no discussion of the deletion of the bracketed phrase “[a jurisdiction or]”.

98. Some doubts were expressed with respect to the proposed draft text, particularly regarding concerns that it would result in forum-shopping and create a multiplicity of actions. In addition, some concerns were raised regarding proposed draft article 83, and the possibility that it could restrict access to arbitration in some circumstances. Overall, the spirit of compromise was reiterated, and support was expressed for the approach of the proposal, with some specific concerns outlined as discussed below.

New draft subparagraph 83 (b)(ii)

99. It was indicated that there was a parallelism between exclusive choice of court agreements, on the one hand, and arbitration agreements, on the other hand, and that therefore the two should be accorded similar treatment in the draft convention with respect to freedom of contract. Accordingly, it was indicated that the goal of the draft subparagraph 83 (b)(ii) was to allow for arbitration agreements in those cases where an exclusive jurisdiction clause would be recognized under draft article 76 of the draft convention, relating to the recognition of exclusive choice of court clauses. It was observed that the effect of draft subparagraph 83 (b)(ii) would be a further expansion of freedom of arbitration in the liner industry. Upon request for clarification, it was explained that draft subparagraph 83 (b)(ii) required the existence of an arbitration agreement for its operation, and, in response, it was suggested that the text should be amended to specifically indicate so. It was further observed that draft subparagraph 83 (b)(ii) applied only to claims against the carrier, while claims brought by the carrier were outside its scope.

100. Some hesitation was expressed regarding draft subparagraph 83 (b)(ii), however, in light of another view that exclusive choice of court clauses and arbitration agreements had different natures and consequences, and that their treatment under the draft convention should reflect such differences. In particular, the link with draft article 76 was seen to be problematic in that it linked arbitration agreements with a State’s decision whether or not to enforce exclusive choice of court agreements. An additional concern was expressed that draft subparagraph 83 (b)(ii) might deprive the shipper of a reasonable place to protect its interests, especially in light of the higher costs of arbitration compared to court litigation. It was therefore suggested that subparagraph 83 (b)(ii) should be deleted.

New York Convention and draft subparagraph 83

101. It was indicated that the effect of draft subparagraph 83 would be to allow courts, under certain conditions, to declare that, despite an arbitration agreement entered into in good faith, the arbitration agreement would not be binding on the parties. It was added that such outcome was not only unusual in modern trade law, but also contrary to basic arbitration principles as contained in a number of widely accepted texts such as the New York Convention, and in particular its article II (3), and the UNCITRAL Arbitration Model Law. It was added that, while the principle of respect of the arbitration agreement might tolerate certain deviations, such as in article 22 (3) of the Hamburg Rules, these could not extend to preventing access to arbitration as envisaged under new draft article 83 without fundamentally affecting that principle. It was suggested that the Working Group should seek the opinion of UNCITRAL Working Group II (on arbitration) on the provisions of the draft convention relating to arbitration.

102. In response, it was indicated that for a number of reasons, the proposed text was not inconsistent with the New York Convention. It was further explained that the basic principle of the New York Convention did not require general recognition of all arbitration agreements, but only non-discrimination of arbitration agreements vis-à-vis jurisdiction clauses. It was added that, since arbitration agreements were allowed in the draft proposal exactly in the same cases where exclusive jurisdiction clauses would be recognized, that basic principle of the New York Convention was not affected by the proposed text. Furthermore, it was indicated that a restriction on the effectiveness of arbitration agreements was a consequence of maritime trade practice, which saw restrictions of freedom of arbitration in certain circumstances and trades.

Conclusions reached by the Working Group regarding revised provisions on arbitration:

103. After discussion, the Working Group decided that:

- The general approach of draft articles 83, 84 and 85 was supported as part of a compromise on jurisdiction and arbitration;
- Draft articles 83, 84 and 85 should be retained in a draft chapter on arbitration of the draft convention for future discussion;
- The chapeau of draft article 83 should be placed in square brackets pending clarification of the relation between draft article 83 and the New York Convention, and subject to the resolution of any potential conflict between the two instruments; and
- Draft subparagraph 83 (b)(ii) of the draft convention should be placed in square brackets pending its next reading.

Other relevant provisions of the draft convention

Article 9. Specific exclusions and inclusions²

1. This Convention does not apply to:
 - (a) Charterparties;
 - (b) Contracts for the use of a ship or of any space thereon;
 - (c) Except as provided in paragraph 2, other contracts in non-liner transportation; and
 - (d) Except as provided in paragraph 3, volume contracts.
2. Without prejudice to subparagraphs 1 (a) and (b), this Convention applies to contracts of carriage in non-liner transportation when evidenced by or contained in a transport document or an electronic transport record that also evidences the carrier's or a performing party's receipt of the goods, except as between the parties to a charterparty or to a contract for the use of a ship or of any space thereon.
3. (a) This Convention applies to the terms that regulate each shipment under a volume contract to the extent that the provisions of this chapter so specify.

(b) This Convention applies to the terms of a volume contract to the extent that they regulate a shipment under that volume contract that is governed by this Convention under subparagraph (a).

Article 10. Application to certain parties³

Notwithstanding article 9, if a transport document or an electronic transport record is issued pursuant to a charterparty or a contract under article 9 (1) (b) or (c), this Convention applies to the contract evidenced by or contained in the transport document or electronic transport record as between the carrier and the consignor, consignee, controlling party, holder, or person referred to in article 34 that is not the charterer or the party to the contract under article 9 (1) (b) or (c).

Article 75. Actions against the carrier

Unless the contract of carriage contains an exclusive choice of court agreement that is valid under article 76, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier in a competent court within the jurisdiction of which is situated one of the following places:

- (a) The domicile of the defendant; or

² Text as set out in para. 52 of A/CN.9/576, and as approved for further discussion in paragraph 66 of A/CN.9/576.

³ Text as set out in paragraph 52 of A/CN.9/576, and as approved for further discussion in paragraph 73 of A/CN.9/576, bearing in mind the possibility of inserting a reference to draft subparagraph 9 (1) (d) at the end of draft article 10, and any necessary clarification of the treatment of receipts.

(b) The contractual place of receipt or the contractual place of delivery;
or

(c) The port where the goods are initially loaded on a ship; or the port where the goods are finally discharged from a ship; or

(d) Any place designated for that purpose in accordance with article 76 (1).

Article 76. Choice of court agreements

1. If the shipper and the carrier agree that a competent court has jurisdiction to decide disputes that may arise under this Convention, then that court has non-exclusive jurisdiction, provided that the agreement conferring it is concluded or documented

(a) in writing;⁴ or

(b) by any other means of communication that renders information accessible so as to be usable for subsequent reference.

2. The jurisdiction of a court chosen in accordance with paragraph 1 is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction

(a) is contained in a volume contract that clearly states the names and addresses of the parties and either

(i) is individually negotiated; or

(ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies its location within the volume contract; and

(b) clearly states the name and location of the chosen court.

3. An exclusive choice of court agreement concluded in accordance with paragraph 2 is binding on a person that is not a party to the volume contract only if this is consistent with applicable law as determined by the [international private law] [conflict of law rules] of the court seized and:

(a) That person is given adequate notice of the court where the action can be brought;

(b) The forum is in one of the places designated in article 75 [(a), (b) or (c)].

4. Subject to paragraph 5, this article does not prevent a Contracting State from giving effect to a choice of court agreement that does not meet the requirements of paragraphs 1, 2, or 3. Such Contracting State must give corresponding notice [to_____].

⁴ The form requirement will be treated under article 3.

5. Nothing in paragraph 4 or in a choice of court agreement effective under paragraph 4 prevents a court specified in article 75 [(a), (b), (c) or (d)] and situated in a different Contracting State from exercising its jurisdiction over the dispute and deciding the dispute according to this Convention. No choice of court agreement is exclusive with respect to an action [against a carrier] under this Convention except as provided by this article.
