United Nations A/CN.9/612

General Assembly

Distr.: General
22 May 2006

Original: English

United Nations Commission on International Trade Law
Thirty-ninth session
New York, 19 June-7 July 2006

Transport Law: Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]

Joint proposal by Australia and France on freedom of contract under volume contracts

Note by the Secretariat*

In preparation for the thirty-ninth session of the Commission, the delegations of Australia and France submitted to the Secretariat the document attached hereto as an annex containing a joint proposal on freedom of contract under volume contracts in the draft convention on the carriage of goods [wholly or partly] [by sea] being considered in Working Group III (Transport Law). The text is reproduced as an annex to this note in the form in which it was received by the Secretariat.

* The late submission of the document reflects the date on which the document was submitted to the Secretariat.

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Annex

Introduction

1. The draft version of article 95 on special rules for volume contracts was examined at the seventeenth session of Working Group III. Few changes were made during that session to the version of the article proposed to the Working Group. Several delegations nevertheless voiced concerns about the extent of freedom of contract allowed under volume contracts. The European Shippers Council, commenting for the first time at the Working Group, also pointed to difficulties that the current version of the draft text could raise.

2. It should also be stressed that the draft instrument initially submitted to the Working Group did not contain any general provisions favourable to freedom of contract.[1] The draft version of article 95 reflected a clear change in the direction of the Working Group's work, because it was only introduced during the fifteenth session of the Working Group, when the instrument had already been substantially drafted.

3. Australia and France therefore consider that further debate is required on this important issue. They would like to draw the Commission's attention in a plenary session to the issue of freedom of contract in the draft instrument and submit alternative proposals.

Historical context

4. The history of the law of carriage of goods by sea is the history of the gradual introduction of mandatory rules on liability. By the late nineteenth century, freedom of contract was being used extensively and aggressively by ship-owners to unfairly reduce their liabilities for cargo loss or damage. To combat such practice, in 1893 the United States introduced the Harter Act, a mandatory regime governing trade with the country. This was followed in 1924 with the signing of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, which now forms the foundation of the law on carriage of goods by sea. That Convention states that "any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability […], shall be null and void and of no effect".

5. This mandatory regime of liability is found today, in highly comparable terms, in the international conventions on the different modes of carriage.[2] Consequently, as it stands, the instrument currently being drafted is the only one to contain provisions that offer considerable scope to freedom of contract.

6. The shift, through the mechanism of volume contracts, from a fundamentally mandatory regime to a largely derogative regime represents a major change. The risk is that in some States obstacles may arise to ratification of a convention whose provisions, which differ sharply from national legislation in the field, appear to be incompatible with fundamental principles of domestic law.

Analysis of the current provisions on freedom of contract

7. The definition of a volume contract given in article 1 of the draft instrument could cover a wide range of contracts of carriage. Indeed, the new version adopted on a proposal from the Finnish delegation, clearly states that "a volume contract is a contract of carriage".[3] 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. A volume contract could therefore potentially cover almost all carriage of goods by shipping lines falling within the scope of the convention. This is likely to leave a loophole in the convention that would enable the parties to release themselves from the binding provisions of the instrument. For example, 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.

8. With respect to the "special rules for volume contracts" set forth in article 95, which are designed to introduce freedom of contract into this framework, the conditions established for the article's application appear equally devoid of limitation.

9. First, regarding the conditions of form for derogations from the convention, it is only stipulated that the volume contract "is individually negotiated *or* prominently specifies the sections […] that contain derogations" (art. 95.1 (a) and (b))". More precisely, the conditions indicated do not require that both parties to the contract expressly consent to the derogations: this clearly opens up the possibility that *standard contracts* containing derogating clauses could be submitted to the shippers. The principle of freedom of contract should, however, be based on genuine negotiation between the shipper and the carrier. If volume contracts are to be the basis of wide-ranging derogations from the terms of the draft conventions, it is imperative that those volume contracts be genuinely negotiated between the parties.

10. Secondly, regarding the scope of the authorized derogations, the limits set on the carrier's right to derogate from the Convention seem extremely weak. It appears paradoxical that the right to derogate from the Convention is established as a principle (art. 95.1).[4] The only exclusions from this right, set forth in paragraph 4, are the carrier's obligation to keep the ship seaworthy and properly man the ship (art. 16.1), and the loss of the right to limit liability (art. 66). Furthermore, these limits do not appear to have been set in the interests of the shipper, but to have been designed as minimal obligations with respect to public interest, given the risks associated with an unseaworthy vessel in particular.

11. Australia and France contend that the public interest defended by other provisions of the convention comprises a minimal level of protection for the contracting parties and that the draft texts on freedom of contract should be revised accordingly.

Proposals regarding volume contracts

12. It would be preferable to clarify the definition of "volume contract" given in draft article 1 (b) as follows (the proposed amendments appear in bold type):

> "'Volume contract' means a contract that provides for the carriage of a **set** quantity of cargo in a series of shipments during a **set** period of time **of no less than one year**. The **set** quantity may be a minimum, a maximum or a certain range."

13. It would be desirable for the derogations from the provisions of the instrument to be subject to express agreement by the two parties. In article 95.1 (a) we propose making the conditions of form cumulative by replacing "or" by "and" and, in (b), "clear" by "in highly visible type". This will provide a much stronger safeguard against misuse of the right of derogation than merely allowing a situation in which a standard form contract with a derogation noted in the text can be used to satisfy the requirements of 95.1 (as could be the case with the draft of art. 95 contained in both A/CN.9/WG.III/WP.56 and A/CN.9/WG.III/WP.61).

14. We propose not allowing any derogation from the liability regime set in the Convention, which is the core of the draft instrument, or from the fundamental obligations of the carrier and the shipper.

Thus, Australia and France suggest that paragraph 4 of article 95 could read as follows:

> "Paragraph 1 does not apply to:
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> "(a) article 17 (basis of the carrier's liability), or to article 66 (right to limit liability);
>
> "(b) article 31 (basis of the shipper's liability);
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> "(c) chapter 5 (obligations of the carrier); or
>
> "(d) articles 28 to 30, and 33 (obligations of the shipper)."

15. Alternatively, a more concise version of the entire article 95 could read as follows:

> "1. The parties to a volume contract may derogate from the provisions of this convention only if :
>
> "(a) the volume contract is individually negotiated;
>
> "(b) the derogation is agreed in writing between the parties; and
>
> "(c) the derogation is set forth in highly visible type in the volume contract in a manner that identifies the clauses of the volume contract containing derogations.
>
> "2. Any such derogation is not binding on third parties, unless those third parties accept it expressly.
>
> "3. Any derogation made pursuant to paragraph 1 does not apply to the basis of the liability of the carrier or the shipper, as set forth in articles 17 and 31 respectively, nor to the fundamental obligations of the carrier or the shipper, as set forth in chapter 5 and in articles 28 to 30, and 33 respectively, and any derogation is null and void to the extent that it purports to so apply."

Notes

[1] Document A/CN.9/WG.III/WP.32, the initial version of the draft convention, clearly stated that "any contractual stipulation that derogates from this instrument is null and void, if and to the extent it is intended or has to its effect, directly or indirectly, to exclude, [or] limit [, or increase] the liability for breach of any obligation of the carrier, a performing party, the shipper, the controlling party, or the consignee […]."

[2] The Convention on the Contract for the International Carriage of Goods by Road (CMR) stipulates that: "any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void" (Art. 41.1). Similarly, the Montreal Convention of 1999 on air carrier liability, states that "any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void" (Art. 26). On the carriage of goods by inland waterways, the Budapest Convention of 2001 (which came into force in 2005) also states that "any contractual stipulation intended to exclude, limit or increase the liability, within the meaning of this Convention, of the carrier, the actual carrier or their servants or agents, shift the burden of proof or reduce the periods for claims or limitations […] shall be null and void. Any stipulation assigning a benefit of insurance of the goods in favour of the carrier is also null and void."

[3] The draft version of article 1 (b) sets forth: "'Volume contract' means a contract that provides for the carriage of a specified quantity of cargos in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range."

[4] The draft version of article 95.1 states: "[…] the volume contract may provide for greater or lesser duties, rights and obligations and liabilities than those set forth in the Convention […]."