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

Jurisdiction and Arbitration: Information presented by the Danish delegation at the fifteenth session

Note by the Secretariat

During the fifteenth session of Working Group III (Transport Law), which took place in New York from 18 to 28 April 2005, the table attached hereto as an annex was distributed informally by the Danish delegation during the discussion of the jurisdiction and arbitration chapters of the draft instrument on the carriage of goods [wholly or partly] [by sea]. The Danish delegation informed the Working Group that the text was intended to facilitate consideration of the topics of jurisdiction and arbitration in the Working Group by compiling the views and comments of various delegations into a single document for discussion by the Working Group. In addition to some individual comments which were received by the Danish delegation, the following delegations provided comments which are reflected in the annex: China, Japan, New Zealand, Norway, Republic of Korea, the International Chamber of Shipping (ICS), the Baltic and International Maritime Council (BIMCO) and the International Group of Protection and Indemnity Clubs (P&I Clubs).

The Working Group was advised that the first column of the table in the annex consisted of the text of the relevant provision from A/CN.9/WG.III/WP.32, as amended by the Working Group during its fourteenth session from 29 November to 10 December 2004 in Vienna. Further, the Working Group was informed that the second column of the table contained proposed alternative text to that contained in the first column, and that the third column contained a summary of the comments of delegations on the text in the first and second columns.

The table in the annex is reproduced in the form in which it was received by the Secretariat.

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Annex

Jurisdiction and arbitration

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Jurisdiction	***Jurisdiction***	Some delegations that commented remain concerned as to the inclusion of rules on jurisdiction and arbitration. It is believed that the provisions of jurisdiction and arbitration could become an obstacle for wide ratification of the new convention, because the issues are sensitive and controversial. It has also been stated that the inclusion of jurisdiction provisions, and in place of directing all claims to a single forum with a single set of rules, the ability of cargo interests to bring a case in any one of a number of diverse fora, will detract from the efficiency of the current system which is acknowledged to work well. Another angle is that rules on jurisdiction without corresponding rules on recognition and enforcement may create deadlock situations. It is pointed out that the Convention as it now stands contains jurisdiction clauses that oblige the shipper or other cargo interests to institute an action in certain courts, and thereby limiting the claimant's choice of forum. Usually assets will be in one of these places, but there is no such guarantee. Without a corresponding duty for other States parties to recognize and enforce the judgement made under the Convention, it may be impossible for the claimant in practice to actually enforce the judgement.
	Article 1 (xx) [Unless otherwise provided in the Instrument] "the time of receipt" and "the place of the receipt" means the time and the place agreed to in the contract of carriage or, failing any specific provision relating to the receipt of the goods in such contract, the time and place that is in accordance with the customs, practices, or usages in the trade. In the absence of any such provisions in the contract of carriage or of such customs, practices, or usages, the time and place of receipt of the goods is when and where the carrier or a performing party actually takes custody of the goods.	In order to clarify that the place of receipt/place of delivery are the agreed places rather than the actual places it has been suggested to introduce definitions (see comment to article 72, letters b and c). It is necessary to determine whether the "time/place of receipt/delivery" is also used as the "contractual" time/place of receipt/delivery of the goods. If not, those provisions which intend a different meaning should be individually clarified. If the term "contractual" is the one used in every place, the bracketed words can be deleted. If definitions of "place of receipt" and "place of delivery" are added, paragraphs (b) and (c) can be replaced by: "**Article 72** (b) the place of the receipt or the place of delivery; or".

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	Article 1 (xxx) [Unless otherwise provided in the Instrument,] "the time of delivery" and "the place of delivery" means the time and the place agreed to in the contract of carriage, or, failing any specific provision relating to the delivery of the goods in such contract, the time and place that is in accordance with the customs, practices, or usages in the trade. In the absence of any such specific provision in the contract of carriage or of such customs, practices, or usages, the time and place of delivery is that of the discharge or unloading of the goods from the final vessel or vehicle in which they are carried under the contract of carriage.	See comment above.
Article 72. In judicial proceedings relating to carriage of goods under this instrument the ~~plaintiff~~ [cargo claimant], at his option, may institute an action in a court in a Contracting State which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:	***Article 72.*** In judicial proceedings by the shipper or other cargo interest against the carrier relating to carriage of goods under this instrument, the cargo claimant, at its option, may institute an action in a court in a State party which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:	This provision has been limited to apply to situations where the cargo interest claims under the instrument against the contracting carrier. This formula prevents a carrier from bringing under the instrument actions for a declaration of non-liability in order to circumvent the cargo claimant's choice of forum. However, the view has been expressed that carrier claimants and cargo claimants should be bound by the same rules. Note that the provision is subject to article 74 ter. Note also that actions by the carrier and maritime performing parties is not entirely left out of the draft, but is regulated in article 74 ter, paragraph 2. It has been suggested to merge article 74 ter into this article in order to minimize the number of articles. The term "cargo claimant" has been applied. In this way there does not seem to be a need for a definition in that the term differs from "claimant". In the proposal the requirement that the place designated must be in a State party has been adopted. In accordance with the Vienna Convention on the Law of Treaties, the term "contracting State" is replaced by "State party". A majority of delegations that commented were in favour of having separate provisions for connecting factors in suits against the contracting carrier on the one hand and the maritime performing parties on the

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		other, and generally supported the text in the form proposed. It was suggested, however, to replace the words "the shipper or other cargo interest" with the words "the holder of a transport document"; and the words "cargo claimant" with the words "such holder". Another correspondent pointed out that a final decision on the terminology would have to await the outcome of the discussion on chapter 13 (Right of Suit).
(a) The [principal place of business] or, in the absence thereof, the habitual residence of the defendant [or domicile]; or	(a) The principal place of business or[, in the absence thereof,] the habitual residence of the defendant; or [the branch through which the contract was made]; or Alt. 1: (a) The principal place of business or [, in the absence thereof], the domicile of the defendant; or Alt. 2: (a) The principal place of business or [, in the absence thereof], the ordinary residence of the defendant; or	This provision reflects the general rule of jurisdiction. There is general support for a provision of this kind. There are, however, a number of suggestions as to how it should be drafted. Some support was expressed for the deletion of the square brackets introducing two connecting factors in the same provision. On the other side other delegations are against extending the number of connecting factors. Various suggestions have been made as to the actual drafting. As to the introduction of "domicile" it has been suggested that it should replace rather than be added to "habitual residence". The term "ordinary residence of the defendant" which is used in CMR and in the Warsaw Convention 1929 was also proposed. Although some support was expressed for including 'the branch [of the defendant] through which the contract was made', most correspondents were in favour of a deletion.
[(b) The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or]		Notwithstanding that this provision still is supported by some delegations, most delegations that commented supported the decision made at the fourteenth session of the Working Group to delete it.
(c) The [actual/contractual] place of receipt or the [actual/contractual] place of delivery; or [(d) the port where the goods are initially loaded on an ocean vessel; or (e) the port where the goods are finally discharged from an ocean vessel; or]	(b) the place where the goods are initially received by the carrier or a performing party from the consignor [pursuant to article 7(2)], (c) the place where the goods are ultimately delivered by the carrier or a performing party [pursuant to article 7(3) or 7(4)]; or	A majority of those delegates who addressed the issue were in favour of specifying that the place of receipt and delivery referred to in this provision should be the agreed places rather than the actual places of receipt and delivery. It is pointed out that the contractual place is more predictable by the parties. The actual place of delivery could, for example, be a port of refuge which is not predictable by the contracting parties. Note the proposed insertions of definitions in article 1 above.

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[(d) Any additional place designated for that purpose in the transport document or electronic record.]	(d) Any additional place designated for that purpose in the transport document or electronic record. Alt.: (d) the place specified in the contract of carriage or other agreement.	The comments made in this respect do not prejudice the basic discussion as to whether jurisdiction clauses should be exclusive or not. Some support was expressed for the alternative text. It was held that any agreed jurisdiction regardless of in which form or document it is stated should be valid. However, a majority of delegations that commented preferred a clearer and narrower provision along the lines of the original text.
	Article 72 bis. In judicial proceedings by the shipper or other cargo interest against the maritime performing party relating to carriage of goods under this instrument, the claimant, at its option, may institute an action in a court in a State party which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places: (a) the principal place of business or [, in the absence thereof,] the [habitual/permanent] residence of the defendant; or (b) the place where the goods are [initially] received by the maritime performing party; or (c) the place where the goods are [ultimately] delivered by the maritime performing party; or	Notwithstanding that some concern was expressed, the delegations that commented generally accepted the idea of separate connecting factors for the maritime performing parties. Many of the drafting comments made to article 72 are relevant in this connection too. Also in relation to the proposed connecting factors there was general support, subject to the comments made in relation to article 72. However, the point was made that it would be more suitable if the places of receipt and delivery were to be the actual place, rather than the contractual place in suits against a maritime performing party. Since it, in contrast to suits against the contracting carrier, is the actual performance that creates the link between the claimant and the defendant and not the contract. It was also pointed out that the words "initially" and "ultimately" did not seem appropriate in relation to maritime performing parties performing their services in one jurisdiction only, e.g. stevedores and terminal operators.
[***Article 73.*** Notwithstanding article 72, an action may be any instituted in the courts of port or place in a State party at which the carrying vessel [or any of the carrying vessels] or any other vessel owned by the carrier may have been arrested in accordance with applicable rules of the law of that State and of international law. However, in such a case, at	[***Article 73.*** Notwithstanding article 72, an action may be instituted in the courts of any port or place in a State party at which the carrying vessel [or any of the carrying vessels] or any other vessel owned by the carrier may have been arrested in accordance with applicable rules of the law of that State and of international law. However, in such a case, at	Almost all delegations that commented were against the introduction of an additional arrest jurisdiction in this instrument. Some wished a mere deletion of the provision, but others were in favour of a provision indicating that the rules of the Instrument respected existing national and international rules on arrest. It was pointed out that not addressing the issue in the Instrument would create uncertainty as to the interrelation between the two sets of rules. Several comprehensive contributions were made in this respect explaining the problems incurred by the proposed article 73 and if the provision was merely

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the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in ~~paragraph 1 of this article~~ the previous Articles of this chapter for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action.]	the petition of the defendant, the claimant must remove the action, at its choice, to one of the jurisdictions referred to in the previous Articles of this chapter for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action.] Alt.: Nothing in this Chapter shall affect jurisdiction with regard to arrest [pursuant to applicable rules of the law of the state or of international law].	to be deleted. The most favoured way was to include a provision along the lines of the alternative—subject to drafting.
	Article 73 bis. 1. The parties can agree that actions can be instituted only at one or more of the places listed in the previous Articles. 2. Notwithstanding paragraph 1, an agreement that only actions can be instituted only at the principal place of business or [, in the absence thereof,] the [habitual/permanent] residence of the defendant does not preclude the cargo claimant from instituting actions at one of the other available fora.	This proposed provision addresses the matter of exclusivity of jurisdiction clauses. The responses of delegations fairly represent the various views expressed in the Working Group from a support for non-exclusivity over a limited exclusivity to unlimited exclusivity. In favour of non-exclusivity it is held that a cargo owner always should be vested with a right to sue in his or her own jurisdiction, otherwise the procedure costs in practice may become a hindrance for pursuing even substantial claims. In favour of unlimited exclusivity it is held that it otherwise can be a hindrance to bringing actions before courts that have experience in commercial disputes. It is suggested that only if the case is referred to a court with a certain maritime or commercial experience it can set aside an agreed forum. The majority of delegations that commented were, however, willing to consider the limited exclusivity as a possible compromise. This being said, some comments and observations were made to the form proposed in article 73 bis. It is noted that the reference to "the places listed in the previous Articles" should exclude article 72(d) otherwise there is no limitation to the exclusivity. Indeed the inclusion of article 72(d) depends on the decision to be made in respect of this article. It is proposed to place the article before article 73. Furthermore it was proposed that it be clarified how precise the designation were to be—a specific court or just a jurisdiction.

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		Finally, a number of delegations raised concerns in relation to the second paragraph. They preferred including article 72(a) in the list of fora in which an exclusive jurisdiction can be agreed.
Article 74. No judicial proceedings relating to carriage of goods under this instrument may be instituted in a place not specified in article 72 or 73. This article does not constitute an obstacle to the jurisdiction of the States parties for provisional or protective measures.	***Article 74***. No judicial proceedings relating to carriage of goods under this instrument may be instituted in a place not specified in article 72, 72 bis or 73. This article does not constitute an obstacle to the jurisdiction of the States parties for provisional or protective measures. [2. For the purpose of this article 'provisional or protective measures' means: (a) Orders for the preservation, interim custody, or sale of any goods which are the subject-matter of the dispute; or (b) An order securing the amount in dispute; or (c) An order appointing a receiver; or (d) Any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; or (e) An interim injunction or other interim order.]	Most delegations that commented supported this provision. Some delegations proposed the words "provisional or protective measures" be clarified. It was suggested to use Article 9 of the UNCITRAL model law on arbitration as a model. This text has been inserted in square brackets as para. 2.
	Article 74 bis. If an action has been instituted under this instrument by a cargo claimant in a place listed in Articles 72 and 72 bis, any subsequent action under this instrument relating to the same occurrence shall at the petition of the defendant be moved to the place where the first action was instituted.	Most delegations that commented expressed support in principle for a rule on concursus. However, at the same time widespread concern was expressed, mainly due to the fact that it had proven impossible to find agreement when the question arose at the Hague Conference on Private International Law. The point was also made that the procedure envisaged in the present draft would be unnecessarily burdensome. It was proposed to require the claimant to bring claims to the defendant's nominated jurisdiction provided that this is a reasonable jurisdiction.
	Article 74 ter. [1. If the cargo claimant institutes actions in solidum against the contracting carrier and the maritime performing	Also this provision was supported in principle, but subject to further drafting. It has been held that the system outlined is too inflexible. For example the rule should not overrule a jurisdiction clause between the carrier and the maritime performing

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	party, this must be done in one of the places mentioned in Article 72 bis, where actions can be instituted against the maritime performing party.]	party if the agreed jurisdiction is in a place listed in article 72 *or* 72 bis.
	2. If the carrier or maritime performing party institutes an action under this instrument against the shipper or other cargo interest, then the claimant, at the petition of the defendant, must remove the action to one of the places referred to in Articles 72 or 72 bis, at the choice of the defendant.	
[***Article 75***. Where an action has been instituted in a court competent under article 72 or 73 or where judgement has been delivered by such a court, no new action may be started between the same parties on the same grounds unless the judgement of the court before which the first action was instituted is not enforceable in the country in which the new proceedings are instituted. 2. For the purpose of this chapter the institution of measures with a view to obtaining enforcement of a judgement is not to be considered as the starting of a new action; 3. For the purpose of this chapter, the removal of an action to a different court within the same country, or to a court in another country, in accordance with article 73, is not to be considered as the starting of a new action.]	~~***Article 75***~~. ~~1. Where an action has been instituted in a court competent under article 72 or 73 or where judgement has been delivered by such a court, no new action may be started between the same parties on the same grounds unless the judgement of the court before which the first action was instituted is not enforceable in the country in which the new proceedings are instituted.~~ ~~2. For the purpose of this chapter the institution of measures with a view to obtaining enforcement of a judgement is not to be considered as the starting of a new action.~~ ~~3. For the purpose of this chapter, the removal of an action to a different court within the same country, or to a court in another country, in accordance with article 73, is not to be considered as the starting of a new action.~~	All delegations that commented supported the deletion of this article.
Article 75 bis. Notwithstanding the preceding articles of this chapter, an agreement made by the parties, [after a claim under the contract of carriage has arisen,] which designates the place where the	***Article 75 bis***. Notwithstanding the preceding articles of this chapter, an agreement made by the parties to the dispute, after a claim under the contract of carriage has arisen, which designates the	There was general support for this article. Some support was expressed for specifying that such agreement should be express, however, on the other side some delegations were in favour of leaving it to the court to determine whether such agreement was entered into. Support was expressed for "after a claim under the

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claimant may institute an action, is effective.	place where the claimant may institute an action, is effective.	contract of carriage has arisen" as being the relevant point in time.
	Article XX	Most delegations that commented were not prepared to comment on the OLSA issue in relation to jurisdiction only.
	The parties to an OLSA may extend an agreement on jurisdiction to a third party only if:	The following observation was made: "It follows from the non-mandatory rules of OLSAs, if included in the Instrument, that jurisdiction clauses inter partes are acceptable. As far as the binding effect of jurisdiction clauses is concerned, this is a more general problem than one merely relating to OLSAs. There are reasonable protective rules for the benefit of a third party in Article XX. There are only restricted choices of fora that can be agreed. As the port of loading or the port of discharge should not be connecting factors in the 'main part' of the jurisdiction provisions, they should not be connecting factors in view of binding third parties to OLSA jurisdiction clauses either."
	(i) the parties to the OLSA expressly agree in the OLSA to extend the forum selected to a subsequent party;	
	(ii) the subsequent party to be bound is provided written or electronic notice of the place where action can be brought;	
	(iii) the place or places chosen by the OLSA parties is:	
	(a) the place where the goods are initially received by the carrier or a performing party from the consignor, or the port where the goods are initially loaded on an ocean vessel, or	
	(b) the place where the goods are delivered by the carrier or a performing party pursuant to article 7(3) or 7(4), or the port where the goods are finally discharged from an ocean vessel, or	
	(c) the principal place of business or habitual residence of the defendant,	
	with regard to one or more shipments moving under the relevant OLSA; and	
	(iv) the place selected in the OLSA is located in a State party.	
Arbitration		Among those delegations who were concerned about the inclusion of rules on jurisdiction in the Instrument, it was expressed that this was the more so as to arbitration. If rules on arbitration were to be included, these should be limited to a statement that such arrangements shall be permitted; requiring arbitrators to apply the rules of the Instrument; and possibly, the validity of the incorporation of charter party arbitration clauses into bills of lading.
[***Article 76***. Subject to this chapter, the	[***Article 76***. Subject to this chapter, the	Delegations that commented generally supported this article. As to the form of the provision, the

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parties may provide [by agreement evidenced in writing] that any dispute that may arise relating to the contract of carriage to which this Instrument applies shall be referred to arbitration.	parties may provide [by agreement evidenced in writing] that any dispute that may arise relating to the contract of carriage to which this Instrument applies shall be referred to arbitration.	comments made by the UNCITRAL secretariat in WP.45, paras. 1-9 should be considered. In para. 9 it is stated: "Working Group III may wish to consider whether it would be preferable to align the definitions of the written form requirement in the draft instrument with the most recent work of Working Group II. However, in order not to duplicate the regulation of the issue of form with the Model Law (the consideration of which has not been concluded), Working Group III may wish to conclude that the purpose of the arbitration provisions in the draft instrument should be simply to provide the parties with the freedom to opt for arbitration (which in view of some national laws on the carriage of goods by sea would be beneficial), then draft article 76 could be drafted in more general terms."
Article 77. If a negotiable transport document or a negotiable electronic record has been issued, the arbitration clause or agreement must be contained in the documents or record or expressly incorporated therein by reference. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration, and a negotiable transport document or a negotiable electronic record issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder, the carrier may not invoke such provision as against a holder having acquired the negotiable transport document or the negotiable electronic record in good faith.	***Article 77***. If a negotiable transport document or a negotiable electronic record has been issued, the arbitration clause or agreement must be contained in the documents or record or expressly incorporated therein by reference. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration, and a negotiable transport document or a negotiable electronic record issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder, the carrier may not invoke such provision as against a holder having acquired the negotiable transport document or the negotiable electronic record in good faith.	Delegations that commented generally supported this article. Also in this respect the UNCITRAL secretariat raises that the question of incorporation by reference has been dealt with generally in Working Group II and recommends that it is considered to align this article with the conclusions from the general debate, cf. WP.45, paras. 10 and 11.
~~***Article 78***.~~ ~~The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:~~ ~~(a) A place in a State within whose territory is situated:~~ ~~(i) The principal place of business of the defendant or, in the absence thereof, the habitual~~	***Article 78***. Except for contracts of carriage in the non-liner trade, it cannot be agreed that the arbitration proceedings must take place where actions cannot be instituted in accordance with chapter 15. Alt.: Except for contracts of carriage in the non-liner trade,	Views in respect of this provision varied from on one side extending the limitation to all trades under the instrument to on the other side leaving it up to the parties in all situations. Some support was, however, expressed for a solution along the lines of the proposed article. As to the drafting the following observation was made: "Unlike court hearings, our understanding is that arbitration hearings may take place anywhere in the world although the formal 'seat' is in a specified place—provided that the parties agree or the

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~~residence of the defendant; or~~ ~~[(ii) The place where the contract of carriage was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or]~~ ~~(iii) The place where the carrier or a performing party has received the goods for carriage or the place of delivery; or~~ ~~(b) Any other place designated for that purpose in the arbitration clause or agreement.~~	the seat of arbitrations relating to the carriage of goods under this instrument must be in a place specified in Chapter 15 for the institution of actions.	arbitration panel so orders. Any such hearing of course proceeds in accordance with any governing rules, such as the Rules of the London Maritime Arbitrators' Association, and in accordance with the law of the seat. Thus the right to invoke the courts of the formal seat is preserved." It was held that the proposed alternative text possibly better reflected this. Note also the comments made by the UNCITRAL secretariat in WP.45, paras. 12-15. Notwithstanding that these comments for the most part refer to article 78 as it appeared in WP.32, the general comments as to how regulation of the seat is dealt with should be considered.
[***Article 79***. The arbitrator or arbitration tribunal shall apply the rules of this instrument.]	[***Article 79***. The arbitrator or arbitration tribunal shall apply the rules of this instrument.]	Delegations that commented generally supported this article. Note, however, the comments made by the UNCITRAL secretariat in WP.45, paras. 16-19 pointing to the general rule leaving it to the parties to decide the applicable law.
Article 80. Article 77 [and 78] shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.	***Article 80***. Article 77 [and 78] shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.	Delegations that commented generally supported this article. Note also the comments made by the UNCITRAL secretariat in WP.45, para. 20.
Article 80 bis. Nothing in this chapter shall affect the validity of an agreement on arbitration made by the parties after the claim relating to the contract of carriage has arisen.	***Article 80 bis***. Nothing in this chapter shall affect the validity of an agreement on arbitration made by the parties after the claim relating to the contract of carriage has arisen.	Delegations that commented generally supported this article. Note also the comments made by the UNCITRAL secretariat in WP.45, para. 21.