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

Proposal by the United States of America regarding the inclusion of "ports" in draft article 75 of the draft convention in the chapter on jurisdiction

Note by the Secretariat

In preparation for the sixteenth session of Working Group III (Transport Law), during which the Working Group is expected to continue its second reading of a draft convention on the carriage of goods [wholly or partly] [by sea] based on a note by the Secretariat (A/CN.9/WG.III/WP.56), the Government of the United States of America, on 15 November 2005, submitted a proposal regarding the inclusion of "ports" in draft article 75 of the draft convention, in the chapter on jurisdiction, for consideration by the Working Group. The text of that proposal 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 is a reflection of the date on which the proposal was communicated to the Secretariat..

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Annex

The Benefits of Including "Ports" in Article 75

1. As currently drafted, article 75(c), which permits a plaintiff to bring an action against the carrier in the port of loading or the port of discharge, is in square brackets. The United States believes that the brackets should be removed and the bracketed language should be retained.[1]

2. It is important to recognize the context in which this issue matters most.[2] For a traditional port-to-port shipment, the port of loading is the place of receipt and the port of discharge is the place of delivery. In this context, article 75(c) would generally be irrelevant because the same places would already be covered by article 75(b).[3] It is only when the port of loading differs from the place of receipt or the port of discharge differs from the place of delivery that the issue matters. This question is therefore important under door-to-door contracts (and, to a lesser extent, port-to-door and door-to-port contracts).

3. When the parties have concluded a door-to-door contract, it is in both of their interests to have the ports of loading and discharge available as potential forums. The advantage to the cargo interests is obvious. If the claimant wishes to sue the carrier in a port, it will be beneficial to have that option available. If the claimant does not wish to sue the carrier in a port, it can choose another option (and the inclusion of ports on the list will not have caused any harm).

4. The advantage to the carrier is less self-evident but nevertheless real. Although the carrier would prefer never to be sued at all (or, barring that, to be sued only in the place designated in a forum selection clause, *cf. supra* note 2), if the carrier is going to be sued in the claimant's jurisdiction it would generally prefer to be sued at the port through which the goods passed rather than at the inland location in which an agent collected or delivered the cargo. Including ports on the article 75 list does not guarantee that suit will be filed in the port, but excluding ports from the article 75 list could make a suit in the port impossible. Unless ports are on the list, both sides may be bound to litigate a matter at an inland location when both would prefer the litigation to be in a port.

5. There are a number of practical reasons why both parties would often prefer to litigate in a port rather than in an inland location. As a practical matter, damage is

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[1] This is substantially the same position that we advocated in paragraphs 30-31 of A/CN.9/WG.III/WP.34. In this paper, we explain our analysis in more detail.

[2] Furthermore, it must be remembered that this issue would be essentially irrelevant to the extent that exclusive forum selection clauses are fully enforceable. Under the U.S. proposal, forum selection clauses in volume contracts would be enforceable and binding on third parties under specified conditions. In that context, it would not matter what places are included on the article 75 list. (The U.S. proposal on this issue was originally presented in paragraphs 34 and 35 of A/CN.9/WG.III/WP.34. A modified/compromise iteration is contained in article 95 of A/CN.9/WG.III/WP.56. Article 76 of A/CN.9/WG.III/WP.56 (which the U.S. opposes in its current form) also deals with the enforceability of exclusive choice of forum clauses.)

[3] One possible difference might arise if article 75(b) is limited to "contractual" places and article 75(c) refers to the actual ports. The United States would not object to revising article 75(c) to cover contractual ports. As a practical matter, multimodal bills of lading in current usage commonly identify the intended ports of loading and discharge.

disproportionately likely to occur in a port because cargo is more likely to be damaged when it is handled. Although cargo can be lost at sea (or damaged in a train derailment or truck collision), there are many more cases of cargo damage during the loading and unloading operations. Even if the cargo is not being handled, it is more likely to be stolen from a warehouse (which is more likely to be in a port area) than from a vessel on the high seas or a moving truck or train. If the cargo is lost or damaged at the port, it will be more convenient for everyone to resolve the dispute there—where both parties have easier access to witnesses and other evidence.

6. When cargo is lost or damaged at the port, a performing party (such as a stevedore or terminal operator) will often be responsible. Thus the cargo owner will wish to claim against both the carrier, which is contractually liable, and the performing party, which is liable for the damage that it actually caused. Under article 77, the port may be the only place in which the claimant can bring an action against the performing party. It would often be the only place in which the claimant can bring a single action against both. If ports are not on the article 75 list, however, there may be no forum in which a single action is possible, thus requiring multiple lawsuits to resolve a single incident.

7. Even if the cargo owner chooses to bring a single action against the carrier alone, the carrier may wish to seek contribution or indemnity from a negligent performing party. This can often be done most efficiently if the carrier joins the negligent performing party as an additional or third-party defendant (using whatever procedural device is available under the forum's law). In many legal systems, this would be possible only if the original court has jurisdiction over the negligent performing party. And that is far more likely to be the case when the action is pending in a port, which could occur under the new convention only if ports are on the article 75 list.

8. Even when the potential liability of performing parties does not make the port a more attractive forum, it will often be in both parties' interest to have any litigation take place in a port. Lawyers with expertise in maritime cases are more likely to practice in or near a port and judges with expertise in maritime issues are more likely to sit in courts with jurisdiction over ports. Of course, not every port in the world will have the maritime legal and judicial expertise of the world's major shipping centres. But that is not the choice at issue here. Even if maritime expertise in a particular port is below the norm, it is still likely to be an improvement over the maritime expertise in the inland place of receipt or delivery.

9. Finally, omitting ports from the list may interfere with the courts' ability to manage their own dockets. In the United States, the doctrine of *forum non conveniens* permits a court, in appropriate circumstances, to transfer a case to another court that is better suited to decide the issues. But this option is available only if the more convenient court has jurisdiction—which may not be the case if ports are not included on the article 75 list.