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

Comments by the United Kingdom of Great Britain and Northern Ireland regarding arbitration

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 Kingdom of Great Britain and Northern Ireland, on 18 November 2005, submitted comments regarding arbitration, for consideration by the Working Group. The text of those comments 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 on the date on which the comments were communicated to the Secretariat.

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Annex

Comments by the United Kingdom of Great Britain and Northern Ireland regarding arbitration

1. Arbitration is a consensual process chosen by parties to a contract as a means of resolving any disputes which might arise. The principles of freedom of arbitration, the enforcement of arbitration agreements, and the enforcement and recognition of arbitral awards is enshrined in Articles II and III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (The New York Convention). 134 States are signatories to the New York Convention of which many are leading maritime nations.

2. Arbitration is the preferred mechanism for the resolution of disputes, mainly in the bulk and tramp trades. The nature of such disputes often involves issues of legal or commercial principle. Charterparties used in such trades almost always incorporate an arbitration provision nominating a particular forum and law in the event of a dispute and such provisions are often expressly incorporated into bills of lading issued under these charterparties. Nevertheless, there are also occasions where arbitration could be appropriate to liner carriage, particularly in the context of specialist trades. Over the years, a number of centres of excellence have developed where experts in specific technical and legal matters are available to arbitrate disputes in maritime commerce.

3. Commercial parties are satisfied with the functioning of the arbitration system both in terms of disputes between the originating parties and, through an incorporation clause, application of the arrangements to third party holders of bills of lading (or in the future, transport documents). The system is understood by parties involved in commercial transactions with buyers and sellers, throughout the chain, aware of their rights and obligations. Third party buyers see this as part of the wider commercial transactions from which they expect to make a profit. The arrangements work well with few, if any, complaints or practical difficulties about the concepts.

4. The widely accepted Hague and Hague Visby Rules do not set out provisions regulating arbitration: this is a matter left to the contracting parties and national law. In contrast, prescriptive provisions in the Hamburg Rules are arguably one of the main reasons why this convention has not been widely implemented. As a matter of principle, it is questionable whether there is a compelling case for the inclusion of any provisions on arbitration in the UNICTRAL draft instrument. If, however, provisions are to be included, the most straightforward approach would be a provision upholding the validity and enforceability of an arbitration agreement in accordance with the parties' agreement, including the extension of such agreements to bind third party buyers.

5. The current text in the draft instrument offers two alternatives, Variant A and Variant B. However, article 84 of Variant A reflects the Hamburg Rules model and provides the claimant with the option of where to institute proceedings. This means that an agreement to arbitrate contained in a contract of carriage subject to the instrument would not be enforceable against either the original party to the contract e.g. a shipper, or a third party buyer.

6. Variant B leaves the location to the agreement of the parties. This would reflect current practice. However, it has been held to provide carriers with an opportunity to circumvent the Jurisdiction provisions in the current Chapter 16. This is not seen as a problem in practice since contracts of carriage in the liner trade do not generally incorporate arbitration agreements but incorporate provisions referring disputes to the exclusive jurisdiction of named courts or states.

7. An alternative proposal has been put forward by the Netherlands to reconcile freedom to arbitrate in the bulk/tramp trades with the application of jurisdiction provisions to liner carriage. This could provide a basis for finding a way forward but further consideration needs to be given to the following points:

- Proposed paragraph 2 of article 78 is understood as imposing a restriction on the right to arbitrate under a contract to which the draft instrument will apply on a mandatory basis. It would give the claimant the right to resile from an arbitration agreement set out in the contract and decide whether to arbitrate or refer the dispute to a court in one of the listed jurisdictions with the added possible confusion of overturning the nominated governing law;
- Proposed article 81 bis seeks to extend the enforceability of a charterparty arbitration agreement to the third party holder of a bill of lading (or other transport document) through the disapplication of article 10. However, this might not, in fact, be the outcome since article 10 brings bills of lading issued under a charterparty or contract otherwise excluded under Article 9 within the mandatory scope of the draft instrument. This is possibly a drafting matter; and
- Arrangements may need to be developed for arbitration to be accepted as the parties' agreed dispute resolution mechanism in certain specialist liner trades.

8. The line of approach is in the right direction but the issues need further study. However, a solution avoiding the difficulties identified in this paper would be a provision permitting the enforceability of arbitration agreements in contracts of carriage without qualification, a system which has proved satisfactory and efficient in resolving maritime disputes over the years.