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

Proposal by the Japan on scope of application

Note by the Secretariat

In preparation for the seventeenth session of Working Group III (Transport Law), the Government of Japan submitted the text of a proposal concerning the scope of application provisions in the draft convention on the carriage of goods [wholly or partly] [by sea] 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.

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Annex

Introduction

1. Draft article 8 (1) (c) provides that this draft convention applies to international contracts of carriage if *"the contract of carriage provides that this Convention, or the law of any State giving effect to it, is to govern the contract."*

2. This article was discussed at the 15th session of the Working Group and views were divided on whether to retain or delete it. The arguments for the retention of this provision are based on the following grounds: the same rule can be found in article 10 (c) of the Hague-Visby Rules, which widens the application of the uniform rule, especially for cross-traders carrying goods through States not party to the Convention (see A/CN.9/576, para. 61). This delegation believes that the above argument in support of the retention is not persuasive in light of the difference between the draft convention and the Hague-Visby Rules, and that the provision could lead to several legal difficulties when it is introduced.

Historical background

3. Draft article 8 (1) (c) has its origin in article 10 (c) of the Hague-Visby Rules, which was copied by the Hamburg Rules. It is worth noting that a similar rule cannot be found in other existing transport conventions. Because the provision is exceptional and unique, it would be helpful to know the historical background of the Visby Amendment, which first introduced such a rule, in order to evaluate the necessity of draft article 8 (1) (c). It will reveal that draft article 8 (1) (c) would expand the scope of the draft convention far beyond that which was intended in the Visby Amendment.

4. The original Hague Rule had a very limited scope of application: it was only applicable to bills of lading issued in any of the Contracting States. As a result, the Hague Rules do not necessarily apply, for instance, even in such a case where the carriage is to a Contracting State (the bills of lading are issued in a non-Contracting State) and the law chosen by the parties is the law of the Contracting States. It was recognized during the drafting process of the Visby Amendment that the scope should be expanded in order to remedy such insufficient application.

5. At the final stage of the Diplomatic Conference for the Visby Amendment, there existed two competing proposals as follows:

(1) The provisions of this Convention shall apply to every bill of lading relating to the carriage of goods between ports in two different States if: (a) the bill of lading is issued in a Contracting State, or (b) the carriage is from a port in a Contracting State, or (c) the contract contained in, or evidenced by, the bill of lading provides that the rules of this Convention or legislation of any State giving effect to them are to govern the contract whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

(2) The provisions of this Convention shall apply to every bill of lading for carriage of goods from one State to another, under which bill of lading the port of loading, of discharge or one of the optional ports of discharge,

is situated in a State party to the Convention, whatever may be the law governing such bill of lading and whatever may be the nationality of the ship, the carrier, the shipper, the consignee or any other interested person.

6. As a result of the vote in the 6th plenary session on February 21, 1968, proposal (1) was adopted (See the *Travaux Préparatoires* of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 25, 1924, the Hague Rules and of the Protocols of 23 February 1968 and 21 December 1979, the Hague-Visby Rules, CMI, 1997, pp. 714-741).

7. It is noteworthy that the choice at the Visby Conference was whether to expand the coverage to (1) outbound carriage and contracts governed by the law of the Contracting State (in addition to the bill of lading issued in a Contracting State which was already covered by the Hague Rules) or (2) to both inbound and outbound. No one intended that the Convention should apply to such a carriage from non-contracting state to non-contracting state, as is suggested by the delegates who support article 8 (1) (c) of the current draft.

8. One might argue that wider application of the draft convention is always desirable and there is no reason to oppose the further expansion whatever the intention of the Visby Amendment was. It is true if and only if such an expansion has no counter-effect. Unfortunately, it would create unnecessary difficulties.

Various difficulties arising out of article 8 (1) (c)

9. A number of delegates have expressed their concern arising out of draft article 8 (1) (c). Those concerns include the following:

(1) First, it should be noted that there is no common understanding of the nature of the Hague-Visby Rules 10 (c). In some jurisdictions, the provision is understood as a choice of law rule which enables the application of the Convention by the force of law. In other jurisdictions, it is considered that the provision simply confirms the practice of "substantive incorporation" which refers to the contract parties' voluntary incorporation of the provisions of the Convention into the contract (known as a "paramount clause"). The nature of the provision is often discussed in connection with questions such as whether the Convention directly applies without regard to the choice of law rules of the forum. The same debate would be retained when draft article 8 (1) (c) is retained.

(2) In addition, different from the Hague-Visby Rules, the draft convention includes in the chapters on jurisdiction and arbitration many provisions which are classified as procedural rules. Those provisions are also applicable when the parties agree that the draft convention governs the contract if draft article 8 (1) (c) is retained. It is quite a strange deviation from the universally-accepted rule that the procedural matters are governed by *lex fori*.

(3) The application of the draft convention to the maritime performing party would add further complications. Suppose that the carrier (Non Vessel

Operating Carrier) undertook the carriage from a non-Contracting State to a non-Contracting State and the maritime performing party (an ocean carrier) actually carried the goods by sea. Suppose further that the carrier and the shipper agree that this draft convention, or the law of any State giving effect to it, is to govern the contract. If draft article 8 (1) (c) is retained, then the draft convention would apply in the above hypothesis and the maritime performing party would be under the coverage of the draft convention. It is a questionable result that the maritime performing party which performed its duties during a voyage between non-Contracting States is subject to the rules of the draft convention including a direct action by the cargo interest simply because the carrier agreed to apply the draft convention.

(4) Finally, it was also observed that draft article 8 (1) (c) would give the parties an opportunity to escape from the mandatory regulation or even public order of the Contracting State when they choose to apply the draft convention to such contracts that otherwise are subject to the law of the Contracting States. Although this is not the specific concern of this delegation, it was pointed out that article 10 (c) of the Hague-Visby Rules had created in certain countries difficulties at the constitutional level (see, A/CN.9/576, para. 61).

10. In the face of the above difficulties, one cannot easily assert that draft article 8 (1) (c) is desirable simply because it broadens the application of the draft convention. Article 8 (1) (a) and (b) of the current draft already provide a sufficiently broad geographic scope of application compared with the Hague-Visby Rules, and there is no necessity to expand it further.

Conclusion

11. Based on the above reasons, this delegation proposes the deletion of draft article 8 (1) (c).