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

Comments and proposals by the International Chamber of Shipping, BIMCO and the International Group of P&I Clubs on topics on the agenda for the 18th session

Note by the Secretariat*

In preparation for the eighteenth session of Working Group III (Transport Law), the International Chamber of Shipping, BIMCO and the International Group of P&I Clubs submitted to the Secretariat the document attached hereto as an annex containing their comments and proposals on provisions of the draft convention on the carriage of goods [wholly or partly] [by sea] scheduled for discussion during the session.

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

* The late submission of the document reflects the date on which the comments were communicated to the Secretariat.

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Annex

Draft convention on the carriage of goods [wholly or partly] [by sea] (A/CN.9/WG.III/WP.56)

International Chamber of Shipping, BIMCO and the International Group of P&I Clubs

Comments and proposals on the topics scheduled for discussion at the 18th session of UNCITRAL Working Group III, to be held in Vienna, 6-17 November 2006

1. In order to assist the deliberations of the Working Group at its next session, the International Chamber of Shipping, BIMCO and the International Group of P&I Clubs offer the following comments on the following topics scheduled for discussion:

A. Jurisdiction and Arbitration (Chapters 16 and 17)

B. Transport Documents and Electronic Records (Chapter 9)

C. Delay and outstanding matters regarding shippers' obligations (Chapters 6 and 8)

D. Limitation of Liability (Chapters 13 and 21)

E. Rights of and Time for Suit (Chapters 14 and 15)

A. Jurisdiction and Arbitration (Chapters 16 and 17)

2. The draft convention should not introduce prescriptive provisions for dispute resolution. The absence of provisions in the Hague and Hague-Visby Rules has not detracted from their wide-spread application or created difficulties of principle or practice. In contrast, the inclusion of provisions in the Hamburg Rules has militated against their use. There are, therefore, strong arguments for leaving commercial parties to determine dispute resolution arrangements most suited to their particular needs. In this context, it is perhaps worth reiterating a point made and acknowledged by many participants in the Working Group, namely that contracts for the carriage of goods are essentially a matter of private rather than public law, which in the modern era are in virtually all cases made between parties of similar bargaining strength who are almost invariably insured.

Jurisdiction

3. The proposals put forward at the sixteenth session of the Working Group in Vienna in 2005, while less constricting than provisions in the Hamburg Rules, nevertheless intrude on party freedom and create legal uncertainty.

Draft article 75—Actions against the carrier

4. It should be clarified that this draft article does not apply where draft articles 83 and 84 come into play.

Draft article 76—Choice of court agreements

5. Exclusive jurisdiction clauses are widely used in contracts of carriage. Such clauses create uniformity and legal certainty (two of the main purposes for developing international conventions) for both cargo interests and carriers. Draft article 76 as presently drafted will, other than in the case of volume contracts, result in a lack of uniformity and certainty and promote forum shopping by claimants. Moreover, the inclusion of both paragraph 4, which permits a state to recognize jurisdiction clauses that do not otherwise satisfy the requirements of draft article 76, and paragraph 5, which despite paragraph 4, permits a claimant to proceed in those jurisdictions specified in draft article 75, will inevitably lead to conflicts between competing jurisdictions and necessarily additional litigation with all its associated cost and delays.

Draft article 80—Consolidation and removal of actions

6. The position is further complicated where an action is brought against both the contracting carrier and maritime performing party. If an exclusive jurisdiction clause cannot be enforced, the contracting carrier might be required to defend the case in a jurisdiction to which he has not agreed in the contract of carriage and this would be unreasonable.

Concursus of Claims

7. The absence of concursus provisions in the event of multiple claims is a significant shortcoming where exclusive jurisdiction clauses are not accepted. As drafted, a shipowner would be forced to defend actions in an almost unlimited number of jurisdictions in the case of claims relating to multi-modal cargoes arising out of the same incident. It would be unreasonable to expect the carrier to defend such suits in many different jurisdictions, possibly subject to varying limitation regimes. Costs would be increased considerably, to the detriment of all parties, and the settlement of claims delayed where the carrier was entitled to limit liability under a global limitation regime. This issue needs to be reconsidered.

Draft article 79—Provisional or protective measures

8. The provision opens the way for the forum of arrest of a ship (*forum arresti*) to be an additional, and unpredictable, jurisdiction open to manipulation by claimants seeking to avoid compliance with the fora listed in draft article 75. In earlier discussions, the Working Group has largely been of the view, no doubt due to the uncertainty which would be created, that *forum arresti* should not provide an additional connecting factor. This issue needs to be addressed through a conflict of conventions provision which gives preference to the jurisdiction provisions of the draft convention over the provisions on jurisdiction/*forum arresti* of the 1952 and 1999 Arrest Conventions to the extent that this is possible under international law.

Arbitration

9. What has been said above in relation to the benefits of giving effect to choice of jurisdiction clauses is equally applicable to arbitration agreements. Arbitration has long been used by parties to a maritime adventure as a means of resolving disputes speedily and economically. This has resulted in the development of a

number of arbitration centres of experience and expertise supported by a well developed legal framework. In industry's view, the introduction of provisions in the draft convention that would curtail the freedom of the parties to a contract of carriage to choose a particular place of arbitration would be both restrictive and unnecessary and would again promote uncertainty. It has been argued that an unrestricted right to include arbitration arrangements could be used by shipowners to circumvent jurisdiction provisions giving rise to the proposals considered by the Working Group at its 16th session (see A/CN.9/591, paras. 90 to 103) to limit the extent of such freedom. Nevertheless, no such difficulties have been experienced under the present system and it can be expected that carriers who have generally preferred to use jurisdiction, particularly in the context of non-bulk trades, would continue with this practice. However, alternative arrangements might at some future stage be a preferred mutual option and should not be rendered unworkable by the draft convention.

Draft article 83

10. Under this provision, arbitration agreements, other than those falling within the draft convention's definition of non-liner (i.e. tramp) transportation, would be subject to the default provisions under this rule whereby a claimant has the ability to opt for judicial proceedings despite the existence of an arbitration agreement. However, the dividing line between the trade types is not necessarily clear and vessels using "liner terms" but not operating to a regular schedule or those undertaking one-off, occasional voyages or engaged in the carriage of specialized cargoes appear to be subject to the regime. The precise meaning of the provision is unclear and likely to be open to differing interpretations.

11. The position in liner trades operating on defined routes and at scheduled times is protected by the proposals relating to liner service volume contracts (see draft article 95 of the draft convention). This will enable regular shippers to agree with carriers to derogate from the provisions of the draft convention, including specific arrangements for dispute resolution matters which might, in the parties' choice, be by reference to the courts or arbitration. Use of the system of liner service volume contracts can be expected to increase.

12. In contrast, the same flexibility to agree binding and enforceable arbitration provisions will be problematic in trades outside the scope of draft article 84.

Draft article 84—Arbitration agreement in non-liner transportation

13. This broadly reflects practice in tramp trades where arbitration is the preferred method for dispute resolution. It will be necessary to ensure that third party interests are equally bound to an agreement but this is primarily a matter of drafting.

14. However, there is an outstanding issue. The original wording in the chapeau made reference to "[a jurisdiction or] an arbitration agreement" but the text in square brackets was removed, without explanation, in the final draft. Although, for the most part, charter parties incorporate arbitration agreements, litigation is used in a limited number of cases. The deletion of the phrase could, therefore, have implications for the exclusivity of such arrangements. In order to preserve the position the following amendment is suggested:

"Article 84 Dispute resolution agreements in non-liner transportation

Nothing in this Convention affects the enforceability of an arbitration or jurisdiction agreement in a contract of carriage .... [remainder of article unchanged]"

B. Transport Documents and Electronic Records (Chapter 9)

Draft article 37 - Issuance of the transport document or the electronic transport record

15. It is essential that the draft convention contains unambiguous provisions as to who is entitled to receive the transport document. We believe the shipper should be the person entitled to receive the transport document, however, this should only be the declaratory rule, which means that the shipper may request that the carrier hands over the transport document to somebody else, e.g. the consignor/seller. It is for the seller in a FOB sales contract to ensure in the sales contract that the FOB buyer/shipper agrees with the carrier that the transport document should be issued to the seller or the consignor.

Draft article 38—Contract particulars

16. Provisions requiring name and address of the shipper should be included.

Draft article 40—Deficiencies in the contract particulars

17. Draft article 40 (3) should be deleted. We are opposed to the notion that where the transport document or electronic record is ambiguous or silent as to the identity of the carrier, there is a presumption that the registered owner of the ship is the carrier. A registered owner may be a financial institution not involved with the operation or trading of the ship. Furthermore, the presumption is inappropriate in an instrument which covers door-to-door transport, where the unidentified carrier might well be a non-vessel operator (NVO). Likewise, the possibility of a bareboat charterer being presumed to be the carrier also strikes us as inappropriate and inequitable given that ships will often be under management contracts, where the registered owner and any bareboat charterer have little to do with the day to day operations.

18. Channelling of liability is a feature of international pollution liability and compensation conventions where the claimant is an unconnected third party, but is inappropriate for parties involved in the contractual carriage of goods. A shipper should ascertain the identity of the contracting carrier, and parties acquiring bills of lading should not be placed in a better position than the shipper who, in accordance with draft article 38 (1) (e), will be aware of the name and address of the carrier set out in the transport document or electronic transport record. During informal consultation, a majority of delegates addressing the issue opposed draft article 40 (3).

Draft article 41—Qualifying the description of the goods in the contract particulars

19. Apart from the more technical comments made below, draft article 41 (a) and (c) are acceptable. However, draft article 41 (b) is difficult to read, unclear and repetitious. The heading of draft article 41 governs (a) as well as (b), and it seems

then very unclear why the latter part of (b) largely repeats what already follows from the heading of draft article 41. The problem may be solved by simply deleting the latter part of (b), i.e. all the words from "the carrier may include ...".

20. The words in draft article 41 (a) (i): "the carrier can show that it" seem to contradict the burden of proof rule in draft article 42 (c) where it is for the party claiming that the carrier did not act in good faith to prove this.

21. In an effort to overcome these problems, we suggest the following revised text for draft article 41:

"Article 41. Qualifying the description and weight of the goods in the contract particulars

The carrier, if acting in good faith when issuing a transport document or an electronic transport record, may qualify the information referred to in article 38 (1) (a), 38 (1) (b) or 38 (1) (c) in order to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper:

(a) For non-containerized goods

(i) if the carrier had no reasonable means of checking the information furnished by the shipper, it may so state in the contract particulars, indicating the information to which it refers, or

(ii) if the carrier reasonably considers the information furnished by the shipper to be inaccurate, it may include a qualifying clause stating what it reasonably considers accurate information.

(b) For containerized goods

(i) unless the carrier [or a performing party] in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container before issuing the transport document or the electronic transport record, provided, however, that in such case the carrier may include a qualifying clause if it reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate.

(ii) the carrier may qualify any statement of the weight of goods or the weight of a container and its contents with an explicit statement that the carrier has not weighed the container if

1. the carrier can show that neither the carrier nor a performing party weighed the container, and the shipper and carrier did not agree prior to the shipment that the container would be weighed and the weight would be included in the contract particulars, or

2. the carrier can show that there was no reasonable means of checking the weight of the container."

Draft article 43—Prima facie and conclusive evidence

22. It is inappropriate that non-negotiable documents should provide conclusive evidence because conclusive evidence should only attach to negotiable documents where a third party buyer of goods relies on the terms of the negotiable document when acquiring the goods. Accordingly, Variants A and B should both be deleted.

Draft article 44—Evidentiary effect of qualifying clauses

23. The suggestion in footnote 154 to attach legal importance to whether a container is delivered intact and undamaged will give rise to a lot of uncertainty and disputes. Furthermore the alternative seems to mix up documentary liability and cargo liability. Thus for these reasons the alternative text in footnote 154 is not acceptable.

C. Delay and outstanding matters regarding shippers' obligations (Chapters 6 and 8)

24. During the 17th session of the Working Group the question of liability for delay for the shipper was extensively discussed and a number of options were considered (see A/CN.9/594, paras. 199 to 207). No solution was achieved, but there was considerable support for the principles of having a balanced solution, i.e. either the draft convention should provide that the carrier as well as the shipper should be liable for delay, or that neither of them should be liable under the Convention.

25. Carriers remain very much opposed to liability for delay outside of any express agreement between the parties, apart from liability for physical loss of/or damage to the goods or to the vessel caused by delay. Accordingly, we fully support the proposals in A/CN.9/WG.III/WP.69.

26. If A/CN.9/WG.III/WP.69 does not achieve sufficient support, and it is decided to leave the question of liability for delay to national law, it is essential in order to provide certainty and predictability that the draft convention establishes some restrictions as to what delay liabilities shippers and carriers may incur under national laws and a distinction may have to be made between bulk and liner trades. Accordingly the draft convention should contain the following elements:

1. Where physical damage to the goods or the vessel takes place following delay, the draft convention should provide for carrier and shipper liability and limitation of liability, as set forth in 3 below;

2. The draft convention should give a right for States to provide for a combination of carrier and shipper liability for delay as follows:

i. The liability of the carrier should be limited to loss of market value of the goods and similar losses directly connected with the goods following delay. The liability and limits of liability should be as set forth in 3 below;

ii. The liability of the shipper should be for loss directly related to delaying the vessel in its loading, departure, voyage, arrival or unloading. The liability and limits of liability should be as set forth in 3 below.

3. The shippers' and carriers' liability for delay under the draft convention or under national laws should for the shipper be an ordinary fault-based liability limited to e.g. the value of the goods. The carriers' liability should follow the general liability rules of the draft convention and be limited to the freight (i.e. to an amount equivalent to one times the freight payable on the goods delayed).

27. If it is decided to regulate liability for delay in the draft convention and not leave it to national law, the rules of the draft convention should be based upon the same principles as suggested above, e.g. provide for a restricted liability for delay for the shipper and the carrier and provide for limitation of liability for both parties.

Dangerous goods

28. At the 17th session of the Working Group it was decided to considerably limit the scope of shipper obligations to provide information under draft article 30 (b) by adopting the proposal in A/CN.9/WG.III/WP.69 (para. 6) (see A/CN.9/594, paras. 190 to 194). In view of this change, it seems justified to provide for strict liability for the shipper for providing correct information. The reference in both Variant A and Variant B of paragraph 2 of draft article 31 to draft article 30 (b) and (c) should be maintained, and the proposal in paragraph 25 of A/CN.9/WG.III/WP.67 should not be followed.

D. Limitation of Liability (Chapters 13 and 21)

Draft article 64—Basis of limitation of liability

29. We firmly believe that it would be appropriate to include the Hague-Visby limits in draft article 64 (1) of the draft convention. Claims' experience demonstrates that the overwhelming majority of claims fall within current liability levels (see footnote 2 of A/CN.9/WG.III/WP.34). Moreover, the adoption of the Hague-Visby limits would in itself constitute a significant increase in the world-wide average limits in use. We suggest that the following amendment should be made to draft article 64:

"*Subject to articles 65 and 66, paragraph 1, the carrier's liability for breaches of its obligations under this Convention is limited to 666.67 SDR per package or other shipping unit or 2 SDR per kilogram of the gross weight of the goods lost or damaged, whichever is the higher,* ***except where ad valorem freight is agreed and paid or*** *the nature and the value of the goods have been declared by the shipper before shipment and included in the contract particulars [or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper].*"

30. Whether or not the words in the last parenthesis should be included depends on the outcome of the discussion under draft article 94.

31. It is of great importance that all liabilities following breaches of the carrier's duties, obligations etc. under the draft convention are subject to limitation. We suppose that the words in draft article 64 "*for breaches of its obligations under this Convention*" are aiming exactly at this. Thus wrongful delivery and misrepresentation constitute breaches of obligations under the draft convention for

which the carrier may be liable, but also entitled to limitation of liability (unless, of course, in the case of intentional breach).

32. A right to limit liability for delay under national law has to be included in the draft convention. We refer to our comments above in relation to delay.

33. We are very much opposed to draft article 64 (2) both in Variant A and in Variant B, and support its deletion. Any contract of carriage falling under the draft convention must include a maritime leg, and in by far most transports falling under the draft convention, the maritime leg will be the most important leg time-wise and length-wise. Under these circumstances, it would be quite logical to apply the liability and limitation rules of the maritime leg for concealed damages. There are of course a number of cases where the maritime leg is insignificant, e.g. a transport from the northern part of Sweden via ferry over the Sound to the southern part of Italy. We believe that in practically all such cases it will be possible to establish whether the damage took place during the ferry crossing or at some stage during the road transport. We question whether the proposals in both Variant A and in Variant B will really benefit claimants if, as the evidence suggests, the overall majority of claims are within the Hague-Visby limits. We also fear that increased liability for concealed damages may deter maritime carriers from offering multimodal transport documents and lead to increased insurance costs. Where larger claims are involved, carriers will do their utmost to establish where the damage took place in order to secure a recourse claim against the sub-carrier. The underlying reason for Variant A and Variant B—that a large number of claims are claims for concealed damages—is highly questionable. For this reason alone, Variant A and Variant B should not be supported. Furthermore, the proposals would lead to great uncertainty. This is especially so, if the reference to national law is retained.

Draft article 104—Amendment of limitation amounts

34. We question the appropriateness of a tacit amendment procedure in a private law instrument. However, if Hague-Visby limits are agreed, a tacit amendment procedure would not be opposed. In that case, we would support the principles in A/CN.9/WG.III/WP.34 (Section II).

35. Draft article 104 (5) is modelled on the Athens Convention, and the factors contained in the provision are appropriate for a public law instrument primarily concerned with regulating claims for loss of life and personal injury to passengers. However, the draft convention is primarily concerned with property claims of commercial parties. In addition to the list of factors in article 104 (5), we consider that account should be taken of average cargo values and freight rates when acting on a proposal to amend the limits.

36. While we would not object to changes in monetary values being taken into account, we would point out that many other factors are involved, such as the type and value of commodities, the fall in real terms of the cost of many consumer goods, and improvements in packaging and transport generally. Furthermore, preliminary research suggests a significant decline in the relative value of freight rates over the years.

E. Rights of and Time for Suit (Chapters 14 and 15)

Chapter 14—Rights of suit

37. We very much doubt the need to include this chapter in the draft convention. It should be deleted. The right to sue is normally regulated by general rules in most legal systems and to establish a special set of rules applicable in this connection, which may differ from the rules applicable under national law, might be difficult, if not impossible.

Chapter 15—Time for Suit

Draft article 69—Limitation of actions

38. We support retention of the present one year prescription period as set forth in Variant A of draft article 69. With modern speedy communication etc., it is difficult to understand that there should be a need to extend this period. The tendency in national law today is to shorten prescription periods. We would suggest that Variant A of draft article 69 is extended to cover actions against maritime performing parties as well, but would suggest further that it is confined to actions against contracting carriers and maritime performing parties. We suggest this in view of the fact that the draft convention does not provide for rules as to jurisdiction etc., vis-à-vis shippers. Accordingly, instituting proceedings against shippers may be a somewhat more complicated task justifying a longer prescription period, and it may be better to leave the question to national law.

Draft article 72—Action for indemnity

39. We prefer Variant B of draft article 72 (b).

Draft article 74—Actions against the bareboat charterer

40. We refer to our comments above in relation to draft article 40.