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

Position of the French National Committee of the International Chamber of Commerce (ICC France) submitted to UNCITRAL Working Group III (Transport Law)

Note by the Secretariat

In preparation for the nineteenth session of Working Group III (Transport Law), the French National Committee of the International Chamber of Commerce (ICC France) submitted to the Secretariat the document attached hereto as an annex containing its 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.



Annex

Position of ICC France submitted to UNCITRAL Working Group III (Transport Law)

Draft convention on the carriage of goods [wholly or partly] [by sea]

Provisions relating to arbitration

1. At its sixteenth session (Vienna, 28 November-9 December 2005), Working Group III (Transport Law), having been entrusted with preparing a draft convention on the carriage of goods [wholly or partly] [by sea], considered document A/CN.9/WG.III/WP.54, which contains a proposal by the Netherlands on arbitration.

That document was presented as a compromise between the principle of unqualified freedom to arbitrate and the view that arbitration should be available to the parties to a dispute but should not be capable of being used by parties in order to circumvent the bases of jurisdiction set out in draft article 75 of the draft convention.

The compromise proposed by the Netherlands entails the deletion of the entire chapter on arbitration and the addition of a paragraph 2 to draft article 78 of the draft convention with the intention of ensuring that the rules in the draft convention on jurisdiction could not be circumvented.

This compromise also entails the inclusion of a reference in draft article 81 to make effective any agreement made by the parties to refer a dispute that has arisen between them to arbitration.

The aim of the proposal is to preserve the status quo with respect to the use of arbitration in the maritime transport industry by providing minimal arbitration rules with respect to the liner industry while maintaining freedom of arbitration in the non-liner industry through the addition of draft article 81 bis.

2. The report of Working Group III (A/CN.9/591) on the work of its sixteenth session (Vienna, 28 November-9 December 2005) stated that the compromise proposal of the Netherlands had given rise to reservations on the part of several delegations.

The report recalled that the question had been raised as to whether the compromise proposal of the Netherlands (A/CN.9/WG.III/WP.54) might limit the use of arbitration in the liner trade.

It was stressed that commercial enterprises would in fact be unlikely to include arbitration provisions in a contract unless they could with certainty determine the place of arbitration.

However, given the current wording of draft article 75, the determination of the place of arbitration might not be possible.

The report also pointed out that refinements were called for in the drafting of the proposed text, in particular in view of the new provisions considered for the jurisdiction chapter.

3. The comments by the delegation of ICC France on the work of Working Group III at its sixteenth session (Vienna, 28 November-9 December 2005) indicated that the French delegation had reservations concerning the Netherlands proposal.

The French delegation recalled that, although during the discussions it had accepted the principle of the compromise, it did not agree with the wording of the text subsequently drawn up, which did not reflect the discussions.

The French delegation had also pointed out that the wording of article 83 raised a number of difficulties, in particular by granting the claimant the option of instituting court proceedings or resorting to arbitration.

Several delegations (France, the United Kingdom, Italy and the Baltic and International Maritime Council (BIMCO)), supported by the delegation of ICC France, stressed that they disagreed with the wording of article 83, which conflicted with arbitration practice.

In the light of those difficulties, the secretariat of the Working Group was asked to give its opinion.

The secretariat pointed out that the solutions recommended in document A/CN.9/WG.III/WP.54 were unusual and it suggested that the wording of article 83 should be re-examined.

4. In that context, ICC France wishes to comment on those provisions of the draft convention that deal with arbitration.

4.1. *Draft article 76: choice of court agreements*

4.1.1. Draft article 76 (1) stipulates that the choice of court agreement has to be concluded or documented in writing.

Arbitration agreements appear to be covered by this definition.

However, they may not be entered into orally or implicitly.

4.1.2. Draft article 76 (2) stipulates that an arbitration agreement (i) has to be included in a volume contract with a clear indication of the parties and (ii) must clearly state the name and location of the chosen court.

(i) As regards volume contracts, it would be desirable to broaden the scope of admission of arbitration agreements to all contracts of carriage of goods by sea.

(ii) As regards the statement of the name and location of the court, such a requirement seems incompatible with an arbitration clause.

It also weakens the role of arbitration institutions, which have no opportunity to remedy any disagreement of the parties concerning the place of arbitration and the designation of arbitrators.

4.1.3. Draft article 76 (3) stipulates that an exclusive choice of court clause is binding on a person that is not a party to the volume contract provided that this is consistent with applicable law as determined by international private law or the conflict of law rules of the court seized.

Recourse to conflict rules may be seen to be obsolete in international trade.

This provision also applies to courts.

Under these circumstances, it would be appropriate to allow an option for arbitration, with the exclusion of the courts.

4.2. *Draft article 81 bis: recognition and enforcement*

This article relates only to decisions made “by a court of one Contracting State” (“*par un tribunal d’un État contractant*”).

However, an arbitral tribunal, by its nature, is not under the jurisdiction of a State.

The provisions concerning recognition and enforcement of decisions will therefore not be applicable to arbitration.

It should, however, be recalled that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards remains applicable.

The formulation “*par un tribunal siégeant dans un État contractant*” would appear to be preferable.

4.3. *Draft article 83: arbitration agreements*

This article provides that (i) the arbitration agreement has to specify the place of arbitration and (ii) the claimant may, even where there is an arbitration agreement, institute judicial proceedings in any place specified in draft article 75 of the convention.

The option available to the claimant of instituting judicial proceedings seems to conflict with international arbitration practice, in particular where contrary to the principle of jurisdiction to decide jurisdiction.

5. At the eighteenth session of Working Group III (Vienna, 6 November-17 November 2006), the Secretariat presented a document on arbitration (A/CN.9/WG.III/XVIII/CRP.3) prepared in conjunction with Working Group II in line with the New York Convention.

The statement by the delegation of ICC France indicated that the new wording of chapter 17 on arbitration was intended to prevent the provisions of chapter 16 on jurisdiction being circumvented.

The French delegation approved chapter 17 as a whole.

However, it did not wish to adopt a position on article 85 bis (applicability of chapter 17 to Contracting States) since that issue came within the domain of the European Union.

The French delegation has considered the precise meaning of the term “applicable law”, which appears in article 83 (4)(d), in relation to arbitration agreements.

This term would in fact seem to refer to the law governing the arbitration procedure and not the law applicable to the arbitration itself.

It is also felt that the wording of article 84 (2) on arbitration agreements in non-liner transportation could be improved and that the conditions under which arbitration agreements would be binding on third parties, in particular consignees, could be re-examined.

Several delegations have requested that the chapter on arbitration be excluded from the draft convention in that it limits the possibilities for resorting to arbitration.

The delegation of ICC France pointed out that the provisions on arbitration were of particular concern to ICC France.

Since document A/CN.9/WG.III/XVIII/CRP.3 had been distributed to delegates during the session, ICC France undertook to adopt a position subsequently.

The delegation of ICC France indicated that its position would be based on respect for freedom of contract and freedom to arbitrate, which are essential principles in the field of international trade.

Conclusion

ICC France notes with satisfaction the progress made in the work of UNCITRAL.

ICC France welcomes the fact that the principle of unqualified freedom to arbitrate has been reaffirmed by the Working Group.

ICC France believes, however, that some provisions, as currently worded, may limit the use of arbitration.

ICC France therefore requests the Working Group to take its observations into consideration.
