United Nations A/CN.9/WG.III/WP.87

General Assembly

Distr.: Limited
14 March 2007

Original: English

United Nations Commission on International Trade Law
Working Group III (Transport Law)
Nineteenth session
New York, 16-27 April 2007

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

Comments of the International Chamber of Shipping (ICS), BIMCO and the International Group of P&I Clubs on the draft convention

Note by the Secretariat

In preparation for the nineteenth session of Working Group III (Transport Law), the International Chamber of Shipping (ICS), BIMCO and the International Group of P&I Clubs submitted to the Secretariat the document attached hereto as an annex containing their comments on the draft convention on the carriage of goods [wholly or partly] [by sea] (A/CN.9/WG.III/WP.81) 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.

V.07-81590 (E)

Annex

Comments of the International Chamber of Shipping (ICS), BIMCO and the International Group of P&I Clubs on the draft convention (A/CN.9/WG.III/WP.81)

Introduction

International Chamber of Shipping (ICS), BIMCO and the International Group of P&I Clubs (collectively referred to as "we") have the following comments on the draft convention on the carriage of goods [wholly or partly] [by sea] as contained in UNCITRAL document A/CN.9/WG.III/WP.81.

Draft Article 6 – Specific exclusions

Draft Article 6(1)(b)

Delete "Contracts" and replace with "Other contractual arrangements…"

Draft Article 6(2)(a)

Delete "contract" and replace with "other contractual arrangement between the parties". After "thereon" delete "between the parties, whether such contract is a charterparty or not".

Rationale: The above suggestions for amendment are in order to clarify the text.

Draft Article 12 - Transport not covered by the contract of carriage

The words in the first parenthesis are strongly preferred.

Rationale: The carrier may wish to assist with shipper requests for pre-carriage or onward carriage. Such service would be most efficiently provided using a through transport document but in such a case, the carrier should act only as agent for the shipper in respect of the pre-carriage or onward carriage so that it remains at the shipper's risk and responsibility. This practice is in widespread use, ensuring a smooth accomplishment of international trade with appropriate delineation of risk. If the second parentheses are chosen, then many carriers may not agree to arrange pre-carriage or onward carriage as agents and will only contract for the whole of the combined transport. The second parenthesis thereby discourages flexibility and that is not helpful to carriers or shippers.

Draft Article 17- Basis of liability

Draft Article 26 – Carriage preceding or subsequent to sea carriage

The words "event or circumstance" should be replaced with "occurrence" wherever they appear in these articles.

Rationale: The word **"**circumstance" is too broad in scope and not appropriate for the intention of these articles and the use of both "event" and "circumstance" is unnecessary and otiose. "Occurrence" is more in line with the meaning and intention of the clause and should replace the present wording.

Draft Article 18 – Liability of the Carrier for other persons

Draft Article 18(2) – Lift the parentheses.

Rationale: As a matter of principle, it is important that the carrier's liability for the actions of its agents, employees and sub-contractors is limited to when the party is acting within the scope of its employment or contract or duty. See also the suggestion under draft article 19 below.

Draft Article 19 – Liability of maritime performing parties

Draft Article 19(4) – We support the principle behind this article but believe that it is more appropriately placed in an independent article and it should be expanded to include the full category of parties that perform the carrier's obligations under this convention.

Rationale: The employee, agent and sub-contractor of the carrier and the maritime performing party, should be afforded the full protection of the rights, defences and limits of liability available to the carrier under this convention for any breach of its contractual obligations or duties in the event that an action under the draft convention is made directly against it (a "Himalaya" clause). This draft article upholds this principle but since it, rightly, encompasses a wider range of parties than the heading of this draft article (maritime performing parties), it is more appropriate for it to be an independent article.

Finally, we suggest that the clause includes a provision similar to draft article 19(2) but extended to the carrier, performing party and maritime performing party.

Draft Article 26 - Carriage preceding or subsequent to sea carriage

Draft Article 26(1) - The reference to "national law" in the preamble to the draft article should be deleted.

Draft Article 26(1)(a) - Variant B is preferred with the reference to "national law" in parentheses, deleted.

Rationale: Only those regulations contained in international conventions or instruments should be able to prevail over the terms of this draft convention since these provisions will be easily and readily identifiable. To allow national law provisions, wherever and whatever they may be, to prevail would create considerable uncertainty as to the extent of carrier's and shipper's liability. Variant B of draft article 26(1)(a) is preferred since it contains more restricted criteria for the circumstances that must exist before the draft convention can be ousted and it introduces the factor of relevance.

Draft Article 27 – Delivery for carriage

Draft Article 27(2) - Delivery for Carriage
We would suggest supporting the deletion of the square brackets around draft article 27(2).

***Rationale*:** When the shipper agrees to perform the operations listed in draft article 14(2), it is right to impose an obligation that they are performed with the same standard of care as the draft convention imposes on the carrier, namely in draft article 14(1).

Draft Article 32 – Special rules on dangerous goods

Draft Article 32 (a) – We support the deletion of the square brackets around "the carriage of such goods" and deleting the words "such failure to inform" in the final line of the paragraph.

Rationale: The carrier stands exposed to enormous loss and damage if dangerous goods are loaded on to his vessel without his knowledge and consent. It is only reasonable, therefore, for the carrier to be afforded the widest protection in these circumstances and the shipper should then be liable for all consequences of such goods having been loaded and carried.

Draft Article 37 – Contract particulars

Draft Article 37(1)(a) - "A description of the goods" could lead to a shipper inserting a very lengthy and detailed description. We wonder therefore whether there should be words here to limit the extent of the goods' description.

Draft Article 38 – Identity of the carrier

Draft Article 38(2) - We have strong objection to any presumption as is proposed in draft article 38(2) and therefore both Variant A and B should be deleted.

Rationale: Where the registered owner is a separate entity from the ship operator, the registered owner will rarely have any practical influence over the operation of the vessel and, indeed, is often a financial institution. Industry maintains that a shipper is in the best position to ascertain the identity of the contracting carrier, and parties acquiring bills of lading should not be placed in a better position than the shipper. As draft article 37(2)(b) now contains an obligation on the shipper to specify the name and address of the carrier and it is agreed in draft article 38(1) that any statements to the contrary elsewhere in the transport document will have no legal effect, any ambiguity thereafter is more appropriately dealt with by the courts under the applicable law and not by the draft convention.

Draft Article 41 – Qualifying the description of the goods in the contract particulars

Draft article 41 is of very great practical importance to carriers. It is vital that carriers know when and how to make a qualification: in order to avoid any uncertainty in this respect, draft article 41 should be somewhat restructured and rephrased. In particular, it should more clearly set out the distinction between cases where a qualification shall be made and cases where a qualification may be made. Additionally, it would appear from the scheme of the article that the qualification to be made under sub-paragraph 1 is more in the nature of a "correction" of the shipper's statements whereas the qualifications to be made under sub-paragraphs 2 and 3 respectively are more in the nature of a "reservation" of rights. We would suggest that this distinction is made clearer in the article. In particular, whereas the word "qualify" is appropriate in paragraph 1, the word "reservation" should be used in paragraphs 2 and 3. Draft article 41(1)(a) is also a little unclear in that there is a reference twice to "material". Is this intended, and if so, is there any reason why the same phraseology has not been used in draft article 41(1)(b)? Furthermore, we would request clarification as to the difference between "materially false" and

"false".

Draft Article 42 –Evidentiary effect of the contract particulars

We are strongly opposed to draft article 42(b)(ii) since it proposes to extend the conclusive evidentiary effect of the statements in a transport document not only to all non-negotiable transport documents transferred to a consignee and where that transport document has to be presented in order to take receipt of the goods, but also to sea waybills.

In commercial practice the distinction referred to in the last sentence of draft article 42 (c) is of no practical use.

Rationale: As a matter of principle, 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. Where there has been no such reliance on the statements in the transport document, there is no reason why a consignee of a non-negotiable document should be placed in a better position than the shipper. Having said that, the draft convention should be flexible and recognize the parties' freedom to contract on terms that are commercially agreeable. An acceptable compromise solution therefore could be to give conclusive evidentiary effect to statements in non-negotiable documents where the parties so agree by a statement on the face of the document.

Draft Article 46 – Delivery when no negotiable transport document or negotiable electronic record is issued

Draft Article 46 (c) – Delete the words "after having received a notice of arrival"

Rationale: We recall that it had been agreed that there should not be an obligation in all circumstances to give a notice of arrival and, indeed, a corresponding obligation does not appear in the subsequent articles. It may be, therefore, that the appearance of the obligation in this article is an oversight and should be deleted.

Draft Article 49 - Delivery when negotiable transport document or negotiable electronic transport record is issued

Draft Article 49(f) - Add after "other than the right to claim delivery of the goods", the words "or compensation for the failure to deliver the goods".

Rationale: It is arguable that the present wording whilst excluding the right to claim delivery of the goods does not exclude the right to claim losses or damages for failure to deliver the goods. The proposed amendment is intended to exclude such claims.

Draft Article 49 (g) – This provision should be deleted.

Rationale: It is of great practical importance that delivery which takes place according to the provisions in draft article 49 (a) to (d) should release the carrier from any further obligations as to delivery. A transport document holder who acquires it in good faith after delivery has taken place may acquire other rights, but not a right to claim delivery or a right to claim loss or damage for failure to deliver the goods. This principle is accepted in draft article 49 (f) and it is difficult to understand why the mere fact of lack of knowledge of the delivery at the time of

becoming holder should justify a departure from this important principle in draft article 49 (g). If draft article 49 (g) is retained, there is a risk that the holder at the time of delivery may simply transfer the transport document to another person acting in good faith and thereby resurrect the right to claim delivery.

Draft Article 50 – Goods remaining undelivered

Draft Article 50(5) - This provision should be amended in order to more clearly set forth the liability of the carrier.

Rationale: The carrier should be liable according to an ordinary fault liability rule with the burden of proof on the claimant. This liability should be related not only to preservation of the goods, but to any steps taken by the carrier under draft article 50(1). Such a rule should be supplemented with a special rule under which a carrier is not liable for damage to the goods or other loss or damage which is a consequence of the goods not being received by the consignee, provided the goods have been handed over to a suitable terminal authority, public authority or other independent person or authority who takes care of the goods. Often destruction or sale of the goods are no real alternatives, therefore the carrier should be provided with alternative ways to be relieved of a continuing liability. Alternatively, an extended concept of delivery could be introduced under which the goods are deemed delivered, if it is handed over to such authority, etc. Compare the principles in draft article 11(3) and draft article 55.

Draft Article 54 – Carrier's execution of instructions

Draft Article 54(4) - Lift the parentheses**.**

Rationale: It is preferable for reasons of harmonization of liability rules, for liability under this article, including liability for delay, to be dealt with under the convention rather than leaving it to national law.

Draft Article 60 – Liability of holder

Draft Article 60(2) – The words in the first parentheses are preferred.

Rationale*:* These words are clearer in the drafting and more comprehensive as to the liabilities to be assumed by the holder. Furthermore, as these liabilities are those that are actually incorporated in or ascertainable from the transport document, it is also fairer to the holder, rather than having liabilities imposed on him through the convention of which he may not be aware, as is the case with the words in the second parentheses.

CHAPTER 12 - TRANSFER OF RIGHTS

This chapter provides clarity regarding as to who can provide instructions to the carrier as to delivery of the cargo and serves a very useful purpose by harmonising national laws in an area where quite different rules apply worldwide. Harmonization would greatly facilitate international trade and this chapter is therefore supported.

Draft Article 62 – Limits of liability

Draft Article 62(1) - The decisions already agreed in relation to carrier's liability should be borne in mind. In particular, it has been agreed: (a) to exclude the exception of error in navigation; (b) that the carrier shall exercize due diligence to make the vessel seaworthy throughout the voyage rather than to limit this obligation to the commencement of the voyage; and (c) that the carrier is liable for delay. The sum result of all these changes has been to radically alter the scheme of liability so that the carrier will be liable in most cases. This will have a serious economic impact on shipowners and their insurers and is very relevant when it comes to deciding levels of limits of carrier's liability.

From the point of view of ensuring adequate compensation, claims experience demonstrates that the overwhelming majority of claims fall within current liability levels in the Hague-Visby Rules (see footnote 2 of A/CN.9/WG.III/WP.34) and no evidence to the contrary has been adduced. It should not be forgotten that the draft convention contains a mechanism to increase any limits of liability should they be found to be insufficient by the tacit amendment procedure in draft article 99 which will be of great practical importance. Moreover, in the event that a cargo is high value, the shipper should be encouraged to declare the value in the bill of lading and for the freight to be adjusted accordingly.

In addition, the concept of "ad valorem" freight is still supported.

Draft Article 62(2) - Substitute Variant A and B for a provision that where the place of damage is not known, the liability rules and limits of liability under the draft convention shall apply.

Rationale: Any contract of carriage falling under the draft convention must include a maritime leg, and in most transports falling under the draft convention the maritime leg will be the most important leg time-wise and lengthwise. Under these circumstances it would be quite logical to apply the liability and limitation rules of the maritime leg for concealed damage. Increased liability for concealed damage may deter maritime carriers from offering multimodal transport documents and lead to increased insurance costs.

Draft Article 63 – Limits of liability for loss caused by delay

The draft convention text should include liability for delay causing economic loss by both carrier and shipper with an appropriate cap on the liability for each party.

Rationale: At the 18th session of the Working Group in Vienna 2006, the Working Group expressed support for the third option put forward by Sweden in A/CN.9/WG.III/WP.74, namely that the draft convention should include a capped liability for delay for both shipper and carrier subject to agreeing an appropriate method to limit the shipper's liability. Industry strongly supports this option as it represents equal treatment of parties which is an important principle to uphold in the draft convention if it is to gain wide support. As to the cap on liability, industry supports the proposal canvassed at the 18th session that this should be one times the freight for the carrier and USD 500,000 for the shipper. In addition, in support of the parties' freedom of contract, the parties should have the right to be able to adjust the cap on liability by the use of a phrase such as "unless otherwise agreed".

CHAPTER 15 - JURISDICTION

We are in favour of a modification whereby inclusion of the jurisdiction chapter would be optional. We support the proposal that this is achieved through a partial opt-in provision which preserves the right of states incorporating the jurisdiction provisions to determine whether, in accordance with their legal policy, to give effect to an exclusive choice of court agreement in respect of any contract, that is, partial opt-in.

CHAPTER 16 – ARBITRATION

Draft Article 78 – Arbitration agreement in liner transportation

This should include a partial opt-in provision similar to draft article 70(3) under the chapter on jurisdiction.

Rationale: It was agreed at the 18th session of the Working Group in Vienna 2006 that if the approach now being put forward in relation to jurisdiction is developed in respect of liner trades, it is essential to replicate the partial opt-in provisions suggested there also with regard to arbitration so that a designated arbitration agreement could be given effect and upheld equally in a state which would recognize an exclusive choice of court agreement. Moreover, rights under an arbitration agreement should be a two-way process, allowing for action both by and against a carrier.

Draft Article 79 - Arbitration agreements in non-liner transportation

Bulk trades are expressly excluded from the arbitration provisions. Nevertheless, it should be made clear that a jurisdiction clause in a charterparty is accorded the same status as a charterparty arbitration clause.

Draft Article 88 – General provisions

Paragraphs 1 and 2 should fully match each other in scope.

Draft Article 99 – Amendment of limitation amounts

The tacit amendment procedure of the limits of liability is an extremely important aspect of the draft convention and one which will ensure its relevance and ability to meet changing situations and is therefore strongly supported. It is submitted that the provisions in this draft article should also extend to shipper’s limits of liability for delay.