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

Proposal by the Government of China on Jurisdiction

Note by the Secretariat*

In preparation for the twentieth session of Working Group III (Transport Law), the Government of China submitted to the Secretariat the attached document.

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 proposals were communicated to the Secretariat.



Annex

Proposal by China on Jurisdiction

Introduction to the issue of jurisdiction

1. Working Group III discussed and revised the jurisdiction chapter of the draft convention several times, and framed the current text as set out in document A/CN.9/WG.III/WP.81. The choice of court agreements of draft article 70 in the text has the focus among the delegations throughout that discussion. We have expressed strong concern in past sessions regarding whether a person that is not a party to the volume contract should be bound by an exclusive choice of court agreement.
2. Working Group III will proceed with the third reading of the chapter on jurisdiction at its twentieth session. We believe that the above-mentioned matter should be further discussed, and propose alternative text for the consideration of the Working Group.

Review of the current provisions (draft article 70)

3. The issue of the validity of an exclusive jurisdiction agreement was not involved in the earlier chapter on jurisdiction as found in document A/CN.9/WG.III/WP.32.
4. The Delegation of the United States suggested in its proposal¹ at the twelfth session of the Working Group that a competent court as agreed by the carrier and the shipper should have exclusive jurisdiction for contractual disputes between them in an action regarding the proposed Ocean Liner Service Agreement.
5. In the fifteenth session of the Working Group, the delegations had a pivotal debate as to whether to recognize the validity of exclusive jurisdiction agreements. In the end, the Working Group decided to take a compromise approach, with a minimum accepted standard being established for the validity of exclusive jurisdiction agreements, and jurisdiction agreements which fulfilled certain conditions would be allowed to be exclusive.
6. At the following sessions, the Working Group further amended the provisions of the exclusive jurisdiction agreement by drafting provisions regarding a choice of court agreement and limiting the validity of the exclusive choice of court agreements solely to volume contracts that were permitted to derogate from the draft convention, and thus framed the text of draft article 70 (1) as contained in A/CN.9/WG.III/WP.81.
7. That decision was justified mainly on the grounds that Governments would not be able to reach consensus as to the validity of exclusive choice of court agreement; and by limiting it to sophisticated parties to the contract of carriage who were of equal bargaining power, i.e. between the parties to volume contracts, it would both support the validity of exclusive jurisdiction agreements, and by setting out certain conditions, it would basically meet the requirement which a number of delegations believed would be strictly held.

¹ See paragraph 34 in A/CN.9/WG.III/WP.34.

8. At the fifteenth session of the Working Group, there was also a striking divergence between the delegations regarding whether third parties to the volume contract could be bound by the exclusive jurisdiction clause.

9. The existing draft article 70 (2) as it appeared in A/CN.9/WG.III/WP.81 is the special provision setting out the conditions for a person that is not a party to the volume contract to be bound by an exclusive choice of court agreement. In this regard, we have expressed our strong concern throughout the discussion.

Analysis of the current provisions (article 70)

10. In our view, firstly, the approach of applying an exclusive choice of court agreement to a third party to a volume contract would prejudice that party's right of choosing a competent court as conferred by the draft article 69.

11. Secondly, the limitation of exclusive choice of court agreements solely to volume contracts was justified mainly on the ground that the parties to a volume contract would, in general, be in an equal bargaining position and would freely negotiate contracts, and that it would seldom occur that a carrier "forced" a shipper to accept the contract clauses by making use of its strong bargaining power. But a third party to a volume contract is not a contracting party to the volume contract, thus to extend the validity of exclusive choice of court agreement to such a third party would without doubt to force that party to accept such agreement. This would be unfair to the third party, and would not reflect the consensus between the parties, and would also contradict the original intention of limiting exclusive choice of court agreements to volume contracts.

12. Thirdly, although the current text sets out some conditions for third parties to be bound, which include the provisions in the subparagraph 2 (d) of the draft article 70 regarding applicable law, it is still far from sufficient protection for third parties to such contracts, and cannot solve our concern in essence, as well as causing inconvenience in practical application. Fourthly, with reference to the provisions of the draft article 89 (5)² in the draft convention with regard to special rules for volume contracts, only when a third party gives its express consent to be bound, can the terms of the volume contract that derogate from this Convention bind him.

13. Therefore, with respect to the matter of whether a third party to a volume contract should be bound by an exclusive choice of court agreement concluded therein, the equivalent or higher protective standard shall be adopted, which would better achieve consistency throughout the draft convention.

² See the paragraph 5 of draft article 89 with regard to special rules for volume contracts:

"5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 1 of this article, apply between the carrier and any person other than the shipper provided that:

(a) Such person received information that prominently states that the volume contract derogates from this Convention and gives its express consent to be bound by such derogations; and

(b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document, or electronic transport record."

Suggestions and a proposal for amendment to the related item of the draft Convention

14. We suggest that the subparagraph 2 (c) of the draft article 70 in document A/CN.9/WG.III/WP.81 could be revised as follows:

“(c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive, and that person gives its express consent to be bound by the exclusive choice of court agreement; and”
