



General Assembly

Distr.: Limited
14 February 2007

English
Original: French

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]

Position of the European Shippers' Council 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 European Shippers' Council 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

Introduction

1. With reference to the work of the eighteen session, which took place in Vienna, the European Shippers' Council wishes to present its analysis of those points which were simply discussed but not actually settled by consensus, in anticipation of the nineteenth session, to be held in New York in 2007.
2. The adopted positions set out below are based on the deliberations in Vienna and on main document A/CN.9/WG.III/WP.64, together with further specific work of official delegations, since to date we are neither aware of the consolidated version of the text following completion of the second reading nor in possession of the agenda for the New York session.

Limitation of liability

Article 64

3. The Council wishes the determination of the method of calculating the liability limit to take account of the actual value of the goods transported by sea. Rather than refer dogmatically to past systems, it seems preferable to take into consideration a value that is representative of current cargo flows and to use high-value flows as a basis (trade from Asia to the rest of the world).
4. The Council is very wary of the apparent extension of the scope of application of limitations of liability in relation to the Hague-Visby and Hamburg Rules.
5. The Council supports variant A of article 64 (2), which automatically applies the limitation that is most favourable to the shipper.

Article 65

6. While welcoming the fact that the principle of liability for delay on the carrier's part is still retained, the Council notes that the method of calculation envisaged by some delegations at the eighteenth session, in Vienna, is still based on the amount of freight.
7. The Council again points out that this criterion, which was meaningful at the time of negotiation of the Hamburg Rules, in the 1970s, when freight rates were high (e.g. the Far Eastern Freight Conference (FEFC) rate of around US\$ 2,000/2,500 for a 20-foot container loaded with steel), has today lost its relevance owing to the volatility of rates, which have fallen to very low levels because of competition (e.g. the average freight-all-kinds (FAK) rate of US\$ 150-200 per 20-foot container for the Europe/Asia sector). The Council recommends abandoning a system whose only justification is tradition and advocates using a modern criterion in the future.
8. The Council proposes that the liability limitation rules applicable to both parties to the contract of carriage be unified:
 - Either through the application of a blanket rule, as set out in article 64,
 - Or through the principle of compensation for actual loss, being limited to a certain sum that is actually insurable in the case of the smallest operators.

In this latter context, the amount of 500,000 Special Drawing Rights (SDRs), proposed at a meeting of the eighteenth session by a consensus group led by the Swedish delegation, during discussions on the shipper's liability for delay, is in our opinion unjustified. We feel that a sum in the region of 80,000/100,000 SDRs is more realistic. That amount would represent the limit of liability of a carrier whose delay gives rise to a proven loss and the limit of liability of a shipper whose fault causes a loss.

9. However, without prejudice to the foregoing, should delegations by consensus adopt a method of calculation based on the amount of freight, the choice of a multiplier lower than that already existing in the Hamburg Rules (2.5 times the freight payable) would be an unacceptable backwards step for shippers benefiting from the most recent convention.

10. At the last session, held in Vienna, an informal group proposed, on the basis of document A/CN.9/WG.III/WP.74, a text relating specifically to the liability of the shipper whose fault causes delay. In essence the proposal denies the shipper the possibility of limiting its liability in two specific cases: where its fault give rise to damage to the ship or where a misstatement concerning its goods causes delay or loss.

11. Only in the very restricted case of the shipper's liability for delay whose cause is not related to a misstatement concerning the goods could it be limited, such limitation corresponding not to the formula "one or X times the freight payable" but to an amount arbitrarily fixed at 500,000 SDRs.

12. Such a proposal, which has no foundation in law, would defy any rule of symmetry and balance between the situation created for the carrier and for the shipper. The Council thus wishes to emphasize that retaining such a clause in the convention would have a negative impact on its support for the draft instrument and would influence shippers' attitude towards their respective Governments when the question of signing and ratifying the convention arises. It should also be noted that the Council finds it unacceptable that the text retains neither the formula in the Hague-Visby Rules (article IV (3)), nor that in the Hamburg Rules (article 12), whereby the shipper is not liable unless there is fault on the shipper's part.

13. The Council's rejection of the draft proposed by the informal group does not, however, mean, as suggested by some delegations, that it is abandoning its wish to retain the clause concerning the carrier's liability in the event of delay. That position is in line with the criteria of service quality that can justifiably be expected from transport providers engaged in global trade conducted under just-in-time and total quality principles.

14. The Council refuses to let itself be drawn into a quid pro quo scenario artificially created to enable carriers to reverse the achievements of the Hamburg Rules in regard to liability for delay.

Article 66

15. In the interests of consistency of interpretation by all legal systems, it is desirable to delete the word "personal" from the English version, which limits cases of liability. That restrictive element is incompatible with the expectations of shipper

customers from their transport providers, who are increasingly assuming a major player position in a modern maritime world.

16. The Council also feels very reluctant regarding the apparent extension of the scope of application of the circumstances recommended in article 66 where the carrier does not lose the right of liability limitation.

Article 89: Other conventions

17. The Council supports the analysis made by the International Road Transport Union (IRU) and shares the concerns expressed by it from a multimodal perspective, whose significance it is important to recognize.

18. We consider it desirable to retain article 27 (but delete article 90, which is harmful) and to retain and modify article 89. The Council is not opposed to a neutral multimodal instrument of global application but is primarily in favour of simple solutions offering good predictability. From that viewpoint, it might consider accepting a single system of liability and compensation but such a position has limits and is valid only if genuine equality of treatment is established in the convention. The instrument as it now stands is so unbalanced to the detriment of shippers that, regrettably, the Council feels compelled at this stage to call for the application of unimodal transport conventions for the non-maritime legs, since such conventions are far more protective of shippers' interests.

Articles 75 and 76: Jurisdiction

19. On the question of designating courts, the Council is primarily seeking predictability and simplicity and accordingly favours an article that gives a specific list of standard places for determining competent courts, in particular those traditionally associated with the transport operation. It would also be desirable to include the place of formation of the contract.

20. The fullest possible list is preferable to the system adopted, which combines a list of locations and total freedom of choice.

21. Such freedom of choice of jurisdiction encourages forum-shopping, which could lead to the designation of places of jurisdiction outside the list of proposed locations and even allow the designation of a court in a country that has not acceded to the convention.

22. The Council feels that freedom of contract (cf. below) granted to the contracting parties should be limited to the possibility of choosing by agreement a basis of jurisdiction from among those appearing in the list in article 75 (a), (b) and (c).

23. The criteria in article 76 (2) (a), (b) and (c) allowing total derogation from article 75 (a), (b) and (c) are not sufficient to justify such a derogation. The definition of the volume contract, on which the right to derogate from the provisions of the instrument is based, is too general. Only substantial strengthening of the definitional criteria concerning the volume contract would make it possible to justify such an extensive derogation.

24. The Council also stresses the need to protect the consignee. From this perspective, paragraph 3 of article 76 does not provide the desired safeguards. It would be necessary to add to paragraph 3 a clause providing for express acceptance of the choice of forum by the consignee, failing which the consignee would be entitled to impose, at its option, one of the places listed in article 75.

25. Again in the interests of predictability, the rules for designating competent courts contained in the convention should be binding on all signatory countries. A convention that allows for an opt-in or opt-out system (article 76 (4)) will needlessly complicate the convention's implementation. The Council does not therefore support the provisions included or put forward by delegations during the discussions on article 76 (4) at the eighteenth session.

26. The Council notes that there is no mention of judicial proceedings against the shipper. In the interests of balance and reciprocity, that point should be specified.

Remarks on contractual freedom

27. The Council recalls the extreme reservations that it was prompted to make in its previous statement of position (A/CN.9/WG.III/WP.64) concerning some delegations' stance in favour of total freedom of contract, which would be harmful to small and medium-sized shippers. Its position on articles 75 and 76 reinforces its misgivings regarding freedom of contract based solely on insufficient definition of the volume contract. It should be noted that the Hague and Hamburg Rules allow very broad freedom of contract while protecting small and medium-sized shippers. By simply reproducing their well-known provisions and excluding derogations in favour of the carrier alone, it would be possible to dispense with the entire, poorly constructed volume contract mechanism.

Conclusions

28. With the second reading of the draft instrument now completed, it has to be acknowledged that the Council, disappointed by the loss of direction of a text whose developments have more to do with reversing the achievements of the Hamburg Rules than endeavouring to modernize intermodal transport law, questions the usefulness of such an instrument in dealing with freight transport in the coming decades.

29. The lack of balance in the main provisions, in particular those concerning rules of liability, is now such that the Council is pessimistic about any possible realignment of the main areas of imbalance by the time of completion of the work. It will nevertheless be present in a constructive spirit at the next session, in New York, in an attempt to save what can still be saved.

30. The European Shippers' Council is the organization which represents the interests of European industrial and commercial companies as users of all modes of transport. "Shippers" are primarily producers or distributors of goods, which they market and distribute to their customers. Carriage by sea is their main mode of transport in international trade.