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

Arbitration: Uniform international arbitration practice and the provisions of the draft instrument

Note by the Secretariat

During its fourteenth session, Working Group III on Transport Law considered the arbitration provisions of the draft instrument on the carriage of goods [wholly or partly] [by sea] as contained in chapter 16 of A/CN.9/WG.III/WP.32. As noted in the report from that session, draft chapter 16 was incorporated from the Hamburg Rules, which were drafted in 1978, before the wide acceptance of uniform standards for international arbitration (A/CN.9/572, para. 153). Following the discussion at that session, the Secretariat was requested by the Working Group to explore the possible conflicts between the draft instrument and uniform international arbitration practice, as reflected in UNCITRAL instruments and model laws (A/CN.9/572, para. 157). The following note was prepared pursuant to that request in two parts: firstly, by identifying the possible conflicts as requested, and secondly, by identifying core principles of international arbitration which are not reflected in the draft instrument.

I. Possible conflicts between the draft instrument and uniform international practice, as reflected in UNCITRAL instruments and model laws

A. Article 76 of Variants A and B of the draft instrument

1. Draft article 76 of the draft instrument provides that the agreement to arbitrate shall be "evidenced in writing". That expression may be understood in the sense that the written form of the arbitration agreement is required *ad probationem* [i.e. for the

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purposes of proof] and not *ad validitatem* [for the purposes of validating the arbitration agreement].

2. The requirement that an arbitration agreement be in writing is contained under article 7, paragraph (2) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"), and article II, paragraph (2) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"). The form requirement aims at providing certainty as to the intent of the parties and at facilitating subsequent evidence of the will of the parties to submit their disputes to arbitration.

3. Article 7, paragraph (2) of the Model Law states as follows:

> "(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

4. Article II, paragraph (2) of the New York Convention states as follows:

> "2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

5. Contrary to the Model Law and the New York Convention, article 76 of the draft instrument does not include a definition of the "writing" requirement. It has been argued that this could be problematic, since, in recent years, with the increased emergence of modern means of communication, this requirement has become a controversial aspect of arbitration law. Questions could arise as to whether that requirement has been fulfilled in certain situations where the answer could raise serious problems, such as with respect to certain brokers' notes, bills of lading and other negotiable instruments, or contracts transferring rights or obligations to non-signing third parties (i.e., third parties who were not party to the original agreement). Lack of clarity regarding the writing requirement in these types of situations has given rise to rather disparate decisions. A writing requirement, without being further defined, could be interpreted in a way which would not be in accord with international trade practice. On the other hand, the Working Group may wish to consider that providing a special definition of writing in the draft instrument has the disadvantage of introducing a difference in the form requirement between the law of the carriage of goods and general arbitration law. As indicated below (see paragraphs 22-26), the Working Group may wish to encourage States that envisage ratifying the draft instrument to consider also enacting the UNCITRAL Model Law on International Commercial Arbitration.

6. Another crucial question with respect to the arbitration provisions in the draft instrument is whether an arbitration agreement, concluded in a manner consistent with draft article 76, would be enforceable under Article II (2) of the New York Convention, as set out in paragraph 4 above. Those requirements for the conclusion

of a valid arbitration agreement under the New York Convention may be considered to be narrower than the requirement under article 76 of the draft instrument. However, it may be noted that Working Group II (Arbitration and Conciliation) has not yet concluded its consideration of the relation between article II of the New York Convention and the provision on the form of the arbitration agreement contained in other laws.

7. Further, Working Group II has taken note that it is important to work towards facilitating a more flexible interpretation of the strict form requirement of the arbitration agreement, so as not to frustrate the expectations of the parties when they agreed to arbitrate. At its thirty-sixth session (New York, 4-8 March 2002), Working Group II proposed a revised text of article 7 of the Model Law, as follows:

"Article 7. Definition and form of arbitration agreement

"(1) 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

"(2) The arbitration agreement shall be in writing. 'Writing' includes any form that provides a [tangible] record of the agreement or is [otherwise] accessible as a data message so as to be usable for subsequent reference.

"[(3) 'Data message' means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.]

"(4) For the avoidance of doubt, the writing requirement in paragraph (2) is met if the arbitration clause or arbitration terms and conditions or any arbitration rules referred to by the arbitration agreement are in writing, notwithstanding that the contract or the separate arbitration agreement has been concluded orally, by conduct or by other means not in writing.

"(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

"(6) The reference in a contract to a text containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

"[(7) For purposes of article 35, the written arbitration terms and conditions, together with any writing incorporating by reference or containing those terms and conditions, constitute the arbitration agreement.]"

8. With the same concern for clarity of the writing requirement contained in article II (2) of the New York Convention and other requirements for written communications in the text of the New York Convention, Working Group II expressed support for the inclusion of a reference to the New York Convention in article 19 of the draft convention on the use of electronic communications in international contracts recently proposed by Working Group IV (Electronic Commerce) (reproduced in the annex to A/CN.9/571).

9. In order to enhance the legal certainty as to the validity of the arbitration agreement and to minimize the risks that an award be denied enforcement on the ground of non-existence or invalidity of the arbitration agreement, Working Group III may wish to consider whether it would be preferable to align the definitions of the written form requirement in the draft instrument with the most recent work of Working Group II. However, in order not to duplicate the regulation of the issue of form with the Model Law (the consideration of which has not been concluded), Working Group III may wish to conclude that the purpose of the arbitration provisions in the draft instrument should be simply to provide the parties with the freedom to opt for arbitration (which in view of some national laws on the carriage of goods by sea would be beneficial), then draft article 76 could be drafted in more general terms.

B. Article 77 of Variants A and B of the draft instrument

10. The first sentence of draft article 77 provides that "if a negotiable transport document or a negotiable electronic record has been issued, the arbitration clause or agreement must be contained in the documents or record or expressly incorporated therein by reference." Incorporation of an arbitration clause or agreement by reference has given rise to diverging interpretations by courts, and the definition of the conditions whereby an arbitration clause or agreement would be considered as valid when it is only incorporated by reference should be defined.

11. The revised draft of article 7, paragraph (6) of the Model Law (see above, para. 8, as well as the current text of article 7 of the Model Law) are concerned with a contract including a reference to a document which contains an arbitration clause. The provisions that the main contract be in writing and that the reference be "such as to make that clause part of the contract" arise from problems and divergent court decisions on this issue in the context of the New York Convention. Therefore, in order to enhance certainty and uniformity at the enforcement stage, Working Group III may wish to take into account the revised provisions of the Model Law concerning the incorporation of an arbitration clause by reference (either by aligning the draft instrument with the Model Law to be revised or by leaving the issue to be covered by the Model Law).

C. Article 78 of Variants A and B of the draft instrument

12. Draft article 78, Variant A proposes a definition of the place where the arbitration proceedings shall be instituted, while Variant B is silent on that matter.

13. Article 20 of the Model Law deals with the question of the place where the arbitration proceedings shall be carried out in the following way:

> "(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
>
> (2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents."

14. The trend in international arbitration is to recognize the freedom of the parties to agree on the place of arbitration; failing such agreement, the place of arbitration shall be determined by the arbitral tribunal. The place of arbitration is of legal relevance, as it determines the arbitration law governing the arbitration and is one of the possible factors establishing the international character of arbitration. The place of arbitration is the place of origin of the award, and as such, it is relevant in the context of recognition and enforcement proceedings.

15. Draft article 78, Variant A limits the permissible forums for arbitrating claims to certain places. If Working Group III considers it appropriate to include a determination of the possible forums for claims, it should be noted that the place where a substantial part of the obligations of the relationship is to be performed, or the place with which the subject matter of the dispute is more closely related are criteria more commonly used than "the place where the contract was made", as used under draft article 78 (a) (ii). Of course, the rationale for the decision of Working Group III to delete the place of the contract as a basis for establishing jurisdiction in chapter 15 of the draft instrument (A/CN.9/572, para. 126) would probably extend to this provision of the arbitration chapter, as well.

D. Article 79 of Variants A and B of the draft instrument

16. Variants A and B of draft article 79 provide that "the arbitrator or the arbitral tribunal shall apply the rules of this instrument."

17. In comparison, the Model Law grants the parties full autonomy to determine the substantive rules to be applied, and failing such agreement, entrusts the arbitral tribunal with that determination. The recognition of the party's autonomy is widely accepted in international arbitration.

18. Article 79 of the draft instrument, while apparently providing for the mandatory nature of the instrument, appears to be contrary to the widely accepted principle of private international law according to which the parties are free to agree on the applicability of the law of a State (including its mandatory provisions). Working Group III may wish to consider deleting draft article 79 (thereby leaving the issue of the applicable law to the general law of arbitration) or aligning the draft instrument with the general arbitration and ensuring the respect of mandatory provisions of the draft instrument in line with the general principles governing arbitration. The carefully drafted article 28 of the Model Law reads:

> Article 28. Rules applicable to substance of dispute
>
> (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.
>
> (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
>
> (3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

19. The Model Law, as well as the UNCITRAL Arbitration Rules, allow the arbitral tribunal to decide *ex aequo et bono* or as *amiable compositeur*, provided that the parties have expressly authorised the tribunal to do so. Both instruments include a provision that "in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usage of the trade applicable to the transaction".

E. Article 80 of Variant A of the draft instrument

20. Draft article 80 of Variant A renders mandatory the incorporation of articles 77 and 78 in all arbitration agreements. The Working Group may wish to consider the implications of this provision for party autonomy and whether the objectives of the draft instrument could be achieved in a way more consistent with party autonomy.

F. Article 80 bis of Variant A and article 80 of Variant B of the draft instrument

21. Working Group III may wish to consider whether the principle expressed in draft article 80 bis of Variant A and draft article 80 of Variant B would be better reflected under draft article 76, by adding the words "or that have arisen" after the words "that may arise".

II. Core principles of international arbitration which are not reflected in the draft instrument

22. The Working Group may wish to consider several core principles of international arbitration which are not currently reflected in the draft instrument. It may be the preference of the Working Group that the draft instrument should remain silent with respect to these principles. An alternative could be to make general reference to the applicable law of arbitration. This would not provide complete uniformity in every detail. Further, the Working Group may wish to consider whether more work is needed in the area of maritime arbitration in order to achieve greater uniformity. The Working Group may also wish to encourage States that envisage ratifying the draft instrument to consider also enacting the UNCITRAL Model Law on International Commercial Arbitration.

23. The first such core principle is that of party autonomy, whereby the law on arbitration defines general default rules, leaving the parties free to shape the rules of the process by agreement, within the scope of internationally accepted mandatory rules. Most of the provisions of the Model Law and of modern legislation on arbitration are conceived as default rules, applying unless otherwise agreed by the parties.

24. Another principle which has been enunciated in most arbitration-supporting instruments of law is an article similar to Article 8 of the Model Law, which establishes the relationship between courts and arbitral tribunals, when substantive claims which could be subject to arbitration have been raised before a court.

25. The Working Group may also wish to consider the current work of Working Group II with respect to a set of rules applicable to interim measures of protection ordered by arbitral tribunals, and to the recognition and enforcement of interim measures of protection ordered by arbitral tribunals and by courts.

26. Finally, the Working Group may wish to consider whether explicit reference to the New York Convention should be made under chapter 18 of the draft instrument, so as to be consistent with its requirements and thus to allow for recognition and enforcement of arbitral awards pursuant to that convention.