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

Proposal by China

Note by the Secretariat

In preparation for the thirteenth session of Working Group III (Transport Law), during which the Working Group is expected to proceed with its reading of the draft instrument contained in document A/CN.9/WG.III/WP.32, the Government of China, on 29 April 2004, submitted the text of a proposal concerning Chapter 19 of the draft instrument and the issue of freedom of contract. The text of that proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat.

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Annex

Proposal by China on Chapter 19 of the Draft Instrument and the Issue of Freedom of Contract

By Chinese delegation (2004.4.26 New York)

I. Background

1. With the development of shipping industry, the mandatory regimes adopted by the Hague Rules are somewhat out of date, and the Hamburg Rules are not advisable either.

2. In practice merchants seldom conclude an agreement in writing in liner service and the contract of carriage is often evidenced only by bill of lading, sea waybill or other transport documents issued by the carrier after he receives the goods. As a transport document is made and issued by the carrier unilaterally, and it belongs to the contract of adhesion, it is advisable that the transport law should limit the freedom of contract in this respect.

3. However, it is improper that the transport law limits the freedom of contract in respect of all types of contract concluded in a liner service. It is the fact that the cargo interests or the parties on behalf of them are able to negotiate with carriers on the basis of equality under many circumstances in the liner trade nowadays, for example contracts of affreightment or ocean liner service agreements (OLSAs). Therefore, under these circumstances, the maritime law shouldn't continue to deny the principle of contract freedom. We have noticed the suggestion regarding OLSAs put forward by the United States. But we don't think OLSAs can include all types of contracts freely negotiated in liner service, and there are many problems in respect of the definition of OLSAs.

4. In addition, the voyage charter party belongs to the contract of carriage of goods by sea in nature. And it should be noted that the Hague rules or the Hague-visby rules are often incorporated into the charter parties by special agreement (such as a paramount clause) nowadays. So we think it logical that this Instrument extends to govern the voyage charter parties. And this will contribute to greater uniformity of laws on carriage of goods by sea notwithstanding it should be created on a non-mandatory basis. We can also find the same principle in Chinese Maritime Code (CMC), Chapter IV of which is entitled "contract of carriage of goods by sea" and governs not only bills of lading but also voyage charter parties. The provisions thereof is mandatory in respect of bills of lading or other transport documents, and non-mandatory in respect of the voyage charter parties except for the obligation of seaworthiness and the obligation not to deviate. The ten-year practice of CMC has proved that the regime is advisable.

5. Therefore, the chief revision to the Instrument in our proposal suggests that the application of the Draft Instrument should be considered respectively under two different circumstances. The provisions of the Instrument should be deemed as mandatory while being based on the concept of "transport document"(including the electronic record). On the other hand, the provisions should be non-mandatory as default rules in respect of the newly coined notion "agreement concluded through

free negotiation", which may include voyage charter parties, contracts of affreightment, volume contracts, OLSAs and other similar contracts.

[6. We believe it is the best choice that this Instrument extends to govern the voyage charter parties or similar agreements. However, if this viewpoint would not be widely accepted, we consider that this Instrument should provide in Article 2 ("Scope of application"): This Instrument applies only to (i) a transport document; or(ii) an electronic record; or (iii) any contract of carriage concluded in a Liner Service. Then " agreement concluded through free negotiation" in Article B of our proposal will only mean one concluded in a Liner Service.]

II. Recommendation and Brief Explanation

Article A

A.1. Unless otherwise specified in this instrument, any provision in a transport document or an electronic record shall be null and void if:

(a) it directly or indirectly lessens or relieves from the liabilities that the carrier or the maritime performing party assumes under this Instrument; or

(b) it directly or indirectly increases the liabilities that the cargo interests assume under this Instrument; or

(c) it assigns the benefit of insurance of the goods in favour of the carrier or a performing party.

A.2 The cargo interests referred to in the preceding paragraph include the shipper, the consignor, the controlling party, the holder of a transport document and the consignee.

7. This article provides the mandatory scope of application of the Instrument, i.e. it is limited to "transport document"(including electronic record) which is a basic concept of the Instrument. The notion of "transport document" includes bills of lading, sea waybills, etc. It is a document issued by the carrier at the time that he receives the goods and evidencing the contract of carriage.

8. The original text of article 88.2 of this Instrument is: Notwithstanding paragraph1, the carrier or a performing party may increase its responsibilities and obligations under this instrument. Our proposal has made this provision superfluous. Therefore, it has been deleted.

9. The original article 89(a) of this Instrument should also be deleted. It would be very detrimental to the cargo interests if carriers may enjoy such exonerations regarding live animals through provisions in a transport document. The Hamburg rules also apply to live animals, but contain a special provision excluding the carrier's liability where loss, damage or delay is due to special risks inherent in that kind of carriage (Art.5.5). And the Hamburg rules don't permits contractual freedom such as this Instrument. We think Article 5.5 of the Hamburg rules is more advisable in this respect. Therefore, besides deleting Article 89(a), this Instrument should also introduce similar provisions based on article 5.5 of the Hamburg rules.

10. The original article 89(b) of this Instrument deals with “special cargo” not carried in the ordinary course of trade. Our position is that this provision should be deleted. It is noticed that article 89(b) adopts the same principle as the Hague rules. It should be further considered whether it is appropriate now. We consider that this Instrument may introduce specific provisions dealing with such “special cargo” in other Chapter of it.

Article B

B.1. Subject to Article C, when an agreement regarding the carriage of goods is concluded through free negotiation, provisions in this Instrument shall apply only in the absence of relevant provisions or in the absence of provisions differing therefrom in the agreement. But provisions in this agreement have no legal binding force on a third party.

B.2. The agreement referred to in the preceding paragraph shall be made in written form other than transport documents. Telegrams, telexes, telefaxes, electronic data interchange and e-mails have the effect of something in writing.

B.3. [Any valid agreement in writing (other than a transport document) regarding the carriage of goods is presumed to be an agreement concluded through free negotiation. But the cargo interests mentioned in Article A is entitled to prove that it is an agreement that is formulated in anticipation by the carrier and its provisions are not permitted to alter through negotiation in the making of it.]

B.4. [If any agreement regarding the carriage of goods doesn’t conform to the requirements mentioned in the paragraph 1 and paragraph 2 of this article, the circumstances specified in Article A which make the provisions null and void shall also apply to this agreement.]

11. This article is intended to deal with voyage charter parties, contracts of affreightment, volume contracts, OLSAs and other agreements freely negotiated. As this article has expanded the scope of application of this Instrument, Articles 2.3, 2.4 and 2.5 of this Instrument should be deleted.

12. The purpose of using the phrase “concluded through free negotiation” is to emphasize that the agreement referred to in this article is not a contract of adhesion. This phrase clearly means the essential characteristics of this kind of contract, i.e. it is a contract freely and equally negotiated. According to the principle of freedom of contract, the Instrument shall not apply forcibly but as a default rule.

13. From viewpoint of the legislative technique, the phrase “agreement concluded through free negotiation” can avoid the need of defining voyage charter parties, volume contracts, contracts of affreightment, OLSAs and similar contracts and overcome the problem of identifying these contracts. We think that it is very difficult or nearly impossible to exactly define these kinds of contracts. The names about these contracts are used confusedly, and there are controversies in respect whether they belong to contracts of carriage or charter parties. Furthermore, new kinds of contracts may appear in the future when commercial practices change rapidly.

14. The paragraph 3 of this article is intended to provide protections to the cargo interests under some circumstances, especially in respect of some small cargo-owners.

Article C

Any provision directly or indirectly lessening or relieving from the liabilities of the carrier or the maritime performing party in the agreement concluded through free negotiation mentioned in Article B shall be null and void, if such liabilities result from:

(a) the violation of the obligation as required under Article 13.1;or

(b) the deviation;[or

(c) an act or omission of the carrier or the performing party done with the intent to cause the loss, damage or delay in delivery of the goods or recklessly and with knowledge that such loss, damage or delay would probably result.]

15. This article is intended to introduce necessary limits to the freedom of contract embodied in Article B.

16. The first limit is set for the obligation of seaworthiness. It means that the obligation of seaworthiness should not be lessened or relieved because it is the overriding obligation. When drafting we have referred to Chinese Maritime Code regarding voyage charter parties where the provision regarding obligation of seaworthiness is mandatory.

17. However, if the obligation of seaworthiness is extended to the entire voyage (the words "and during" are currently in square brackets), how to strike a balance between shipowners and cargo interests should be carefully considered when drafting this provision. Apparently, a continuing and mandatory obligation of seaworthiness may impose heavy burden on shipowners under the agreements freely negotiated. Moreover, according to the principle of freedom of contract, we consider the law should introduce minimum limit to the agreement freely negotiated but for public policy. As a tentative conclusion, this Instrument should provide that the obligation, before and at the beginning of the voyage, to exercise due diligence to make the ship seaworthy, is mandatory, however, the obligation during the voyage is non-mandatory, that is to say, two parties may freely negotiated the provisions regarding the obligation of seaworthiness during the voyage. We believe this approach can contribute to striking a new balance between shipowners and cargo interests.

18. We think this Instrument should not permit the carrier to lesson or relieve from the liabilities resulting from the deviation notwithstanding the agreement is concluded through free negotiation. We also have referred to CMC regarding voyage charter parties when drafting this provision.

19. In addition, we think that the contract should not exempt the liabilities resulting from intention or gross negligence according to the principle of equity. For example, Article 53 of Chinese Contract Law provides: *The following clauses on liability exemption in a contract shall be invalid (1) those causing physical injury to the other party; or (2) those causing losses to property to the other party by intention or due to gross negligence.* We prefer that the instrument should adopt similar provisions to limit the freedom of contract. To assure the consistence of the texts in the Instrument, we don't use the term "intention or gross negligence", instead we think the words already used in this Instrument "the intent to cause the loss, damage or delay in delivery of the goods or recklessly and with knowledge that such loss, damage or delay would probably result" is suitable in this regard. We believe these words means similarly to the term "intention or gross negligence".