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

Right of control: information presented by the Norwegian delegation

Note by the Secretariat

During the fifteenth session of Working Group III (Transport Law), which took place in New York from 18 to 28 April 2005, the Working Group considered generally the issue of right of control pursuant to the draft instrument on the carriage of goods [wholly or partly] [by sea]. The Norwegian delegation has submitted the paper attached hereto as annex I in order to facilitate consideration of the topic of right of control by compiling the views expressed by various delegations during informal consultations into a single document for discussion by the Working Group. The following delegations provided comments which are reflected in the annex: Italy, Japan, Norway, Republic of Korea, Spain, the International Chamber of Shipping (ICS), the Baltic and International Maritime Council (BIMCO) and the International Group of Protection and Indemnity Clubs (P&I Clubs).

The paper in annex I is reproduced in the form in which it was received by the Secretariat.



Annex I

Report

Chapter 11. Right of Control (Karl J. Gombrii, Norway)

1. Chapter 11 of A/CN.9/WG.III/WP.32, dealing with right of control, was the subject of an informal intersessional round-table meeting (seminar) in London, on 25 February 2005. An informal paper explaining the background for and contents of chapter 11 had been submitted to and was discussed at that seminar.
2. Following the London seminar, an informal questionnaire was circulated electronically on behalf of the Norwegian delegation. Replies have been received from the delegations of the Republic of Korea, Spain, Japan, Italy, Norway (indirectly, as author of this report), as well as BIMCO, ICS and the International Group of P & I Clubs (the said NGOs having submitted a joint reply).
3. On the basis of the above, the following is noted:
4. Article 53 of A/CN.9/WG.III/WP.32 is seen by many of those who responded as not clearly distinguishing between the right of the controlling party to give unilateral instructions, on the one hand, and the right of the controlling party, and no other person, to agree on a variation of the contract of carriage, on the other hand.
5. As to the substance of article 53 (b), which provides that the controlling party may “demand delivery of the goods before their arrival at the place of destination”, has been a bone of contention. Some of the delegations that responded felt that such a demand would always amount to a variation of the contract and could therefore not be subject to unilateral instructions. Others felt that such a right of instruction was essential, e.g. for banks providing financing to buyers. As security, they might be required to be made by the controlling party when there is no negotiable transport record issued, and if it should appear that the buyer is unable to honour its obligations towards the bank, it should be possible to prevent the cargo from entering the jurisdiction of its defaulting customer/the buyer.
6. A majority of the replies to the informal questionnaire suggested that it was important for the controlling party to be able to demand delivery of the goods before their arrival at the place of destination and that the place of such delivery need not be en route to the original place of destination, always provided that the conditions set out in article 55 are met.
7. In view of the above, the Working Group may wish to consider the following redraft of **article 53**:

“The right of control under a contract of carriage may be exercised by the controlling party only and means the right to

- (a) agree with the carrier on any variation of the contract of carriage;**
- (b) give or modify instructions in respect of the goods which do not amount to a variation of the contract;**

(c) replace the consignee with another person, including the controlling party itself;

[(d) demand, subject to the conditions provided for in article 55, delivery of the goods at a place other than the original place of destination.]”

8. Article 54 decides who is the controlling party and provides for the transfer of the right of control from one controlling party to another.

9. In article 54(1), which applies when no negotiable transport record is issued, it is provided in (a) that the shipper is the controlling party unless the consignee or another person is designated as controlling party. As is indicated by the square brackets in the present text of the draft instrument in A/CN.9/WG.III/WP.32, there has been disagreement as to whether the shipper can unilaterally so designate a new controlling party, or whether the consent of the consignee is required.

10. In reply to the informal questionnaire on this point, there was a strong majority in favour of deleting the text in the square brackets so as to make it clear that the shipper can unilaterally designate a new controlling party. It was also mentioned by several that in such a case, it is important that there is a requirement to notify the carrier.

11. Judging from the responses to the informal questionnaire, therefore, **article 54(1)(a)** should read:

“The shipper is the controlling party unless it designates another party to be the controlling party and so notifies the carrier.”

12. Another question under article 54 is when the right of control shall cease when no negotiable transport record has been issued. Should it be when the goods have arrived at their destination and the consignee has requested delivery thereof, or should it be when the goods are actually delivered at their destination?

13. The views were divided at the London seminar. Some felt that the latter was the more practicable solution, since it was common for a shipper/seller to instruct the carrier to contact him on arrival at the destination immediately before delivery. The purpose of such an instruction would be to enable the shipper/seller to check that payment has been received before the cargo is delivered to the consignee/buyer. If payment has not been forthcoming, the shipper/seller as controlling party should be entitled to designate a new consignee and thereby secure its position even if the defaulting party had requested delivery.

14. Others felt that the instruction to the carrier, in such a situation, could be to contact the shipper/seller shortly before arrival at the destination and that the present wording of article 54 (d) could be preserved.

15. In reply to the informal questionnaire on this point, the majority view of those who responded was that the right of control shall cease on actual delivery of the goods at the place of destination, whereas two replies suggested the other solution. Judging from that, **article 54 (d)** ought to read:

“The right of control terminates when the goods have been delivered at the place of destination [, or any other place designated pursuant to article 53 (d)].”

16. Whether or not the bracketed language is necessary, is of course dependent on the decision by the Working Group on article 53 (d). If that provision is deleted, the bracketed language in article 54 (d) should obviously also be deleted.

17. Article 54(2)(d) basically provides that the instructions given should be stated on a negotiable transport document. There is no corresponding requirement that instructions given when no negotiable transport record has been issued, e.g. regarding the designation of a new consignee, should be stated on any non-negotiable transport record which may have been issued. The issue was raised in the informal questionnaire. The replies were divided as to whether such a requirement should be introduced. Three replies suggested not, whereas the same number of delegations (including Norway) were of the view that there should be such a requirement. One delegation was undecided.

18. In the introductory comments to chapter 11 of A/CN.9/WG.III/WP.21, it was noted that in many trades, the use of negotiable transport documents is rapidly decreasing or has entirely disappeared and that a well-defined and transferable right of control may play a useful role in the development of e-commerce systems, where no negotiable electronic record is used. The Working Group may wish to consider whether the use of non-negotiable transport documents or records for purposes of financing and/or e-commerce may be enhanced by a requirement that instructions or the replacement of a consignee should be stated on a non-negotiable transport record, where one is issued. If so decided, the Working Group may wish to amend **article 54(1)(c)** as follows:

“When the controlling party exercises the right of control in accordance with article 53, it shall produce proper identification and any instructions given or the replacement of the consignee by the controlling party shall be stated in any non-negotiable transport document or electronic record which may have been issued.”

19. In relation to article 55(4), it has been discussed whether the liability for failure by the carrier to comply with instructions given should be strict and unlimited, or, whether on a true construction of the provision, the liability was a due diligence liability in the same way as liability for loss of or damage to cargo, and also limited in the same way.

20. In response to the informal questionnaire on this point, the majority of those who responded clearly favoured a due diligence liability limited in the same way as damage to or loss of cargo. The majority also felt that the provision ought to be clarified. On that basis, the Working Group may wish to consider the following as a replacement of the existing **article 55(4)**:

“The carrier shall be liable for loss of or damage to the goods as well as delay in delivery resulting from its fault or that of any person referred to in article 15(3) in complying with the instructions of the controlling party, and the liability shall be limited as per the provisions of articles 18 and 19.”

21. It is otherwise noted with respect to article 55(1) that variant A is based on the original text of the draft instrument, whereas variant B is a result of a recast by the UNCITRAL secretariat requested by the Working Group.

22. Articles 56, 57 and 58 were not touched upon at the London seminar and have also previously proved to be uncontentious.
