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

Revised text of articles 42, 44 and 49 of the draft convention on the carriage of goods [wholly or partly] [by sea]

Note by the Secretariat*

In implementing the changes to the text of the draft convention on the carriage of goods [wholly or partly] [by sea] that were requested by the Working Group at its nineteenth session in New York in April of 2007, the Secretariat proposes corresponding drafting improvements to the text of certain provisions of the draft convention that are to be considered by the Working Group at its twentieth session. At its twentieth session, the Working Group may wish to base its consideration of those draft provisions on the text attached hereto, rather than on the text as it appeared in A/CN.9/WG.III/WP.81.

* The late submission of this document reflects the date on which input regarding the content of the provisions was communicated to the Secretariat.



Draft article 42

1. This draft provision remains the same as it appeared in A/CN.9/WG.III/WP.81, but for corrections made to errors identified in the text of subparagraph (c). In particular, the reference to draft article 37, subparagraph 2 (a) in the first sentence has been deleted as incorrect, since subparagraph 2 of draft article 37 refers exclusively to information in the contract particulars which would be furnished by the carrier. Instead, subparagraph (c)(i) below has been substituted, such that reference is now made to contract particulars in draft article 37, paragraph 1, that are provided by the carrier. Subparagraph (c)(ii) below repeats text that appeared in the previous version of the provision, and subparagraph (c)(iii) below refers to the contract particulars in draft article 37, paragraph 2, all of which will be furnished by the carrier. The corrections to the text of subparagraph (c) are not intended to alter its meaning.

*Article 42. Evidentiary effect of the contract particulars*¹

Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 41:²

(a) A transport document or an electronic transport record that evidences receipt of the goods is prima facie evidence of the carrier's receipt of the goods as stated in the contract particulars;³

(b) Proof to the contrary by the carrier in respect of any contract particulars shall not be admissible when such contract particulars are included in:

(i) A negotiable transport document or a negotiable electronic transport record that is transferred to a third party acting in good faith, or

(ii) A non-negotiable transport document or a non-negotiable electronic transport record that indicates that it must be surrendered in order to obtain delivery of the goods and is transferred to the consignee acting in good faith.⁴

(c) Proof to the contrary by the carrier shall not be admissible against a consignee acting in good faith in respect of the following contract particulars included in a non-negotiable transport document or a non-negotiable electronic transport record:

(i) The contract particulars referred to in article 37, paragraph 1, when such contract particulars are furnished by the carrier;

¹ The drafting adjustments to the text are made to the provision as it appeared in para. 58 of A/CN.9/616.

² The contents of the chapeau of draft article 42 was located in former draft article 44, as it appeared in A/CN.9/WG.III/WP.56, which has been deleted.

³ The Working Group may wish to note that this paragraph represents an expansion of the coverage of this principle from that set out in article IV (5)(f) of the Hague-Visby Rules.

⁴ This subparagraph has been reformulated to avoid the difficult notion of conclusive evidence by using the construction of article 16 (3)(b) of the Hamburg Rules, which has, however, been expanded to include non-negotiable transport documents and electronic transport records.

- (ii) The number, type and identifying numbers of the containers, but not the identifying numbers of the container seals; and
- (iii) The contract particulars referred to in article 37, paragraph 2.

Draft article 44

Paragraph 1

2. In considering how best to clarify the relationship between paragraphs 1 and 2 of draft article 11 as instructed by the Working Group at its nineteenth session (see A/CN.9/621, paras. 30 to 33), the Secretariat concluded that the optimum drafting approach was to delete paragraph 2 of draft article 11 as it appeared in A/CN.9/WG.III/WP.81, so as to avoid confusion with paragraph 1, and to move the relevant text to the end of paragraph 1 of draft article 44. In addition, the text of paragraph 1 of draft article 44 was adjusted by deleting the cross-reference to paragraph 2 of draft article 11 in draft article 44. It was thought that the rule regarding the time and location of delivery would best be placed in draft article 44 in the chapter on delivery. The suggested revised text of draft paragraph 1 appears following paragraph 3 below.

Paragraph 2

3. In its consideration of how best to clarify the text of paragraph 2 of draft article 27 as instructed by the Working Group at its nineteenth session (see A/CN.9/621, paras. 209 to 212), the Secretariat concluded that it would be best to move the obligation of unloading the goods to a separate location in the text, since an agreement to unload the goods pursuant to paragraph 2 of draft article 14 would be performed by the consignee, and should thus not appear in the chapter on shipper's obligations. It is suggested that this obligation will thus be deleted from paragraph 2 of draft article 27 in the next consolidated text of the draft convention, that it will be clarified that it is the obligation of the consignee, and that it will moved to become a new paragraph 2 of draft article 44 with respect to the obligation of the consignee to accept delivery. The suggested text of draft paragraph 2 appears below.

Article 44. Obligation to accept delivery

1. When the goods have arrived at their destination, the consignee that [exercises any of its rights under] [has actively involved itself in] the contract of carriage⁵ shall accept delivery of the goods at the time or within the time period and at the location agreed in the contract of carriage or, failing such agreement, at the time and location that are in accordance with the customs, practices or usages of the trade. In the absence of such agreement or of such customs, practices, or usages, the time and location of delivery are that of the unloading of the goods from the final means of transport in which they are carried under the contract of carriage.

⁵ As set out in footnote 160 of A/CN.9/WG.III/WP.32, a preference was expressed for the obligation to accept delivery not to be made dependent upon the exercise of any rights by the consignee, but rather that it be unconditional.

2. When the parties have made an agreement referred to in article 14, paragraph 2, that requires the consignee to unload the goods, the consignee shall do so properly and carefully.

Draft article 49

4. In keeping with the suggested change to draft article 44, paragraph 1, the reference to “article 11, paragraph 2” in subparagraph (a) has been adjusted to refer to “article 44, paragraph 1”.

5. It is suggested that the phrase “before expiration of the time referred to in article 44, paragraph 1” in subparagraph (d) be added to clarify the text to ensure, for example, the inclusion of situations in which the time for delivery in the contract of carriage is stated as a time period rather than as a particular time or date. Draft article 44, paragraph 1, has been adjusted to include a similar clarification.

6. Two changes are suggested to subparagraph (g). First, it is suggested that the meaning of the text be clarified through the addition of the phrase “becomes a holder after such delivery and who”. Secondly, it is suggested that the phrase “did not have or could not reasonable have had” should be corrected to read “did not have and could not reasonable have had”.

7. The complete text of draft article 49, which is the text as it appeared in A/CN.9/WG.III/WP.81 with the addition of the suggestions in paragraphs 4 to 6 above, appears below.

Article 49. Delivery when a negotiable transport document or negotiable electronic transport record is issued⁶

When a negotiable transport document or a negotiable electronic transport record has been issued:

(a) Without prejudice to article 44, the holder of the negotiable transport document or negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location referred to in article 44, paragraph 1, to the holder, as appropriate:

(i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 12 (a)(i), upon proper identification; or

(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, subparagraph 1 (c), that it is the holder of the negotiable electronic transport record.

(b) The carrier shall refuse delivery if the conditions of subparagraph (a)(i) or (a)(ii) are not met.

(c) If more than one original of the negotiable transport document has been issued, the surrender of one original will suffice and the other originals

⁶ Revised text as agreed by the Working Group (A/CN.9/591, paras. 231-239, and A/CN.9/595, paras. 80-89). As a drafting improvement to avoid repetition, former subparas. (a)(i) and (ii) as set out in A/CN.9/WG.III/WP.56 have been combined to form paras. (a) and (b) in this article.

cease to have any effect or validity. When a negotiable electronic transport record has been used, such electronic transport record ceases to have any effect or validity upon delivery to the holder in accordance with the procedures required by article 9, subparagraph 1 (d).

(d) If the holder does not claim delivery of the goods before expiration of the time referred to in article 44, paragraph 1, from the carrier after their arrival at the place of destination, the carrier shall so advise the controlling party or, if, after reasonable effort, it is unable to locate the controlling party, the shipper. In such event the controlling party or shipper shall give the carrier instructions in respect of the delivery of the goods. If the carrier is unable, after reasonable effort, to locate the controlling party or the shipper, the documentary shipper shall be deemed to be the shipper for purposes of this paragraph.

(e) The carrier that delivers the goods upon instruction of the controlling party or the shipper in accordance with subparagraph (d) of this article is discharged from its obligation to deliver the goods under the contract of carriage to the holder, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

(f) A person that becomes a holder of the negotiable transport document or the negotiable electronic transport record after the carrier has delivered the goods pursuant to subparagraph (e) of this article, but pursuant to contractual or other arrangements made before such delivery acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods.

(g) Notwithstanding subparagraphs (e) and (f) of this article, a holder that becomes a holder after such delivery, and who did not have and could not reasonably have had knowledge of such delivery at the time it became a holder, acquires the rights incorporated in the negotiable transport document or negotiable electronic transport record.