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

Proposal by the United States of America

Note by the Secretariat

In preparation for the fourteenth session of Working Group III (Transport Law), the Government of the United States of America, on 8 November 2004, submitted the text of a proposal modifying its original proposal on Ocean Liner Service Agreements, as contained in paragraph 29 of A/CN.9/WG.III/WP.34. The text of the modified proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat.



Annex I

Proposal by the United States of America

1. In WP.34, the United States presented an overall proposal covering the key subjects that should be addressed in the draft instrument. Paragraph 29 of WP.34 proposes a definition of an Ocean Liner Service Agreement, i.e., a definition of the category of transactions that we believe should be presumptively covered by the draft instrument, but which should be allowed to derogate from the terms of the draft instrument under certain conditions.
2. Since WP.34 was distributed in August 2003, the United States has listened carefully to the comments we have received on the definition of an OLSA included in paragraph 29. These comments came from individual private sector interests in the United States, from other States, and from U.S. and international non-governmental organizations. One of the concerns expressed was that, due to a provision of U.S. shipping law, non-vessel operating common carriers (NVOCCs) in the U.S. trade would be unable to enter into an OLSA, as that term was defined in paragraph 29.
3. Another less substantive concern was that the draft instrument would be clearer if the OLSA concept was contained in a stand-alone article, rather than as part of what is now Article 88 of WP.32 (Limits of Contractual Freedom).
4. In response to those concerns, the United States has modified its proposal contained in paragraph 29 of WP.34. This proposal provides for a stand-alone article on OLSAs, and defines an OLSA in a way that meets shipper concerns for specificity, and meets NVOCC concerns that the definition be broad enough to include them. This proposal has the support of all affected U.S. interests, including shippers, VOCCs and NVOCCs.
5. The United States therefore proposes the following language, in lieu of our proposal in paragraph 29 of WP.34:

Article XX

1. [Notwithstanding art. xx [contract of carriage definition/excluded contracts provision], this instrument applies to an Ocean Liner Service Agreement. [Note 1.]
2. An Ocean Liner Service Agreement means a contract that is mutually negotiated and agreed to in writing or electronically between one or more carriers and one or more shippers and that provides for the liner carriage of goods by sea in a series of shipments over a specified period of time. Such contract shall obligate the carrier(s) to perform a service not otherwise mandatorily required by this instrument and shall obligate the shipper(s) to tender a minimum volume of cargo and to pay the rate(s) set forth in the contract. The carrier(s) service obligation shall include ocean carriage and may also include carriage by other modes of transport, warehousing, or logistics services, as required by the shipper. Liner carriage means an advertised maritime transport service for the carriage of general cargo on an established and regular pattern of trading between a range of specified ports. [Note 2]

3. An Ocean Liner Service Agreement may not be (i) a carrier's schedule of prices and services, a bill of lading, or a cargo receipt or similar document, although an Ocean Liner Service Agreement may incorporate such documents by reference; or (ii) a charter of a liner vessel or the charter of space on a liner vessel.

4. Notwithstanding paragraph 1, an Ocean Liner Service Agreement may provide for greater or lesser duties, rights, obligations, and liabilities than those set forth in this instrument. A provision in an Ocean Liner Service Agreement that provides for greater or lesser duties, rights, obligations, and liabilities shall be set forth in the body of the contract and may not be incorporated by reference from another document. Any terms in an Ocean Liner Service Agreement that vary from this instrument shall be binding only on the parties to the contract and any third-party who expressly consents to be bound thereby. [Note 3]

5. If a transport document or electronic record is issued pursuant to an Ocean Liner Service Agreement, then the provisions of this instrument apply to the contract evidenced by or contained in that transport document or electronic record to the extent that the transport document or the electronic record governs the relations between the carrier and any holder or consignor or consignee named in said transport document or electronic record who is not a party to the Ocean Liner Service Agreement, except to the extent that said holder, consignor or consignee expressly consented to be bound by an Ocean Liner Service Agreement or such terms therein that are different from those set forth in the instrument.

Note 1: The bracketed language cannot be finalized until other articles, such as the definition of "contract of carriage" and the treatment of excluded contracts, have been finalized. The intent, however, is to avoid any confusion between the OLSA provision, on the one hand, and other provisions which might suggest that OLSAs were excluded (such as the definition of contract of carriage, and the list of excluded contracts) from the Instrument.

Note 2: In order to ensure that the OLSA provision is interpreted to apply equally to vessel operators and non-asset based carriers who issue documentation in their own name and are responsible for the performance of the ocean carriage, the United States proposes that the definition of "carrier" included in Article 1(b) of WP.32 be amended to read as follows: "Carrier" means a person, whether or not that person operates a vessel, that enters into a contract of carriage with a shipper."

Note 3: The United States notes that it has proposed in WP.34 that the parties to an OLSA could bind a third party to a forum selected for the litigation of cargo claims that is designated in an OLSA, as long as certain conditions have been satisfied, including, among others, that notice of the designated forum is provided to the third party. See WP.34, paragraph 35.