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

Scope of Application provisions

Note by the Secretariat

During its fourteenth session (Vienna, 29 November to 10 December 2004), Working Group III considered certain provisions of the draft instrument on the carriage of goods [wholly or partly] [by sea] pertaining to the scope of application of the draft instrument (A/CN.9/572, paras. 83 to 96). Based upon that discussion in the Working Group, an informal drafting group composed of a number of delegations prepared a redraft of the core provisions regarding the scope of application of the draft instrument. The informal drafting group presented the redrafted provisions to the Working Group (A/CN.9/572, paras. 105-106), and the Working Group agreed that the redraft represented a sound text upon which to base future discussions on scope of application, once further reflection and consultations had taken place (A/CN.9/572, para. 109). This note contains those redrafted provisions presented by the informal drafting group as they appeared in the report of the fourteenth session (A/CN.9/572, para. 105), plus a brief commentary prepared by the informal drafting group following each of the articles presented.

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Annex

Scope of Application provisions

Introduction

1. During the fourteenth session of Working Group III, an informal drafting group discussed the joint drafting suggestions of Finland, Italy, Japan, the Netherlands, Sweden, and the United States, which were intended to reflect the general consensus in the Working Group (A/CN.9/572, para. 89) regarding which types of transactions should fall within the mandatory scope of the draft instrument on the carriage of goods [wholly or partly] [by sea]. Based on these discussions, the informal drafting group proposed to the Working Group during its fourteenth session a series of new provisions regarding the scope of application of the draft instrument. These new provisions are reproduced as they appeared in para. 105 of A/CN.9/572, with the addition of a brief commentary prepared by the informal drafting group following each provision. These new provisions do not address the issue of Ocean Liner Service Agreements (OLSAs) (see A/CN.9/WG.III/WP.34 and A/CN.9/WG.III/WP.42), and will need to be reconsidered in light of the Working Group's decision in that regard. In addition, further examination of draft articles 88 and 89, which also address freedom of contract issues, will be necessary. While renumbering of the provisions will clearly have to occur should the following articles become part of the draft instrument, for ease of reference in this note, the series of new provisions below will be referred to as the "scope-of-application draft articles", while the existing provisions of the draft instrument will be referred to as the "draft articles".

> "Article 1
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> "(a) "Contract of carriage" means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. This undertaking must provide for carriage by sea and may provide for carriage by other modes of transport prior to or after the sea carriage. [A contract that contains an option to carry the goods by sea shall be deemed to be a contract of carriage provided that the goods are actually carried by sea.]
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> "[(--) "Liner service" means a maritime transportation service that
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> (i) is available to the general public through publication or otherwise; and
>
> (ii) is performed on a regular basis between specified ports in accordance with announced timetables or sailing dates.]
>
> "[(--) "Non-liner service" means any maritime transportation service that is not a liner service.]"

2. *Commentary on scope-of-application draft article 1 (a) definition of "contract of carriage", including the proposed definitions of "liner service" and "non-liner service"*: Scope-of-application draft article 1 (a) was intended to clarify the definition of "contract of carriage" in draft article 1 (a) of the draft instrument as contained in para. 6 of A/CN.9/WG.III/WP.36. The requirement of an international sea leg, which was included in that A/CN.9/WG.III/WP.36 definition, has been included in scope-of-application draft article 2, along with reference to the

internationality of the overall carriage. The bracketed language at the end of scope-of-application draft article 1 (a) is substantially the same as draft paragraph 1 (bis) of article 2 as contained in para. 6 of A/CN.9/WG.III/WP.36. It was suggested in the informal drafting group that the bracketed text is superfluous, but it was thought by some that, given that the provision was controversial and that it had been included in brackets in para. 6 of A/CN.9/WG.III/WP.36, it should be preserved for further discussion. In addition, definitions of "liner service" and "non-liner service" were proposed for inclusion in the definition section at article 1 of the draft instrument in order to clarify scope-of-application draft article 3, below. These proposed definitions were intended to serve as a basis for further discussion in the Working Group.

"Article 2

"1. Subject to Articles 3 to 5, this Instrument applies to contracts of carriage in which the [contractual] place of receipt and the [contractual] place of delivery are in different States, and the [contractual] port of loading and the [contractual] port of discharge are in different States, if

"(a) the [contractual] place of receipt [or [contractual] port of loading] is located in a Contracting State, or

"(b) the [contractual] place of delivery [or [contractual] port of discharge] is located in a Contracting State, or

"(c) [the actual place of delivery is one of the optional places of delivery [under the contract] and is located in a Contracting State, or]

"(d) the contract of carriage provides that this Instrument, or the law of any State giving effect to it, is to govern the contract.

"[References to [contractual] places and ports mean the places and ports provided under the contract of carriage or in the contract particulars.]

"[2. This instrument applies without regard to the nationality of the ship, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.]"

3. *Commentary on scope-of-application draft article 2*: Scope-of-application draft article 2 (1) requires the internationality of the overall carriage as well as the internationality of the sea leg. The requirement for the internationality of the overall carriage was included in draft article 3.1 of the draft instrument as contained in A/CN.9/WG.III/WP.21 and draft article 2 (1) of the draft instrument as contained in A/CN.9/WG.III/WP.32, but was omitted from draft article 2 (1) of A/CN.9/WG.III/WP.36. Sub-paragraphs (a) to (d) of the scope-of-application draft are taken directly from draft article 2 (1) of A/CN.9/WG.III/WP.32 and A/CN.9/WG.III/WP.36. The question remains whether a provision such as paragraph (2) of scope-of-application draft article 2, set out above, is still necessary; it was once thought to be required and thus it was included in Article X of Hague-Visby Rules.

"Article 3

"1. This Instrument does not apply to

"(a) subject to Article 5, charter parties, whether used in connection with liner services or not; and

"(b) subject to Article 4, volume contracts, contracts of affreightment, and similar contracts providing for the future carriage of goods in a series of shipments, whether used in connection with liner services or not; and

"(c) subject to paragraph 2, other contracts in non-liner services.

"2. This Instrument applies to contracts of carriage in non-liner services under which the carrier issues a transport document or an electronic record that

(a) evidences the carrier's or a performing party's receipt of the goods; and

(b) evidences or contains the contract of carriage,

except in the relationship between the parties to a charter party or similar agreement."

4. *Commentary on scope-of-application draft article 3*: While scope-of-application draft article 2 was intended to reflect the Working Group's preference for the contractual approach in defining the draft instrument's scope of application (A/CN.9/572, paras. 89), it was recognized that it was necessary to supplement the contractual approach with further clarifications. Scope-of-application draft article 3 (1) was intended to avoid the situation that a pure contractual approach would create in including transactions that the Working Group had agreed to exclude from the scope of application of the draft instrument. Scope-of-application draft article 3 (1) (a) and (b) refer to liner services as well as to non-liner services because certain forms of charter parties (such as slot charters and space charters) and volume contracts are regularly used in liner services. Scope-of-application draft article 3 (2) was intended to ensure that transactions covered by the Hague and Hague-Visby Rules would continue to be governed by the draft instrument, so that the draft instrument would not reduce the current level of coverage. In particular, common carriage transactions in non-liner trades in which a bill of lading is issued should continue to be governed by the draft instrument. [*Secretariat note*: The Working Group may wish to consider whether it is necessary to provide further clarification of the terms and concepts used in scope-of-application draft article 3, particularly paragraphs 1 (b) and 2 thereof. Such clarification could be achieved by way of text in the draft instrument, or by way of commentary on the draft instrument in accompanying explanatory material. Also, as a matter of drafting, there could be problems with the drafting technique employed by placing at the end of scope-of-application draft article 3 (2) the phrase "except in the relationship between the parties to a charter party or similar agreement." The Working Group may wish to consider whether this phrase could be relocated, perhaps to the opening of the chapeau of that paragraph, in order to avoid errors that could be caused by changes in formatting.]

"Article 4

"If a contract provides for the future carriage of goods in a series of shipments, this Instrument applies to each shipment in accordance with the rules provided in Articles 2, 3 (1) (a), 3 (1) (c), and 3 (2)."

5. *Commentary on scope-of-application draft article 5*: Scope-of-application draft article 4 is substantially the same as draft article 2 (5) as contained in previous versions of the draft instrument.

> "Article 5
>
> "If a transport document or an electronic record is issued pursuant to a charter party or a contract under Article 3 (1) (c), then such transport document or electronic record shall comply with the terms of this Instrument and the provisions of this Instrument apply to the contract evidenced by the transport document or electronic record from the moment at which it regulates the relationship between the carrier and the person entitled to rights under the contract of carriage, provided that such person is not a charterer or a party to the contract under Article 3 (1) (c)."

6. *Commentary on scope-of-application draft article 5*: Scope-of-application draft article 5 is substantially the same as draft article 2 (4) as contained in previous versions of the draft instrument, except that: (i) it has been extended in the scope-of-application provision to cover all transport documents and electronic records (not just negotiable transport documents and electronic records), as agreed by the Working Group (A/CN.9/572, paras. 94 and 106); and (ii) it includes a proviso to ensure that it does not apply as between the immediate parties to a contract otherwise excluded from the operation of the draft instrument.