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

Proposed revised provisions on electronic commerce

Note by the Secretariat

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* The late submission of the document is a reflection of the current shortage of staffing resources in the secretariat.



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Introduction

1. During its fourteenth session, Working Group III heard that, given the areas of complementarity and mutual interest both in the draft convention on the use of electronic communications in international contracts (annex to A/CN.9/577) and in the draft instrument, the work of Working Group III could be assisted by the holding of an intersessional informal meeting of experts from both the electronic commerce and transport law fields. The Working Group agreed to that suggestion (A/CN.9/572, para. 162). This informal joint meeting of experts from Working Group IV (Electronic Commerce) and Working Group III (Transport Law) took place in London on 23 February 2005 and considered the provisions of the draft instrument relating to electronic commerce. Following discussions during the meeting, and given the passage of time as well as changes made to the original version of the draft instrument, the experts suggested a revised drafting of those articles of the draft instrument relating to electronic commerce as presented for the consideration of the Working Group in sections I to V below.

2. The joint meeting of experts on transport law and on electronic commerce underlined the complementary approach to electronic commerce of the draft instrument and of the draft convention on the use of electronic communications in international contracts (annex to A/CN.9/577) and concluded that there was no major obstacle to the approach to electronic commerce adopted in the draft instrument. It was also noted that, while bills of lading themselves were excluded from the scope of application of the draft convention on the use of electronic communications in international contracts, in accordance with its draft article 2, paragraph 2, electronic communications relating to bills of lading fell within its scope of application.

I. Chapter 1: General provisions

A. Definitions (draft article 1)

3. The joint meeting of experts considered draft article 1 of the draft instrument as it appeared in A/CN.9/WG.III/WP.32.¹ Following the discussion, the following provisional revised version of draft article 1, letters (f), (o), (p), (q) and (r), was suggested:

“Article 1. Definitions

“For the purposes of this instrument:”

[...]

“(f) “Holder” means

(i) a person that is for the time being in possession of a negotiable transport document and

¹ For ease of reference, the draft provisions of the draft instrument are referenced here following the numbering of the revised text of the draft instrument contained in A/CN.9/WG.III/WP.32. These provisions will be renumbered at the end of the second reading of the draft instrument, when the Secretariat will prepare a new consolidated draft of the draft instrument.

(a) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to whom the document is duly endorsed, or

(b) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or

(ii) the shipper, the consignee, or the person to whom a negotiable electronic transport² record has been transferred and who has exclusive control of that negotiable electronic transport³ record.”⁴

“(o) “Electronic transport⁵ record” means information in one or more messages issued by electronic communication pursuant to a contract of carriage by a carrier or a performing party that

(i) evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage, or

(ii) evidences or contains a contract of carriage,

or both.

It includes information logically associated with the electronic transport⁶ record by attachments or otherwise linked to the electronic transport⁷ record contemporaneously with or subsequent to its issue by the carrier or a performing party, so as to become part of the electronic transport⁸ record.”⁹

“(p) “Negotiable electronic transport¹⁰ record” means an electronic transport¹¹ record

(i) that indicates, by statements such as ‘to order’, or ‘negotiable’, or other appropriate¹² statements recognized as having the same effect by the law governing the record, that the goods have been consigned to the

² See footnote 5.

³ See footnote 5.

⁴ The joint meeting of experts suggested that while draft letter (f) of draft article 1 in the text in A/CN.9/WG.III/WP.32 included “[access to]” and “[control of]” as alternatives, there was strong agreement that “control” should be used, since it was considered to be the electronic equivalent of “possession” of a document. It was thought that repetition of the phrase “control of that negotiable electronic transport record” would render its use sufficiently clear.

⁵ The joint meeting of experts suggested the insertion of the qualifying term “transport” between the words “electronic” and “record” to avoid any confusion with the generic term “electronic record”, already widely in use in various domestic legislation.

⁶ See footnote 5.

⁷ See footnote 5.

⁸ See footnote 5.

⁹ The joint meeting of experts suggested the insertion of the phrases “logically associated with the electronic transport record by” and “so as to become part of the electronic transport record” for clarification that the intention was to encompass all possible cases of information, logically associated with attachment or otherwise linked to the record, which could become part of the electronic record.

¹⁰ See footnote 5.

¹¹ See footnote 5.

¹² The Working Group may wish to consider whether the word “appropriate” is necessary in light of the use of the phrase “recognized as having the same effect”. The Working Group may also wish to consider whether similar language in draft article 1(l) should be aligned accordingly.

order of the shipper or to the order of the consignee, and is not explicitly stated as being “non-negotiable” or “not negotiable”, and

(ii) the use of which meets the requirements of article 6(1).¹³

“(q) “Non-negotiable electronic transport¹⁴ record” means an electronic transport¹⁵ record that does not qualify as a negotiable electronic transport¹⁶ record.”

“(r) “Contract particulars” means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is¹⁷ in a transport document or an electronic transport¹⁸ record.

II. Chapter 2: Electronic communication

A. Draft article 3

4. The joint meeting of experts considered draft article 3 of the draft instrument, as it appeared in A/CN.9/WG.III/WP.32. It was noted that while it was clear that the draft instrument created an electronic equivalent of the bill of lading, that is, an electronic transport document with the same legal effect as a paper-based bill of lading, given the experience of the electronic commerce experts, it would be valuable for greater certainty to include an express statement of that principle. Draft article 3(b) was added for this purpose. In addition, it was noted that the principle of implied consent to electronic communications was common to the draft convention on the use of electronic communications in international contracts (annex to A/CN.9/577, para. 8(2)). After discussion, the following provisional redraft was suggested:

“Article 3

“Subject to the requirements set out in this convention,

(a) anything that is to be in or on a transport document in pursuance of this instrument may be recorded or communicated by using electronic communication¹⁹ instead of by means of the transport document, provided the

¹³ The joint meeting of experts felt that, due to the suggested addition of a draft paragraph 2 to draft article 6, the reference to such article from draft article 1, letter (p)(ii) should be limited to its paragraph 1. It was also suggested that all substantive requirements be incorporated in the revised draft article 6, and deleted from draft article 1, letter (p)(ii).

¹⁴ See footnote 5.

¹⁵ See footnote 5.

¹⁶ See footnote 5.

¹⁷ The joint meeting of experts suggested, to avoid misinterpretation of the requirements of the provision, the replacement of the word “appears” with “is”.

¹⁸ See footnote 5.

¹⁹ The Working Group may wish to consider whether the word “communications” should be used instead of “communication” to clarify that reference is made in the article to the act of communicating and not to the individual communication.

issuance and subsequent use of an electronic transport²⁰ record is with the express or implied consent of the carrier and the shipper; and

(b) the issuance, control, or transfer of an electronic transport²¹ record shall have the same effect as the issuance, possession, or transfer of a transport document.”

B. Draft article 4

5. The joint meeting of experts considered draft article 5 of the draft instrument as it appeared in A/CN.9/WG.III/WP.32, and suggested the following provisional redraft:

“Article 4

“1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport²² record,

(a) the holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier; and

(b) the carrier shall issue to the holder a negotiable electronic record that includes a statement that it is issued in substitution for the negotiable transport document,

whereupon the negotiable transport document ceases to have any effect or validity.

2. If a negotiable electronic transport²³ record has been issued and the carrier and the holder agree to replace that electronic record by a negotiable transport document,

(a) the carrier shall issue to the holder, in substitution for that electronic transport²⁴ record, a negotiable transport document that includes a statement that it is issued in substitution for the negotiable electronic transport²⁵ record; and

(b) upon such substitution, the electronic transport²⁶ record ceases to have any effect or validity.”

C. Draft article 5

6. The joint meeting of experts considered draft article 5 of the draft instrument, as it appeared in A/CN.9/WG.III/WP.32. It was noted that the purpose of the provision was to prevent the use of oral communications in the cases enumerated,

²⁰ See footnote 5.

²¹ See footnote 5.

²² See footnote 5.

²³ See footnote 5.

²⁴ See footnote 5.

²⁵ See footnote 5.

²⁶ See footnote 5.

and to allow for the use of electronic communications subject to consent. It was further noted that the term “writing” included both electronic and written communications in some jurisdictions, and it was suggested that the text as it appeared in A/CN.9/WG.III/WP.32 could be confusing in those jurisdictions. Consequently, it was suggested that the intention of the provision could be more universally understood if it were slightly redrafted as follows:

“Article 5

“The notices and confirmation referred to in articles 20(1), 20(2), 20(3), 34(1)(b) and (c), 47, 51, [61bis(2),]²⁷ the declaration in article 68, and the agreement as to weight in article 37(1)(c) shall be made in writing. Electronic communication may be used for these purposes, provided the use of such means is with the express or implied consent of the party by which it is communicated and of the party to which it is communicated.”

D. Draft article 6

7. The joint meeting of experts considered draft article 6 of the draft instrument as it appeared in A/CN.9/WG.III/WP.32. A redrafted version of draft article 6 was suggested in order to clarify it as follows:

“Article 6

“1. The use of a negotiable electronic transport²⁸ record shall²⁹ be subject to procedures³⁰ which provide for:

- (a) a method to effect the exclusive transfer of that record³¹ to an intended holder;
- (b) an assurance that the negotiable electronic transport³² record retains its integrity;

²⁷ The Working Group may wish to consider the insertion of a reference to draft article 61 bis (2), subject to the outcome of its deliberations on that article.

²⁸ See footnote 5.

²⁹ It was felt that the phrase “adequate provisions” in draft article 6 of A/CN.9/WG.III/WP.32 could lead to uncertainty. It was suggested that, instead, draft article 6 should include the minimum requirements to bring such a record within the scope of the draft instrument.

³⁰ The term “procedures” was substituted for “rules of procedure” as was used in A/CN.9/WG.III/WP.32 so as to avoid setting out precisely-defined rules which could be circumvented by creative parties.

³¹ The Working Group may wish to consider whether it would be appropriate to insert here the phrase “or of the rights represented by or incorporated into that record” in light of concerns that the draft provision, when read in conjunction with the definition of “electronic transport record” in draft article 1(o) and of “negotiable electronic transport record” in draft article 1(p) might imply the use of a technology whereby the electronic record would be “passed” along the negotiation chain. It has been suggested that such an interpretation may not offer the same legal recognition to other business models where this does not occur, such as registry systems where rights are transferred by exchanges of communications between the parties and the registry, rather than, for instance, by transfer of a token or other particular from one party to the other. An alternative approach which the Working Group may also consider could be to leave the text of draft article 6 as is, but to include a clarification in an explanatory note or a commentary accompanying the draft instrument.

(c) the manner in which the holder is able to demonstrate that it is the holder; and

(d) the way in which confirmation is given that delivery to the consignee has been effected; or that, pursuant to articles 4(2) or 49(a)(ii), the negotiable electronic transport³³ record has ceased to have any effect or validity.

2. The procedures in paragraph 1 must be referred to in the contract particulars and be readily ascertainable.”³⁴

III. Chapter 8: Transport documents and electronic records

A. Issuance of the transport document or electronic transport record (draft article 33)

8. The joint meeting of experts considered draft article 33 of the draft instrument, as it appeared in A/CN.9/WG.III/WP.32. After discussion, the following provisional redraft was suggested:

“Article 33. Issuance of the transport document or electronic transport³⁵ record

“Upon delivery of the goods to the carrier or performing party

(a) the consignor is entitled to obtain a transport document or, if the carrier so agrees, an electronic transport³⁶ record evidencing the carrier’s or performing party’s receipt of the goods;

(b) the shipper or, if the shipper so indicates to the carrier, the person referred to in article 31, is entitled to obtain from the carrier an appropriate negotiable transport document, unless the shipper and the carrier, expressly or impliedly, have agreed not to use a negotiable transport document, or it is the custom, usage, or practice in the trade not to use one. If pursuant to article 3 the carrier and the shipper have agreed to the use of an electronic transport³⁷ record, the shipper is entitled to obtain from the carrier a negotiable electronic transport³⁸ record unless they have agreed not to use a negotiable electronic

³² See footnote 5.

³³ See footnote 5.

³⁴ The term “readily ascertainable” was used to indicate without excessive detail that the necessary procedures must be available to those parties who have a legitimate interest in knowing them prior to entering a legal commitment based upon the validity of the negotiable electronic transport record. It was further noted that the system envisaged would function in a manner not dissimilar to the current availability of terms and conditions of bills of lading. The Working Group may wish to consider whether related detail should be specified in a note or a commentary accompanying the draft instrument.

³⁵ See footnote 5.

³⁶ See footnote 5.

³⁷ See footnote 5.

³⁸ See footnote 5.

transport³⁹ record or it is the custom, usage or practice in the trade not to use one.”

B. Signature (draft article 35)

9. The joint meeting of experts considered draft article 35 of the draft instrument, as it appeared in A/CN.9/WG.III/WP.32. After discussion, the following provisional redraft was suggested:

“Article 35. Signature.

“1. A transport document shall be signed by the carrier or a person having authority from the carrier.

2. An electronic transport⁴⁰ record shall include⁴¹ the electronic signature of the carrier or a person having authority from the carrier. For the purpose of this provision such electronic signature means data in electronic form included in, or otherwise logically associated with, the electronic transport⁴² record and that is used to identify the signatory in relation to the electronic transport⁴³ record and to indicate the carrier’s authorization of the electronic transport⁴⁴ record.”

IV. Chapter 11: Right of control

A. Draft article 54

10. The joint meeting of experts considered the electronic commerce aspects of draft article 54 of the draft instrument, as it appeared in A/CN.9/WG.III/WP.32. After discussion, the following provisional redraft was suggested:

“Article 54.

“1. When no negotiable transport document or no negotiable electronic transport⁴⁵ record is issued, the following rules apply:

(a) The shipper is the controlling party unless the shipper [and consignee agree that another person is to be the controlling party and the shipper so notifies the carrier. The shipper and consignee may agree that the consignee is the controlling party] [designates the consignee or another person as the controlling party].

³⁹ See footnote 5.

⁴⁰ See footnote 5.

⁴¹ The joint meeting of experts noted that the use of the term “authenticated” with respect to signatures was avoided in the UNCITRAL Model Law on Electronic Signatures (2001) because it raised questions concerning who was entitled to authenticate the signature. To avoid such an outcome, the replacement of the phrase “be authenticated” with the word “include” was suggested.

⁴² See footnote 5.

⁴³ See footnote 5.

⁴⁴ See footnote 5.

⁴⁵ See footnote 5.

(b) The controlling party is entitled to transfer the right of control to another person, upon which transfer the transferor loses its right of control. The transferor [or the transferee] shall notify the carrier of such transfer.

(c) When the controlling party exercises the right of control in accordance with article 53, it shall produce proper identification.

[(d) The right of control [terminates] [is transferred to the consignee] when the goods have arrived at destination and the consignee has requested delivery of the goods.]

2. When a negotiable transport document is issued, the following rules apply:

(a) The holder or, in the event that more than one original of the negotiable transport document is issued, the holder of all originals is the sole controlling party.

(b) The holder is entitled to transfer the right of control by passing the negotiable transport document to another person in accordance with article 59, upon which transfer the transferor loses its right of control. If more than one original of that document was issued, all originals must be passed in order to effect a transfer of the right of control.

(c) In order to exercise the right of control, the holder shall, if the carrier so requires, produce the negotiable transport document to the carrier. If more than one original of the document was issued, all originals [except those that the carrier already holds on behalf of the person seeking to exercise a right of control] shall be produced, failing which the right of control cannot be exercised.

(d) Any instructions as referred to in article 53(b), (c) and (d) given by the holder upon becoming effective in accordance with article 55 shall be stated on the negotiable transport document.

3. When a negotiable electronic transport⁴⁶ record is issued:

(a) The holder is the sole controlling party and is entitled to transfer the right of control to another person by transferring⁴⁷ the negotiable electronic transport⁴⁸ record in accordance with the procedures⁴⁹ referred to in article 6, upon which transfer the transferor loses its right of control.

⁴⁶ See footnote 5.

⁴⁷ The joint meeting of experts noted that the word “transfer” was used in a consistent technical meaning in the draft instrument and suggested its insertion to replace the word “passing” here and in any other similar provisions of the draft instrument.

⁴⁸ See footnote 5.

⁴⁹ In order to be consistent with the change suggested to draft article 6, it is suggested that the words “rules of procedure” be replaced with the word “procedures”. The Working Group may also wish to consider changing the reference to draft article 6 to draft paragraph 6(1) in order to be consistent with the language of draft article 1 letter (p)(ii) (see footnote 13 above).

(b) In order to exercise the right of control, the holder shall, if the carrier so requires, demonstrate, in accordance with the procedures⁵⁰ referred to in article 6, that it is the holder.

(c) Any instructions as referred to in article 53(b), (c) and (d) given by the holder upon becoming effective in accordance with article 55 shall be stated in the electronic transport⁵¹ record.

4. Notwithstanding article 62, a person, not being the shipper or the person referred to in article 31, that transferred the right of control without having exercised that right, shall upon such transfer be discharged from the liabilities imposed on the controlling party by the contract of carriage or by this instrument.”

V. Chapter 12: Transfer of rights

A. Draft article 59

11. The joint meeting of experts considered the electronic commerce aspects of draft article 59 of the draft instrument, as it appeared in A/CN.9/WG.III/WP.32. After discussion, the following provisional redraft was suggested:

“Article 59

“1. If a negotiable transport document is issued, the holder is entitled to transfer the rights incorporated in such document by transferring⁵² such document to another person,

(a) if an order document, duly endorsed either to such other person or in blank, or,

(b) if a bearer document or a blank endorsed document, without endorsement, or,

(c) if a document made out to the order of a named party and the transfer is between the first holder and such named party, without endorsement.

2. If a negotiable electronic transport⁵³ record is issued, its holder is entitled to transfer the rights incorporated in such electronic record, whether it be made out to order or to the order of a named party, by transferring⁵⁴ the electronic record in accordance with the procedures referred to in article 6.”⁵⁵

⁵⁰ See footnote 49.

⁵¹ See footnote 5.

⁵² See footnote 47.

⁵³ See footnote 5.

⁵⁴ See footnote 47.

⁵⁵ See footnote 49.

B. Draft article 61 bis

12. The joint meeting of experts considered the electronic commerce aspects of draft articles 61 and 62 of the draft instrument, as they appeared in A/CN.9/WG.III/WP.32, and the alternate text of draft article 61 bis suggested in footnote 207 of A/CN.9/WG.III/WP.32. The joint meeting of experts found the alternative text of draft article 61 bis to be clearer and to be preferable to draft articles 61 and 62. After discussion, the following provisional redraft of draft article 61 bis was suggested:

“Article 61 bis

- “1. If no negotiable transport document and no negotiable electronic transport⁵⁶ record is issued, the transfer of rights under a contract of carriage is subject to the law governing the contract for the transfer of such rights or, if the rights are transferred otherwise than by contract, to the law governing such transfer. [However, the transferability of the rights purported to be transferred is governed by the law applicable to the contract of carriage.]
2. Regardless of the law applicable pursuant to paragraph 1, the transfer may be made by electronic means. In any event, the transfer must be notified to the carrier by the transferor or, if other applicable law permits, by the transferee.⁵⁷
3. If the transfer includes liabilities that are connected to or flow from the right that is transferred, the transferor and the transferee are jointly and severally liable in respect of such liabilities.”

⁵⁶ See footnote 5.

⁵⁷ It was noted in the joint meeting of experts that, while notification of the transfer by the transferor was a common rule, some jurisdictions require the notification of the transfer to be accomplished by the transferee. It was therefore suggested to substitute the phrase “either by the transferor or the transferee” with the phrase “by the transferor or, if other applicable law permits, by the transferee”, so as to set the burden of notification on the transferor, while preserving the possibility of a notification by the transferee, where permissible.