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

## Transport documents and electronic transport records: Document presented for information by the delegation of the United States of America

**Note by the Secretariat**

In preparation for the seventeenth session of Working Group III (Transport Law), the Government of the United States of America submitted to the Secretariat the document attached hereto as an annex with respect to transport documents and electronic transport records in the draft convention on the carriage of goods [wholly or partly] [by sea]. The delegation advised that the text was intended to facilitate consideration of the topic of transport documents and electronic transport records in the Working Group by compiling the views and comments of various delegations into a single document for discussion by the Working Group.

The document in the attached annex is reproduced in the form in which it was received by the Secretariat.

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# Annex

## I. Introduction

1. During the period since the Working Group's sixteenth session, delegates and observers had an opportunity to participate in informal discussions on the principal issues arising under chapter 9 ("Transport documents and electronic transport records") of the draft convention on the carriage of goods [wholly or partly] [by sea], which is annexed to A/CN.9/WG.III/WP.56 (hereafter cited simply by article number). A number of delegates have exchanged preliminary views on these issues, both in response to an informal questionnaire that was made available to all delegates and observers and during an informal seminar in London arranged by the Italian delegation (23-24 January 2006) and open to delegates, observers and others. For the convenience of the Working Group, this document summarizes these preliminary views.

## II. Draft article 37. Issuance of the transport document or the electronic transport record

2. Draft article 37 of the draft convention provides:

> "Upon delivery of the goods to the carrier or performing party:
>
> "(a) The consignor is entitled to obtain a transport document or, subject to article 5 (a)[1] an electronic transport record evidencing the carrier's or performing party's receipt of the goods; and
>
> "(b) The shipper or, if the shipper instructs the carrier, the person referred to in article 34,[2] is entitled to obtain from the carrier an appropriate negotiable transport document or, subject to paragraph 5 (a), electronic transport record, unless the shipper and the carrier, expressly or impliedly, have agreed not to use a negotiable transport document or electronic transport record, or it is the custom, usage, or practice in the trade not to use one."

3. The corresponding provision of the Hague and Hague-Visby Rules, article 3 (3), provides in relevant part simply that:

> "After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading … ."

4. Article 14 (1) of the Hamburg Rules similarly provides:

> "When the carrier or the actual carrier takes the goods in his charge, the carrier must, on demand of the shipper, issue to the shipper a bill of lading."

5. The principal innovation of draft article 37 is based on the recognition that the "consignor" (defined in draft article 1 (i) as the "person that delivers the goods to the carrier or a performing party for carriage") is not necessarily the "shipper" (defined in draft article 1 (h) as the "person that enters into a contract of carriage with a carrier"). An FOB seller, for example, may fulfil its obligations under the sales contract by delivering the goods to a carrier that has previously concluded a

volume contract with the buyer. The seller is the "consignor" but the buyer (having contracted with the carrier) is the "shipper." Under the Hague and Hague-Visby Rules, it appears that in this context only the shipper/buyer would be entitled to a bill of lading,[3] but in practice both the consignor/seller and the shipper/buyer have a legitimate interest in receiving some sort of transport document. The former may well need a receipt to justify payment under the sales contract; the latter may need a transport document to control the goods.

6. During the preparatory work of the Comité Maritime International (CMI), there was some controversy as to whether the shipper or the consignor should be entitled to demand a transport document from the carrier. This conflict was ultimately resolved by recognizing that the two parties have different needs that can be served by different types of transport documents. The proposed text therefore permits the consignor to obtain the type of transport document that it needs—a receipt that is not necessarily evidence of the contract of carriage, not necessarily a document of title, and not necessarily negotiable. The proposed text permits the shipper, as the carrier's contractual counterpart, to obtain the type of transport document that gives it control over the goods (and the performance of the contract of carriage), subject to a contrary agreement in the contract.

7. During the Working Group's spring 2003 session, the substance of this provision was found to be generally acceptable. (See A/CN.9/526, para. 25.)

8. During informal discussions since the Working Group's last session, roughly two-thirds of the delegates addressing this issue supported draft article 37 substantially as drafted. Some expressed the view that when the consignor/seller delivers the goods to a carrier that has contracted with the shipper/buyer, the consignor/seller delivers the goods to a person acting on the behalf of the shipper/buyer—and thus loses control of the goods to the shipper/buyer. Accordingly, the consignor/seller is entitled only to a receipt proving that delivery has been completed; it is not entitled to a transport document giving further control of the goods.

9. The delegates participating in informal consultations who opposed draft article 37 objected that in commercial practice the consignor/seller retains control of the goods, by means of a suitable transport document, until it is paid the purchase price for the goods (often under a documentary credit) when it tenders the transport document. Those delegates would amend draft article 37 to give only the consignor the right to demand a transport document.

10. One delegate suggested that, to overcome these difficulties, the carrier should be permitted to require the surrender of the transport document or electronic transport record issued to the consignor under draft article 37 (a) as a precondition to issuing an appropriate transport document or electronic transport record to the shipper under draft article 37 (b). This would seem to accord with the current practice in a number of jurisdictions under which a carrier demands the surrender of a dock receipt or mate's receipt before issuing a negotiable bill of lading. But some questioned whether this would unduly elevate the significance of the receipt issued under draft article 37 (a). If a negotiable transport document is viewed as the figurative "key to the warehouse", would the non-negotiable receipt become the "key to the key to the warehouse"?

11. Some delegates participating in the informal consultations suggested drafting improvements. (1) One delegate suggested that the chapeau be amended to read "Upon *or after* delivery of the goods to the carrier or performing party" to recognize the common situation in which the consignor delivers the goods to the carrier but does not wish to receive a transport document until after the goods have been loaded on the vessel. (2) Another delegate questioned whether the phrase "expressly or impliedly" in paragraph (b) is necessary. (3) Finally, one delegate suggested that it might be appropriate to specify that a shipper is entitled in any event to obtain at least a non-negotiable transport document or electronic transport record, even if the shipper and the carrier have agreed not to use negotiable transport documents or electronic transport records. During the London seminar arranged by the Italian delegation, it was generally thought that this change would be desirable.

# III. Draft article 38. Contract particulars

12. Draft article 38 provides:

"1. The contract particulars in the transport document or electronic transport record referred to in article 37 must include:

"(a) A description of the goods;

"(b) The leading marks necessary for identification of the goods as furnished by the shipper before the carrier or a performing party receives the goods;

"(c) (i) The number of packages, the number of pieces, or the quantity, as furnished by the shipper before the carrier or a performing party receives the goods and

"(ii) The weight as furnished by the shipper before the carrier or a performing party receives the goods;

"(d) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for shipment;

"(e) The name and address of the carrier; and

"(f) The date

"(i) on which the carrier or a performing party received the goods, or

"(ii) on which the goods were loaded on board the ship, or

"(iii) on which the transport document or electronic transport record was issued.

"2. The phrase "apparent order and condition of the goods" in paragraph 1 refers to the order and condition of the goods based on:

"(a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party and

"(b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or the electronic transport record."

13. The corresponding provision of the Hague and Hague-Visby Rules, article 3 (3) (a)-(c), is similar to article 38 (1) (a)-(d). Article 15 (1) of the Hamburg Rules has a much longer list of mandatory items that must be included in a transport document.[4]

14. The mandatory items included in article 38 (1) have not been substantially controversial. Indeed, during the informal discussions since the Working Group's last session every delegate addressing this issue supported article 38 substantially as drafted, although there was some support for expanding the list slightly. Various delegates suggested that one or more of the following items might be added:

- The name and address of the shipper or consignor (compare article 15 (1) (d) of the Hamburg Rules);
- The name and address of the consignee (but perhaps only if that information is furnished by the shipper or consignor) (compare article 15 (1) (e) of the Hamburg Rules);
- The places of receipt and discharge and the ports of loading and unloading (compare article 15 (1) (f) and (g) of the Hamburg Rules);
- The number of originals of the transport document (compare article 15 (1) (h) of the Hamburg Rules);
- A statement, if applicable, that the goods will or may be carried on deck (compare article 15 (1) (m) of the Hamburg Rules and draft article 26 (3) of the draft convention); and
- An indication of the dangerous nature of the goods, if applicable (which might be included in draft paragraph 1 (a), addressing the description of the goods).

Stronger support was expressed for the view that draft article 38 (1)'s list should not be expanded, but should be limited to only those items that are absolutely necessary.

15. During previous discussions, the Working Group addressed some drafting issues. During the spring 2003 session, for example, a concern was expressed that the phrase "*as* furnished by the shipper before the carrier or a performing party receives the goods" might be read as placing a heavy burden on the shipper. (See A/CN.9/526, para. 28.) The intention was not to place any burden on the shipper but to clarify that the carrier's obligation to issue the required documents containing the specified information was dependent on the shipper's furnishing the specified information. Perhaps the phrase "*if* furnished by the shipper" would be more appropriate. It was also observed, however, that the phrase "*as* furnished" is appropriate because it stresses that the contract particulars should include the information in the same form as the shipper furnished it.

16. During informal discussions since the Working Group's last session, several drafting suggestions were made with respect to these three paragraphs. Several delegates suggested that draft paragraph 1 (a), covering the description of the goods, should be qualified in the same way as draft paragraphs 1 (b) and (c)—with the phrase "as furnished by the shipper before the carrier or a performing party receives the goods" (or whatever alternative is accepted). This suggestion was widely supported at the informal seminar in London. One delegate suggested that the separate paragraphs be combined under a chapeau containing the agreed phrase,

thus minimizing duplication. Another suggested that the phrase "*as* furnished" was appropriate for draft paragraphs 1 (b) and (c)(i) but that "*if* furnished" was more appropriate for draft paragraph 1 (c)(ii). (This suggestion was based on the assumption that the consignor should always know the leading marks and the number of packages, but may not know the weight.) One delegate suggested that the agreed phrase should mention the "consignor" (recognizing that if the "consignor" and the "shipper" were not the same person, the "consignor" was more likely than the "shipper" to provide the required information). Finally, it was suggested that addressing the timing issue was too cumbersome. The words "before the carrier or a performing party receives the goods" should thus be deleted from the phrase.

17. The remaining draft paragraphs prompted fewer drafting suggestions. One delegate wondered whether draft paragraph 1 (d) referred to the goods inside a container and suggested that the provision be modified to clarify that the carrier need state only the apparent order and condition of the container at the time the carrier or a performing party receives it for shipment (in case this was not sufficiently clear from draft paragraph (2)). One delegate suggested that draft paragraph (f) should require the carrier to indicate the significance of the date of the transport document (i.e., whether it was the date of receipt under draft sub-paragraph (i), the date of loading under (ii), or the date of issuance under (iii)).

18. No delegate that expressed a view in informal consultations favoured express sanctions for carriers that fail to provide mandatory information, but the view was expressed that a carrier should not be permitted to benefit from a breach of its obligation under this article (e.g., by qualifying for a lower package limitation). One delegate suggested that a carrier's failure to provide the required information should create a presumption that the accurate information would support the party claiming against the carrier. (Compare draft article 40 (4) in this regard.) Another delegate suggested that a carrier's breach of its obligation under this article would constitute a breach of contract, thus permitting an action for contract damages that could be proven.

# IV. Draft article 39. Signature

19. Draft article 39 provides:

> "1. A transport document must be signed by the carrier or a person having authority from the carrier.
>
> "2. An electronic transport record must include the electronic signature of the carrier or a person having authority from the carrier. Such electronic signature must identify the signatory in relation to the electronic transport record and indicate the carrier's authorization of the electronic transport record."

20. During the Working Group's spring 2003 session, the substance of this provision was found to be generally acceptable. (See A/CN.9/526, para. 32.) Since then, it has been revised to conform to the Working Group's conclusions in light of the recommendations of the Experts' Group that addressed electronic commerce issues. A further suggestion was made that the Working Group may wish to consider

whether "signature" should be defined as, for example, in article 14 (3) of the Hamburg Rules, which provides:

> "The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued."

21. During the informal discussions since the Working Group's last session, every delegate addressing this issue supported draft article 39 substantially as drafted.

22. The only contentious issue was whether a definition of "signature" was necessary. Some delegates supported the inclusion of a definition along the lines of article 14 (3) of the Hamburg Rules or article 5 (k) of the United Nations Convention on International Bills of Exchange and International Promissory Notes.[5] A clear majority of those participating in informal discussions said that no definition was necessary.

23. No delegate participating in informal discussions favoured the inclusion of express sanctions for carriers that fail to sign transport documents.

24. One delegate made the drafting suggestion that the expression "by the carrier or a person having authority from the carrier" in draft paragraph (1) should be amended to read "by or on behalf of the carrier" and the expression "of the carrier or a person having authority from the carrier" in draft paragraph (2) should be amended to read "of the carrier or a person acting on behalf of the carrier." (Compare article 15 (1) (j) of the Hamburg Rules.)

# V. Draft article 40. Deficiencies in the contract particulars

25. Draft article 40 provides:

> "1. The absence of one or more of the contract particulars referred to in article 38 (1), or the inaccuracy of one or more of those particulars, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.
>
> "2. If the contract particulars include the date but fail to indicate its significance, then the date is considered to be:
>
> "(a) If the contract particulars indicate that the goods have been loaded on board a ship, the date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship; or
>
> "(b) If the contract particulars do not indicate that the goods have been loaded on board a ship, the date on which the carrier or a performing party received the goods.
>
> "[3. If the contract particulars fail to identify the carrier but indicate that the goods have been loaded on board a named ship, then the registered owner of the ship is presumed to be the carrier. The registered owner can defeat this presumption if it proves that the ship was under a bareboat charter at the time of the carriage that transfers contractual responsibility for the carriage of the goods to an identified bareboat charterer. [If the registered owner defeats the

presumption that it is the carrier under this article, then the bareboat charterer at the time of the carriage is presumed to be the carrier in the same manner as that in which the registered owner was presumed to be the carrier.]]

"4. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them from the consignor, the transport document or electronic transport record is either prima facie or conclusive evidence under article 43, as the case may be, that the goods were in apparent good order and condition at the time the consignor delivered them to the carrier or a performing party."

26. During the CMI's preparatory work, various suggestions were made as to possible sanctions that might be imposed on a carrier that failed to date the transport document at all. Suggested sanctions included "a large fine", "loss of recourse to the P&I club", "loss of the right to limit liability", and liability in "a separate action for any resulting loss." (See 2000 CMI Yearbook, p. 184.) It was ultimately concluded that other forces ensured that transport documents are dated. The only issue requiring attention, therefore, was the problem of ambiguous dates.

27. Draft article 40 (3), which is bracketed, is the most controversial portion of this article. (It may be the most controversial provision in the chapter.) During the first reading of this material, the prevailing view in the Working Group was that draft paragraph 3 identified a serious problem that must be treated in the draft convention, but that the matter required further study with respect to other means through which to combat the problem, and that the provision as drafted was not yet satisfactory. The Working Group decided to keep draft paragraph 3 in square brackets in the draft convention, and to discuss it in greater detail at a future date. (See A/CN.9/526, para. 60.)

28. The theory of draft article 40 (3) recognizes that the registered owner may have no direct connection with a particular cargo owner. Indeed, it may be a lender that became the registered owner solely to maintain a security interest in the vessel. But the registered owner should nevertheless know (directly or indirectly) who is booking cargo on its ship, and thus be able to redirect the suit to the appropriate party—the carrier. In some ways, those jurisdictions that recognize *in rem* liability for cargo claims indirectly accomplish a similar result.

29. Alternative approaches can be imagined to deal with the problems created by a transport document's failure to identify the carrier. For example, the carrier might lose the benefit of the time bar (recognized in draft chapter 15) or the time bar period might begin to run only when the carrier is properly identified. In addition, the carrier might be required to reimburse the claimant for any expenses incurred in locating the carrier. It was even suggested that the carrier might lose the benefit of the package limitation if the transport document violates draft article 38 (1) (e). But all of these alternatives deal only with the indirect consequences of having a difficult time identifying the carrier. None of them offers any practical assistance in identifying the carrier. Draft article 40 (3), in contrast, provides a direct incentive for the readily identifiable party most likely to know the identity of the true carrier to share that key information.

30. During informal discussions since the Working Group's last session, all of the delegates addressing the issue supported draft article 40(1), (2) and (4) in substance as currently drafted.

31. Draft article 40 (3) continues to be highly controversial. A few of the delegates participating in informal consultations support draft article 40 (3) in substance, but suggest ways in which it could be improved. One delegate suggested strengthening draft article 40 (3) to give greater protection to the shipper. The provision could create an irrebuttable presumption that the registered owner is the carrier (which would be consistent with the general rule that a person is bound by the acts of another person with apparent authority under certain circumstances). If there must be a rebuttable presumption, it was suggested that the registered owner can overcome the presumption that it is the carrier only if (1) it fully identifies the true carrier and (2) the true carrier accepts that it is the carrier.

32. A majority of the delegates addressing this issue in informal consultations opposed draft article 40 (3) for a variety of reasons. Most found it inappropriate to presume that the registered owner is the carrier when it may have had no real connection with the carriage. Indeed, under the current draft the registered owner may have had no connection whatsoever with the carriage. Suppose that "the contract particulars … indicate that the goods have been loaded on board a named ship", but in fact the goods were never carried on that ship. Should draft article 40 (3) be limited to cases in which the goods were in fact loaded on board a named vessel? Or the registered owner may have had no connection with the portion of the carriage on which the loss occurred. Why should the loading of the goods on a ship for carriage on the sea leg of a multimodal transaction create any presumption as to the identity of the carrier for the inland legs? Those opposing draft article 40 (3) argue as a matter of principle that the shipper should bear the responsibility of knowing the identity of the party with which it contracted. Even third-party consignees, which did not themselves contract with the carrier, should force their contracting party—the shipper—to reveal the identity of the carrier rather than forcing the registered owner to do so.

33. Delegates that participated in informal consultations also pointed out a host of practical problems with the current draft. For example, it is unclear what is meant by "fail[ing] to identify the carrier." Draft article 38 (1) (e) requires the contract particulars to include "the name and address of the carrier." Must both be included to avoid draft article 40 (3)? If the contract particulars include the name of the carrier without the address, has there been a "fail[ure] to identify the carrier"? Is an "identity of carrier" clause sufficient to identify the carrier? Should a standard-form "identity of carrier" clause in fine print be allowed to contradict other information on the transport document? Other problems abound. Does draft article 40 (3) accept the possibility of multiple carriers (as many national legal systems do)? The relationship between the first two sentences is also unclear. The first sentence establishes a rebuttable presumption (that the registered owner is the carrier) and the second sentence describes one way to rebut the presumption. Is the second sentence intended to specify the only way in which the presumption may be rebutted? Or may the registered owner rebut the presumption by proving that someone other than a bareboat charterer is the true carrier? For example, may the registered owner rebut the presumption by proving that a time charterer is the true carrier? And if so, must the time charterer accept responsibility as "carrier" before the registered owner is released from liability? Even if the Working Group accepts draft article 40 (3), it seems clear that a number of drafting issues will need to be considered.

34. One delegate participating in informal consultations suggested that draft article 40 (3) may no longer be necessary as a practical matter because other forces will operate to solve the problem. (1) Competitive pressures have already improved the clarity of transport documents. (2) Requirements in the ICC's Uniform Customs and Practices for Documentary Credits make transport documents that fail to identify the carrier unacceptable to banks and thus unacceptable to shippers that seek payment under a documentary credit. (3) Draft article 38 (1) (e) of the draft already requires the inclusion of the carrier's name and address. (4) The regime of draft article 49 provides a strong incentive for a carrier to include its name and address in the transport document.

# VI. Draft article 41. Qualifying the description of the goods in the contract particulars

35. Draft article 41 provides:

> "The carrier, if acting in good faith when issuing a transport document or an electronic transport record, may qualify the information referred to in article 38 (1) (a), 38 (1) (b) or 38 (1) (c) in the circumstances and in the manner set out below in order to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper:
>
> "(a) For non-containerized goods
>
> "(i) If the carrier can show that it had no reasonable means of checking the information furnished by the shipper, it may so state in the contract particulars, indicating the information to which it refers, or
>
> "(ii) If the carrier reasonably considers the information furnished by the shipper to be inaccurate, it may include a clause providing what it reasonably considers accurate information.
>
> "(b) For goods delivered to the carrier or a performing party in a closed container, unless the carrier or a performing party in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container before issuing the transport document or the electronic transport record, provided, however, that in such case the carrier may include such clause if it reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate, the carrier may include a qualifying clause in the contract particulars with respect to
>
> "(i) the leading marks on the goods inside the container, or
>
> "(ii) the number of packages, the number of pieces, or the quantity of the goods inside the container.
>
> "(c) For goods delivered to the carrier or a performing party in a closed container, the carrier may qualify any statement of the weight of goods or the weight of a container and its contents with an explicit statement that the carrier has not weighed the container if
>
> "(i) the carrier can show that neither the carrier nor a performing party weighed the container, and the shipper and the carrier did not agree prior

to the shipment that the container would be weighed and the weight would be included in the contract particulars, or

"(ii) the carrier can show that there was no reasonable means of checking the weight of the container."

36. This article is drafted on the assumption that the shipper is always entitled to obtain a transport document or electronic transport record reflecting the information that it provided to the carrier. (During informal discussions since the Working Group's last session, including at the informal London seminar, all of the delegates addressing the issue accepted this assumption.) The issue here concerns when the carrier may qualify the shipper's information or provide additional information that may contradict the shipper's.

37. During the Working Group's spring 2003 session, several suggestions were made for further consideration. Some of those suggestions have already been incorporated in the text. Others that the Working Group may wish to consider include:

- Language along the lines of draft article 41 (a)(ii) could be included in draft paragraph (b) to address the situation in which the carrier reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate.
- A carrier that decides to qualify the information mentioned on the transport document could be required to give the reasons for the qualification.
- The draft convention could deal with the situation in which the carrier agreed not to qualify the description of the goods, for example, so as not to interfere with a documentary credit, but obtained a guarantee from the shipper.
- When the carrier acting in bad faith voluntarily agrees not to qualify the information in the contract particulars, such conduct should be sanctioned and no limitation of liability could be invoked by the carrier.

(See A/CN.9/526, para. 37.) During informal discussions since the Working Group's last session, each of these suggestions received at least some support.

38. Although most of the delegates addressing the issue in informal consultations supported the substance of draft article 41, there were a number of caveats and drafting suggestions. One delegate suggested that it was necessary to distinguish between cases in which a carrier *may* qualify the information provided by the shipper (in order to protect itself from liability for cargo damage) and cases in which a carrier *must* qualify the information provided by the shipper (in order to protect third parties). This proposal received substantial support at the informal London seminar. Another delegate suggested that it might be possible to delete draft paragraph (b) and apply draft paragraph (a) to containerized goods. (Alternatively, language along the lines of draft article 41 (a)(ii) could be included in draft paragraph (b).) Those attending the informal London seminar agreed that draft paragraphs (a) and (b) should be considered in conjunction with each other, also addressing any possible gaps (for example, with respect to containerized cargo in an open container or with respect to the description of cargo in a closed container).

Several delegates thought it would be helpful to clarify the allocation of burdens of proof (although one delegate suggested that this issue be left to national law).

39. Some delegates participating in informal consultations questioned the use of the concept of "good faith", which they reported was not used in their legal system. Even if the concept of "good faith" is retained, some delegates found it problematic in this context. In considering whether to distinguish between cases in which a carrier *may* qualify the information and cases in which a carrier *must* qualify the information (a possible distinction mentioned in the previous paragraph), it would be helpful to consider that the concept of "good faith" might operate differently in the two cases.

# VII. Draft article 42. Reasonable means of checking and good faith

40. Draft article 42 provides:

> "For purposes of article 41:
>
> "(a) A "reasonable means of checking" must be not only physically practicable but also commercially reasonable.
>
> "(b) The carrier acts in "good faith" when issuing a transport document or an electronic transport record if
>
> > "(i) the carrier has no actual knowledge that any material statement in the transport document or electronic transport record is materially false or misleading, and
> >
> > "(ii) the carrier has not intentionally failed to determine whether a material statement in the transport document or electronic transport record is materially false or misleading because it believes that the statement is likely to be false or misleading.
>
> "(c) The burden of proving whether the carrier acted in good faith when issuing a transport document or an electronic transport record is on the party claiming that the carrier did not act in good faith."

41. During the Working Group's spring 2003 session, the substance of this provision was found to be generally acceptable. (See A/CN.9/526, para. 43.) During informal discussions since the Working Group's last session, all of the delegates addressing the issue supported draft article 42 in substance as currently drafted (although one delegate made the drafting suggestion that draft paragraph (b) should be phrased in terms of "bad faith" instead of "good faith").

# VIII. Draft article 43. Prima facie and conclusive evidence

42. Draft article 43 provides:

> "Except as otherwise provided in article 44, a transport document or an electronic transport record that evidences receipt of the goods is:

"(a) Prima facie evidence of the carrier's receipt of the goods as described in the contract particulars; and

"(b) Conclusive evidence of the carrier's receipt of the goods as described in the contract particulars

"[(i)] if a negotiable transport document or a negotiable electronic transport record has been transferred to a third party acting in good faith [or

"(ii) Variant A of paragraph (b) (ii)

"if a person acting in good faith has paid value or otherwise altered its position in reliance on the description of the goods in the contract particulars.]

"(ii) Variant B of paragraph (b)(ii)

"if no negotiable transport document or no negotiable electronic transport record has been issued and the consignee has purchased and paid for the goods in reliance on the description of the goods in the contract particulars.]"

43. During the Working Group's spring 2003 session, the substance of draft paragraphs (a) and (b)(i) were generally accepted. (See A/CN.9/526, paras. 44-48.) During informal discussions since the Working Group's last session, including at the informal London seminar, all of the delegates addressing the issue supported the substance of draft paragraphs (a) and (b)(i) as currently drafted.

44. Draft paragraph (b)(ii) has been more controversial. (See A/CN.9/526, paras. 44-48.) Since the Working Group's spring 2003 session, two new variants have been introduced for draft paragraph (b)(ii). Under the narrower variant B, a non-negotiable transport document or electronic transport record can be conclusive evidence only if the consignee has purchased and paid for the goods in reliance on the contract particulars. For example, the shipper and the carrier may use a non-negotiable transport document because the goods will not be resold en route. The sales contract may provide for payment when the shipper tenders this transport document to the consignee because it proves that the goods have in fact been shipped. Thus the consignee would rely on the contract particulars to pay for the goods. But if essentially the same transaction were conducted with a letter of credit, variant B would not protect the bank that advanced the money for the purchase price to the consignee and took a security interest in the goods. The broader variant A would extend protection to the bank that relied on the contract particulars to advance money to the consignee.

45. During informal discussions since the Working Group's last session, including at the informal London seminar, it appeared that views on draft paragraph (b)(ii) ran the full gamut. A majority of the delegates addressing the issue supported the broader variant A. Indeed, one delegate would support an even broader version in which every third party was protected (at least under some non-negotiable transport documents) regardless of whether it paid value or otherwise altered its position in reliance on the description of the goods in the contract particulars. The minority was divided between those delegates who favoured the narrower variant B and those

who opposed both variants (on the ground that only negotiable documents should be allowed to constitute conclusive evidence).

46. Two delegates participating in informal consultations suggest that the text should be revised to deal directly with the non-negotiable transport documents sometimes known as "straight" or "recta" bills of lading. This suggestion received substantial support at the informal London seminar.

# IX. Draft article 44. Evidentiary effect of qualifying clauses

47. Draft article 44 provides:

> "If the contract particulars include a qualifying clause that complies with the requirements of article 41, then the transport document or electronic transport document does not constitute prima facie or conclusive evidence under article 43 to the extent that the description of the goods is qualified by the clause."

48. Draft article 44 is the key provision of the entire chapter because it provides the conditions under which most of the other articles have practical meaning. Draft articles 41 and 42, for example, specify when the carrier is allowed to qualify the description of the goods in the contract particulars. But draft article 44 then specifies when a qualification has practical meaning, permitting the qualification to supersede the prima facie or conclusive evidence that would otherwise exist under draft article 43. Moreover, draft article 37's fundamental obligation to issue a transport document or electronic transport record and draft article 38's obligation to include within it a description of the goods is meaningful in practice to the extent that the description has any effect, which ultimately turns on draft article 44.

49. During the Working Group's spring 2003 session, it was suggested that draft article 44 "was too much in favour of the carrier" because it allowed the carrier to rely on its qualifying clauses without regard to its treatment of the goods. (See A/CN.9/526, para. 50.) An alternative text for containerized cargo (from footnote 154 of A/CN.9/WG.III/WP.56 and previously in footnote 146 of A/CN.9/WG.III/WP.32) would permit the carrier to rely on qualifying clauses only when the carrier could demonstrate a chain of custody by delivering a container in substantially the same condition in which it had been received:

*Alternative draft of article 44*

> "1. If the contract particulars include a qualifying clause, then the transport document will not constitute prima facie or conclusive evidence under article 43, to the extent that the description of the goods is qualified by the clause, when the clause is "effective" under paragraph 2.
>
> "2. A qualifying clause in the contract particulars is effective for the purposes of paragraph 1 under the following circumstances:
>
> "(a) For non-containerized goods, a qualifying clause that complies with the requirements of article 41 will be effective according to its terms.

"(b) For goods shipped in a closed container, a qualifying clause that complies with the requirements of article 41 will be effective according to its terms if

"(i) The carrier or a performing party delivers the container intact and undamaged, except for such damage to the container as was not causally related to any loss of or damage to the goods; and

"(ii) There is no evidence that after the carrier or a performing party received the container it was opened prior to delivery, except to the extent that

"(1) A container was opened for the purpose of inspection,

"(2) The inspection was properly witnessed, and

"(3) The container was properly reclosed after the inspection, and was resealed if it had been sealed before the inspection."

50. The Working Group's discussion of this issue at the spring 2003 session is reported at A/CN.9/526, paragraphs 49-52. Delegates may also wish to consider the commentary on this issue in A/CN.9/WG.III/WP.21 at paragraphs 150-154.

51. During informal discussions since the Working Group's last session, a clear majority of the delegates expressing a view on this issue supported draft article 44 substantially as drafted. The minority's views in favour of the alternative draft included in footnote 154, however, appear to be strongly held. One delegate argued that the principles of the alternative draft should be extended to non-containerized goods concealed by packaging.

# X. Draft article 45. "Freight prepaid"

52. Draft article 45 provides:

"[If the contract particulars in a negotiable transport document or a negotiable electronic transport record contain the statement "freight prepaid" or a statement of a similar nature, then neither the holder nor the consignee is liable for the payment of the freight. This article does not apply if the holder or the consignee is also the shipper.]"

53. This provision had originally been included in a proposed chapter on freight. (See draft article 9.4 (a) of A/CN.9/WG.III/WP.21; draft article 44 (1) of A/CN.9/WG.III/WP.32.) At the Working Group's spring 2004 session, when most of the proposed chapter on freight was deleted from the draft, the decision was taken to retain for future consideration the provision that now appears (in brackets) as draft article 45. Proponents suggested that the provision would give protection and clarity to third-party holders of a transport document. (See A/CN.9/552, paras. 163-164.)

54. During informal discussions since the Working Group's last session, most of the delegates addressing this issue supported draft article 45 substantially as drafted. One delegate suggested that draft article 45 might be expanded (1) to apply also in cases of non-negotiable transport documents and electronic transport records (particularly if non-negotiable transport documents and electronic transport records may constitute conclusive evidence under draft article 43 (b)(ii)), and (2) to give the

"freight prepaid" statement prima facie effect when a claim is made against the shipper.

55. A few of the delegates participating in informal consultations instead expressed support for revising the article to conform in substance with article 16 (4) of the Hamburg Rules, which provides:

> "A bill of lading which does not, as provided in paragraph 1, subparagraph (k), of article 15 [quoted in endnote 4], set forth the freight or otherwise indicate that freight is payable by the consignee or does not set forth demurrage incurred at the port of loading payable by the consignee, is *prima facie* evidence that no freight or such demurrage is payable by him. However, proof to the contrary by the carrier is not admissible when the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication."

56. This would have the effect of reversing the presumption. Under draft article 45 as drafted, the carrier's right to collect freight from the consignee is unaffected by the convention unless an affirmative statement (e.g., "freight prepaid") appears in the transport document. Under article 16 (4) of the Hamburg Rules, the convention defeats the carrier's right to collect freight from the consignee unless an affirmative statement (e.g., "freight payable by consignee") appears in the transport document.

57. Roughly half of the delegates addressing this issue in informal consultations favoured including draft article 45 in the draft convention because it solves two practical problems under current law. First, it clarifies the position of banks (and third parties generally). If a transport document contains the statement "freight prepaid", a bank will never become liable for the freight. Second, if a carrier seeks to collect freight from a shipper under a "freight prepaid" document, this provision defeats the shipper's unjustified defence that a "freight prepaid" document is a receipt issued by the carrier evidencing that the freight has in fact been paid. Another quarter of the delegates had no objection to including draft article 45 in the draft convention in substantially its current form, even if they did not think that such a provision was necessary.

58. Roughly a quarter of the delegates addressing this issue in informal consultations opposed the inclusion of draft article 45 in its current form. This group included those who would favour a provision along the lines of article 16 (4) of the Hamburg Rules and those who would simply leave the matter to national law.

59. Some of the delegates participating in informal discussions suggested drafting improvements that border on substantive change. The most significant of these involves the carrier's assertion of a lien or a right of retention when a consignee or other third party claims the goods. The current draft confirms that the consignee or other third party does not have an obligation to pay the freight, but it does not explicitly address whether the carrier can retain the goods (which would have the practical effect of forcing the consignee or other third party to pay the freight in order to take delivery). This problem might be corrected by redrafting the first sentence of draft article 45 along the following lines:

"If the contract particulars in a negotiable transport document or a negotiable electronic transport record contain the statement "freight prepaid" or a statement of a similar nature, *then the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid*."

60. The suggestion was also made that the draft should clarify (either here or in the definition of "freight") that—for the purpose of this article—"freight" does not include demurrage and costs incurred by the carrier in relation to the goods during their carriage.

*Notes*

[1] Draft article 5 (a) requires the consent of the parties before electronic transport records can be used.

[2] Draft article 34 refers to the party sometimes described as the "documentary shipper", i.e., a person identified as the "shipper" in the contract particulars who does not qualify as the "shipper" under the definition in draft article 1 (h).

[3] Neither the Hague Rules nor the Hague-Visby Rules explicitly define the term "shipper" but draft article 1 (a)'s "carrier" definition implicitly recognizes that the "shipper" is the party that enters into a contract of carriage with the carrier. The result under the Hamburg Rules is uncertain because article 1 (3) combines the concepts of draft article 1 (h) *and* draft article 1 (i) of the draft Convention.

[4] Article 15 (1) of the Hamburg Rules provides:

"1. The bill of lading must include, inter alia, the following particulars:

"(a) The general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;

"(b) The apparent condition of the goods;

"(c) The name and principal place of business of the carrier;

"(d) The name of the shipper;

"(e) The consignee if named by the shipper;

"(f) The port of loading under the contract of carriage by sea and the date on which the goods were taken over by the carrier at the port of loading;

"(g) The port of discharge under the contract of carriage by sea;

"(h) The number of originals of the bill of lading, if more than one;

"(i) The place of issuance of the bill of lading;

"(j) The signature of the carrier or a person acting on his behalf;

"(k) The freight to the extent payable by the consignee or other indication that freight is payable by him;

"(l) The statement referred to in paragraph 3 of article 23;

"(m) The statement, if applicable, that the goods shall or may be carried on deck;

"(n) The date or the period of delivery of the goods at the port of discharge if expressly agreed upon between the parties; and

"(o) Any increased limit or limits of liability where agreed in accordance with paragraph 4 of article 6."

[5] Article 5 (k) of the United Nations Convention on International Bills of Exchange and International Promissory Notes defines "signature" as "a handwritten signature, its facsimile or an equivalent authentication effected by any other means".