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

Identity of carrier—Drafting proposal by the Governments of Italy and the Netherlands

Note by the Secretariat*

In preparation for the eighteenth session of Working Group III (Transport Law), the Governments of Italy and the Netherlands submitted to the Secretariat the proposal attached hereto as an annex with respect to the identity of carrier in the draft convention on the carriage of goods [wholly or partly] [by sea].

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

* The late submission of the document reflects the date on which its contents were communicated to the Secretariat.



Annex

Identity of carrier

1. This proposal is intended to address practical problems relating to transport documents that are unclear as to the identity of the carrier. It tries to take into account the observations made by delegates when draft article 40 (3) was discussed previously.¹

2. The premises of the proposal are that the evidentiary function of a transport document entails that any holder of the document must be able to ascertain from the document itself who the carrier is. In principle, research into the contractual relations between the shipper and the carrier should not be needed in order to find out who the carrier is.

3. The first practical problem addressed in this proposal is the matter of an unclear face of the document. Such face may include certain names that legally may be the carrier's booking agents or its trade name only. However, it is important that the carrier is *identified* as such on the document.² Therefore, it is proposed that article 38 (e) is redrafted as follows:

“(e) the name and address of a person identified as carrier;”

4. A second practical problem is that the carrier is identified on the face of the document (often in the signature box), while the small print at the reverse of the same document includes a clause on the identity of carrier or a demise clause that refers to the owner of the carrying vessel as the carrier. Often, these two indications of the carrier's identity are in conflict. The ambiguity resulting therefrom may be solved by making the information on the face of the document to prevail over the information at the reverse side. For this purpose the following language is suggested:

“If a person is on the face of a transport document or electronic record identified as the carrier, any information on the reverse side of the transport document or electronic record expressly or impliedly identifying a different person as the carrier shall have no legal effect.”

5. Thirdly, from the document it may not be sufficiently clear who the carrier is. At present, many transport documents do not comply with the requirement of draft article 38 (e). The most common example is the document signed by (or on behalf of) the master. In such case it is rarely stated whether the master has signed pursuant to the authority of the owner of the vessel or the authority of somebody else, such as a time- or voyage charterer. Under many national jurisdictions case law has developed dealing with this matter and some jurisdictions may have statutory provisions too. However, these solutions at national level are far from uniform. To address this issue, the current draft article 40 (3) introduces a rebuttable presumption that the registered owner is the carrier. However, in previous

¹ See A/CN.9/526, paras. 56-60 and A/CN.9/WG.III/WP.62, paras. 27-34.

² This is in line with the requirements of articles 23 (a)(i) and 26 (a)(i) of the ICC Uniform Customs and Practice for Documentary Credits 500 (UCP 500). However, these articles also accept bills of lading signed by the master of the carrying vessel without the carrier being identified.

discussions this draft provision gave rise to several critical questions. Therefore, hereunder is a new and more refined draft suggested as a replacement of the current draft of article 40 (3) that may address most of the concerns raised:

“If no person is identified in the transport document or electronic record as the carrier or its name and address is not included therein, but the contract particulars indicate that the goods have been loaded on board of a named ship, then the registered owner of that ship is presumed to be the carrier, unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicate its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the owner may defeat the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may defeat any presumption of being the carrier in the same manner.”

6. If the draft proposed in the previous paragraph would be accepted, a consequential provision is needed to the effect that the one year prescription period must be extended for cases that the presumption is rebutted. A draft could be:

“If the owner has identified the bareboat charterer and has provided its address, or any of them has identified the carrier and provided its address, the period mentioned in article 69 shall not run from the date of institution of judicial or arbitral proceedings against the registered owner or bareboat charterer until the lapse of 90 days from the date when the relevant information is provided by the owner or the bareboat charterer as the case may be.”

7. Finally, as a drafting matter it is suggested to the secretariat to delete the current draft article 40 (3) and, instead, to create a new article to be placed between the current articles 38 and 39 that, if adopted, includes the drafts outlined in the paragraphs 4, 5 and 6 above. Such new article may bear the heading:

“Identity of carrier”
