



# General Assembly

Distr.: Limited  
12 September 2007

Original: English

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**United Nations Commission  
on International Trade Law  
Working Group III (Transport Law)  
Twentieth session  
Vienna, 15-25 October 2007**

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

### **Proposal on Chapter 12 “Transfer of Rights” submitted by the Delegation of the Netherlands**

#### **Note by the Secretariat\***

In preparation for the twentieth session of Working Group III (Transport Law), the delegation of the Netherlands submitted to the Secretariat their proposal on Chapter 12 “Transfer of Rights” in the attached annex.

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

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\* The late submission of the document reflects the date on which the proposal was communicated to the Secretariat.



## Annex

### Proposal on Chapter 12 on “Transfer of Rights” submitted by The Netherlands

1. During the first reading of the draft convention on the carriage of goods [wholly or partly] [by sea] (the “draft convention”), a full discussion was held on the chapter on “Transfer of Rights”.<sup>1</sup> This discussion was based on the drafts in A/CN.9/WG.III/WP.21. Thereafter, the Secretariat made a new draft of the chapter in A/CN.9/WG.III/WP.56. Subsequently, informal consultations were held on this draft, with respect to which the Swiss delegation reported in A/CN.9/WG.III/WP.52. However, that report and the substance of the new drafts were not discussed during the second reading of the draft convention. Instead, the whole chapter was placed between brackets and the further consideration of it was deferred “for future discussion, following consultations”.<sup>2</sup> This means that during the third reading of the draft convention, the Working Group must decide on the fate of this chapter. This note will try to provide some guidance thereon.

2. The chapter consists of three articles dealing with different subjects. Some of these are non-contentious, while others certainly are contentious. Some subjects are related to other provisions of the draft convention, while other matters are exclusively dealt with in this chapter. Furthermore, some provisions are not likely to need much further discussion and may be decided upon fairly quickly, while others require further attention and discussion. Generally, the chapter is not free of complications. However, a simple deletion of the whole chapter might unnecessarily discard useful provisions that could be retained relatively easily.<sup>3</sup> The following paragraphs consider each provision separately, along with the view whether the particular provision should be deleted or retained in the draft convention.

#### Draft article 59

3. The first paragraph of draft article 59 provides that, with regard to negotiable documents, rights embodied in the document are transferable and it sets out the mechanics of a transfer of these rights. This is a non-contentious rule, the retention of which received strong support in the first reading.<sup>4</sup> The draft article is of great particular importance for electronic commerce purposes, because, within the scope of the functional equivalence of an electronic document, the rule first must be determined for the paper document before the equivalence can be established. In other words, the key provision on electronic transport records, draft article 8 (b),

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<sup>1</sup> See paragraphs 127-148 of A/CN.9/526.

<sup>2</sup> See paragraphs 77 and 78 of A/CN.9/594. In addition, in paragraph 72 of the same document, the issues of ‘the position of third parties to the contract of carriage’ and ‘transfer of liabilities’ were mentioned as examples of items that are possibly better suited for inclusion in another instrument, such as a model law.

<sup>3</sup> See also: Alexander von Ziegler, “Transfer of Rights and Transport Documents”, paper delivered at UNCITRAL Congress “Modern Law for Global Commerce”, 9-12 July, 2007, Vienna, available at [www.uncitral.org/uncitral/en/about/congresspapers.html](http://www.uncitral.org/uncitral/en/about/congresspapers.html).

<sup>4</sup> See paragraph 134 of A/CN.9/526. The concerns about the nominative transport document are dealt with in the second reading by the inclusion of the new provisions of the articles 42 (b) (ii), 47, 48 and 53, paragraph 2.

builds on the contents of draft article 59. Also, in view of the fact that electronic commerce and liability were regarded as the core provisions of the draft convention,<sup>5</sup> it may be fairly obvious that draft article 59 should be retained as it stands.

#### Draft article 60

4. As to draft article 60, a distinction must be made between the first paragraph (which is supplemented by the third one) and the second paragraph of this article. The second paragraph deals with the subject of transfer of liabilities, which in many jurisdictions is a notoriously difficult issue. A related matter is the question of whether the third party holder of the negotiable document is bound by the terms of the contract of carriage, a question with respect to which there are a variety of doctrines under national law.<sup>6</sup> Another related issue is the question if, and to what extent, a transferor of a liability is relieved from its obligations. Often, these matters cause much difficulty under national law. Therefore, not surprisingly, during the first reading, the second paragraph caused much discussion in the Working Group and views were rather divided. More harmony can already be seen in the Swiss report on the informal consultations. However, this report also shows a certain desire in the Working Group to leave these matters to national law.

5. It may safely be concluded that the issue raised in the second paragraph of draft article 60 is not sufficiently mature for inclusion in the draft convention. It requires more thought and discussion and the subject itself is probably more suitable for a model law than for a binding convention.

6. The first and third paragraphs of draft article 60 are different matters. At issue in those paragraphs is the position of intermediate holders: commodity traders in a string of sales and, in particular, banks that hold a negotiable document for security purposes only. Because of the uncertainties referred to in paragraph 4 above, at present, the legal position of these intermediate holders are insufficiently clear. However, the perception of these holders may be different because they often feel themselves 'safe' as long as they do not interfere with the carriage.

7. In the first reading of the draft convention, the first and third paragraphs of draft article 60 were not considered to be contentious. Some concerns were raised that the first paragraph might be interpreted too extensively, although it was precisely for this reason that it was drafted in a negative manner and was confined to a specific situation. This specific situation refers to a common practice, which explains why this first paragraph may play a very useful role for commercial actors. It provides highly desirable certainty for banks financing the flow of goods<sup>7</sup> and will, therefore, enhance the acceptability of the draft convention as a whole to these important stakeholders.

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<sup>5</sup> See paragraph 72 of A/CN.9/594.

<sup>6</sup> See also the somewhat cumbersome discussion the Working Group had on the same issue within the scope of the subject 'jurisdiction and arbitration'.

<sup>7</sup> This may also apply to a comparable provision: article 53, paragraph 6, which is also a non-contentious provision that relates to a specific situation. When an intermediate holder of the right of control has transferred this right, is there any liability connected with the right of control left with the transferor? Article 53, paragraph 6, makes it clear that there is not, which is primarily in the interest of banks that finance the flow of goods.

8. The third paragraph of draft article 60 is of explanatory nature only and may also play a similar role in respect of draft article 44 (relating to delivery). In the past, it appeared that the contents of this third paragraph was non-contentious in the Working Group. Therefore, if the first paragraph of draft article 60 is retained, it is recommended that the third paragraph should also be retained.

Draft article 61

9. Draft article 61 is partly an applicable law provision and partly a provision that provides for substantive rules. In the first reading in the Working Group, the provision raised so many concerns that it was decided to place the whole article between brackets. From the Swiss report, it appears that the new draft as revised by the Secretariat in A/CN.9/WP.III/WP.56, was regarded as much clearer. Nevertheless, fundamental questions remain. Is an applicable law provision appropriate in a substantive law convention? Is there a need for a provision on transfer of rights other than under a negotiable document, in particular when the matter of transfer of liabilities will not be dealt with in the draft convention? Furthermore, in this respect, it must be noted that the transfer of the most important right under a contract of carriage, the right of control (including its notification to the carrier) is already dealt with specifically in Chapter 11. In conclusion, it may be better to leave article 61 out of the convention and to deal with its content, to the extent desirable, in a model law.

10. To summarise, it is proposed:

- to delete draft article 60, paragraph 2, and draft article 61<sup>8</sup> from the convention, and
- to retain draft article 59 and article 60, paragraphs 1 and 3 in the draft convention.

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<sup>8</sup> Because within the European Union, the EU Commission is competent with respect of the subject of conflict of law in matters of contract, informal consultation took place with the Commission services on this part of the proposal. They gave a clear indication of support for the deletion of draft article 61 from the convention.