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

Transfer of Rights: Information presented by the Swiss delegation

Note by the Secretariat

During the fifteenth session of Working Group III (Transport Law), which took place in New York from 18 to 28 April 2005, the Working Group considered generally the issue of transfer of rights pursuant to the draft instrument on the carriage of goods [wholly or partly] [by sea]. The Swiss delegation has submitted the paper attached hereto as annex I in order to facilitate consideration of the topic of transfer of rights by compiling the views expressed by various delegations during informal consultations into a single document for discussion by the Working Group. The following delegations provided comments which are reflected in the annex: Italy, Japan, the Netherlands, Norway, Republic of Korea, Spain, the United States of America, the International Chamber of Shipping (ICS), the Baltic and International Maritime Council (BIMCO) and the International Group of Protection and Indemnity Clubs (P&I Clubs).

The paper in annex I is reproduced in the form in which it was received by the Secretariat.

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Annex I

Paper on chapter 12: Transfer of Rights

General remarks

1. Based on informal consultation with other delegations, the Swiss delegation has collected some ideas and views and formulated some principles, which might serve as a basis for further discussions in the Working Group III at its Vienna Session in November/December 2005.

2. Chapter 12 of the draft instrument (chapter 12 of A/CN.9/WG.III/WP.32) is dealing with the essence if not core of the project. Its relevance derives from the fact that the new instrument aims since its inception at clarifying and harmonising the issues relating to transfer of rights and to a certain degree the transfer of some obligations from the contractual shipper to third parties under the contract of carriage. The prime focus is, of course, on the bill of lading, which for centuries has functioned on the basis of national law and custom as the tool to transfer rights in the cargo to third parties involved in the transaction. Particularly in the context of electronic commerce it has become urgent to clarify and to harmonise the rules relating to such transfers. Therefore, this chapter will have to meet the high expectations of the commercial world engaged in modern trade and transportation.

3. The provisions dealing with transfer of rights were initially incorporated in article 12 of document A/CN.9/WG.III/WP.21 and have been discussed for the first time by the Working Group during the New York Session of 24 March to 4 April 2003 (see the report in A/CN.9/526). As a result, the UNCITRAL Secretariat has amended the provisions of A/CN.9/WG.III/WP.21 and thereby reflected the discussion on those provisions. A/CN.9/WG.III/WP.32 is, therefore, the current basis for discussion. During the New York Session of 18 to 28 April 2005, the issue of transfer of rights had received only a very limited review, but it was decided that all further discussions of this chapter should be based on a revised draft of article 61 bis as set out in A/CN.9/WG.III/WP.47 (or any new draft produced by the UNCITRAL Secretariat, prior to the next Working Group Session, now article 63 in A/CN.9/WG.III/WP.56).

4. Based on information obtained, it is considered that the following issues might be the main points for deliberation for the next session:

5. **Article 61: Documents, that are made out simply to a named party without the words "to order":** Should such a document be treated as a non-negotiable document for all purposes or should some of the functions of the bill of lading survive at least in the relationship between the shipper and the named consignee? Some delegations were of the opinion that at least the major features of a bill of lading (apart from the negotiability) should be maintained. Others held the view that such a document should fall under the category of sea waybills as treated in article 63.

6. **Article 62: General reference to liabilities or closed liability list:** The Working Group will have to try to find a solution on the choice of either a general provision on liabilities or a close list. One option provides flexibility, the other

predictability for third party holders. It should be mentioned here that a majority of the views collected so far preferred the general provision relating to liabilities.

7. **Article 62 (3): Cases where no liabilities are transferred:** Further examination should be made of the specific rights, which should not trigger any transfer of liabilities to the holder, when exercised by such holder.

8. **Article 63 (a) and (b): Choice of law provision:** The Working Group will have to decide on the exact wording of the referral to the applicable law for questions of the transfer of rights. It was decided in New York in 2005 that delegations wish to base their discussions on the new proposal in the format of article 61 bis (A/CN.9/WG.III/WP.47), now article 63 in A/CN.9/WG.III/WP.56.

9. **Article 63 (c)(i) and (ii): Notification:** Some delegates' views request clarification of the notion of "notification", relating both to form and to substance. Others even question that such a requirement of notification is adequate and compatible with the nature of article 63.

Views and principles analysed article by article

Article 61

10. There is general support among the delegations participating in informal consultations for the language and content of article 61 (1) and (2). The consequence of this is that a closed list exists of negotiable transport documents and that, therefore, any document that does not fulfill the form requested by article 61 will be treated as a non-negotiable document.

11. Despite the clarity of this general approach, one may have to reconsider the list once a decision on the "nominative transport document" is taken, for which there seems to be a number of different views with respect to the treatment of documents which are made out to a named person, but where the words "to order" are missing. While one school of thought is that those documents should not be treated as negotiable transport documents at all, but rather merely as non-negotiable transport documents under this instrument (on the same level as sea waybills etc.), another school of thought prefers them to remain "negotiable", despite the lack of the words "to order". A middle position raised by some views proposes that while such a nominative document might lose its "negotiability", it would maintain all other features of a bill of lading in other areas (right of control, function at delivery of the cargo, etc).

12. What seems quite clear from the views collected is that all other forms of "hybrid" bills of lading, such as "not to order" / "non-negotiable" bills of lading, etc. should not be treated here and should fall under the provisions of article 63 of the instrument.

Article 62

13. The views collected show a clear preference for a general provision and that there should not be a closed list in article 62. However, some views suggest that article 62 mentions a list of liabilities, but that this list should be open.

14. Assuming that article 62 will not provide a list, the issue the inclusion of freight, dead freight, demurrage and damages for detention becomes obsolete. In case that an open list is kept in article 62, the Working Group would need to decide whether reference to freight and similar charges should be included in the list, and whether such an inclusion would be appropriate.

15. As currently drafted, the instrument does not address the issue of whether and to what extent and at what stage the third party holder is bound to the terms of the contract of carriage. This is quite an important issue in practice and has also a close connection to the questions of the effects of jurisdiction clauses and arbitration clauses on third parties.

16. However, the general views received so far show that despite the fact that such a provision might be quite useful in practice, it would overburden the instrument if such an issue were to be incorporated. Suggestions were made that this issue might be submitted to international organisations, in particular the Comité Maritime International (CMI), with the aim to receive their views on how such issues could be further harmonized independent from the current exercise of drafting the instrument.

17. Depending on the respective choice of either a list of liabilities or an open liability provision, the views received are equally divided on the issue of liability for damages caused by cargo. Those who supported a provision without a list are of the view that it would be beneficial to clarify the position of the holder relating to damages caused by cargo. Obviously, for those delegations which prefer the closed list in article 62, such a clarification would become obsolete since, as such a liability would not be listed, the provision would sufficiently clarify that the holder would not be liable for such damages.

18. To make things clear, the question does not address the possibilities of tort claims relating to damages caused by cargo, as those would not fall under the scope of the instrument. What could, however, be an issue is the scope of the contractual liabilities of the shippers / holder for damages caused to the carrier by the cargo either directly (ship) or indirectly (recourse for cargo claims for other (innocent) cargo).

19. There seems to be general support for the position that the transfer of liabilities does not mean that the contractual shipper and prior holders are relieved from all responsibilities. Apart from this general view, some delegations have mentioned that they would not like to see any clarification of that issue in the instrument and prefer to leave all relative issues to national law.

20. General support is ascertainable for article 62 (3) of the instrument. However, some views made clear that they would like to elaborate more on that issue. In particular, they think that a list might not be sufficiently clear and that, indeed, further examples must be considered where it would not be justified to trigger liability of the holder when exercising those "rights".

21. It was generally observed that article 62 (2) needs further consideration. What seems undisputed is the fact that any new exercise of a "right", which should fall under article 62 (2) and, thereby, not trigger responsibility as provided for by article 62 (2) must be of "administrative" nature and may only relate to "non-substantial matters". The list of article 62 (3) must, furthermore, be exhaustive.

Article 63

22. There is unanimous support among the views received for basing all further discussions on the issues of both articles 61 and 62 on the revised text in form of article 61 bis (A/CN.9/WG.III/WP.47), now article 63 (A/CN.9/WG.III/WP.56). This view was, again, clearly established during the last New York Session in April 2005.

23. One view suggests that article 63 (a) should, in its last sentence, read “determined” or “asserted according to”, instead of “governed by”.

24. General support among the views received is given to the fact that the requirement of a notification is adequate and this should be maintained since such a notification is essential (article 63 (c)(i) and (ii)). Some delegations suggest that the form of such a notification should also be regulated in more detail. Another point relates to the question whether notification is only necessary if the applicable law so requests it, or whether notification should be made regardless of the applicable law. Such view stresses that by providing a notification regardless of the requirements set out in the applicable law, the instrument provides a minimum protection to the carrier, which should not be subject to any other (weaker) requirements provided by national law. Despite this general view expressed in the different replies received, one must note that some delegations think that a notification (as a matter of substantive law) is in contrast and conflict with the general principle of article 63 being only a choice of law and not a substantive law provision.

25. Relating to the wording of the choice of law provision contained in article 63 (a), concern is raised in the views received that the provision is not clear enough and, therefore, the text will require clarification.

26. One view even raises the general question whether a choice of law rule is adequate in the instrument, as the unification of the choice of law is not the purpose of our instrument and that the harmonization of substantive laws should be the only main focus.

27. It seems to be clear that there should be joint and severable liability, for the transferor and transferee (article 63 (c)(iii)). If the carrier so decides and accordingly agrees that the transferor could be released from its liability such a release should be feasible and effective. More by way of clarification, it was mentioned that a release by the carrier should not affect the liability of the transferee or the transferee’s right of recourse against the transferor under the underlying agreement. A further clarification makes reference to the fact that article 63 (c)(iii) only refers to liabilities that are “connected to” the transfer of rights.

28. Most views found that for the question of transferring liabilities to third parties, such as holders, reference to the applicable law was also adequate in cases where non-negotiable transport documents are issued. However, it was mentioned that this issue should be examined more closely.

29. In the line with the views expressed in relation to article 62, views are also divided as to the necessity and advisability of a provision relating to the transfer of the binding effect of a contract to a third party. A majority of the views received, at least, seems to regard such a provision and clarification as unnecessary in the context of this instrument.