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

Proposal by the Netherlands on bills of lading consigned to a named person

Note by the Secretariat

In preparation for the seventeenth session of Working Group III (Transport Law), the Government of the Netherlands submitted the text of a proposal for the inclusion of provisions on bills of lading consigned to a named person in the draft convention on the carriage of goods [wholly or partly][by sea] for consideration by the Working Group. The text of that proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat.

Annex

Proposal by the Netherlands on bills of lading consigned to a named person

I. Introduction

1. In the draft convention on the carriage of goods [wholly or partly][by sea], reference is made to negotiable transport documents and non-negotiable transport documents (and, of course, to their electronic variants). In A/CN.9/WG.III/WP.56, these two types of documents are defined in draft articles 1(o) and (p). Subsequently, the draft convention develops rules relating to each type of document.
2. However, in practice a transport document is also used, the legal effect of which is in many jurisdictions somewhere *between* that of a negotiable and a non-negotiable transport document: the bill of lading consigned to a named person¹. This document may be referred to by different names, such as 'straight bill of lading', 'nominative bill of lading', 'recta bill of lading', etc.²
3. The law governing bills of lading consigned to a named person is far from uniform. Must the consignee present this document to the carrier in order to obtain delivery of the goods at the place of their destination? Is this document a document of title? Are its contents conclusive evidence towards the consignee? Does this document embody rights towards the carrier? In case of transfer of rights from the shipper to the consignee, which method may or must be used?
4. These types of questions are answered differently in various jurisdictions. There may be different views within the same jurisdiction. Although the bill of lading consigned to a named person has long been in use, the uncertainty of law relating to this document still causes litigation in several jurisdictions. Further, the case law resulting from such litigation is not always of assistance to achieve uniformity.
5. It may be argued that the new provisions in the draft convention make the bill of lading consigned to a named person superfluous. All of its commercial functions, arguably, can be performed under the new provisions (such as those on delivery, right of control and transfer of rights) by either an ordinary non-negotiable transport document (such as a sea waybill), or an ordinary negotiable transport document (such as an order bill of lading) endorsed by the shipper to a named person.
6. It may, however, not be expected that the average user of a bill of lading consigned to a named person will make an explicit choice for either of these alternatives. Once the draft convention has entered into force, it is more probable that

¹ Most jurisdictions regard this document as a special type of *non-negotiable* transport document. There are, however, also jurisdictions that consider the bill of lading consigned to a named person as a special type of *negotiable* transport document.

² Because these words may have certain legal connotations under national law, this proposal is as neutral as possible and refers to this type of transport document as a 'bill of lading consigned to a named person'.

shippers that are accustomed to requesting carriers to issue a bill of lading and to consign it to a named person, will continue doing so. As a consequence, the use of this transport document would in future become subject to the rules applying to non-negotiable transport documents generally³, which may not be the intention of the parties. Of course, they may contractually deviate from the rules⁴ in the draft convention and adjust their document to their specific commercial needs. But, would this occur in the ordinary course of business? In light of the present lack of uniformity of the law relating to bills of lading consigned to a named person, these doubts are justified. If these assumptions are right, the eventual result might be that the new convention would increase the uncertainty of law in respect of the use of bills of lading consigned to a named person instead of diminishing such uncertainty.

7. It is clear that such a result must be avoided: it is the aim of any trade law convention to provide for uniformity and certainty of law where possible and achievable. Therefore, in the view of the Netherlands' delegation, it is desirable that the draft convention should treat bills of lading consigned to a named person as a separate category of documents and should try, in the interests of uniformity and certainty of law, to provide for some rules relating to this type of transport document.

8. Following this line of thinking, the legal areas that, in our view, deserve attention when discussing possible rules on bills of lading consigned to a named person are:

- (a) delivery of the goods to the named consignee,
- (b) allocation of the right of control and its transfer,
- (c) evidentiary effect of the document and
- (d) transfer of rights.

II. Specific proposals

9. Before addressing these legal areas, however, attention must be paid to a proper definition of the bill of lading consigned to a named person. The draft convention does not give much assistance, since it makes no reference to bills of lading at all. Under national law, the bill of lading is also often left undefined. The draft instrument, however, defines in article 1(o) "negotiable transport document" as a document indicating that the goods have been consigned to order or to bearer. It follows that a document indicating that the goods have been consigned to a named person belongs *within the scope of the draft instrument* to the category of non-negotiable documents.

10. Further, under transport law, a key function of the bill of lading is that it legitimates a person who either is indicated in the document by name (either directly named or named as endorsee), or has become the bearer of the document (when the document is consigned to bearer directly or is endorsed in blank) as the person who is entitled to exercise any right under the contract of carriage evidenced by the document. This legitimating function carries with it the requirement that the document must be shown or surrendered to the carrier when the possessor of the document wants to exercise that right. Therefore, the presentation rule seems a second and key element of the definition of the bill of lading consigned to a named person.

³ See paragraph 9 hereunder.

⁴ It is assumed that the provisions relating to the legal effect of transport documents will not be of a mandatory nature.

11. A sea waybill is also a non-negotiable document that normally is consigned to a named person. In order to distinguish the bill of lading consigned to a named person from such sea waybill, and fully in line with its legitimating function, the definition should, thirdly, include that the presentation rule must be stated in the document itself.

12. For the reasons outlined above, in the proposals hereunder the bill of lading consigned to a named person is described as:

“a non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods.”

13. It follows that, if a transport document is made out to a named person and the presentation rule is not in some form or another stated in such document, all the provisions under the draft convention for non-negotiable transport documents apply to such document, even if such document is called a ‘bill of lading’.^{5 6}

14. When the bill of lading consigned to a named person is described as suggested in the previous paragraph, the provisions on delivery in draft articles 48 and 49 are no longer appropriate for this type of document. Therefore, hereunder follows a proposal for a new draft article 48 bis that should apply to the bill of lading consigned to a named person. This new article combines those elements from draft articles 48 and 49 that, in our view, are relevant to the use of this type of document.

15. New draft article 48 bis. “Delivery when non-negotiable transport document that requires surrender is issued”

When a non-negotiable transport document has been issued that indicates that it must be surrendered in order to obtain delivery of the goods, the following paragraphs apply:

(a) The carrier must deliver the goods at the time and location referred to in article 11(4) to the consignee upon surrender of the non-negotiable document and production of proper identification by the consignee. The carrier may refuse delivery if any of these two requirements are not met. In the event that more than one original of the non-negotiable document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity.

⁵ It is believed that the requirement that the presentation rule must be indicated in the document follows the current practice. When a carrier is requested by the shipper to consign the bill of lading to a named person, a carrier will use its standard bill of lading form. In the absence of a legally uniform definition of the bill of lading, these standard forms, almost without exception, include contractually the presentation rule because the legitimating function of the document is a key element for the relation between the carrier and the cargo-interested party. Over the past few years, most of the banks have also become proponents of on the inclusion of the presentation rule in bills of lading.

⁶ It is realised that this description may include transport documents that are receipts only. In our view, this is not objectionable. If a receipt includes a presentation rule, it is given such a status that, if needed, the proposed provisions can be applied, *mutatis mutandis*, to such receipts as well.

(b) If the consignee does not claim delivery of the goods from the carrier after their arrival at the place of destination or the carrier refuses delivery because the consignee is unable to produce proper identification or does not surrender the document, the carrier must so advise the shipper. In such event, the shipper must give instructions in respect of delivery of the goods. If the carrier, after reasonable effort, is unable to identify and find the shipper, then the person referred to in article 34 is deemed to be the shipper for the purpose of this paragraph. The carrier that delivers the goods upon instruction of the shipper under this paragraph is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the non-negotiable transport document has been surrendered to it.

16. The corresponding provision for the electronic version of the document may then become:

New draft article 48 ter. "Delivery when non-negotiable electronic transport record that requires surrender is issued"

When a non-negotiable electronic transport record has been issued that indicates that it must be surrendered in order to obtain delivery of the goods, the following paragraphs apply:

(a) The carrier must deliver the goods at the time and location referred to in article 11(4) to the person named in the electronic record as the consignee and that has exclusive control of the electronic record. Upon such delivery the electronic record ceases to have any effect or validity. The carrier may refuse delivery if the person claiming to be the consignee is unable to produce proper identification and to demonstrate in accordance with the procedures referred to in article 6⁷ that it has exclusive control of the electronic record.

(b) If the consignee does not claim delivery of the goods from the carrier after their arrival at the place of destination or the carrier refuses delivery in accordance with paragraph (a), the carrier must so advise the shipper. In such event, the shipper must give instructions in respect of delivery of the goods. If the carrier, after reasonable effort, is unable to identify and find the shipper, then the person referred to in article 34 is deemed to be the shipper for the purpose of this paragraph. The carrier that delivers the goods upon instruction of the shipper under this paragraph, is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the person to whom the goods are delivered is able to demonstrate in accordance with the procedures referred to in article 6 that it has exclusive control of the electronic record.

17. As to the right of control, draft article 56 of the draft convention provides that in case of a non-negotiable transport document this right may be transferred to any third party, including the (initial) consignee. This way, banks may become in control of the goods. In respect of the bill of lading consigned to a named person, however, the

⁷ Draft article 6 has to be amended so as to reflect the proper procedures for the use of a non-negotiable electronic record that indicates that it must be surrendered in order to obtain delivery of the goods.

presentation rule carries with it the requirement that any transfer of the right of control can only take place between the shipper and the consignee named in the document. A bank that is in possession of a bill of lading consigned to a named person (other than the bank itself) cannot, positively, exercise a right of control. It has only, negatively, the power to prevent anyone else from exercising the right of control during the carriage of the goods. A further consequence of the presentation rule is that the transfer of the right of control and the transfer of the document must take place simultaneously.

18. Based on the above, it is proposed that a new paragraph is added to draft article 56. This new paragraph combines those elements from the other paragraphs of draft article 56 that, in our view, are relevant to the use of bills of lading consigned to a named person.

19. New paragraph to article 56

When a non-negotiable transport document or a non-negotiable electronic transport record has been issued that indicates that it must be surrendered in order to obtain delivery of the goods, the following rules apply:

(a) The shipper is the controlling party. Upon transfer of the document, or upon transfer of the electronic record in accordance with the procedures referred to in article 6 to the named consignee, that person becomes the controlling party and the shipper loses its right of control. If more than one original of the document was issued, all originals must be transferred in order to effect a transfer of the right of control.

(b) In order to exercise its right of control, the controlling party must produce proper identification and, if the carrier so requires, must produce the non-negotiable document to the carrier, or in case of an electronic record must demonstrate in accordance with the procedures referred to in article 6, that it has exclusive control of the electronic record. If more than one original of the document was issued all originals shall be produced, failing which the right of control cannot be exercised.

(c) Any instruction referred to in article 54(c) given by the controlling party, upon becoming effective in accordance with article 57, must be stated on the non-negotiable document or in the non-negotiable electronic record.

20. As to the evidentiary effect of the bill of lading consigned to a named person that is in the hands of this person, the choice is between:

- (i) following the ordinary rule for non-negotiable transport documents: the document is prima facie evidence in accordance with article 43(a), or
- (ii) emphasizing the additional security that the bill of lading consigned to a named person gives this person and to provide it with the additional benefit of the document becoming conclusive evidence towards the carrier.

In this paper no specific choice is made as between these alternatives. The next paragraph includes only suggestions with regard to drafting.

21. If the choice is made for option (i) in the paragraph above, no new text is needed because this option is already covered under article 43(a). If, however, the choice is made for option (ii), new text is needed that either may be Variant C of article 43 (b)(ii) or may become an addition to this provision as article 43(b)(iii). Such new text may read as follows:

New paragraph of article 43 (b) that either replaces the Variants of (b) (ii) or is added as a new (b) (iii)

“if a non-negotiable transport document or a non-negotiable electronic transport record that indicates that it must be surrendered in order to obtain delivery of the goods has been issued, if such document or record has been transferred to the consignee acting in good faith.”

22. As to transfer of rights under a bill of lading consigned to a named person, the main question is whether this document embodies rights or not. Normally, a non-negotiable document does not. In several jurisdictions, however, the bill of lading consigned to a named person is regarded as a document of title. A general rule on documents of title is that the document itself embodies the rights that the holder of the document is able to exercise. A related matter is the question of what method to use to transfer rights under a bill of lading consigned to a named person. These kind of issues have a highly doctrinarian character, about which, sometimes even within the same jurisdiction, differences of opinion exist. In addition, the matter of whether a certain transport document is a document of title, is left outside the scope of the draft convention. Therefore, we recommend that the issue of transfer of rights under a bill of lading consigned to a named person is left to national law. Which law applies in such case is determined in article 63 that, pursuant of its chapeau, also applies to bills of lading consigned to a named person, as described in the proposals in this paper.