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TRANSFER OF RIGHTS AND TRANSPORT DOCUMENTS

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- Transportation law would be very simple and straightforward if the law only had to respect the needs inherent to a contract of carriage: All the legislator would have to regulate would be the rights and duties of both contractual parties, the carrier and the shipper. The main content of the contract would be (1.) for the shipper to hand over the goods to the carrier, (2.) for the carrier to then transport the goods safely to destination and (3.) from there to hand them back to the shipper. The transport document would – if at all needed – be a receipt and proof of a contract of carriage for the sole purposes of proof for both, the shipper and the carrier, should a disagreement arise in course of their dealings.
- Transportation – and indeed transportation law – is not, and never was, that simple. The reason for this lies in the almost pleonastic economic function of transportation, namely that it very rarely serves a self-fulfilling purpose but, instead, only mirrors the logistical necessities deriving from any international sales / trade contract in which goods are sold and bought with the view to be shipped from one place to another. The *raison d'être* of the transportation is the sales contract and the necessity under this sales contract to move the goods from the seller's sphere into the sphere of the buyer. Traditionally the sales law (e.g. UNCITRAL's CISG) and the contractual terms, in particular the trade terms (INCOTERMS 2000), will determine which of the parties to the sales contract (seller or buyer) will have to organize and pay for transportation.
- Delivery in the sales contract under the F– or C- Clauses of INCOTERMS 2000 (FAS, FCA, FOB, CFR, CIF, CPT, CIP) is made when the goods are handed over to the carrier / ship. As a consequence, the transport document established in the transportation contract is, in most trade transactions, the proof of performance of the sales contract in question. Therefore, such a transport document – for purposes apart from actual transportation – will have to provide sufficient indications as to the date of the handing over of the goods, the quantity and the quality of the goods and possibly also other points which the buyer will have to be able to verify prior to the payment of the purchase price (e.g. whether or not the freight is to be pre-paid). Looking at the reliance on the facts as stated in the transport document one must realize that this reliance is not the one of the contracting party (contracting shipper) but of the *bona fide* third party buyer / consignee. In the context of a customary trade finance scheme (letter of credit) this reliance of the buyer / consignee is – as a rule - shared by his L/C bank which needs to be able to rely on those facts and figures for its finance agreements and for the security interests such a delivery to the carrier may provide.
- This reliance aspect and the interdependence of carriage and sales contracts underline the fact that the law of carriage of goods by sea has to satisfy many more aspects than just transportation issues between carrier and shipper. As third parties take substantial risks in their trade and trade finance agreements, they need to be able to rely on the statements and contents of the transport document.

- In a normal trade context it is not the shipper who requests delivery of the goods at destination, but a third party (consignee). Therefore, the transportation law must provide for the right to request delivery to that third party. This means that the law of contract of carriage must transfer in one way or another rights from the shipper to the consignee.

- Where the national law recognizes the concept of a contract to the benefit of a third party (e.g. in civil law), the basis for such a transfer of the right is feasible. It is more complicated for national laws that do not accept such a concept.

- As the transfer of these rights must be done at very precise moments in time (e.g. once payment for the goods has been made) the law of contract of carriage must define the circumstances under which the rights are indeed transferred to the consignee.

- String sales are very common, in particular in the commodity trade. This obviously complicates matters as a single and unique transportation contract for the same goods (entered into by the first CIF seller) will serve a number of subsequent sales contracts between a great number of subsequent sellers and buyers. The consignees (buyers under each subsequent sales contracts) and the ultimate receiver will be identified long after the contract of carriage has been entered into and all rights vested in the contract of carriage and possibly in the transport document must also be transferred to any new "consignee".

- Things are made even more complicated by the fact that the shipper needs to keep control over the goods vis-à-vis the carrier while they are in transit. He needs to be able to instruct the carrier or give him specific orders or renegotiate new terms under the contract of carriage. This is not only necessary for issues relating purely to carriage and logistics but, more importantly, as a tool to control the goods before the shipper (in his function as seller) has obtained payment from the buyer. Sales law, and in particular CISG Article 71, provides for such a right of stoppage in transit. The law of contract of carriage must, in turn, provide an equivalent right to enable the seller to enforce his right under his sales contract by using mirroring rights as vis-à-vis the carrier.

- In this context the transport document receives a crucial function. It traditionally embodies the function of the **contract of carriage** (based on which transportation to destination and delivery to the consignee is made), as well as the function of a **receipt** relating to the quality and / or the quantity of the goods. In a maritime context, these functions were secured by issuing a bill of lading, a transport document which, in addition, had the function of a **document of title**. While the first two functions were sufficiently codified on a harmonized level (Hague Rules 1924; Hague–Visby Rules 1968, Hamburg Rules 1978), the crucial aspect of its role in enabling the transfer of rights from the shipper to any third party (consignee, holder of the B/L) was left up to national law.

- Furthermore, parties involved in special trades and, in particular, in in-house transactions forming part of deliveries within multinational production systems, needed an informal transport document, a simple receipt, in the form of a sea-waybill. This alternative to the traditional Bill of Lading became very popular; apart from a set of Uniform Rules for sea-waybills prepared by the Comité Maritime International (CMI), however, no harmonized regime existed in favor of commerce and trade to provide harmonized and legally enforceable rules for such documents.

- Both alternatives – bills of lading and sea-waybills - are nowadays "translated" into electronic formats of different kind. In addition to the generally applicable rules on electronic commerce, these new electronic trading methods require much broader regulation in the scope of transportation, since these electronic equivalents are not just bilateral messages, but will be relied on by third parties; in cases of negotiable "documents", all the rights vested in the "holdership" of the original message will have to be legally transferred from one party to the other in the course of the performance of their trade and sales contract.

2. Transport Documents and Transfer of Rights in the new Draft Convention

From all[1] of this, it follows that following issues must be put on the agenda for a new international regime for the contract of carriage (in particular by sea):

- The Convention must regulate the entire contract of carriage and cannot just regulate – as the older (or, to be more precise the existing)[2] Conventions do – selected liability issues relating to typical transport documents.
- The provisions of the new Convention must differentiate between three **groups of "transport documents**"[3]
    1. traditional negotiable transport documents (bills of lading)
    2. contracts of carriage which are not specially documented or for which simple sea-waybills are issued;
    3. contracts of carriage which are not "documented" but are issued by electronic means[4], either to provide the equivalent of a negotiable document or simply to provide an electronic evidence of the contract of carriage.

- As the contract of carriage by sea has long gone ashore, the documents must cover the entire period of transportation and custody by the contractual carrier (door-to-door) irrespective of which ever mode of transport is used to move the goods. Today, the legal status of multimodal bills of loading is not entirely clear. Clarity on this is important and needs to be provided by the new instrument.
- In addition to this list of transport documents, the new Convention needs to deal with other typical transport arrangements, including the traditional **charter party**[5] and the more modern form of a general umbrella agreement for shipment, the so-called **volume contracts**[6] (e.g. Ocean Liner Service Agreements, **OLSA**). This special treatment is important, to allow sufficient room for the well established practice of special shipment arrangements which are explicitly negotiated in and for specific markets.
- The new Convention must define the scope and the extent of the **evidentiary value**[7] of any entry relating (a) to the description of the goods (identity, quality and quantity) and (b) to any other important fact or agreement (e.g. freight pre-paid[8]) also for the benefit of the subsequent holder of such a document. The criteria and the standards are – of course – very different for each of the types of transport documents[9].
- A definition of the **right to control**[10] relating to the goods while in transit must clarify the rights and obligations of both cargo interests and carriers and then must clearly state in what circumstances such a right of control is transferred from the shipper to the next party, and then to the controlling party, who from then on will be the only party to give instructions to the carrier or to otherwise control the goods in transit. It is clear that the applicable principles will differ depending on the format of transport document which was issued and chosen in a particular shipment.

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1 A/CN.9/WG.III/WP81.

2 Article 1 para. 17 UNCITRAL Draft Convention.

3 Article 1 para. 16 UNCITRAL Draft Convention; see also Chapter 9; Articles 36 – 43 UNCITRAL. Draft Convention.

4 Article 1 para. 19 UNCITRAL Draft Convention see also Articles 8 – 10 UNCITRAL Draft Convention.

5 Article 6 para. 1 subparagraph (a) UNCITRAL Draft Convention.

6 Article 1 para. 2 UNCITRAL Draft Convention. See further Article 89 UNCITRAL Draft Convention.

7 Article 42 UNCITRAL Draft Convention.

8 Article 43 UNCITRAL Draft Convention.

9 Article 42 UNCITRAL Draft Convention.

10 Article 52 – 58 UNCITRAL Draft Convention.

- The new Convention must also regulate how and in what circumstances the **rights** vested in one party (shipper, subsequent holder) are then **transferred** to the next party and eventually to the final receiver/consignee. Again, the mechanism for such a transfer will depend on the format of the transport document[11].
- Finally, the new rules will have to cover the role of such a transport document (if needed) in order for the consignee to have the right to **request the delivery** of the goods at destination. It is clear that – due to the role given to the negotiable transport document (or its electronic equivalent) for the benefit of international trade – the bill of lading will be crucial for the exercise of such a right to request delivery – while, in cases where sea-waybills are used, the document will practically have no impact for this final phase of the transaction[12].

3. Where do we stand? What needs to be done?

I have often made reference to the new UNCITRAL Draft Convention. I do not intend, nor would I have sufficient time, to describe and discuss the individual provisions that have come out of the very interesting process of harmonization within Working Group III of UNCITRAL. Let me give you, instead, my personal thoughts on the situation in light of the desire and need for the right balance of international harmonization and national interests to regulate matters on a national level. In doing so I will, of course, restrict my comments to the scope of my speech: transport documents and transfer of rights.

- Historically, the international community has not been that interested in these issues, as for more than a century now the discussion has been focused on the liability regime under bills of lading. This historical focus shifts the focus even today to those issues and indeed – in an extent that is hardly explainable by economical needs. This has an influence primarily on issues like liability standards and levels and freedom of contract, but also has some effects on the issues of transport documents and the transfer of rights.
- One tendency noticed within Working Group III is to opt for an automatical transfer all the benefits which were traditionally given to a third party holder of a bill of lading also to a third party receiver of goods which are transported under simple sea-waybills or even on the basis of even just receipts. Those benefits are not limited to the value of the documents but to a number of other issues. Here my position is, that only those parties in a trade transaction should be able to rely on a given information or document, if the document was drawn up in a form justifying such a reliance. In my view such reliance is justified only when bills of lading are issued and circulated to third parties.
- Another tendency noticed within WG III which is explained by the limits of the stamina of the international community in a harmonization process is that all issues which fall outside the historic focus (i.e. liability) are put in danger. They are put in brackets and are then brought to execution in the phase of the last reading of the instrument. While the starting point of the entire exercise was the harmonization of the mechanism of transfer and control of rights in all variants of modern transport documentation, the pivotal point of the new Draft Instrument, very much like the Hague 1924 / 1968 and Hamburg Rules 1978, has remained the liability system. My opinion – while accepting the need to provide a modern liability system – is that the issues of rights of all parties and the exercises and transfer of such rights remain the real added value in terms of harmonization and that they need to remain in the Draft Convention.
- One often hears the argument that the time needed for harmonizing these new areas has not been available and the time for promulgating a new liability regime is pressing. Now, looking at the page-count of the reports of WG III one can easily see that the balance on a time-spent basis per issue is clearly in favor of the historic liability issues. This is not a criticism of the work, not at all. It is clear that this highly sensitive, if not political issue of liability absorbs much energy - well spent energy; but to sacrifice areas of added value would be sad.

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11 Articles 59 – 61 UNCITRAL Draft Convention.
12 Articles 46 – 49 UNCITRAL Draft Convention.

- The other argument often heard in the process of harmonization exercises is: *"this issue is too sensitive; it needs to be left to the applicable law* (whatever that means), *to the national law."* Many provisions of the new Draft Instrument in the current version do exactly this. Often, such reference to national law is provided as a substitution for a specific substantive provision. Again, this is not a criticism of the way the WG III has decided to deal with the issues. It is an example of how issues are withdrawn from the harmonization agenda. Every one of the highly successful International Conventions has a long list of such "deletions" or "referrals". It is, therefore, a fact of life. It is important, however, that one remembers the items on this list, that one mentally puts them on a silent agenda and that other opportunities are created where such issues can be harmonized further in the future. The different instruments of UNCITRAL in the context of Arbitration can, to a certain extent, be seen as an example for such a step-by-step, multi-instrument approach.
- Having said that, it is interesting to see that the degree of harmonization (and the degree of specification) is much higher for traditional negotiable instruments such as the bill of lading. And this is a good thing, as it is the bill of lading (and its electronic equivalent) that will be and will remain for a long time the backbone of international trade and trade finance.
- For the remaining contracts, where no bills of lading were issued, the new Convention is less specific and leaves much to national law. Trade and commerce might claim one day the same degree of specification and request yet a further harmonization in whatever form.
- The challenge for the international community will be that those issues which were left to national law are not always controllable by contract as they will depend on national laws covering areas like third-party rights, possession, securities, title to sue etc. etc.
- But, first things first! We need first to bring safely the new Convention to water; in a seaworthy condition, fit to withstand the rough waters of the real test; the commercial reality!

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