

## CMI INITIATIVE ON TRANSPORT LAW

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*1. Introduction. – 2. Scope of application. – 3. Door-to-door transport. – 4. Contracting carrier and performing party. – 5. Through carriage. – 6. Obligations of the carrier. – 7. Liability of the carrier. – 8. Liability for delay. – 9. Liability of performing parties. – 10. Deck cargo. – 11. Limits of liability and loss of the right to limit. – 12. Obligations of the shipper. – 13. Transport documents. – 14. Freight. – 15. Delivery to the consignee. – 16. Right of control. – 17. Transfer of right when a “negotiable” transport document is issued.*

### **1. Introduction**

When the revision of the 1924 Bill of Lading Convention (the Hague Rules) was discussed by the CMI Conference held in Stockholm in 1963 certain suggestions which would have ensured a more significant updating of the Rules did not meet with sufficient support. They included the extension of the scope of application to all cases where the port of discharge of the goods is in a contracting State and the extension of the period of application from the time when the goods are taken in charge by the carrier to the time when they are delivered to the consignee in the port of destination.

The changes brought about five years later by the Protocol of 1968 were, therefore, insufficient to bring the Rules up-to-date. This, also, because the “container revolution” had meanwhile started.

At about the same time both UNCTAD and UNCITRAL, acting under the pressure of developing countries, placed international shipping legislation on their agenda constituting special working groups for the purpose, inter alia, to revise the international legislation on the liability of the carrier of goods by sea. The result of such initiative was the approval, ten years later, of the Hamburg Rules.

Even if they did not achieve a wide success, the Hamburg Rules disrupted the process of unification and prevented a wide approval of the two Protocols of 1968 and 1979 to the 1924 Bill of Lading Convention.

For this reason in 1988 the CMI decided that the problem of uniformity of the law of carriage of goods by sea should again be investigated. Such investigation, which took the form of a critical review of the Hague-Visby Rules, was completed in 1990, when a Report of Uniformity of the Law of the Carriage of Goods by Sea in the Nineteen Nineties was submitted to the CMI Conference held in Paris and was approved by the Conference as a basis for further work. The hope was expressed that the International Organizations concerned would continue to cooperate with the CMI.

At the subsequent CMI Conference held in 1994 in Sydney the CMI Executive Council confirmed a previous decision to further explore the possibility of ensuring

greater uniformity in the liability regime of the carrier of goods by sea and an International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea (the “Uniformity I-SC”) was established. At the end of five sessions, held between 1995 and 1998, a conclusive report was prepared on the 22 issues selected by the Uniformity I-SC<sup>1</sup>:

That hope materialized after the Assembly of UNCITRAL had decided, at its 29<sup>th</sup> Session in December 1996, to include in its work programme a review of current practices and laws in the area of international carriage of goods by sea “with a view to establishing the need for uniform rules in the areas where no such rules existed”. It was decided in fact that the UNCITRAL Secretariat should gather information, ideas and opinions as to the problems that arose in practice and possible solutions to those problems, involving in such research international organizations, such as the CMI.

After some exploratory contacts, the CMI Executive Council set up a Steering Committee to consider the project. Following the report issued by the Steering Committee an International Working Group was constituted under the chairmanship of Stuart Beare. The Working Group studied the issues outlined in the Steering Committee’s report and drew up a Questionnaire which was sent to all National Associations.

Based on the responses received the Working Group prepared a list of six principal issues which it recommended should be the subject of debate within the International Sub-Committee which had meanwhile been constituted.<sup>2</sup>

The liability regime, which had been the subject of the work undertaken by the Uniformity I-SC, had not been included in such list since no reference to it had expressly been made in the Report of the 29<sup>th</sup> Session of UNCITRAL.

It was therefore decided that issues of liability would be re-introduced into the overall work of the Sub-Committee at a later stage.

A draft Outline Instrument, including alternative provisions on liability, was prepared in the course of four meetings of the CMI Sub-Committee held during 2000 and was then submitted to the CMI Conference held in Singapore from 12 to 16 February 2001.

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<sup>1</sup> The issues covered by the Report were the following: 1. Definitions – 2. Scope of application – 3. Period of application – 4. Identity of the carrier – 5. Liability regime of the carrier – 6. Liability of the performing carrier – 7. The rough carriage – 8. Deviation – 9. Deck cargo – 10. Delay – 11. Limitation of liability – 12. Loss of the right to limit – 13. Transport Documents – 14. Contractual stipulations – 15. Contents and evidentiary value of the transport documents – 16. Duties and liabilities of the shipper – 17. Dangerous cargo – 18. Letters of guarantee – 19. Notice of loss – 20. Time bar – 21. Jurisdiction – 22. Arbitration.

<sup>2</sup> Such issues were the following: 1. Description of the goods in the transport document – 2. Transport documents – 3. Rights of the carrier (freight and deadfreight, demurrage, lien) – 4. Obligations of the shipper, intermediate holder and consignee – 5. Delivery and receipts of the goods at destination – 6. Right of disposal.

Following the decision of the Executive Council that the terms of reference of the Sub-Committee should be extended to considering how the Instrument might regulate carriage by other modes of transport associated with carriage by sea, a paper on that subject, entitled “Door to Door Transport”, was prepared by the Working Group for consideration by the Singapore Conference, together with a report of the CMI E-Commerce Working Group on the Electronic Commerce Implications of the Draft Outline Instrument.

The issues discussed and the provisional conclusions reached by the Committee in charge of Issues of Transport Law at Singapore can be summarized as follows:

- (i) Type of instrument: a clear majority was of the view that it should be a convention and that at least its core provisions should be mandatory.
- (ii) Period of responsibility and door-to-door transport: there was considerable support for extending the period of responsibility to cover inland carriage preceding or subsequent to maritime carriage.
- (iii) Through transport: this type of transport should be permitted, but limits on the carrier’s liberty to contract as agent for the shipper should be set out.
- (iv) Liability: there was overwhelming support for a fault-based regime and most delegates favoured a regime based on the Hague or Hague-Visby Rules, but there was considerable support for eliminating the exemption for errors in the navigation or management of the vessel.
- (v) Liability of performing carrier: there was considerable support for the performing carrier’s liability not being affected by clauses in the transport document unless expressly accepted by him.
- (vi) Delay: while there was wide-spread support for liability for delay when a specific time for delivery has been agreed, the views on such liability when no time for delivery has been agreed were equally divided.
- (vii) Shipper’s responsibilities and liability: there was considerable support for a shipper’s liability being based on fault and for there being no distinction between inherently dangerous and other cargo; there was also general support for the view that the shipper’s liability should not be subject to limitation.
- (viii) Transport documents: there was broad support for addressing issues such as transfer of rights and obligations, right of control, and rights and obligations of the carrier and consignee regarding delivery.
- (ix) Electronic commerce: there was a consensus that the instrument must facilitate and be compatible with electronic commerce and that the provisions covering these aspects should be simple and technology neutral.

On the basis of the report submitted by the Committee the Conference resolved to request the CMI International Sub-Committee to undertake further work and to complete the Outline Instrument and to request the CMI Executive Council to report on the work of the CMI to the UNCITRAL Secretariat.

The aim of the Draft Outline Instrument is very ambitious: to regulate as widely as possible all modern types of carriage of goods in respect of which a sea leg is

involved and to ensure that it may apply also in case the parties to the contract of carriage agree to communicate electronically. But while at present the uniform rules are all – or almost all – of a mandatory nature, this may no more be the case in respect of some of the new areas covered by the Outline Instrument.

I shall discuss in this paper the issues covered by the revised Draft Outline Instrument that appear to be of greater interest.<sup>3</sup>

## 2. *Scope of application*

The provision on the scope of application is in line with that of the Hamburg Rules. The Outline Instrument applies only to international carriage by sea but it will suffice that either the place of receipt or that of delivery is in a contracting State. Reference is now made in article 3.1 of the draft Outline Instrument to the places of receipt and delivery rather than to the places of loading and discharge because the Instrument is intended to apply to door-to-door shipments.

Although in the present draft it is stated that the provisions of the Outline Instrument apply “to all contracts of carriage”, in reality this is not so, for charter parties (or, rather, contracts of carriage evidenced by charter parties) are excluded, except when a negotiable transport document is issued pursuant to a charter party and such document governs the relations between the parties. In the Hague-Visby Rules reference is made to bills of lading or similar documents of title; in the Hamburg Rules reference is only made to bills of lading. “Transport document” is defined in Article 1.7 of the Draft Outline Instrument as a document issued pursuant to the contract of carriage by the carrier or a performing party that either evidences or contains the contract of carriage or evidences the carrier’s or a performing party’s receipt of the goods under the contract of carriage. “Negotiable transport document” is then defined in article 1.8 as a transport document “such as a bill of lading, that states that the goods are to be delivered to order, to bearer, or to order of any person named in the document, and is not prominently marked ‘non negotiable’ or ‘not negotiable’”. These two definitions deserve some attention. Firstly, it is thought that evidencing the receipt of the goods is a fundamental characteristic of all transport documents rather than a characteristic that may or may not exist, as the conjunction “or” seems to imply. Secondly, while the negotiability – or, rather, the transferability<sup>4</sup> – is certainly a characteristic of bills of lading and similar documents (if they exist), it is thought that other characteristics may be relevant, such as the incorporation of the right of possession of the goods and of the right to obtain their delivery. But whatever definition of negotiable transport document is adopted, the question arises whether it is right nowadays to confine the application of the uniform rules where the contract is evidenced by a charter party to cases where a negotiable

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<sup>3</sup> The Revised Draft Outline Instrument consists of the following seventeen chapters: 1. Definitions – 2. E-Commerce – 3. Scope of Application – 4. Period of Responsibility – 5. Obligations of the Carrier – 6. Liability of the Carrier – 7. Obligation of the Shipper – 8. Transport Documents – 9. Freight – 10. Delivery to the Consignee – 11. Right of Control – 12. Transfer of Rights under Negotiable Transport Documents – 13. Right of Suit – 14. Time for Suit – 15. General Average – 16. Other Conventions – 17. Limits of Contractual Freedom.

<sup>4</sup> See comments on *Transport documents*, *infra*, p. 30.

transport document is issued. It is thought in fact that the person named as consignee in a sea waybill deserves the same protection as the holder of a bill of lading. Nor is it entirely correct to state, as a condition for the application of the Outline Instrument, that the document must govern the relations between the carrier and the holder other than the charterer, because this is not the case when the bill of lading incorporates by reference a charter party.

A different problem is that relating to the various types of contracts of affreightment that at present may be evidenced by documents that can loosely be described as charter parties, such as tonnage agreements and slot charters. Perhaps a definition of charter party would be useful.

A different problem is that of adapting these definitions and the provisions on the scope of application to e-commerce. A problem that is still under consideration by the CMI E-commerce Working Group.

### **3. *Door-to-door transport***

The original draft Outline Instrument was confined to carriage by sea because such were the terms of reference. The Sub-Committee was, however, aware that in the world of container transport this was an anachronism and therefore the recommendation was made to the Executive Council to widen the terms of reference and the Executive Council decided accordingly.

The issues that had consequently to be considered were the extent to which multimodal transport should be governed by the Outline Instrument and which liability rules should apply.

As regards the first of such issues, it was decided that what really mattered was to meet the needs of the industry and to provide an instrument that would apply to the ordinary container trade, which involves a leg by sea and a leg by road or rail, from the door of the seller to that of the buyer. Other types of multimodal transport, such as sea-air, are only of a very marginal interest and can be regulated separately.

The extension of the scope of the Outline Instrument to the entire door-to-door transport has been realized by providing that the period of responsibility of the carrier covers the whole of the period from the time when the carrier has received the goods from the shipper until the time until the goods are delivered by the carrier to the consignee, wherever such places are. The requirement that a sea leg be involved results from the definition of contract of carriage as the contract under which a carrier undertakes to carry goods wholly or partly by sea from one place to another.

Notwithstanding such extension of the period of responsibility of the carrier, the parties should be permitted to reduce such period when they agree that certain activities will be performed by the shipper or the consignee. The f.i.o. and f.i.o.s. clauses are classical examples of such restriction of the activities of the carrier. The validity of a

restriction of this kind has been held, under the Hague Rules, by Devlin, J. in *Pyrene Co. Ltd. v. Scindia Steam Navigation Co. Ltd.*<sup>5</sup>; a decision subsequently approved by the House of Lords in *G. H. Renton & Co. Ltd. v. Palmyra Trading Corporation of Panama*<sup>6</sup>.

It has therefore been deemed convenient to incorporate this principle in the Outline Instrument. Article 4.2 provides in fact under (a) that particular activities, such as loading, stowage, discharging or temporary storage of the goods, that are to be performed during the period of responsibility of the carrier may, by agreement between the parties, be carried out by or on behalf of the shipper or consignee.

Two comments need to be made in respect of this provision. First, it should be stated clearly which “particular activities” may be carried out by the shipper or consignee: it is obvious that the core activities of the carrier, such as transportation and care of goods, cannot be the subject of any such agreement, and the question arises whether reference to loading, stowage, discharging preceded by the words “such as” suffices. Secondly, it should be considered whether the agreement that certain particular activities are carried out by the shipper or consignee affects the period of responsibility, which commences later and terminates earlier, or entails the exclusion of the responsibility of the carrier in respect of any loss or damage arising out of such activities, the period of responsibility remaining unaltered.

#### **4. Contracting carrier and performing party**

It is known that a carrier who has entered into a contract of carriage with a shipper normally avails himself of the services of other persons for the performance of his contractual obligations. Such services may not only consist of the performance of a part of the transportation, but also of the performance of ancillary activities, such as storage (both before and after carriage), loading, stowing, unstowing and unloading the goods. The problem that arises in such case is twofold: it relates to the right of the shipper or consignee to sue directly the persons who have provided such services and to the basis of their liability.

In the Protocol of 1968 to the 1924 Bill of Lading Convention this problem was considered only from the standpoint of the liability regime applicable in case the carrier is sued in tort and in case his servants or agents are sued in connection with a claim for loss of or damage to the goods carried. But the protection granted to them was not extended to independent contractors nor was the basis of liability of other carriers to whom the performance of a part of the carriage is subcontracted by the carrier in any way regulated.

The Hamburg Rules went a step forward, and provided in article 10 that the carrier is responsible for the entire carriage when he entrusts its total or partial

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<sup>5</sup> [1954] 1 Lloyd's Rep. 321 (at p. 328).

<sup>6</sup> [1956] 2 Lloyd's Rep. 379, at p. 393.

performance to another carrier, called “actual carrier” and that the provisions of the Convention apply to such other carrier.

A significant area continued, however, to remain uncovered, viz. that of all activities ancillary to the carriage. It was thought initially that all ancillary services could come under a wide notion of “performing carrier”, defined as a person who performs, undertakes to perform or procures to be performed any of the carrier’s responsibilities under a contract of carriage, thus covering the whole spectrum normally covered by Himalaya clauses.

In consideration of the comments made at Singapore on such definition and on its effect, it was deemed preferable to narrow the definition so to cover only those parties whose services consist in the carriage, handling or storage of the goods and who, therefore, normally have custody of the goods. Since some of such activities do not fall within the common understanding of the term “carrier”, the name was changed to “performing party”. As it will be seen, the Himalaya protection is, however, extended to a much broader class of parties.

## **5. *Through carriage***

The carrier may agree with the shipper that he will perform only a part of the carriage and, acting on behalf of the shipper, will entrust the remaining part or parts to other carriers. This situation differs from that previously mentioned, of the carrier subcontracting part of the carriage, for in that case the carrier is responsible for the whole carriage, while in the case now under consideration he enters into two separate contracts: a contract of carriage and a forwarding contract. The characteristic of through carriage is that the carrier issues a transport document covering the whole transportation, in order thus to enable the shipper to negotiate such document and to enable delivery against presentation of one unique transport document.

Through carriage is also regulated in article 11 of the Hamburg Rules, but the freedom of the parties to enter into this type of contract is significantly restricted, because it is subject to the name of the other carrier being indicated in the original transport document: a condition frequently impossible to fulfil since at the time of entering into the contract, the carrier does not often know on which ship the goods will be transhipped.

In the draft Outline Instrument through carriage is regulated in article 4, which is titled “Period of responsibility”. Article 4.2 provides that the parties may agree (a) that particular activities, such as loading, stowage, discharging, shall be carried out by or on behalf of the shipper or the consignee, and (b) that the carrier, acting as agent of the shipper, may contract out specified parts of the carriage to a third party. There is a clear distinction between the situation covered in (a) which corresponds to that realised by the f.i.o. and f.i.o.s. clauses, and the situation covered in (b), which consists in the classic through carriage agreement. It would certainly be preferable to regulate them separately.

This latter provision does not require, as does article 11 of the Hamburg Rules, that the name of the second carrier be specified in the transport document. It only requires that the part of the carriage to be performed by a different carrier must be specified. In other words, the port of transshipment must be named. Two alternative provisions are to be found in the draft Outline Instrument in respect of the obligations of the carrier. In one (Alternative I) the obligations are set out in detail and include the duty to conclude the contract with the second carrier on customary terms, to take care that the shipper is named as party to such contract and the consignee (or a subsequent carrier) be the consignee under the first contract to exercise reasonable care in selecting the second carrier, to provide him with all necessary information and instructions in respect of the goods, to provide the consignee with all documents required in order to enable him to obtain delivery of the goods at their final destination. In the other (Alternative II) such obligations are mentioned in a much more synthetic form: to exercise due diligence in selecting the second carrier, to conclude the contract on customary terms and to do everything reasonably necessary to enable the second carrier to perform duly under his contract. It is thought that the more detailed alternative is preferable, since it provides more precise guidelines to the parties and, in particular, to the contracting carrier.

## **6. *Obligations of the carrier***

A large majority of the members of the Uniformity I-SC had been of the view that the spelling out of the obligations of the carrier, as is done in article 3(1) and (2) of the 1924 Bill of Lading Convention, is a very useful guideline for the parties and for the Courts. Views instead had been divided as to whether the obligation to make the ship seaworthy must be exercised only at the beginning of the voyage or must now become a continuous obligation. In the draft Outline Instrument submitted to the Singapore Conference there was only a provision setting out the basic obligation of the carrier, viz. to carry the goods to the place of destination and to deliver them to the consignee and then a provision on the duty of the carrier to properly care for the goods.

At Singapore the proposal to reintroduce a provision along the lines of article 3(1) and (2) of the 1924 Convention was supported by a considerable number of delegates. The only change suggested was that the duty to make the ship seaworthy should become a continuous duty.

This provision was included in square brackets in the revised Draft Outline Instrument and has now met with a very significant support during the July session of the International Sub-Committee. It was pointed out that in the present time the carrier is continuously in touch with the master and, therefore, can give him timely instructions on the action to be taken in order to ensure the seaworthiness of the ship and that, in any event, the degree of diligence would be established with reference to the experience of the persons in charge of the ship at the material time: the degree of diligence, therefore, would not be the same in port, where experts and sophisticated equipment are available, and at sea. It was also pointed out that in various charter party forms the obligation to

exercise due diligence is continuous and that means that the industry believes that such obligation can be fulfilled without difficulties.

## 7. *Liability of the carrier*

In the Uniformity I-SC there was a consensus that the system of liability of the Hague-Visby Rules should be retained, except for the defence relating to faults in the navigation and management of the ship, in respect of which views were divided.

Two alternative options, however, were suggested by the I-SC on Issues of Transport Law in view of the broader spectrum covered by the draft Outline Instrument. These options consisted in a provision along the lines of the so-called “catch-all” exception of article 4(2)(q) of the Hague-Visby Rules and in a provision along the lines of article 17 of CMR which, after having provided that the carrier is liable for loss of or damage to the goods occurring while the goods are in his custody as well as for delay in delivery, exonerates the carrier from liability if the carrier proves that the loss or damage was caused by certain specified events beyond the carrier’s control. The main difference between the Hague-Visby Rules and the CMR lies in that while under article 4(2)(q) of the former the carrier is exonerated from liability if he proves that the loss or damage has resulted from a cause arising without his fault or the fault of his servants or agents, under article 17 of CMR the carrier must prove that the loss or damage resulted from circumstances he could not avoid and the consequences of which he was unable to prevent. While, therefore, the former is clearly a fault based regime, the latter is a stricter regime, similar to that of the Warsaw Convention.

Since there was overwhelming support in Singapore for a fault based regime, the revised draft of the Outline Instrument contains alternative texts all based on fault. The first two of them (Alternatives I(a) and I(b)) provide that the carrier is liable unless he proves the absence of his fault. The language is different, being based in one case on article 4(2)(q) of the Hague-Visby Rules and in the other case on article 5(1) of the Hamburg Rules, but the expression “took all measures that could reasonably be required to avoid the occurrence and its consequences” has been replaced by “such loss or damage was caused by events or through circumstances that a diligent carrier could not avoid or the consequences of which a diligent carrier was unable to prevent”. The difference is, however, more apparent than real. In fact in its substance Alternative I(b) is closer to article 4(2)(q) of the Hague-Visby Rules than to article 5(1) of the Hamburg Rules, because diligence is the standard that proves absence of fault.

The last alternative (Alternative II) is based on article 4(2) of the Hague-Visby Rules except that it starts with the general provision of paragraph (q) and then lists most – but not all – of the so-called excepted perils which, however, are no more cases of exoneration from liability, but rather cases where a presumption of absence of fault operates.

In fact the view expressed by the Uniformity I-SC that the catalogue of excepted perils had served and could still serve a useful purpose, was supported in Singapore, nor

was the change from exoneration to presumption of absence of fault a real change, for the Protocol of Signature of the 1924 Bill of Lading Convention already provided that Contracting States may reserve the right to prescribe that the holder of a bill of lading shall be entitled to establish that the carrier is responsible for the loss or damage resulted from one of the excepted perils, except in respect of fault in navigation on management and fire.

And here lies the real difference between the revised draft Outline Instrument and the Hague-Visby Rules, for the exemptions for errors in the navigation and in the management of the ship have been eliminated, such elimination having received a considerable support in Singapore.

As in the Hamburg Rules the situation where loss or damage has been caused in part by a breach of the carrier's obligations and in part by an event for which the carrier is not liable has been expressly regulated. The wording of the draft (article 6.1.3) is, however, not altogether satisfactory. It is thought in fact that the burden of proof should in such case rest on the carrier and that if the apportionment cannot be reasonably established the carrier must be held liable for the entire loss or damage, rather than such loss or damage being apportioned on a fifty-fifty basis.

The liability regime applicable to door-to-door transport is a modified network regime. Article 4.4 of the revised draft, added after the decision reached at Singapore to cover door-to-door transport, provides that any claim for loss or damage that has occurred during the period between the receipt of the goods from the shipper and their loading on board the vessel or between discharge and delivery is subject to the mandatory uniform or national provisions applicable to the carrier's activities during any such periods. It may, however, be questionable, whether national mandatory provisions, as opposed to uniform mandatory provisions, should prevail over those of the Draft Instrument.

In order that the provisions of the Outline Instrument be departed from it is therefore necessary that:

- (a) the claimant proves that the loss or damage has occurred before or after the period during which the goods were on board the ship;
- (b) there are provisions in terms of nature and structure suitable to be applied within the scope of the provisions of the Instrument that apply according to their own terms to the carrier's activities;
- (c) such provisions cannot be departed from by private contract to the detriment of the shipper.

## **8. *Liability for delay***

As previously mentioned, the views were divided as to whether the carrier should be liable also where no time limit for delivery is agreed upon by the parties and, therefore, the part of article 6.4.1 of the draft Outline Instrument so providing is placed in square brackets. It is thought that the carrier should be liable also in such case, since

very seldom the shipper would be able to obtain the endorsement in the transport document of the date by which the goods should be delivered. It is questionable, however, whether this provision should be mandatory.

The limit of liability, as in the Hamburg Rules, is related to the freight. But since the economic loss resulting from delay may be as great as the physical loss of the goods, there does not seem to be any reason not to apply also in this case the limit provided for in respect of loss of or damage to the goods.

### **9. *Liability of performing parties***

The liability regime of the carrier applies also to the performing parties who, however, are only responsible for any loss or damage occurring during the period they have custody of the goods. Since, however, performing parties may participate in the carriage without having actually the custody of the goods, as is the case for the loading and unloading operations, it has been deemed necessary to add a provision to that effect in article 6.3.1.

Since performing parties may not be aware of the contractual stipulations in the transport document, it has been deemed reasonable to provide that such stipulations, if any, are not binding on them unless they have accepted them.

### **10. *Deck cargo***

As it is known, the Hague Rules apply to deck cargo only when such mode of transport is not stated in the bill of lading, in which event the carrier shall be deemed in breach of his obligations under article 3(2) and shall be liable for any loss of or damage to the goods resulting from the stowage on deck. The draft Outline Instrument instead applies, as the Hamburg Rules, to deck cargo. The structure of the provision contained in article 6.6 is threefold.

It sets out first the cases in which deck stowage is permitted, such cases being when the deck stowage is required by laws or regulations, for containerised cargo when the containers are stowed on decks specially fitted for that purpose and, generally, when deck stowage is in accordance with the contract or with the custom of the trade.

It then regulates the liability of the carrier in respect of loss, damage or delay caused by the special risks involved in deck stowage: if such stowage is made in the first and third case mentioned above, the carrier is not liable for loss, damage or delay caused by the special risks involved in such carriage; if instead deck stowage is in breach of the aforesaid provision, the carrier is liable. Two comments may be made on this rule: firstly, rather than making reference to stowage in breach of the preceding rule reference should be made to stowage on deck effected in cases not covered by that rule; secondly, the second case (stowage of containerised cargo on decks specially fitted for that purpose) is not mentioned and since such stowage is not in breach of the rule, it is unclear what is the applicable liability regime. It is thought that since deck stowage of

containers is nowadays in accordance with the custom of the trade, the carrier should not be liable. But this case should be specifically regulated in the Outline Instrument.

Thirdly, article 6.6 regulates the documentary evidence of deck stowage and provides that when the goods have been loaded on deck by agreement between the parties or in accordance with the custom of the trade or other usage in the trade this must be stated in the transport document. The consequences of the omission to do so differ according to whether the transport document is non negotiable or negotiable. In the first case, the carrier must prove that deck stowage is in accordance with an agreement between the parties or custom or other usage and this indicates that when mention is made of deck stowage in the transport document the burden lies on the consignee to prove the non conformity. If a negotiable transport document is issued, the carrier is not entitled to invoke the provision permitting deck stowage against the holder of the document who has acquired the document in good faith. The consequence of this provision is that the carrier is liable for loss, damage or delay that are exclusively the consequence of deck stowage.

The question whether loading on deck in breach of the provision of the applicable law entails the loss of the right to limit liability or not has been solved by providing that the benefit of limitation applies, except where loading on deck is contrary to an express agreement between the carrier and the shipper.

### ***11. Limits of liability and loss of the right to limit***

The provisions on the limits of liability and the loss of the right to limit are based on those of the Hague-Visby Rules (as amended by the SDR Protocol) and of the Hamburg Rules. Some observations are, however, needed.

The limits do not apply where the nature and value of the goods has been declared by the shipper and inserted in the transport document. The question, however, arises whether by declaring the value the shipper is not required to prove the actual value of the goods in case they are lost or damaged, the declaration constituting a prima facie evidence of such value. It is thought that since the declaration of value has the purpose of excluding the operation of the limits and replacing such limits with the value so declared, the value constitutes a new limit and the consignee has the same burden of proof he would have had if no such declaration had been made. An additional reason for this is that the carrier would have no means (or time) to check the correctness of the value declared by the shipper prior to inserting it in the transport document.

The additional provision according to which a higher amount may be agreed between the parties has been placed in square brackets for the reason that it has to be decided whether any mandatory provision (such as that on the limits of liability) should be one-sided or two-sided mandatory. It is thought that the mandatory character of the limits of liability is dictated for the protection of the shipper and that, therefore, as in the Hague Rules, it should be permitted to the parties to increase the limits. It would be odd

to allow a declaration of value, which results in the abolition of the limits, and to deny the possibility of agreeing a higher limit.

The provision on the calculation of the limit in respect of containerised goods is the same as in the Hague-Visby Rules and in the Hamburg Rules. However in the draft Outline Instrument there is a very wide definition of container, “container” including “any type of container, transportable tank or flat, swapbody, lashbarge, or any similar unit used to consolidate goods”; this significantly extends the scope of application of the limit applicable to goods carried “in or on” a container.

No suggestion is made as to the amounts of the limits, but attention is drawn to the need, in any event, to include a quick amendment procedure (in reality not so quick!) along the line of that adopted in the 1996 Protocol to the 1976 Limitation of Liability Convention.

The provision on the loss of the right to limit, which is basically the same as in the Hamburg Rules (which differs from that in the Hague-Visby Rules for the intentional or reckless action is referred to the very loss that occurred by using the words “such loss”), calls for one drafting and one substantive comment. The former is that the reference to the limit “as provided in the contract of carriage” at present should be placed in square brackets as has been done for the parallel provision in article 6.7.1. The latter is that some further thoughts should be given to the requirement that the action should be personal. The rule “*respondeat superior*” is thus applied in part: the carrier is liable for the acts of his servants or agents (now included in the expression “performing party”) but his liability is always limited, even if the action is intentional or reckless. Is that right? It must be considered that the “performing parties” (including, therefore, the carrier’s servants or agents) lose the right to limit if the action is intentional or reckless. My personal opinion is that also the carrier should lose the benefit of limitation in such case. The risk of the servants or agents (and, also, sub-contractors) causing loss of or damage to the goods intentionally or recklessly is a risk within the sphere of activity of the carrier, and it is only right that he should bear it. In any event, if this were not the case, consideration should be given to the possibility of defining the “personal act” when the debtor is a legal entity. Such definition, which for example has been made in Germany when giving effect to the 1976 Limitation of Liability Convention, would enhance uniformity in a very delicate area.

## ***12. Obligations of the shipper***

In the Hague-Visby Rules there are two specific and one general provisions on the obligations and liabilities of the shipper. The two specific provisions relate to the obligation of an indemnity in favour of the carrier for any loss, damage or expense arising from the inaccuracy of the description of the goods (article 3(5)) and from the carriage of dangerous goods to the shipment of which the carrier has not consented with the knowledge of their nature (article 4(6)). The general provision is to the effect that the shipper is responsible for loss or damage sustained by the carrier only if caused by

his fault or the fault of his servants or agents (article 4(3)). The Hamburg Rules contain similar provisions (articles 17, 12 and 13).

The draft Outline Instrument contains instead a wider spectrum of rules based on the philosophy that payment of freight is not the only obligation of the shipper, but that the contract of carriage requires for its satisfactory performance the cooperation between all the parties in all its stages.

Article 7 of the draft Outline Instrument starts by setting out the obligations of the shipper regarding the preparation of the goods for the intended carriage, including loading, handling, stowage and discharge. In so far as containerised cargo is concerned, the obligations of the shipper include proper stowage, loading and securing the goods in or on the container. The carrier in turn must cooperate by providing to the shipper all information that can assist the shipper in complying with its obligations.

The shipper must, in addition, provide to the carrier all the information, instructions and documents reasonably necessary for the handling and carriage of the goods, the compliance with rules and regulations of authorities in connection with the carriage of the goods and the correct issuance of the transport documents.

There follow, in articles 7.5 and 7.6, provisions on liability. The first of them is related to the breach of the obligations respectively of the shipper and of the carrier and in this connection the liability is strict. The second one makes the shipper generally liable for any loss or damage caused by the goods and in this case the liability is instead based on fault. While under the Hague-Visby Rules and, subsequently, under the Hamburg Rules, the liability of the shipper is linked to the dangerous nature of the goods and is strict, now the liability becomes general, whether or not the goods may be qualified as dangerous goods, but the basis is fault.

### ***13. Transport documents***

The chapter on transport document – Chapter 8 – contains a more systematic and a wider set of regulations on transport documents than that existing in the Hague-Visby Rules and in the Hamburg Rules. The matters dealt with may be subdivided as follows:

- (a) persons entitled to receive the document;
- (b) type of document;
- (c) contents of the transport document and effect of omissions;
- (d) signature of the document;
- (e) qualification of the description of the goods;
- (f) deficiencies, ambiguous date, failure to identify the carrier.

An overview of the above matters is appropriate, though an in-depth analysis of this very important chapter, the provisions of which are of great relevance both for the contract of carriage and for the contract of sale, is not possible here.

(a) The issue of the identification of the person or persons entitled to the transport document is relevant when a negotiable transport document is requested.

The obvious solution to the question is that the shipper, as the contracting party, should be entitled to receive the document. This does not cause any problem if the shipper is the seller of the goods, i.e. if the goods are sold on c.i.f. terms. The shipper needs the document in order to present it to the buyer's bank and obtain payment of the price for the goods. The situation, however, differs where the goods are sold at f.o.b. terms and the shipper (who is the person who enters into the contract of carriage with the carrier) is not the consignor (who is the person who delivers the goods to the carrier for transportation). The consignor is the seller and as such he is entitled to receive the transport document in order to present it to the bank and obtain payment of the sale price.

Originally the draft Outline Instrument contained a definition of consignor and it was considered that the consignor – and not the shipper – should be entitled to receive the transport document as the person who hands the goods over to the carrier. It is felt, however, that as respects the contract of carriage, the consignor acts as an agent for the shipper and as such he may receive the documents if the shipper has authorized him to do so.

Perhaps the solution could be to provide in the draft Outline Instrument that unless otherwise agreed, when the goods are handed over to the carrier by a person other than the shipper, the transport document shall be handed over by the carrier to that person. In such a case the c.i.f. seller being the shipper (and the consignor), the transport document shall be delivered to him while in a f.o.b. sale the seller, being the consignor, shall be entitled to receive the transport document and shall also be entitled to refuse handing over the goods to the carrier should the carrier (pursuant to an agreement with the f.o.b. buyer who will be his contracting party) refuse to do so.

(b) As regards the type of document the carrier must issue, while in the Hague-Visby Rules and in the Hamburg Rules it is provided that the shipper is entitled to a bill of lading, in the draft Outline Instrument it has been thought convenient to use different words in order to widen the category of documents representing the goods that may in the future be issued. The expression used is “negotiable transport document” which is certainly a term of art in United States law, where it has a very clear meaning, but may not be such or may have different implications in other jurisdictions. The characteristics this type of document must have are that it entitles the person who possesses the document to possess the goods and to obtain their delivery at destination as well as to transfer such rights to another person by transferring to him the document.

It is thought that transferability is the correct expression, rather than negotiability. It is also thought that the present definition of “negotiable transport document” – to be changed to “transferable transport document” – should be more precise and clearly identify the fundamental characteristics of this document, as they have been previously described: to confer to the holder the possession and the right to obtain delivery of the

goods and to permit the transfer of such rights by means of the transfer of the documents. Of course the manner in which the transfer may be made should also be stated. These characteristics result in part from the subsequent provision in article 11 on the right of control of the goods (which consists in the right to give or modify instructions in respect of the goods, in demanding delivery before arrival at the place of destination and in replacing the consignee), which belongs to the holder of the negotiable transport document.

(c) No special comment is required in respect of the contents of the transport document except that it clearly mentions the need for an adequate identification of the carrier. The draft Outline Instrument also clarifies as do the Hamburg Rules, that the absence of any one or more of the particulars required in article 6.2.1 or their inaccuracy does not affect the legal character or the validity of the document. There may be doubts, however, as to the correctness of this statement with regard to the signature of the carrier (on the assumption that it may be qualified as a “particular”): in fact an unsigned transport document is not a transport document. Similar doubts may be justified in respect of the description of the goods in case such description is missing altogether.

(d) Article 8.2.3 provides that the transport document must be signed by or for the carrier or a person having authority for the carrier (this applies in all cases when the document is signed for the carrier). There follows a bracketed sentence stating that a transport document signed by or for the master is deemed to have been signed by or on behalf of the registered owner or the bareboat charterer of the ship. This provision must be considered together with that of article 8.4.2 pursuant to which if the transport document fails to identify the carrier, then the registered owner shall be deemed to be the carrier except that he may defeat that presumption if it proves that the ship was under a bareboat charter at the time of the carriage and the bareboat charterer accepts responsibility for the carriage of the goods.

There is no doubt that the holder of the document needs protection in case the carrier is not properly identified in the transport document: in such case there must be a person he is entitled to sue, irrespective of whether or not such person actually is the contracting carrier. Such person cannot but be the registered owner, who can always be identified through the ships register. If the owner is not the contracting carrier, he should know who he is and could take the necessary action in order to ensure that he identifies himself in the transport documents he will issue. It has, however, been deemed proper to allow the owner to prove that he is not operating his ship, in which event he can defeat the presumption that he has acted as carrier, provided, however, the bareboat charterer accepts responsibility. This provision operates only when the carrier is not properly identified in the transport document. From this it follows that the presumption in the bracketed part of article 8.23(a), whereby a transport document signed by or for the master shall be deemed to have been signed by the owner or the bareboat charterer of the ship, is both wrong and unnecessary. It is wrong because if the actual carrier is properly identified in the transport document the presumption cannot operate. It is unnecessary because if the carrier cannot be properly identified in the transport document the presumption of article 8.4.2 operates anyhow.

(e) Very detailed provisions are contained in the draft Outline Instrument on the circumstances in which the carrier may qualify the description of the goods in the transport document and this is proper, for qualifications can undermine the evidentiary value of the document, in so far as the description of the goods are concerned.

The meaning of this expression is made clear by article 8.3.1 which states that the carrier may qualify the information mentioned in article 8.2.1(a) or 8.2.1(b) consisting in the leading marks and in the number of packages or pieces and in the quantity and weight of the goods and by article 8.3.1 which provides that the carrier may qualify the above information with an appropriate clause to indicate that he does not assume responsibility for the accuracy of the information furnished by the shipper. Its effect is then stated in article 8.3.4 which provides that the transport document which contains a qualifying clause does not constitute prima facie or conclusive evidence (according to whether the document remains in the possession of the shipper or is transferred to a third party in good faith) as regards the information to which the qualifying clause relates. Even if they are not mentioned by name, such clauses are in the common practice “said to be”, “said to weight” or “weight unknown” and other similar clauses.

In line with the existing conventions the apparent order and conditions of the goods cannot be qualified and if the description is omitted, the goods are presumed to have been received by the carrier in apparent good order and conditions, such presumption being irrebuttable if the transport document has been transferred to a third party in goods faith.

Distinct provisions are contained in article 8.3.5 of the draft Outline Instrument in respect of non-containerised goods and containerised goods, the common element being that the carrier must act in goods faith when issuing the transport document.

For non-containerised goods two different situations are envisaged. The first is where the carrier has no reasonable means of checking the information furnished by the shipper. It has been deemed proper to clarify the notion of “no reasonable means of checking” which in the past has given rise in several jurisdictions to conflicting opinions. Article 8.3.2 provides that checking must be not only physically practical, but also commercially reasonable: for example it should not require an excessive amount of time or an excessive cost. The burden of proof is on the carrier, but the question remains open when this proof must be supplied and whether the acceptance by the shipper of a qualified transport document implies the acknowledgment that the conditions for qualifying the document have materialized. The second situation is where the carrier is able to check the information supplied by the shipper but considers such information to be inaccurate: in such a case he may include his own description of the goods. It is questionable whether in this case the carrier may, alternatively, simply refuse to include the information furnished by the shipper, as under the Hague-Visby Rules: it is thought that this is not the case and this conclusion is supported by the omission of the previous rule.

For containerised goods there are two separate provisions: one in respect of marks, number of packages and pieces and quantity and another in respect of weight. In respect of the first category of information the carrier is entitled to qualify the document unless he in fact inspects the goods inside the container or has otherwise actual knowledge of the contents of the container. The burden of proof in his case lies on the shipper or consignee but it is questionable whether the validity of the qualification may be challenged after the shipper has accepted the document, since such acceptance may be held to imply that the carrier was entitled to insert the qualification.

In respect of the weight, the carrier may qualify any statement of the weight of the goods or of the container (the qualification consisting in this case in a statement that carrier has not weighed the container) under two conditions: first, that he can show that he actually has not weighed the container; secondly, that the shipper and the carrier had not agreed in writing prior to shipment that the container would be weighed and the weight would be recorded in the transport document. As regards the first condition the burden of proof is clearly on the carrier, but it is a difficult proof to provide, since it is of a negative nature. On whom the burden lies in respect of the second condition is not clear, but it seems reasonable to assume that the burden is on the shipper or consignee who challenges the validity of the qualification.

#### ***14. Freight***

In view of the request of UNCITRAL to expand regulation of the contract of carriage to areas presently not covered by international conventions it has been deemed proper to attempt to suggest rules applicable to this area, normally left to the freedom of the parties. The intention is to provide rules that may supplement the agreement of the parties, when it is incomplete or non-existent. The rules, therefore, are not intended to be mandatory.

The first rule relates to the time when the freight is earned. Article 9.2 provides that freight is deemed to be earned upon delivery of the goods to the consignee unless the parties have agreed otherwise. The principle, therefore, is that the carrier must perform its service before earning the remuneration.

The first corollary to this rule is that if the goods are lost before the time the freight is earned no payment is due. The second corollary is that if the goods are lost after the time the freight is earned payment is due.

The second rule relates to the time when the freight is payable, Article 9.3(a) provides that freight is payable when it is earned unless the parties have agreed that payment must be made, wholly or partly, at an earlier or later point in time or at an earlier or later occasion. It is in fact common to provide that part of the freight is payable on signing bills of lading or so many days thereafter and that the balance is paid before breaking bulk or upon right delivery of the cargo or so many thereafter.

Perhaps it would be useful to add a provision to the effect that, unless otherwise expressly agreed, provisions relating to the time of payment of the freight do not affect the time when the freight is earned: the consequence would be that the payment made in advance must be returned if the goods are subsequently lost.

The third rule, also derived from the practice and the jurisprudence, is that payment of freight is not subject to set-off on the grounds of any counterclaim the shipper or consignee may have against the carrier. There has been added in article 8.3(c) a proviso to the effect that the above rule operates unless the amount of the counterclaim has been agreed or established (by a judgment or award). This proviso is certainly necessary, for in many jurisdictions there are statutory provisions on set-off of claims.

There follow provisions on the party liable to pay the freight and on the right of the carrier to retain the goods until freight and other claims are paid.

As regards the person liable to pay freight the general rule is that the shipper is liable. Contractual provisions on the cesser of liability of the shipper are subject to some mandatory rules. First, pursuant to article 9.4(b)(i), any agreement cannot affect the obligations of the shipper in respect of the preparation and documentation of the goods set out in article 7; secondly, pursuant to article 9.4(b)(ii) the carrier must have adequate security for any amount payable to him under the contract of carriage either by exercising the right of retention or otherwise. This provision gives effect to the principle whereby the cesser clause is effective only if and to the extent that the carrier may exercise the right of retention.

Such right is granted to the carrier (together with the right of sale) by article 9.6 of the draft Outline Instrument conditionally to the consignee being liable for the payment of freight (as well as demurrage, damages for detention, contribution in general average and other claims of the carrier) “under national law”: which is the applicable national law is not stated in this provision, but it should be the law applicable on the basis of the private international law rules of the State where the place of delivery is located. It may, however, be questioned whether it is right to make the exercise of the right of retention and of sale conditional to the consignee being liable for the payment of the claims in respect of which the right of retention is exercised. It is in fact normal – or at least it occurs frequently – that the consignee is not liable for any payment under the contract of carriage unless he requests the delivery of the goods. But nevertheless the carrier should be entitled to exercise the right of retention except when a freight prepaid transport document has been issued.

### ***15. Delivery to the consignee***

In the draft Outline Instrument there are also provisions on the rights and obligations of the parties in respect to the delivery of the goods at destination.

There are distinct provisions according to whether a negotiable transport document is issued or not. If no such document has been issued, the shipper (or the party having the right of control if different from the shipper) must advise the carrier, prior to the arrival of the goods at the place of destination, of the name of the consignee. No equivalent obligation is conceivable when a negotiable transport document is issued, for the document is transferable and the shipper may not know who the holder of the document will be at the time of arrival of the goods at the place of destination. The corresponding provision in the draft Outline Instrument is, therefore, to the effect that the holder of the document is entitled to delivery of the goods upon production (perhaps “surrender” would be a better word) of the original (or one of the originals) of such document.

It has then been deemed convenient to regulate the situation where nobody is claiming delivery: a situation that can be awkward for the carrier in case the goods have very little or no value at all and their disposal is difficult and expensive. The solution has been to make the shipper, as the contracting party, responsible for the delivery. When no negotiable document is issued, the carrier must advise the shipper, whereupon the shipper (or the controlling party) must take delivery of the good himself. When instead a negotiable transport document is issued the carrier shall advise him that nobody has claimed delivery of the goods after their arrival at the place of destination and in such event the shipper shall give instructions to the carrier in respect of the delivery of the goods. Nothing is said in the relevant provision on the draft Outline Instrument (article 10.3.2(ii)) about the consequences of the failure by the shipper to give instructions or of the consequences of such instructions being ineffective.

It is thought, however, that in such case the shipper is responsible for all costs borne by the carrier or must take delivery of the goods himself. The problem that in any case arises is what are the consequences of a delivery without surrender of the transport document in case the holder of such document will consequently claim delivery.

Perhaps an alternative solution might be to provide that if the holder of the document will not claim delivery within a reasonable time after notice has been given to the shipper the goods may be sold or, if a sale will not prove possible, will be destroyed and the shipper will be responsible for all costs.

Finally the consequences of delivery without surrender of the negotiable transport document are regulated in this chapter. Article 10.3.2(iii) regulates the situation where a person becomes the holder of a negotiable document after the goods have been delivered and draws a distinction according to whether he has done so pursuant to arrangements made before or after delivery. In the former case he acquires rights under the contract of carriage in respect of the goods; in the latter case he does so only he proves that he had not or could not reasonably have knowledge of such delivery. From the above provision it follows that if the document has been obtained prior to delivery of the goods, the holder has all rights arising out of the lawful possession of the document.

## **16. *Right of control***

It may happen that the shipper or any other person to whom the rights arising out of the contract of carriage have been transferred may wish to give instructions to the carrier in respect of the performance of the carriage or may wish to negotiate with the carrier a change of the terms of the contract, such as a change of destination. Traditionally a case in which instructions have been considered is that of the so-called *stoppage in transitu*.

Since the limits of such right and the identity of the person entitled to exercise it are unclear, it has been deemed advisable to set out precise rules in the draft Outline Instrument in that respect.

First, it has been indicated which such rights are. Article 11.1 classifies them in two groups: rights that do not constitute a variation of the contract of carriage and that can therefore be exercised without the prior agreement of the carrier and rights that instead constitute a variation of the contract, the exercise of which is subject, as expressly stated in article 11.3(b), to the agreement of the carrier. Only the rights of the first category are enumerated and consist of the right to give or modify instructions in respect of the goods that do not constitute a variation of the contract, to demand delivery of the goods before arrival at the place of destination and to replace the consignee or any other person including the controlling party. Compliance with such instructions is, however, conditional upon such compliance being reasonably possible and not interfering with the normal operations of the carrier. Moreover, the carrier has the right of being indemnified against any additional expenses, loss or damage arising therefrom. This would be the case, for example, if delivery in a port other than the contractual place of delivery is requested. During the sea leg this may imply a deviation which, besides involving relevant additional costs, can interfere with the timely performance of the voyage and cause delay. In such a case compliance with the instructions would be considered not to be reasonably possible.

Secondly, rules are laid down as to who is entitled to exercise the right of control. If no negotiable transport document is issued the controlling party is the shipper or the person to whom the right of control is transferred by the shipper, such transfer to be notified to the carrier. If a negotiable document is issued, the holder of the document is the controlling party, and the document (or all the documents if more than one has been issued) must be produced to the carrier in order to enable him to identify the controlling party.

Thirdly, article 11.5 also sets out the duties of the controlling party. Such duties consist in giving instructions to the carrier in respect of the goods upon the carrier's reasonable request. Such duties, however, are not of the controlling party only. Subject to the carrier being unable to identify or to obtain from the controlling party instructions may be requested from the shipper, or, if this is not possible, from the person identified as the shipper in the transport document or from the person who has delivered the goods to the carrier. Since, however, the instructions should be given, as a general rule, by the

controlling party, doubts may arise as to whether the carrier is entitled to follow instructions given by other persons only because the controlling party cannot be identified or cannot be found. An alternative solution might be to provide that in such case the carrier must take the action that is reasonably in the interest of the controlling party, rather than to leave the decision to persons who may not have an interest in the goods anymore.

### ***17. Transfer of right when a negotiable transport document is issued***

Article 12 of the draft Outline Instrument contains provisions on the transfer of rights under a negotiable transport document. It is thought that the title of this article is not precise. If in fact the negotiable (or transferable) transport document incorporates certain rights (viz. the right of delivery), the subject matter of the transfer is the document itself and the rights incorporated are transferred as a consequence of the transfer of the document.

The manner in which the transfer of the document can take place are three, and depend on the type of document. Three types of document are mentioned in article 12.1: i) the order document, ii) the bearer document and, (iii) the document made out to the order of a named person. The order document may be transferred by endorsement to the transferee or in blank, i.e. may be signed in blank by the transferor and handed over to the transferee. This does not appear clearly in article 12.1(i), where it is stated that the rights embodied in the document are transferred by passing the order document duly endorsed to the transferee or in blank: perhaps it would be clearer to state that the document is endorsed in blank. The bearer document may be passed to another person without endorsement and without the need for the holder to sign it. Finally, the description of the third type of document can create confusion in certain jurisdictions, since it might seem to overlap that of the first type, viz. the order document: in fact, in certain jurisdictions a document issued to the order of a named person (and not to a named person) is a typical order document. It is thought that the expressions used should be the subject of further refinement, in order to ensure actual uniformity.