

Documents under the UNCITRAL Draft Instrument on Carriage of Goods by Sea

Johan Schelin

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1 Introduction

The Working Group on Electronic Commerce in UNCITRAL originally initiated the work with this new instrument on carriage of goods by sea. It was felt that there was a need for a revision of the provisions regarding transport documents in order to adapt them to the emerging e-commerce practices in international trade. The CMI, which had been working with model rules on electronic bill of lading and sea waybills, was asked whether it could study the problem. At a later stage the mandate was expanded to developing a whole new instrument on carriage of goods by sea that is supposed to replace the Hague Visby and the Hamburg Rules. It is also supposed to cover not only port-to-port transports, but also door-to-door transports. It is however important to keep in mind that the provisions on transport documents play a key role here. One of the main ideas important things with the instrument is that it places the electronic transport document on an equal footing with traditional paper documents.

The intention with this paper is to try to describe the different documents that are regulated in the instrument and to a certain extent analyze the different legal effects the use of these documents will have. I will also try to discuss the specific provisions on electronic records in chapter two of the instrument. But before going into details regarding the effects of the documents, it seems to be a good idea to discuss the different types of transport documents that are addressed in the convention. This will also serve as an overview of the regulation in the draft instrument.

2 The Documents and Their Nature

Compared to The Hague Visby Rules the draft instrument contains a regulation that is more general. While in the Hague Visby Rules only transports under bills of lading are regulated the intention with the draft instrument is that it ought to cover all contracts of carriage regardless of the which type of document that evidences the contract.¹ In line with this principle there are two types of documents that are addressed in the instrument, negotiable transport documents and non-negotiable transport documents.

The term “negotiable transport document” is defined in Art. 1(l) as a transport document that indicates by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law governing the document, that the goods have been consigned to the order of the shipper, to the order of the consignee or to bearer, and is not explicitly stated as being “non-negotiable” or “not negotiable”. The term “non-negotiable transport document” is then defined in Art. 1(m) in a negative way: All documents that do not qualify

¹ An exception to this is the voyage charter, which in most jurisdictions is considered as a contract of carriage. Charter parties are explicitly excluded from the scope of application of the draft instrument.

as negotiable documents are to be considered as non-negotiable transport documents.

Looking at the provisions regarding delivery of goods it becomes apparent that the authors of the text have had the traditional order bill of lading and the ordinary sea waybill in their minds as they wrote the text of the draft instrument. In Art. 49 it is regulated that the holder of a negotiable transport document is entitled to claim delivery and that the carrier has an obligation to deliver the goods upon surrender of the negotiable transport document. According to Art. 48, which regulates transports under non-negotiable documents, the carrier has an obligation, but also a right to deliver if the consignee produces proper identification.² A problem here is that in practice there exist a type of transport document which has legal effects that are something in between the traditional order bill of lading and the sea waybill, i.e. the *recta bill of lading*. According to the Scandinavian Maritime Code a *recta bill of lading* is considered to be a non-negotiable transport document. In practice it usually appears as a standard bill of lading marked with a stamp “not to order”. The legal effect of this is that even if the document is acquired in good faith by a third party the transferee will not acquire a better right than the transferor of the document.³ In other words to stamp the bill of lading as “not to order” may serve as a protection for the shipper and the consignee in a situation where the document has come into the wrong hands. At the same time the *recta bill of lading* may serve as a protection of the consignee in relation to the seller and his creditors. After that the document has been passed to the consignee the sender will automatically, in contrast to the sea waybill, lose his right to name a new consignee.⁴ And since the document must be presented in the port of destination the consignee will also obtain protection in relation to the creditors of the seller already by acquiring the document.⁵

The *recta bill of lading* will at the same time serve as a protection for the carrier compared to a sea waybill. The problem with the sea waybill is that the carrier has an obligation to deliver against the production of proper identification. But in practice it could be difficult to identify who is the right consignee, especially if the goods are, despite the original intention, sold during the transport. The *recta bill of lading* will here provide a solution to that problem in the way that it despite the fact that it is non-negotiable will function as a document that must be presented by the consignee in the port of destination.⁶ In other words the presentation of the *recta bill of lading* is a condition for the delivery of the goods.

² In A/CN.9/WG.III/WP.32 there exist a number of variants of Art. 32(b), but all of them includes the rule that carrier has an obligation and a right to deliver upon proper identification of the consignee.

³ This is a general principle that is reflected in the Swedish Act on Promissory Notes from 1936 (Lag 1936:81 om skuldebrev).

⁴ Cf. Falkanger, T. & Bull HJ., *Innføring i sjørett*, 6 ed., Oslo 2004, pp 300–301.

⁵ Tibergh, H. & Lennhammer, D., *Skuldebrev, växel och check*, 7 ed., Stockholm 1995, pp. 73–74.

⁶ Cf. Falkanger & Bull, p. 301–302.

Is there a need for preserving the existence of the *recta bill of lading* then? Or does this type of document just promote ambiguity? At least in Sweden the *recta bill of lading* is often used in certain trades as an alternative to the sea waybill and since the general idea behind the draft instrument, especially regarding the provisions on transport documents, is that it ought to be commercially driven this speaks in favour of preserving the *recta bill of lading*.

By acquiring the bill of lading the right to claim the goods from the carrier in the port of destination is transferred from the sender to the consignee. But – and this is important to keep in mind – the consignee does not become a party to the contract of carriage by that, in the hands of the consignee the bill of lading is only to be considered as a bearer of the right to claim the goods. In this sense the bill of lading may be compared with a negotiable promissory note that are transferred from the seller of goods to a another creditor. Here the negotiable promissory note is in principle only a bearer of rights but not of obligations. The second creditor will not become a party to the contract and it is not possible in relation to him make reservations regarding for example the quality or quantity of the goods. The debtor, i.e. the buyer of the goods will have to pay the second creditor even if the goods are damaged. In the light of this the attempt in Art. 46 of the draft instrument to impose an unconditional obligation on the consignee to accept delivery of the goods appears as a contradiction.

An argument for maintaining the obligation to take delivery in Art. 46 of the draft instrument is that the carrier may face considerable practical problems to even discharge the goods from the vessel if the consignee does not show up. A refusal to take delivery may give rise to delay and other losses for the carrier. However in practice there is a risk that a regulation like will deprive the buyer of the goods the right to terminate the sale contract in relation to the seller because of a breach of contract. If for example the goods are delivered on *DDP-terms* the seller of the goods will be liable for the damages until the moment when the goods are delivered to the consignee according to the conditions stipulated in the sale contract or the applicable law of sale of goods.⁷ A mandatory regulation as the one proposed in Art. 46 of the draft instrument will in fact force the buyer to take delivery in relation to the seller of the goods, despite the fact that the latter might be in breach of the sales contract. Of course the buyer will after having taken delivery still be able to terminate the sale contract, but this is not an attractive solution for the buyer. And sometimes it will be impossible for the buyer to take delivery, because of the fact that he is forbidden to do so by the local authorities. An example of this could be that the goods that are sold on *DDP-terms* get infected by some insects and that the import of the goods are prohibited by the customs authorities.

Another question here is also whether the consignee will have an unconditional obligation to take delivery also in situations where the carrier has damaged the goods during the transport. The problem here is that it might cost a lot of money to get rid of the goods. An example of this could be where the

⁷ Delivered Duty Paid. According to Incoterms 2000 the goods are delivered when the seller has placed those at the disposal of the buyer on any arriving means of transport not unloaded at the named place of destination on the date or within the period agreed for deliver. See Ramberg, J., *International Commercial Transactions*, 2 ed., Stockholm 2000.

carrier is transporting chemicals packed in containers that are damaged during the carriage. Will the consignee here have to accept delivery and also to pay the costs for the destruction of the chemicals? A problem here is also that when the CMR Convention is applicable to the last part of the transport the consignee will have the right to refuse to take delivery. It might also be the fact that the consignee will be able to get compensation for the costs of destroying the goods according to Art. 17(4) of the CMR Convention. In Danish case law such costs have been considered as “charges incurred in respect of the transport”.⁸

This problem was discussed during the negotiations in UNCITRAL and it was suggested that the consignee ought only to take delivery if he exercises any rights under the contract of carriage. In this situation the consignee will have a choice to take or not to take delivery of the goods. However, a question here is if it is possible for the consignee to exercise any rights under the contract of carriage at all. He is not a party to the contract and what he actually does in a situation, where the carrier has issued a negotiable transport document, is that he exercises his rights under that particular document. And regarding transports under non-negotiable transport documents, i.e. sea waybills, he is not even exercising rights under a transport document. Here the consignee according to the Maritime Code is merely granted an independent right to claim compensation for damages and delay to the goods from the carrier.

3 Right of Control and Transfer of Rights

3.1 *The Seller's Right of Stoppage in Relation to the Buyer and his Creditors*

According to Article 54(2)(b) the holder of a negotiable transport document is entitled to transfer the right of control by passing the document to another person in accordance with Art. 59 upon which the transferor loses its right of control. Regarding non-negotiable documents the same principle is regulated in Art. 54(1)(b). The right of control comprises among other things the right to demand delivery of the goods before their arrival of their destination. This is regulated in Art. 53(b). A problem here is that in at least some jurisdictions, among them the Scandinavian countries, as well as according to CISG Art. 71(2) the seller of the goods has the right to prevent the carrier from delivering the goods to the buyer regardless of whether the latter has got transport documents that indicates him as the consignee.⁹ In the Swedish Maritime Code it is explicitly regulated that the right of stoppage applies even in situations where the seller has passed a negotiable transport document, such as an order bill of lading, to the buyer of the goods. The only exception is in a situation where the bill of lading has been acquired by a third party in good faith. In other words the right of stoppage

⁸ See ND 1996 p. 172 VL.

⁹ Johansson, S.O., *Stoppningsrätt under godstransport*, Stockholm 2001, pp. 360–362. Cf. Selvig, E., *Fra kjøpsrettens og transportrettens grenseland*, Oslo 1975, p. 49–50.

prevail over the fact that the bill of lading is a document of title in relation between the seller and the buyer.

Another important question is how the right of control will affect the relation to third parties, i.e. the creditors of the buyer. Today the seller may invoke the right of stoppage not only in relation to the buyer, but also in relation to his creditors, even if a negotiable transport document, such as an order bill of lading has been passed to the buyer. In other words the right of stoppage also works as a right to separate the goods and prevent those from coming into the hands of the bankruptcy estate of the buyer. And the crucial question here is whether a consequence of a provision indicating that the transferor loses the right of control is that also the right of stoppage in relation to the buyer of the goods and his creditors automatically ceases?¹⁰

3.2 The Buyer's Right to Separate the Goods in Relation to the Creditors of the Seller

Another problem with the right of control is how these provisions will affect the creditors of the sender in relation to the buyer. According to Swedish insolvency law there is a general principle that the buyer is not protected against the creditors of the seller until he has come into the possession of the goods. Normally that is the fact when he has got the goods in his custody. The consequence of this is that in a situation where the goods are transported under a non-negotiable document, i.e. a sea waybill, the bankruptcy estate may order the carrier not to deliver the goods even if the buyer has paid for those in advance. The buyer will in this situation have to file an unprivileged claim against the bankruptcy estate. In order to protect himself from the creditors of the seller the buyer must require that the goods are transported under a negotiable document, i.e. a bill of lading. By the acquirement of the bill of lading, the buyer will come into the possession of the goods and obtain protection against the creditors of the seller despite the fact that the goods are in the custody of a third party, i.e. the carrier. Because of the fact that the holder of the bill of lading is the only one, who is entitled to claim the goods from the carrier in the port of destination he will be considered to have a sort of indirect possession of the goods.¹¹

However in Art. 54(1)(a) regarding transports under non-negotiable transport documents it is regulated that the shipper and the consignee may agree that the latter is the controlling party. As an alternative it has been suggested that the shipper may on his own designate the consignee or another person as the controlling party. And according to Art. 54(1)(b) the controlling party is granted the right to transfer its rights to another person upon which transfer the transferor loses its right of control. If such an agreement will be binding also in relation to third parties, it would restrict the general principle that the buyer must come into

¹⁰ Cf. Johansson, pp. 212–224.

¹¹ Håstad, T., *Sakrätt avseende lös egendom*, 6 ed., Stockholm 1996, p. 179.

the possession of the goods such as the creditors of the sender, this would in practice mean that the seller and the buyer would be able to agree on that the right of control is to be transferred to him to the detriment of the creditors of the seller. Such a regulation would restrict the general principle that the buyer must come into the possession of the goods in order to obtain protection from creditors of the carrier.

A condition for the transfer of the right of control is that the transferor or possibly the transferee notifies the carrier. The same principle exists in Swedish law regarding non-negotiable promissory notes. According to the Act on Promissory Notes from 1936 the transferor or the transferee must notify the debtor of the transfer in order to be protected from the creditors of the transferor. The same principle is considered to be applicable in a situation where the debtor pledges goods that are in the custody of the third party. The debtor or the creditor must then notify the third party that he is not allowed to deliver the goods to the debtor. Otherwise the creditor will not obtain protection against other creditors of the debtor. However, it is questionable whether the scope of application of this principle ought to be extended also to non-negotiable transport documents. The difference between these documents and for example promissory notes is that the carrier, as opposed to the debtor, already from the beginning has an obligation to deliver the goods to the consignee, i.e. the buyer of the goods. Such a transfer would contradict the general principle in the insolvency law that the debtor may not favour one creditor, in this case the consignee, to detriment of the rest of the creditors. And an agreement where the sender designates the consignee as the controlling party shortly before the seller becomes declared bankrupt will run the risk of being considered void according to the bankruptcy law.¹²

Another important thing to notice is that the instrument is supposed to cover ancillary land transports and that according to the network principle in Art. 8 the CMR Convention and the CIM Rules might be applicable to certain parts of the transport. These conventions are built on the presumption that the sender retains the right of control until the goods have reached the destination. What if the right of control is transferred to the consignee according to the instrument, will the sender or the creditors of the seller then still be able to prevent delivery by ordering the performing land carrier not to do so according to the CMR Convention or the CIM Rules if they are applicable to a part of the transport. This question seems not to be regulated by Art. 8, which only deals with claims for losses and damages to goods and delay.

4 Electronic Transport Documents

In Art. 3 it is regulated that the parties to the transport agreement may use electronic transport documents instead of paper documents. The intention with this provision is to place the electronic document on equal footing with the paper document. This is necessary because of the fact that some jurisdictions still not

¹² See the Act on Bankruptcy (1987:672), chapter 4, section 5, 10 and 12.

recognise electronic documents. One of the main problems with the electronic document has been that such a document can be multiplied, in other words there is no original document here. Because of this it has proved difficult until now to create a system for the transfer of negotiable transport documents, such as the electronic order bill of lading, where the document is the bearer of the right to claim the goods in the port of destination. Systems like BOLERO with central data bases where the transfers of rights to goods are recorded has been created in order to overcome these problems. The problem here is that one must here be registered as a member in order to make use of the system. In other words this is not a system that take advantage of the one of the most important ideas with the Internet, i.e. that the Internet is a decentralized (and an anarchic) system.

Also the regulation in chapter 2 of the draft instrument seem to be built on the idea that the negotiable transport documents must be transferred between the parties within central data bases. This is indicated by Art. 6 where it is regulated that the use of negotiable electronic records are subject to the rules of procedure agreed between the parties. When becoming a member of the BOLERO you will have to accept the rules of procedure within the system. However there is a risk in building up the regulation of the electronic documents on a centralized system. Already today there are techniques for giving electronic documents a unique character, i.e. creating originals. There are also techniques for identifying persons in the form of electronic ID-cards and electronic signatures. In other words there is a risk that the proposed regulation will be superseded by the technical development, especially since this development is very rapid.

According to Art. 6(a–c) the procedures shall include adequate provisions relating to the transfer of the electronic document to a further holder, the manner in which the holder of that document is able to demonstrate that it is such holder and the way in which confirmation is given that delivery to the consignee has been effected or that the electronic document has ceased to have any effect or validity. In Art. 59(2) the holder of a negotiable electronic document is granted the right to transfer the right incorporated according to the rules of procedure. Clearly these procedures will affect third parties that acquire electronic transport documents and it is possible to question whether this should be left to the parties to the transport agreement, especially if these procedures will affect the protection of the transferee against the creditors of the transferor alternatively the creditors of the transferor in relation to the transferee.

5 Concluding Remarks

It has been said that the draft instrument ought to be commercially driven and that the needs of the industry must be taken into account. However it seems that the recta bill of lading that are used in the short shipping trade are not covered by the instrument. And perhaps this must be seen as a disadvantage if the industry wants that sort of document.

Another problem with the instrument is that the provisions on right of control and transfer of right are very detailed at the same time as they may contradict

general principles of the bankruptcy law and the protection of third parties in certain jurisdictions. It is a fact that the bankruptcy regulation differs a lot between jurisdictions due to different legal traditions and certain States may face difficulties in ratifying the instrument because of this. As a consequence of this problems regarding bankruptcy and the protection of third parties this sort of regulation has often been left out of international conventions. And maybe this is a tradition that ought to be followed also in this instrument. Otherwise there is a risk that States will abstain from ratifying the instrument only because of this.

Lastly, a problem regarding the regulation of the electronic transport documents is that the development in this field is so rapid so there is a risk that the provisions will appear as outdated already at the time when the instrument is enacted. May be the only thing that ought to be regulated here is that the electronic document is on equal footing with the paper document? The more specific problems will instead have to be solved in national law, which are more easy to change and as a consequence of this to adapt to the rapid development in this field.