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Summary record of the 872nd meeting
Held at Headquarters, New York, on Thursday, 19 June 2008, at 3 p.m.

Chairperson: Mr. Illescas . . . . . (Spain)

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Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*)

08-39386 (E)

The meeting was called to order at 3.10 p.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13)

Draft article 43 (continued)

1. **The Chairperson** said that, in the absence of further comment, he took it that the majority of the Commission members were not in favour of the amendments proposed at the previous meeting.

2. *Draft article 43 was approved in substance and referred to the drafting group.*

Draft article 44 ("Freight prepaid")

3. *Draft article 44* was *approved in substance and referred to the drafting group.*

4. **The Chairperson** invited the Commission to turn to the definitions contained in draft article 1, paragraphs 14 to 16, 18 to 22 and 27.

Draft article 1, paragraph 14 (definition of "transport document")

5. **Mr. Sato** (Japan), drawing attention to his delegation's written comments (A/C.9/658/Add.6, para. 2), recalled that Working Group III (Transport Law), at its twenty-first session, had deleted all references to the consignor from the draft convention and had agreed that a mere receipt for the goods, which could be issued by a performing party, would not constitute a transport document for the purposes of the draft convention, since a transport document also had to evidence or contain a contract of carriage. His delegation did not think that a performing party could issue a transport document on its own initiative, rather than on behalf of the carrier, under the current definition. He therefore proposed that all references to "a performing party" should be deleted from the definition of "transport document".

6. **Mr. Elsayed** (Egypt) said that he agreed with the representative of Japan. His delegation would also like to add a new subparagraph (c) with wording along the lines of "Evidences the delivery of the goods to the consignee".

7. **Mr. Hu** Zhengliang (China) said that he supported the Japanese delegation's position. In addition, he proposed that the words "or a person acting on its behalf" should be added after the two references to "the carrier" in order to bring the paragraph into line with draft article 40 on signature.

8. **Mr. Sharma** (India) said that he, too, supported the proposal made by the representative of Japan.

9. **Mr. van der Ziel** (Observer for the Netherlands), supported by **Mr. Sandoval** (Chile), **Mr. Romero-Nasser** (Honduras), **Mr. Berlingieri** (Italy), **Mr. Mayer** (Switzerland) and **Mr. Miller** (United States of America), said that while he agreed with the representative of Japan, he could not support the amendment proposed by the representative of Egypt. In any case, draft article 11 clearly stipulated that the carrier must deliver the goods to the consignee. While he sympathized with the position of the Chinese delegation, he was hesitant to accept its proposal. Draft article 40 had been included because it was desirable to make it clear that a transport document could be signed by one person on behalf of another. Generally speaking, however, the concept of agency, an old transport practice that had caused many problems, had been deliberately left out of the draft convention.

10. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that he associated himself with the statement made by the representative of Japan. He was also sympathetic to the Chinese proposal since paragraph 14 might otherwise suggest that only the carrier could issue a transport document.

11. **The Chairperson** said he took it that the Commission wished to delete all references to "a performing party" from paragraph 14, but noted that there was insufficient support for the other proposals.

12. *Draft article 1, paragraph 14, as amended, was approved in substance and referred to the drafting group.*

Draft article 1, paragraph 15 (definition of "negotiable transport document") and paragraph 16 (definition of "non-negotiable transport document")

13. *Draft article 1, paragraphs 15 and 16 were approved in substance and referred to the drafting group.*

Draft article 1, paragraph 18 (definition of "electronic transport record")

14. **Mr. Sato** (Japan) proposed that all references to "a performing party" should be deleted from paragraph 18 for the reasons that he had given with reference to paragraph 14.

15. *Draft article 1, paragraph 18, as amended, was approved in substance and referred to the drafting group.*

Draft article 1, paragraph 19 (definition of "negotiable electronic transport record"), paragraph 20 (definition of "non-negotiable electronic transport record"), paragraph 21 (definition of the "issuance" of a negotiable electronic transport record), paragraph 21 (definition of the "transfer" of a negotiable electronic transport record) and paragraph 27 (definition of "freight")

16. *Draft article 1, paragraphs 19 to 22 and 27 were approved in substance and referred to the drafting group.*

Draft article 45 (Obligation to accept delivery)

17. **Mr. Blake-Lawson** (United Kingdom), drawing attention to his delegation's written comments (A/C.9/658/Add.13, paras. 15-19), said that he had deep misgivings about the entire chapter on delivery of the goods, which, if adopted, would prejudice the United Kingdom's adoption of the draft convention. The chapter would create more problems than it solved and could facilitate fraud. The current text was the result of long negotiation, but he thought that it was important to reconsider it.

18. Draft article 45 raised a number of questions; it was not clear what the consignee must do in order to incur the obligation to accept delivery, whether a consignee that did not initially exercise its rights under the contract of carriage but later accepted delivery of the goods would be retroactively in breach of the draft article, and whether the carrier had any remedy in the event of a breach of the obligation.

19. **Ms. Czerwenka** (Germany), drawing attention to her delegation's written comments (A/C.9/658/Add.11, para. 18), said that she shared the concerns raised by the representative of the United Kingdom; the draft article created an obligation for the consignee without specifying the point at which that obligation arose. It would be preferable to replace "the consignee that exercises its rights" with "the consignee that requires delivery of the goods".

20. **Mr. Kim** Bong-hyun (Republic of Korea) said that he agreed with the representatives of the United Kingdom and Germany. His delegation would welcome examples of ways in which the consignee could exercise its rights under the contract of carriage, perhaps by making a claim against the carrier or by exercising its right of inspection. He hoped that other delegations could provide additional information on that point.

21. **Ms. Downing** (Australia) said that she associated herself with the previous speakers, particularly the United Kingdom.

22. **Mr. Mayer** (Switzerland) said that he, too, shared the concerns expressed by the representative of the United Kingdom. His delegation had stated in the past that it did not think the consignee's exercise of its rights under the contract of carriage was an appropriate criterion for determining the point as from which the consignee should be bound by that contract. Rather than the language suggested by the representative of Germany, he would prefer to introduce a reference to the consignee's explicit or implicit consent to be the consignee.

23. **Mr. Sato** (Japan) said that his delegation had raised the issue repeatedly in the Working Group, but its proposal to replace "the consignee that exercises its rights under the contract of carriage" by "the consignee that demands delivery" had always been rejected. However, he was prepared to accept the wording suggested by the German delegation.

24. **Mr. van der Ziel** (Observer for the Netherlands) said that he could not support the proposed change. Draft article 45 was intended to address a specific problem for the carrier: that of the consignee who was well aware that the goods were being shipped and who did not wish to accept delivery for a variety of reasons. That was a fairly common business attitude and should be legislated against. An example of the consignee exercising its rights might include, for example, inspecting the goods before demanding delivery. If the consignee then decided to reject the goods, it should not be allowed to leave the problem in the carrier's hands. According to the United Nations Convention on Contracts for the International Sale of Goods, even a buyer wishing to reject goods must accept delivery, but

could do so on behalf of the seller. The draft convention should provide that the consignee must either accept the goods as the agent of the seller or instruct the carrier what to do with them. The consignee, not the carrier, should bear the risk and take the responsibility of lodging a claim or sending the goods back. Of course, inspection was not the only action covered by the phrase "exercises its rights"; it could mean that the consignee had been actively engaged with the carrier. The point was that the consignee must allow the carrier to be discharged, and the solutions proposed by Germany and Japan did not accomplish that.

25. **Mr. Tsantzalos** (Greece), supported by **Ms. Carlson** (United States of America), **Mr. Hu** Zhengliang (China), **Mr. Sandoval** (Chile), **Ms. Slettemoen** (Norway) and **Mr. Mollmann** (Observer for Denmark), said that the arguments of the representative of the Netherlands were convincing that such a provision was needed. The current text of draft article 45 had been arrived at by compromise and should be retained.

26. **Mr. Imorou** (Benin), supported by **Mr. Moulopo** (Observer for the Congo) said that his delegation did not find the arguments of the Netherlands convincing, since draft article 45 involved a contract of carriage, not a sales contract; it therefore supported the proposal of Germany.

27. **Ms. Shall-Homa** (Nigeria) said that, in the light of the extensive provisions on the obligations of the shipper to the carrier in chapter 7 and in the spirit of a fair division of risks and responsibilities between the carrier and the consignee, her delegation supported the proposal of Germany.

28. **Mr. Berlingieri** (Italy), **Ms. Halde** (Canada), **Mr.** Ibrahima Khalil **Diallo** (Senegal), **Ms. Wakarima Karigithu** (Kenya), **Ms. Talbot** (Observer for New Zealand), **Mr. Bigot** (Observer for Côte d'Ivoire), **Ms. Traore** (Observer for Burkina Faso) and **Mr. Luvambano** (Observer for Angola), also supported the proposal of Germany.

29. **The Chairperson** noted that there seemed to be sufficient support for the proposal to replace the words "exercises its rights" with the words "requires delivery of the goods".

30. **Ms. Carlson** (United States of America) said that the verb "demands", as proposed by Japan, would perhaps be more correct than "requires", while conveying the same idea.

31. **Ms. Czerwenka** (Germany) said that her delegation had no problem with the substitution of "demands" for "requires".

32. *Draft article 45, as amended, was approved in substance and referred to the drafting group.*

Draft article 46 (Obligation to acknowledge receipt)

33. *Draft article 46 was approved in substance and referred to the drafting group.*

Draft article 47 (Delivery when no negotiable transport document on negotiable electronic transport record is issued)

34. **Mr. Blake-Lawson** (United Kingdom), supported by **Mr. Delebecque** (France), said that his delegation was concerned that the protection provided to the carrier depended on the carrier's having followed the prescribed procedures, which might not always be available. In subparagraph (c), the carrier, if unable to locate the controlling party, was told to advise the shipper, which should then give instructions in respect of the delivery of the goods. However, in cases where the shipper had transferred all its rights to a controlling party, it could not give delivery instructions without the express authorization of the controlling party.

35. **The Chairperson** said that, in the absence of further comments, he took it that the majority of the Commission did not share those concerns.

36. *Draft article 47 was approved in substance and referred to the drafting group.*

Draft article 48 (Delivery when a non-negotiable transport document that requires surrender is issued)

37. *Draft article 48 was approved in substance and referred to the drafting group.*

Draft article 49 (Delivery when a negotiable transport document or negotiable electronic transport record is issued)

38. **Ms. Downing** (Australia), drawing attention to her delegation's written comments (A/CN.9/658, paras. 48-52), noted that the draft article was intended to address a practical problem frequently faced by carriers when the cargo owner appeared without the

requisite documents or did not appear at all. However, the solution proposed had very serious flaws. The draft article as written would undermine confidence in the system of the bill of lading as a document of title and increase the risk of fraud without effectively solving the carrier's problem. The alternative procedures in subparagraph (d) for obtaining instructions for the delivery of the goods without a bill of lading would eliminate the long-standing requirement to deliver on the production of a bill of lading and would affect banks and other parties relying on that security. Yet the procedures proposed would not solve the problem, because a prudent shipper would not issue delivery instructions without authorization from the rightful owner, since a shipper that did so might be subject to lawsuit. The Australian banking sector had commented that the provision would impose additional risks on banks.

39. The statutory indemnity provided for in subparagraph (f) was also problematic. A seller providing the carrier with alternative delivery instructions would unwittingly be giving the carrier an indemnity that would make it more difficult for a CIF cargo insurer to institute a recovery action or for a cargo claimant to recover for misdelivery. Moreover, since the effect of subparagraphs (d) to (f) was that a carrier who sought alternative delivery instructions from a shipper would be relieved of liability to the holder of a bill of lading, the shipper would be giving an indemnity to a party that had no liability.

40. There were other practical solutions available to the carrier. One possibility was that carriers concerned about certain destinations could insist on prepaid freight including all destination charges, the latter to be refunded if the goods were collected. Australia had procedures that could be followed for turning abandoned goods over to police or customs.

41. **Mr. Delebecque** (France) agreed that the provisions obliging a shipper that was no longer in a position to do so to give delivery instructions and to indemnify the carrier were problematic and would seriously affect confidence in the bill of lading as security. His delegation would prefer to delete subparagraphs (d) to (h).

42. **Mr. van der Ziel** (Observer for the Netherlands) said that the trade as a whole, bankers as well as carriers, had engaged in practices that had undermined the function of the bill of lading. Whenever experts had studied the problem it had been concluded that practitioners could not solve it without the assistance of legislators. The Commission should therefore seize the opportunity to restore trade law in that area. If the system established by draft article 49 created other problems in practice, then practical solutions would have to be found for them.

43. He took strong exception to some assertions that had been made — first of all, that the new system would lead to fraud. Frankly, it was the current system that encouraged fraud: often, for instance, there were three originals of the negotiable transport document in circulation, making it easy to sell them to multiple buyers. It was simple to forge a bill of lading with the current copying techniques. The guarantee system involving delivery against letters of indemnity meant that bills of lading continued to circulate after delivery. The new system, on the contrary, eliminated existing types of fraud. If and when it was shown to facilitate new types of fraud, they could deal with it.

44. Secondly, it was asserted that the banking sector would be assuming additional risk. Yet the new system tended to remove the existing risk, and restored the very essence of the bill of lading system, namely, that the transport document itself, and not a letter of indemnity, legitimated the person entitled to delivery at the place of destination. Draft article 49 put the onus on the holder of the document, which could well be a bank to give the carrier delivery instructions when the goods arrived at destination. That meant, of course, that the bank might have to take action if it did not want its collateral to become worthless — but that could by no means be described as a risk. Additionally, the new system provided legal security in respect of bills of lading, which were currently allowed to continue in circulation after delivery, raising all kinds of legal questions about their validity, generally by voiding those still in circulation.

45. Thirdly, it had been asserted that the lines of authority were unclear. Under draft article 49, the holder of the bill obviously needed no special authorization; when the holder was in default, the carrier, who was generally in a good position to do so, was under the obligation to search for the holder, and if the carrier could not find the holder, it must ask for instructions from the shipper, who admittedly might have to seek authorization from an absent holder. However, that was a cargo-side problem for which

there were solutions, and he would be glad to see draft article 49 improved on that point.

46. He urgently appealed to the Commission, in view of the very serious structural problem in the trade, to recognize that article 49, drafted after extensive discussions and broad consultation with industry practitioners, including banks and commodity traders, solved a number of problems. The time had come for the industry to change its practices.

47. **Mr. Elsayed** (Egypt), agreeing with Australia, Germany and others that article 49 was ambiguous, favoured the holding of informal consultations with a view to redrafting the article from a legal rather than a technical standpoint. A more legal approach should have been taken in the first place.

48. **Mr. Blake-Lawson** (United Kingdom) acknowledged that the current system did encourage fraud, but familiar risks were more easily controlled. The disadvantage of the new system proposed in draft article 49 was that it complicated the current legal position and would stand in the way of a satisfactory and comprehensive reform of the law. The Commission had a chance now to develop a better system, but it could not do so in just a few more days. He therefore reverted to his original proposal to delete draft article 49 and devote more time in the future to finding the best solution for that particular problem.

49. **Mr. Berlingieri** (Italy) said that a number of national legal systems had a procedure for extinguishing a document of title, but unfortunately it took a long time, often months. Draft article 49 offered a rapid procedure, albeit one that perhaps did not offer sufficient security to all interested parties. An effort should be made in informal consultations to enhance the security aspect.

The meeting was suspended at 4.45 p.m. and resumed at 5.15 p.m.

50. **Ms. Slettemoen** (Norway) said that draft article 49, subparagraph (d), did not offer a practical solution. It was couched in terms not of the rights and obligations of the carrier but rather of instructions to be given, and it created problems in respect of the bill of lading. The banking community in Norway found the provision worrisome. She proposed deleting subparagraph (d), and, for the same reasons, deleting the similar provision in article 48, subparagraph (b).

51. **Ms. Talbot** (Observer for New Zealand) said that her delegation supported the comments of Australia, whose banking system closely resembled that of New Zealand. Draft article 49, in attempting to solve a very real problem for carriers, seemed likely to create other problems for the banking industry.

52. **Mr. Miller** (United States of America) said that article 49 did not offer a perfect solution to an acknowledged problem, but it was the best that the Working Group had been able to devise in six years. He doubted that the Commission would be able to improve on it in the current session, but his delegation was willing to participate in informal consultations in an attempt to do so. It believed that the Commission should seize the opportunity to make some changes, for that was better than no solution at all.

53. **Mr. Tsantzalos** (Greece), supporting the Netherlands, said that his delegation favoured retention of the current text.

54. **Mr. Morán Bovio** (Spain) said that the current text of draft article 49 should be retained. It solved a good number of problems and had met with approval in both the banking and the maritime circles in his own country.

55. **Ms. Czerwenka** (Germany) said that she found the Australian and United Kingdom statements very persuasive. It was not likely that the Commission could resolve such an extremely complex matter to everyone’s satisfaction, and it was not clear that draft article 49 actually improved the situation at all. A policy decision was required, not merely informal consultations. Her delegation supported France’s proposal to delete paragraphs (d) to (h).

56. **Mr. Mollmann** (Observer for Denmark) said that there was a practical problem to be resolved, not just for carriers but for all involved in the trade, especially for consignees without a bill of lading to present. Draft article 49 was perhaps not the perfect solution, but it had been thought through and had by and large received a favourable response from the industry. He endorsed the remarks of the Netherlands. The draft article would resolve many problems for all parties in practice, and it would be a mistake not to seize the opportunity to improve the situation. His delegation strongly recommended the approval of draft article 49 as it stood.

57. **Mr. Kim** In Hyeon (Republic of Korea) and **Mr. Sandoval** (Chile) agreed that draft article 49 should be retained in its current wording.

58. **Mr. Delebecque** (France) said that the scenario described in subparagraph (d) was fairly common and therefore required a solution. On reflection, the solution proposed — that, in the event the holder did not claim delivery of the goods, the carrier should seek instructions from the controlling party, the shipper or the documentary shipper — seemed acceptable.

59. With regard to subparagraphs (e) to (h), however, his delegation had a fundamental problem with the idea that, in the event that the holder did not claim delivery of the goods, responsibility would be placed on the shipper. The shipper was not the guarantor of the consignee. Furthermore, the consignee and the shipper were two completely different parties, and the responsibilities of the former could not be transferred to the latter. While his delegation supported some of the ideas expressed in the subparagraphs in question, overall they went too far, for they overturned existing practices and called into question the very way in which the contract of carriage and the relationship between sale and transport were preserved. Subparagraphs (e) to (h) at least should therefore be deleted.

60. **Mr. Hu** Zhengliang (China) reiterated his delegation's position that the arrangements set out in draft article 49 would solve some problems but create others. In particular, the arrangement contained in subparagraph (d) would be time-consuming and costly for the carrier. If, as his delegation preferred, subparagraphs (d) to (h) were deleted, any goods whose delivery was not claimed would simply be deemed to be goods remaining undelivered and draft article 50 would come into play. That said, his delegation might consider retaining the provisions in question if the wording could be improved; however, that might not be feasible so late in the day.

61. **Ms. Czerwenka** (Germany) said that her delegation agreed that subparagraph (d) was also problematic. However, her delegation's concerns related to the statement that if, after reasonable effort, the carrier was unable to locate the controlling party, the carrier should so advise the shipper; the shipper was not the holder of the document. Her delegation therefore favoured the deletion of subparagraphs (d) to (h).

62. **Ms. Halde** (Canada) said that her delegation supported the deletion of subparagraphs (d) to (h). That said, she welcomed the idea of holding informal consultations to try to improve the wording of the draft article.

63. **Mr. Sharma** (India) said that the subparagraphs in question, though somewhat complicated, addressed a very practical problem, namely, what to do in the event that the holder did not claim delivery of the goods. If the goods were simply deemed to be goods remaining undelivered, article 50 would be invoked. It was not unreasonable, in his view, for the carrier to be required to take certain steps before that happened. His delegation therefore supported the retention of subparagraphs (d) to (h).

64. **The Chairperson** said that the Commission seemed to be divided almost equally between delegations in favour of deleting all or part of the draft article and delegations in favour of retaining the draft article. Since some of the latter delegations had acknowledged that the wording could be better, he suggested that an effort should be made to improve the text in informal consultations. If a favourable outcome was not achieved, however, the current version of the draft article should be retained, in line with the usual practice in such cases.

65. **Ms. Czerwenka** (Germany) said that the Chairperson's statement that, in the absence of a favourable outcome, the current version of the draft article should be retained was somewhat at odds with the approach he had taken thus far. In her view, every effort should always be made to find a good compromise that was acceptable to all delegations; to say that the current wording would be retained if no favourable outcome was found was not a compromise. If informal consultations failed, the Commission should be able to consider the text again so as to make a clear decision as to whether or not the current wording should be retained.

66. **The Chairperson** said that the draft convention before the Commission was the result of six years of discussions in the Working Group. As he had announced at the start of the session, the text would be modified only when that was the clear will of the majority of the Commission. Just the day before, the Commission had clearly disagreed with the Working Group in respect of draft article 36 and the draft article had been deleted. The only time when he had not

applied that rule was in respect of draft article 12, where, despite a slight majority in favour of retention, he had facilitated informal consultations.

67. In the case of draft article 49, the delegations in favour of deleting all or part of the draft article were still outnumbered by the delegations in favour of retaining the draft article as it currently stood. However, since some of the delegations in favour of retention had indicated their willingness to try to improve the wording, he took it that the Commission wished to hold informal consultations on draft article 49.

68. *It was so decided.*

69. **Mr. Elsayed** (Egypt) said that his delegation agreed with the Chairperson's suggestion and, as representative of the States belonging to the Council of Arab Ministers of Transport, wished to participate in efforts to improve the wording of draft article 49.

The meeting rose at 6.05 p.m.