



## General Assembly

Distr.: Limited  
17 February 2006

Original: English

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**United Nations Commission  
on International Trade Law**  
Working Group III (Transport Law)  
Seventeenth session  
New York, 3-13 April 2006

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

#### **Delivery to the consignee: Proposal by the delegation of Switzerland on the carrier's right of retention of the goods**

##### **Note by the Secretariat\***

In preparation for the seventeenth session of Working Group III (Transport Law), the Government of Switzerland submitted the text of a proposal concerning the carrier's right of retention of the goods in the draft convention on the carriage of goods [wholly or partly] [by sea] for consideration by the Working Group. The text of that proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat.

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\* The late submission of the document reflects the date on which the proposals were communicated to the Secretariat.



## Annex

### **Delivery to the consignee: Proposal by the delegation of Switzerland on the carrier's right of retention of the goods**

#### **I. Background**

1. As referred to in the report of the sixteenth session of Working Group III (see A/CN.9/591, paras. 221 and 222), during the discussion of chapter 10 of the draft convention on the carriage of goods [wholly or partly] [by sea] on "Delivery to the consignee", the Swiss delegation proposed the introduction of a provision regulating the right of the carrier to retain the cargo for some specific reasons. Such a right would effectively mean that the carrier may suspend its obligation under draft articles 13, 48 (b) and 49 (a)(i) and (ii) to deliver the cargo to the consignee as long as the shipper and/or consignee are in breach of some of their obligations.

2. If no such provision is introduced in the draft convention, then it might be questionable whether and to what extent national law would still be able to maintain its own rules on retention of goods and/or on liens over cargo, as the silence of the draft convention regarding this issue might be read as having covered this issue by dealing with aspects of delivery in the detailed way currently proposed in draft chapter 10.

3. This is particularly the case since chapter 10 does implicitly provide for a right to retain the goods (and withhold or suspend delivery) in some specific instances. Those currently are:

#### **Article 47**

Right to refuse delivery, unless receipt is acknowledged (this, at least, is our reading of the current draft);

#### **Article 48 (b) (Variant C)**

Right to refuse delivery, unless consignee does produce proper identification.

4. Furthermore, the draft convention might be read to preclude any possibility for the parties to agree in the contract of carriage (as it is very frequently done in current practice) to a retention or lien clause, since the obligation under article 13 to deliver the goods at destination is made mandatory by virtue of article 94 (1) (a). Therefore, without clarification relating to the right to retain the cargo in specific situations in this draft convention, any traditional lien clause validity entered into under current legal regimes could become null and void.

5. Such a right to retain the goods (and to exercise a lien on the goods) is crucial to the carrier, as it is for any contracting party in a comparable legal relationship. It is a fundamental remedy and a form of security for payment for services, rendered in connection with that object. Other UNCITRAL Conventions foresee such rights of a contracting party, e.g. the United Nations Convention on Contracts for the International Sales of Goods in article 71. In the context of a contract of carriage, such a right secures the interest of the carrier to be fully paid before it performs the

contract by delivering the goods to the consignee. The draft convention should allow such a practice also in the future.

6. The extent of the right to retain the cargo, and the way that this right of retention has to be exercised, is currently not harmonized and substantially depends on the applicable law, and in fact, on the applicable rules of conflict of law. The value of any lien clause, its extent, its validity and its practical enforcement is, therefore, substantially dependent on the applicable law as recognized at the place of the enforcement of such rights. In practice, this fact makes this right to retain highly coincidental and unpredictable.

7. It is the view of the Swiss delegation that a substantive provision on the right to retain the cargo for payment of freight (and other financial claims arising under the contract of carriage) should be introduced. It recognizes that, depending on the decision of the Working Group on the way to address the issue of the right to retain the goods and to exercise liens over the goods, other provisions of chapter on delivery (chap. 10) might be affected and should be adapted in the drafting process. The Swiss delegation, therefore, suggests that the Working Group should first take a decision on the principles and on the degree of detail of specification to be regulated in the instrument and, then, request the UNCITRAL Secretariat to provide a consolidated version, integrating the aspects of the right of the carrier to retain the goods in the different situations provided for in the draft convention.

8. It is the view of the Swiss delegation that such a provision should not enter into procedural issues or issues of property or real or proprietary rights. The draft provisions should provide a (non-mandatory) answer to the most important questions:

1. Is such a retention allowed?
2. Is the carrier allowed to sell the cargo?
3. Has the consignee or controlling party to be notified?

## II. Proposed Variant A of draft article 52 bis

9. The proposal of this delegation uses as a basis for further discussion the draft provision of article 45 initially provided for in the chapter on freight (see A/CN.9/WG.III/WP.32), but later deleted by the Working Group (see A/CN.9/552, para. 164). This provision, as modified by this proposal, would read as follows:

### Article 52 bis

**1. Notwithstanding any agreement to the contrary, if and to the extent that under national law applicable to the contract of carriage the consignee is liable for the payment of:**

**(a) Freight, dead freight, demurrage, damages for detention and all other reimbursable costs incurred by the carrier in relation to the goods;**

**(b) Any damages due to the carrier under the contract of carriage;**  
**and**

(c) **Any contribution in general average due to the carrier relating to the goods.**

**The carrier is entitled to retain the goods until such payment has been effected, or adequate security for such payment has been provided.**

**2. If the payment as referred to in paragraph 1 of this article is not, or is not fully, effected, the carrier is entitled to sell the goods [according to the procedure, if any, as provided for in the applicable national law] and to satisfy the amounts payable to it [including the costs of such recourse] from the proceeds of such sale. Any balance remaining from the proceeds of such sale must be made available to the person entitled to the goods.**

10. In this proposal, the brackets around the words “Notwithstanding any agreement to the contrary” of the old article 45 of A/CN.9/WG.III/WP.32 are deleted. It is suggested that, thereby, it is made clear that contractual clauses to the effect of describing the right to retain are allowed under the draft convention.

11. The draft provision as set out in Variant A above does not mention the duty of the carrier to notify cargo interests of its intention to enforce its rights of retention and sale. It is suggested that such a provision should be added.

12. Furthermore, the language of the second paragraph of Variant A above should be aligned to draft article 51 (2) and (3) of the draft convention (use of proceeds), or, alternatively, the latter paragraphs should be made applicable to the right of retention.

13. When discussing the chapter on freight in earlier sessions of the Working Group, the provision on the right to retain the goods was not discussed in much detail. However, it became clear that this provision raises issues which are quite complex and, to a certain extent, entail aspects of the law relating to real rights and to procedural laws. It is the position of the Swiss delegation that this fact should not cause UNCITRAL and its Working Group to refrain from attempting to regulate issues of the enforcement of such a right to retain, and thereby allow the commercial parties to be able to deal with this issue in a predictable manner.

### **III. Proposed Variant B of draft article 52 bis**

14. As an alternative to a draft provision in line with Variant A above, the Working Group might want to restrict the draft convention by simply allowing the applicable law and/or the parties to provide for a right to retain the goods. Such a provision could read as follows:

#### **Article 52 bis**

**Nothing in this Convention affects a right conferred to the carrier or [maritime] performing party pursuant the contract of carriage or the applicable law to exercise a right to retain the goods until payments of sums payable to the carrier are fully effected.**

**IV. Right to retain in cases of articles 47 and 48 (b)**

15. Independent from a decision on the two variants above, the Working Group may want to consider a provision which clarifies the right to retain in the cases of draft articles 47 and 48 (b). Such a provision could read as follows:

**The carrier may retain the goods and refrain from delivering the goods to the consignee**

**(a) Provided that the consignee has not acknowledged receipt of the goods pursuant to article 47; or**

**(b) Provided that the consignee does not provide identification pursuant to article 48 (b).**

16. Alternatively, these two possibilities for the carrier to refuse delivery could be added as a new paragraph (c) under draft article 51 (1).

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