Transfer of Documents
On the CMI Draft Instrument on Transport Law
by Hugo Tiberg

At the Southampton Maritime Law Institute’s very excellent Romsey Colloquium on the 2002 CMI Draft Instrument on Transport Law, the subject of transferability of documents in general was practically eclipsed by the special aspect of electronic communication according to the Bolero method. As a result there was no time for comments on the general question, and I would venture a few remarks which I have felt to be called upon, considering the area is perhaps easily overlooked by transport lawyers who have not delved into it. The development of common principles for such transfer is important for the efficient conduct of a global trade, but the question is also one in which differences of a Continental and an Anglo-Saxon method make such assimilation particularly difficult.

The Continental law to which I shall refer is primarily the Scandinavian law and the German law from which it is derived. I should expect a similar understanding to prevail in other Continental systems, but I have not yet studied any of these and invite comments.

The gist of what I shall have to say on these matters has already been presented in my article Towards a common understanding of transport documents in Cargo Liability in Future Maritime Carriage (eighth Hässelby Colloquium 1997), Stockholm 1998 and, in much more detail, in Legal Qualities of Transport Documents, 1998 Tulane Maritime Law Journal pp 1–44. For support and references, I content myself with referring to those articles, particularly the latter.

Terminology
A key notion in the Draft Instrument is the adjective ”negotiable” with the corresponding noun ”negotiability”. Neither term is explained in the Definitions, except that a ”negotiable transport document” is said to mean one made out to the order of either the shipper or the consignee or to the bearer, which ties on to the definition of ”holder” as one who holds a negotiable document acquired in due course. While even this rather empty definition is not correct by Continental standards – and as it seems, hardly by English standards either – it may be asked whether it could still be used as a specially shaped tool for handling the material. The answer is that it cannot.

Negotiability, in Continental and allegedly in English law also, refers to the quality of a commercial document to give its good-faith holder a right of asserting the rights expressed in the document against the document obligee or debtor (i.e. for our purposes, the carrier), irrespective of the previous holder’s position. While this not altogether exhaustive definition may serve for discursive
purposes, it seems to create confusion in international discussions on transferability of transport documents. To many, it seems like if I were to define the front of a man’s head as ”foot” and then remark on some one coming into the room ”with a big smile on his foot”. For the purpose of this intervention I choose to adopt the unworn term ”independent” (and corresponding ”independence”) for documents capable of conferring to the holder rights independent of the cause of the obligation they express. For that which seems intended by ”negotiable” in the Draft Instrument I shall use the word ”transferable”, noting, of course, that the issue is not really whether the document can be transferred but whether the rights it expresses come along with the transfer.

From the quality of independence it is important to distinguish that of the ”title” that the document may confer upon its holder. Title is the holder’s right against others claiming the benefits under the document, and title is directed not against the document’s debtor, but against the world, or competing claimants, in the same way as exclusive title to a bicycle would confer the right of using the vehicle to the exclusion of any one else. Title need not be exclusive, of course, and may well be that of a pledgee or other limited titleholder. A document of title is therefore one for which – under the requisite conditions – the good-faith acquisition and continued possession of the document will give the holder such protected position.

For clarification it may be added that general recognition of a holder’s title need not necessarily determine the debtor’s (carrier’s) recognition of title. In particular, the carrier may have a right to discharge his duties by performing to some one appearing to be the rightful title holder without actually being that holder. The quality of such an apparent holder’s right against the carrier is suitably referred to as ”ostensible title” (”Legitimation” in Continental law) but will not be needed here.

For facilitation of the carrier’s control of the holder’s title it is often provided, by law or in the document itself, that the document must be presented or even surrendered to the carrier on being ”accomplished” through performance of the obligation expressed in it. Without this, performance cannot be enforced. A document subject to this requirement is referred to as a ”presentation document”.

Other specific qualities and further distinctions are found in my mentioned articles but are not needed for this short discussion.

**Substantive provisions**

I need not go into the Draft’s various provisions relating to electronic documents, except to observe that an electronic communication is assumed to be capable of having transferable qualities and that it may then be exchanged for a negotiable transport document, vice versa. I do not question the possibility and usefulness of recreating the various legal characteristics of paper documents into electronic communication but will simplify this account by omitting that aspect.
Three types of documents

Even if we were to accept the Draft’s various definitions, real difficulties are raised by the Draft’s description of the legal effects of the various documents. The Draft operates with a dichotomy of negotiable and non-negotiable documents, having widely distinct characteristics. This distinction is tied in the manner of Anglo-Saxon law to the order/bearer or ”straight” character of the document, which does not at all square with the Continental distinction between order/bearer and ”recta” documents. A brief look at that distinction should clarify the issue.

The form and function of the order/bearer document makes it fit for sale to persons not named in the document – in other words for sale of goods in transit. This facility is the particular virtue of these documents, and it is for these unknown buyers that the qualities of independence and title transfer are particularly designed. For purposes of this presentation I shall refer to these documents as on-sale documents.

But independence and title transfer serve a purpose also for a document intended for a known and named person; indeed, documents not made out to order are becoming increasingly common in practice because of the risks attendant upon on-sale documents getting astray. A document not usable for on-sale may still support the seller’s or credit bank’s faith in having security for payment and may thus serve as tool for exchange against payment. There is a manifest need, therefore, for documents not exposed to risks in getting into the wrong parties’ hands but still having to be presented as a condition for a named buyer’s right to claim the cargo. This named buyer also has use for the document’s conferring the rights it expresses, while the seller has an interest in retaining his title until the buyer has paid. Accordingly, in Continental law, these documents to a named person are independent (“negotiable”) and are documents of title, and they are by law presentation documents. On the other hand, there is no reason to extend these legal effects to buyers other than the named consignee, and thus their transfer to third parties is possible only under the principles of civil assignments.

Documents having these characteristics are the German and Scandinavian ”recta bills of lading”, and I submit that English and American ”straight” bills of lading should at least be presentation documents if they contain a clause to that effect (which is normally the case). German bills of lading become ”recta” by being made out to a named person, while the Scandinavian Maritime Codes require recta bills of lading to have a specific ”recta” clause (”not to order” or ”non-negotiable”) which renders these documents less common than they might otherwise be in this day of increased use of bills of lading to named persons.

The effects ascribed by the Draft Instrument to documents not to order or bearer are reached in Continental law by means of the waybill. Such documents are in no way bearers of rights, and their presentation is not a condition for the entitled person’s exercise of his right to require performance.
Two things seem fairly sure in connection with the recta and straight presentation bills of lading. First, they are suitable documents for the normal modern documentary sale to a known person. Secondly, a Convention suppressing these documents as the Draft Instrument would do seems to stand a very small chance of gaining the acceptance of legislators who have seen the benefit and advantages of such documents as providing both legal security and safety against fraud.

Effects of transfer

The Draft Instrument’s stated consequences of a document’s belonging to the transferable or non-transferable (“negotiable and non-negotiable”) category tie all independent and title-transfer characteristics of a bill of lading to its being an on-sale document. A new holder of such a document assumes rights under the document by receiving it according to well-recognised methods of transfer (12.2.1., 12.2.2.) but assumes liabilities only through the exercise of rights under it (12.2.1.). Contrariwise the transfer of rights other than under a negotiable document is achieved only according to the principles of civil assignments (12.3.), and the Draft allows for liability to be incurred under national law through mere transfer (cf. 12.4.).

Although much thought and some wisdom has gone into these provisions, any further discussion of them seems premature as long as the potential advantages of the various available documents have not been adequately penetrated. In particular, the confining of all transfer effects into the straight jacket of only on-sale documents seems to rule out the benefit that might have been derived from the Continental experience of a model providing for the needs of both the seller and his known and named buyer.