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Transport Law: Preparation of a draft instrument on the carriage of goods [by sea]

Proposal by Sweden

Note by the Secretariat

In preparation of the eleventh session of Working Group III (Transport Law), during which the Working Group is expected to proceed with its reading of the draft instrument contained in document A/CN.9/WG.III/WP.21, the Government of Sweden, on 14 November 2002, submitted the text of a proposal concerning the scope and structure of the draft instrument 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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Annex

Proposal by Sweden on the regulation of door-to-door shipments

1. Background

Sweden welcomes the initiative by UNCITRAL to promote the cause of harmonization of international maritime law. Our gratitude also goes to the Comité Maritime International (CMI) for its immense contribution to this cause.

At the tenth session of Working Group III on transport law, held in Vienna, Austria, 16–20 September 2002, it was decided that the multimodal aspects of the draft instrument on maritime transport were to be discussed during the 11th session in New York, USA, in the spring 2003. The Secretariat also invited the States to submit papers on the multimodal aspects during the autumn 2002. This proposal by Sweden is a response to that. If it later on is decided that the draft instrument is going to cover door-to-door transports Sweden proposes that the text of the Instrument in A/CN.9/WG.III/WP.21 are changed in the following way (changes and commentaries are in italics):

2. Scope of application

Art. 3.1

3.1 Subject to article 3.3.1, the provisions of the draft instrument apply to all contracts of carriage *of goods by sea* in which the place of receipt and the place of delivery are in different States if

(a) the place of receipt [or port of loading] specified either in the contract of carriage or in the particulars is located in a Contracting State, or

(b) the place of delivery [or port of discharge] specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or

(c) [the actual place of delivery is one of the optional places of delivery specified either in the contract of carriage or in the contract particulars and is located in a Contracting State, or]

(d) [the contract of carriage is entered into in a Contracting State or the contract particulars state the transport document or electronic record is issued in a Contracting State, or]

(e) the contract of carriage provides that the provisions of this instrument, or the law of any State giving effect to them, are to govern the contract.

Subject to 4.2.1 the provisions of this instrument also apply to carriage by inland waterway before and after the voyage by sea as well as to carriage by road or by rail from the place of receipt to the port of loading and from the port of discharge to the place of delivery, provided that the goods, during the sea voyage, have been unloaded from the means of transport with which the land segment of the carriage is performed.

Commentary

In the first paragraph it is specified that the instrument apply to contracts of carriage of goods by sea instead of contracts of carriage. This is outlined also in paragraph 2 in which it is regulated that the instrument is not applicable to the ancillary transports if the goods are loaded on the truck or railway during the sea voyage. The idea behind this is to make it clear that the contract must be for a carriage of goods by sea and not by road or rail. Otherwise there is a risk that there will be collision between on the one hand art. 2 of the CMR Convention and art. 48 of the CIM Rules and on the other hand the proposed Instrument. If a ferry operator agrees to carry goods from for example Leeds in Great Britain to Stockholm in Sweden via the harbour of Gothenburg and the goods are loaded on a truck during the sea voyage it is, as 3.1 stands today, uncertain whether the contract should be viewed as a contract of carriage by sea with ancillary transports under this instrument or as a contract of carriage by road under the CMR Convention. It is also important to notice here that a re-writing of the definition in 1.5 might be necessary.

Subparagraph 4.2.1 Carriage preceding or subsequent to sea carriage

Where it has been established that a claim arises out of loss or of damage to goods or delay and the event which caused the loss, damage or delay took place solely during either of the following periods:

(a) from the time of receipt of the goods by the carrier or a performing party *until the goods are discharged in the sea port of loading from the means of transport with which the land segment of the carriage is performed*;

(b) *from the loading of the goods in the sea port of discharge on the means of transport with which the land segment of the carriage is performed until the time of their delivery to the consignee;*

and at the time of such loss, damage or delay there are international conventions or national legislations that according to their terms apply to all or any of the carrier's activities under the contract of carriage during that period and that cannot be departed from by private contract at all or to the detriment of the shipper, such provisions, to the extent they are mandatory, shall prevail over the provisions of this instrument.

Art. 4.2.2 ought to be deleted

Commentary

The words "or as a consequence of" indicates that the loss, damage or delay does not need to materialize during the periods in small (a) and (b). It is enough that they depend solely on what happened during these periods. An illustration to that could be that frozen food is carried by truck to the harbour at too high a temperature. The result of this is that the food starts to rot, but this is not detected until the goods are loaded on board the vessel. The liability will in this situation be governed by the liability regime for carriage of goods by road.

In small (a) and (b) the words "until the time of loading of the vessel" and "from the time of their discharge from the vessel" have been changed to "until the goods are discharged from the other transport mode" and "from the loading of the goods

on the other transport mode" in order to specifically point out that the instrument is not only applicable during the loading and the discharge of the seagoing vessel but also during the storage in a sea harbour terminal. However the instrument is not applicable during the loading or discharge of the other transport mode if that part of the transport is covered by an international or national mandatory regime. The reason for this wording is that the mandatory international and national regulations on carriage of goods by land at least are applicable from the loading of the goods on to the truck or railway wagon to the discharge of the goods from those are completed. In the proposal the word "sea port" is used to point out that the instrument is not applicable if there are international or national mandatory provisions that govern the carriage by inland waterway, i.e. ancillary transports to and from an inland waterway harbour.

According to this proposal all the provisions in these mandatory regulations will prevail over the instrument. In the text in the WP.21 it is prescribed that only the specific provisions on carrier liability, limitation of liability and time for suit prevail over the instrument. The consequence of this is however, as the text appears in WP.21, that for example the mandatory provisions in the CMR Convention on reservations are excluded here and this will constitute a breach of the Convention. The present text ought therefore to be changed in this respect. As a consequence of the fact that national legislation will prevail over the instrument here, art. 4.2.2 should be deleted.

According to the proposed text this will also bring conformity in the chain of carriers. It will for example become impossible for a sub-carrier to hide behind the contracting carrier. If for example goods are carried by sea from USA to a harbour in Sweden and then transported by train from the harbour to an inland city the railway carrier may according to the existing text in the Instrument hide behind the sea carrier. According to the mandatory Swedish railway legislation the shipper is entitled to a compensation of SEK 150 per kilogram of the goods lost if there is a total loss. However if the American shipper sues the contracting carrier, i.e. the American shipping company — which is far more cheaper and convenient for him than suing the Swedish railway carrier —, he will only get 2 SDR per kilogram (i.e. approximately SEK 30.) After that the American shipping company will in the recourse action only claim 2 SDR per kilogram from the railway carrier.

3. Calculation of the compensation

6.2.1 If the carrier is liable for loss of or damage to the goods, the compensation payable shall be calculated by reference to the value of such goods at the place and time of *receipt* according to the contract of carriage. *In addition to this the carrier shall refund the freight, customs duties and other charges incurred in respect of the carriage.*

6.2.2 The value of the goods shall be fixed according to the commodity exchange price or, if there is no such price, according to their market price or, or if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of *receipt*.

6.2.3 In case of loss of or damage to the goods and save as provided for in article 6.4, the carrier shall not be liable for payment of any compensation beyond what is provided for in subparagraphs 6.2.1 and 6.2.2.

Commentary

In the proposed text the place for the calculation of the compensation and the value of the goods have been altered from the place of delivery to the receipt. As a consequence of this it is also regulated that the carrier shall refund the freight, customs duties and other charges incurred in respect of the carriage, values that normally are included in the market price at the place of delivery. The reason for the change from the place of delivery to the place of receipt is to make the Instrument to conform with the CMR Convention art. 23 and the CIM Rules art. 40. Otherwise the calculation of the value of the goods will vary depending on during which leg, the land leg or the sea leg, the goods are damaged. However this also requires that the provisions on freight in chapter 9 of the Instrument are changed.

6.7.1 Subject to article 6.4.2 the carrier's liability for loss of or damage to or in connection with the goods is limited to […] units of account per package or other shipping unit, or […] of account per kilogram of the gross weight of the goods lost or damaged, whichever is the higher, except where the nature and the value of the goods has been declared by the shipper before shipment and included in the contract particulars, [or where a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper]

#.#.# Notwithstanding the provisions of subparagraph 6.7.1, if the carrier cannot establish whether the goods were lost or damaged during the sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international and national mandatory provisions that govern the different parts of the transport shall apply.

Commentary

In addition to subparagraph 6.7.1 which is regulating that liability is limited to units of account per package regarding losses and damages that have occurred during the sea voyage there is a need for regulating the text of the Instrument the limitation level will here be governed by article 6.7.1. Even if the exact level has not yet been decided upon it is likely that the level will be rather low (today it is 667 SDR per package or 2 SDR per kilogram) compared to other transport modes. A reason for having a rather low level for losses and damages during the sea voyage could be that if there is a total loss the carrier or his P&I Club would have to pay a very high compensation in total. However this reason does not make sense in a situation where there is a non-located damage. Here the damages to the goods usually are detected at the place of receipt which means that there are only small amounts of goods that are damaged. Regarding non-located damages, i.e. losses and damages where it is impossible to say whether they occurred during the sea voyage or during one of the ancillary transports, it seems preferable to protect the shipper/consignee by regulating that the carrier is only entitled to make use of the highest limitation level (according to the CMR Convention 8.33 SDR, and according to the CIM Rules 17 SDR) in the national or international mandatory liability regimes that govern the transport.