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

Shipper's obligations: United States proposal on chapter 8

Note by the Secretariat*

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

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



Annex

Shipper's obligations: Chapter 8 of the draft convention on the carriage of goods [wholly or partly] [by sea]

I. Introduction

1. In preparation for the seventeenth session of Working Group III in April 2006, at which time chapter 8 (Shipper's obligations) of the draft convention will be discussed, the United States submits these comments. The U.S. comments in this paper will be limited to (1) a response to certain of the proposals in the recent submission of the delegation of Sweden (A/CN.9/WG.III/WP.67) and (2) the U.S. position on the treatment of delay.

II. Draft article 29. Carrier's obligation to provide information and instructions

2. The United States supports the conclusion reached by the Working Group in Vienna that draft article 29 should be redrafted to focus on the mutual obligation of the carrier and shipper to cooperate with each other in good faith with respect to the sharing of information that is related to and necessary for the parties to perform their respective obligations under the draft convention. However, we do not believe that the obligation to respond to requests for information should extend to information and instructions that are already known or reasonably available to the requesting party, based on independent sources of information.

3. We therefore support Variant C in the Swedish submission (para. 14 in A/CN.9/WG.III/WP.67), and suggest that the title to the article be changed to reflect the mutual nature of the obligation. The article would read as follows:

Article 29. Obligation of shipper and carrier to provide information and instructions.

The carrier and the shipper shall respond in good faith to reasonable requests from the other for information and instructions required for the safe handling and transportation of cargo, which information and instructions are in such party's possession and not otherwise reasonably available to the requesting party.

III. Draft article 30. Shipper's obligation to provide information, instructions, and documents

4. As was expressed by a number of delegations at the Vienna session, we are very concerned with the scope and breadth of the obligations set forth in draft article 30 (b) (compliance with laws). Specifically, we have a serious concern that the scope of the draft article 30 (b) obligation in Variant A of the Swedish submission (para. 20 of A/CN.9/WG.III/WP.67) is unduly broad, as it is not clear whether the obligation created by this paragraph extends to legal obligations applicable to the shipper or to the carrier. It is further unreasonable to expect that a

shipper would have specific knowledge of every law and requirement applicable to the carrier that exists in foreign jurisdictions.

5. If the Working Group concludes that an obligation to comply with-laws-obligation should be included in the draft convention, then the United States believes that this obligation must be narrowed significantly. Our suggestion for achieving a more workable requirement is to limit the obligation of the shipper to provide information that relates to the goods and that is needed only for the carrier's compliance with rules and regulations that apply to the shipment, to the extent that the shipper is required to provide such information by law or the information needed by the carrier is timely made known to the shipper. In addition, we believe that the shipper should not be required to provide such data if the information is otherwise reasonably available to the carrier. We believe that this proposal places reasonable parameters on what is otherwise an overly broad and ambiguous obligation that is susceptible to multiple interpretations.

6. Accordingly, the United States strongly prefers Variant B of the Swedish submission, with some minor changes, as shown below:

Article 30. Shipper's obligation to provide certain information, instructions and documents

The shipper must provide to the carrier in a timely manner such information, instructions, and documents related to the goods that are reasonably necessary for:

...

(b) The Carrier's compliance with rules and regulations of government authorities that are applicable to the shipment if (i) the shipper is required by applicable law to provide such information, instructions and documents; or (ii) the carrier timely makes known to the shipper the information, instructions and documents it requires. Except as required by applicable law, the shipper is not obligated under this paragraph to provide information, instructions and documents that are otherwise reasonably available to the carrier; and

IV. Reversal of the order of draft articles 29 and 30

7. The delegation of Sweden has suggested that one way to address the very broad scope of Variant A of draft article 30(b) (see para. 14 in A/CN.9/WG.III/WP.67) would be to expand the carrier's draft article 29 obligation to provide information so that the shipper can comply with its draft article 28 obligations also to cover the information the shipper needs to comply with its draft article 30 obligations. This would mean reversing the order of articles 29 and 30 (para. 11 in A/CN.9/WG.III/WP.67). This is a new proposal that has not been previously discussed. Placing draft article 29 after draft article 30 has the effect of broadening the information to be provided by the carrier. We do not support this change. The draft convention is a delicate balance between shippers' and carriers' obligations, and, in our view, this is not an appropriate place to add one more obligation to the carrier's side.

V. Draft article 31. Basis of shipper's liability/delay

8. The United States strongly believes that consequential damages for delay should be excluded from the draft convention for both shippers and carriers. Including delay in the draft convention for shippers potentially creates enormous, open-ended liability exposure for shippers. Deletion of delay from the draft convention is also supported by the difficulties surrounding the establishment of a reasonable and logical liability limit that could be applied to shipper delay damages, as well as establishing a liability regime that allows for insurability of the potential risks associated with delay damages. In order to ensure fairness and balance in the draft convention, liability for consequential damages for delay should likewise be eliminated from the carrier's liability to shippers, except as the parties to a shipment may expressly agree. Just as holding shippers liable to carriers under the draft convention for delay exposes them to significant potential liabilities, so too does holding carriers liable to shippers for delay. Carriers could be exposed to claims for damages in connection with delays that are beyond the control of the carrier (e.g., delay in obtaining a berth due to port congestion, inability to release cargo due to terminal congestion, late delivery due to a shortage of truckers or a shortage of rail equipment). Subjecting carriers to liability for delay damages invites a significant increase in claims and related litigation, thereby increasing not only the time and expense of defending and/or settling the claims, but also higher insurance costs which will surely follow from the increased risk and unknown level of claims. The potential economic impact on the industry is such that the inclusion of carrier liability for delay in the draft convention could discourage carriers in some trades from offering door-to-door intermodal services in order to avoid such claims. We believe that the issue of delay and the consequential damages that typically result from such an event are more appropriately addressed by the commercial parties on a case-by-case basis.

9. Should the Working Group decide to retain carrier liability for consequential damages for delay in the draft convention, the U.S. delegation is of the view that, in order to maintain a fair balance, it is essential to include a mirror liability for a shipper who causes carrier delay and exposes a carrier to losses resulting from delay claims against it by other shippers. Because carrier liability for delay damages would be capped, such shipper liability should also be subject to a reasonable limitation.

10. The U.S. delegation has spent considerable time trying to develop an acceptable limitation on shipper liability for delay damages and found it to be an extremely difficult task. A limitation based on the freight paid by the offending shipper is thought by carrier interests to be unreasonably low, while shipper interests find other formulations unreasonably high. A carrier should be fairly protected against any losses it incurs for delay damages caused by a shipper, albeit that the resultant liability on one shipper could be significant. We have therefore concluded that the only equitable resolution to this dilemma is to remove the concept of delay damages from the draft convention for shippers and, unless they agree in a contract of carriage or volume contract on a date certain for delivery of the cargo, for carriers as well.

11. Finally, with respect to whether the shipper's liability should be subject to a fault-based regime or a strict liability regime, the United States believes that a

breach of the shipper's obligations under draft articles 28 and 30 (a) should be subject to a fault-based standard, whereas a failure to provide accurate information should be subject to strict liability. We are uncertain as to whether a shipper should be held strictly liable for a failure to provide information required by draft article 30 (b). On the one hand, a fault-based standard might be appropriate because strict liability would create a significant departure from existing maritime law, and it could be unfair to hold the shipper strictly liable for failure to provide information when the failure was not its fault. On the other hand, strict liability might be appropriate for a breach of article 30 (b) because carriers are dependent on shipper-provided information to comply with legal requirements, and non-compliance may result in liability for the carrier.

12. Therefore, the United States urges the Working Group to consider the following proposal for draft article 31:

Article 31. Basis of shipper liability

1. The shipper is liable to the carrier under the contract of carriage and to any maritime performing party for loss or damage caused by the goods and for breach of its obligations under article 28 and paragraph[s] 30 (a) [and (b)], provided such loss or damage was caused by the fault of the shipper or of any person referred to in article 35.*

2. Notwithstanding paragraph 1, the shipper is deemed to have guaranteed the accuracy [and timeliness] at the time of receipt by the carrier of the information and documents that have to be provided according to paragraph[s] 30 [(b)] and (c). The shipper must indemnify the carrier against all loss or damage arising or resulting from such information, instructions and documents not being accurate [or provided on a timely basis].*

13. Removing shipper and carrier liability for delay would require the following conforming changes to chapter 6 of A/CN.9/WG.III/WP.56:

(1) Draft article 22 would be deleted and replaced with the following:

Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time expressly agreed upon. If delay in delivery causes loss not resulting from physical loss of or damage to the goods carried, the carrier may be held liable for such loss only if the carrier has expressly agreed to be liable for such loss resulting from delay.

(2) Draft articles 24 (2) and 66 (2) would be deleted in their entirety.

* U.S. agreement to the removal of shipper's liability for damages caused by delay from the draft wording of articles 31 and 33 is expressly conditioned upon the elimination of the mandatory carrier liability for consequential damages for delay under article 22 of A/CN.9/WG.III/WP.56. The U.S. views carrier liability for consequential damages for delay as directly related to the issue of shipper liability for delay. If the Working Group decides not to eliminate such carrier liability, the U.S. position is that shipper liability for delay must be reinserted, subject to a reasonable limitation.

- (3) Draft article 65 would be revised to read as follows:

Compensation for physical loss of or damage to the goods caused by delay is subject to article 64. The carrier shall not be liable for economic or other consequential loss caused by delay, except as provided in article 22.

- (4) References to delay would need to be deleted from the following provisions:

- Draft article 17 (1) – four references to delay to be deleted
- Draft article 17 (2) – seven references to delay to be deleted
- Draft article 17 (4) – one reference to delay to be deleted
- Draft article 20 (1) – one reference to delay to be deleted
- Draft article 20 (2) – one reference to delay to be deleted
- Draft article 21 (1) – two references to delay to be deleted
- Draft article 21 (3) – two references to delay to be deleted
- Draft article 25 (1) – one reference to delay to be deleted
- Draft article 26 (2) – three references to delay to be deleted
- Draft article 26 (4) – one reference to delay to be deleted
- Draft article 27 (1) – two references to delay to be deleted
- Draft article 64 (2) – three references to delay to be deleted.

14. Finally, if delay is removed completely from the draft convention for both the shipper and carrier, we believe that a new article should be added to the chapter on shipper's obligations that would clarify that the liability of the shipper for "loss or damage" does not encompass delay. This new article is proposed immediately below:

Article 36 bis. Delay

Damages recoverable from the shipper by the carrier under this chapter for any loss or damage, for a breach of any obligation established hereunder, or under an indemnity or guarantee provided for in this chapter, shall not include damages for delay of a vessel or in delivery of goods loaded on a vessel other than physical damage caused by delay.

VI. Draft article 33. Dangerous goods

15. The references to "delay" should be removed from draft articles 33 (2) and 33 (3), subject to the same understanding set forth in the footnote with respect to draft article 31.

16. Draft article 33 (4) of the Swedish submission (see para. 31 of A/CN.9/WG.III/WP.67), which is a new proposal that has not been discussed before should be deleted in our view, as it would unnecessarily broaden the carrier's

obligation. This issue would also appear to be adequately addressed by the proposal for draft article 29 set out in paragraph 3 above.
