

**General Assembly**

Distr.: Limited  
10 August 2006

Original: English

---

**United Nations Commission  
on International Trade Law**  
Working Group III (Transport Law)  
Eighteenth session  
Vienna, 6-17 November 2006

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

**Limitation of Carrier Liability**

**Note by the Secretariat**

In preparation for the eighteenth session of Working Group III (Transport Law), the Government of China submitted to the Secretariat the document attached hereto as an annex with respect to the limitation of the carrier's liability in the draft convention on the carriage of goods [wholly or partly] [by sea]. The Government of China advised that the text was intended to facilitate consideration of the topic of the limitation of the carrier's liability for breaches of its obligations under the draft convention in the Working Group by compiling the views and comments of various delegations into a single document for discussion by the Working Group.

The document in the attached annex is reproduced in the form in which it was received by the Secretariat.



## Annex

### I. Introduction

1. The 10th session of Working Group III (Transport Law), held between 16 and 20 September 2002 in Vienna, started an initial discussion on the issue of limitation of the carrier's liability (see A/CN.9/525, paragraphs 65 to 70 and 81 to 92). The 13th Session of Working Group III (Transport Law), held between 3 and 14 May 2004 in New York, held the second round of discussions on the issue of limitation of the carrier's liability (see A/CN.9/552, paragraphs 38 to 51 (basis for the limitation of liability), 25 to 31 (liability for loss caused by delay), and 51 to 62 (loss of the right to limit liability)). Following that discussion, the Working Group asked the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) to draft a plan for revising the articles that had been considered. The draft text of the articles on the limitation of liability was contained in paragraphs 3 and 6 to 8 of A/CN.9/WG.III/WP.39. The secretariat compiled and submitted in November 2005 a new, amalgamated text of the draft convention, and issued it as A/CN.9/WG.III/WP.56. The provisions of the limitation of liability in A/CN.9/WG.III/WP.56 are to a certain extent different from A/CN.9/WG.III/WP.39 in terms of their overall structure. A/CN.9/WG.III/WP.56 has an independent Chapter 13 on the limitation of liability, including draft article 64: basis of limitation of liability (corresponding to draft art. 18 of A/CN.9/WG.III/WP.39), draft article 65: liability for loss caused by delay (corresponding to draft art. 16 (2) of A/CN.9/WG.III/WP.39), draft article 66: loss of the right to limit liability (corresponding to draft art. 19 of A/CN.9/WG.III/WP.39) and draft article 104: amendment of limitation amounts (corresponding to draft art. 18 (bis) of A/CN.9/WG.III/WP.39). The present document is based on the text of the draft convention in A/CN.9/WG.III/WP.56.

2. In November 2005, the Chinese Delegation distributed to all interested delegations an informal questionnaire on the issue of limitation of the liability of the carrier's liability. The purpose of this document is to facilitate the discussion by the Working Group on this topic. Five delegations submitted their responses to the questionnaire. The text of the present document does not necessarily reflect the views of the Chinese Delegation, but represents a compromise that may be reached, which the Working Group may wish to consider.

### II. The Core Provisions of Chapter 13

3. The core provision of Chapter 13 of the draft convention is draft article 64: Basis of limitation of liability.

4. Paragraph 1 of draft article 64 provides for the limitation level of liability. It adopted a per package and per kilogram limitation approach, and treated as exceptions goods with a declared value and those regarding which other agreements exist between the parties.

5. Paragraph 2 of draft article 64, which includes two variants, of which Variant A is intended as a clarification of the text of Variant B, without change in substance. Thus, differences exist in the text, but the issues covered remain the

same. Both variants regulate the limitation of liability when it cannot be determined during which leg of the transport the loss or damage occurred.

6. Paragraph 3 of draft article 64 regulates the limitation of liability in terms of the number of packages or shipping units when using containers, pallets or other similar means of transport.

7. Paragraph 4 of draft article 64 provides for the unit of account, and requires that the Special Drawing Rights (SDR) defined by the International Monetary Fund be used as the unit of account.

8. There are two alternative texts set out in draft article 65, Liability for loss caused by delay. Variant A is again intended as a clarification of the text of Variant B, without a change in substance.

9. The final provision in Chapter 13 is draft article 66, Loss of the right to limit Liability.

10. Paragraph 1 of draft article 66 provides for circumstances under which the right to limit liability for loss of or damage to goods, and for breaches of the carrier's obligations under the draft convention may be lost.

11. Paragraph 2 of draft article 66 provides for circumstances under which the right to limit liability for loss caused by delay in delivery may be lost.

12. The final provision of relevance to this report is draft article 104, Amendment of limitation amounts.

13. Draft article 104 was drafted by the Secretariat at the request of the Working Group, by drawing on such international conventions as the 2002 Protocol to the Athens Convention and the United Nations Convention for Liability of Operators of Transport Terminals in International Trade.

### **III. Draft article 64: Basis of Limitation of Liability**

#### **Paragraph 1: Breaches of the carrier's obligations under the draft convention**

14. At the 13th session of the Working Group, some delegates suggested adding "in connection with the goods" of Article 4(5) of the Hague Rules to enable this paragraph to be applicable to circumstances including misdelivery or misrepresentation of the goods in the bill of lading. The conclusion of the discussion on this issue was to insert "in connection with the goods" in brackets into this and other paragraphs for the Working Group to review and discuss in future (see paragraphs 41 to 44 of A/CN.9/552). A/CN.9/WG.III/WP.56 replaces the wording of the whole phrase "loss of, damage to [or in connection with goods] with "breaches of its obligations under this Convention". In the responses to the informal questionnaire, some delegations were opposed to using "breaches of its obligations under this Convention", suggesting that this was an expansion of the limitation on liability enjoyed by the carrier. Other delegations that responded to the informal questionnaire, however, suggested that the Working Group should first discuss what other liabilities of the carrier than those included in chapters 6 and 7 should be subject to limitation. For example, it seems to be possible for a carrier to limit liability in cases of misdelivery of the goods, delivery without presentation of

negotiable transport document or misrepresentation in the transport document. It seems impossible to cover the above cases by simply using “loss of or damage to goods”. As a result, it may not be justifiable to hold that the carrier is not entitled to limit its liability since there might be no question of “intent” or “knowledge” when the carrier acted as mentioned above. Therefore, the correct approach may be to use suitable wording to include the cases mentioned above in the liability limitation covered by draft article 64. Whether or not the carrier should lose the liability limit should be decided by judging in accordance with draft article 66 if the acts of the carrier were taken “with intent” or “with knowledge”.

15. On the basis of the above discussion, it seems that the Working Group may wish to consider:

(1) What other liabilities of the carrier than those included in Chapters 6 and 7 should be subject to limitation? Should misdelivery of the goods, delivery without presentation of negotiable transport document or misrepresentation in the transport document be covered by the limitation of liability covered by draft article 64?

(2) If the Working Group decides that the limitation of liability should cover the circumstances mentioned above, then which specific wording can accurately reflect the intention of the Working Group, i.e. “loss of or damage to goods or [or in connection with the goods]” or “[breaches of its obligations under this Convention]”?

#### **Paragraph 1: Limitation level of liability**

16. At the 13th session of the Working Group, delegates expressed the belief that it was not yet the time to discuss the level of the limitation of liability, and therefore did not discuss the level of limitation of liability that the convention should adopt (see para. 39 of A/CN.9/552). Following the 13th session, the Secretariat compiled at the request of the Working Group in December 2005 a comparative table on limitation levels of carrier liability (A/CN.9/WG.III/WP.53) on the basis of the initial information provided by a number of States. In the responses to the informal questionnaire, some delegations suggested adopting the level of limitation of liability of the Hague-Visby Rules, while other delegations suggested adopting the level of limitation of liability of the Hamburg Rules. Still another delegation suggested greatly raising the level of limitation of liability, arguing that the 1996 Protocol to amend the Convention on Limitation of Liability for Maritime Claims had greatly increased the limit set by the 1976 Convention.

17. If the draft convention adopted the limitation of liability of the Hague-Visby Rules, i.e. 666.67 SDR per package or 2 SDR per kilogram, it would be the same as the limitation of liability currently applied by the majority of countries, which would help the adoption of the draft convention as it would have less impact on the existing system. However, considering the fact that any revision to the draft convention would increase appropriately the limitation of liability on the basis of considering price factors such as inflation, it seemed feasible to raise it to 835 SDR per package or 2.5 SDR per kilogram as required by the Hamburg Rules. Since the draft convention would be an international transport convention rooted mainly in maritime transport, the appropriate approach seemed to be an investigation into the average value of goods shipped through maritime transport and into claims for cargo loss or damage, and then to determine a scientific level of limit of liability on the

basis of the result of the investigation. Some States that responded to the informal questionnaire carried out work similar to this, and the conclusion was that the average value of goods and the absolute majority of the claims were under the level of limitation of liability of 2 SDR or 2.5 SDR per kilogram. As shown by the restricted investigation that China has conducted into judicial decisions, the absolute majority of the claims were under the level of limitation of liability of 2 SDR per kilogram.

18. On the basis of the above discussion, the Working Group may wish to consider:

What level of limitation of liability should the draft convention set after considering factors such as the average value of goods and claims against goods loss or damage?

**Paragraph 2: Non-localized loss or damage**

19. The Working Group discussed paragraph 2 of draft article 64 in detail at its 12th session, the result of which was an even split between the opinions which favoured maintaining the provision, and those which favoured eliminating it (see paragraphs 43 to 50 of A/CN.9/544). The Working Group reiterated this opinion but did not discuss it in detail at its 13th session (see paragraph 45 of A/CN.9/552). In the responses to the informal questionnaire, one delegation favoured maintaining this provision, but the majority of the delegations who responded recommended eliminating it, arguing that the draft convention was an international convention that would be in fact mainly targeted on maritime transport plus other legs of transport. Since the draft convention focuses on maritime transport, it was suggested that it would be not appropriate to include this paragraph in the draft convention. Furthermore, limitation of liability was not an isolated issue, but instead was closely related to such issues as the basis of liability and the conditions for the loss of the limitation of liability. It was suggested that it was not advisable to introduce the limitation of liability for individual legs of transport.

20. The Working Group may also wish to note that article 19 of the United Nations Convention on International Multimodal Transport of Goods provides that where the leg of the multimodal transport in which the loss or damage occurs is determined, the higher limit of liability provided either by an international convention or a domestic law that governs that leg of the transport should be applied. This is in keeping with the principle in draft article 27 of the draft convention. Nevertheless, the United Nations Convention on International Multimodal Transport of Goods does not include any provision for non-localized loss or damage. It seems that the unified limit of liability provided for in article 18 of that Convention should be applied. It seems that the draft convention should adopt a similar approach to apply the limit of liability of draft article 64, paragraph 1, to non-localized loss or damage.

21. The two alternative texts on this provision do not have any substantive difference. Variant A further clarifies Variant B.

22. On the basis of the above discussion, the Working Group may wish to consider:

After thorough consideration of the advantages and disadvantages of providing for non-localized loss or damage, should this provision be deleted so as to

apply the limit of liability of draft article 64, paragraph 1, to non-localized loss or damage?

#### **IV. Draft article 65: Liability for loss caused by delay**

##### **Economic Loss**

23. Draft article 65 includes two variants. Variant A is intended to clarify the content of Variant B. In the responses to the informal questionnaire, one delegation expressed support for Variant A, believing that it was clearer. There were also delegations who supported Variant B, but they suggested replacing “consequential loss” with “economic loss”. Still another delegation proposed distinguishing different kinds of loss, suggesting that the Working Group should make clear that the decrease in the market value was a kind of economic loss, and therefore should be subjected to a limitation of liability such as [one times] the freight.

24. On the basis of the above discussion, it seems that the Working Group may wish to consider:

Which of Variants A or B is clearer? If Variant B is chosen, the Working Group may wish to consider replacing “consequential loss” with “economic loss” so as to cover the loss represented by the decrease in market value.

##### **Limitation Level for Economic Loss Caused by Delay**

25. On the issue of what level should be set for the limitation of liability for economic loss caused by delay in delivery, most delegations that responded to the informal questionnaire proposed to apply the liability limit of 2.5 times the freight payable on the goods delayed, as required by the Hamburg Rules, and supported the rule that the total amount of compensation received in accordance with this article and draft article 64, paragraph 1, should not exceed the liability limit for the total loss of the goods calculated according to draft article 64, paragraph 1. However, another delegation that responded believed that one times the freight would be enough. It was proposed that the specific issue of the level of the limitation for loss caused by delay should be settled on the basis of further investigation, for which consideration should be made of many factors, including the future recognition and acceptability of the amount chosen.

26. On the basis of the above discussion, it seems that the Working Group may wish to consider:

Should the liability limit of the economic loss caused by delay in delivery be set at 1 or 2.5 times of the freight?

##### **Unless otherwise agreed**

27. As for the wording “unless otherwise agreed”, some delegations that responded to the informal questionnaire proposed that the limit of liability of this article should be compulsory, and not subject to negotiation. Another delegation believed that the limit of liability in this article, although compulsory, could be negotiated, but that the limit could only be increased rather than decreased, according to the spirit of the principle of freedom of contract in chapter 20. Still another delegation believed that it was not necessary to include “unless otherwise

agreed” because a correct conclusion could be drawn by following the spirit of the principle established in draft article 94 of Chapter 20. It was suggested that it would be superfluous to insert “unless otherwise provided” into this article.

28. On the basis of the above discussion, it seems that the Working Group may wish to consider:

Is it necessary to keep the wording “unless provided otherwise”?

## **V. Draft article 66: Loss of the right to limit liability**

29. Draft article 66 provides the conditions for the loss by the carrier of the right to limit its liability. The original paragraph was divided into two paragraphs, regulating respectively the circumstances of the loss of the right to limit liability related to loss of or damage to goods, and that related to loss caused by delay in delivery. In addition, the wording of “breach of the carrier’s obligation under this Convention” was inserted into paragraph 1 in lieu of the phrase “[or in connection with] the goods”, as it was in paragraph 1 of draft article 64. In the responses to the informal questionnaire, there seemed to be no substantial difference of views among the delegations regarding this provision. The delegations that responded broadly supported a separate paragraph 2 to deal with the issue of delay in delivery, and it appears that they were also satisfied with the conditions for losing the limitation of liability.

30. Only one delegation expressed misgivings about the fact that “breach of the carrier’s obligation under this Convention” was added to the first part of paragraph 1 of this draft article, yet it was not mentioned in the latter part. It was suggested that the inconsistency between the wording of the first part and the latter part of the paragraph could cause problems. The example was given that, in the case of misrepresentation of the transport document, the carrier did not cause the loss of or damage to goods with intent, or recklessly and with knowledge that loss or damage would probably result, yet it was obvious that the carrier should lose the right to limit its liability in such circumstances.

31. On the basis of the above discussion, it seems that the Working Group may wish to consider:

Would the insertion of “breach of the carrier’s obligation under this Convention” into paragraph 1 result in inconsistency between the wording in the first part and the latter part of this paragraph, which might cause problems for the application of this paragraph?

## **VI. Draft article 104: Amendment of limitation amounts**

### **Paragraph 1**

32. In the responses to the informal questionnaire, some delegations proposed the addition of a rule on an amendment procedure for the revision of the liability limit for loss caused by delay. However, another delegation that responded was opposed to it, arguing that freight itself was a variable factor.

33. On the basis of the above discussion, it seems that the Working Group may wish to consider:

Whether amendment of the limit of liability for loss caused by delay of Article 65 should be added to paragraph 1?

**Paragraph 2**

34. In the responses to the informal questionnaire, some delegations mentioned that the number of States that could apply for amendment of the limitation of liability, i.e. one-quarter or one-half of the total, was related to the number of ratifying States required for the Convention to come into force. If the latter number was high, then a quarter would be enough. If the latter number was low, then half would seem to be more acceptable. In addition, it was suggested that a second condition could be considered, i.e. to set the minimum number of States required for an application to amend the limitation of liability.

35. On the basis of the above discussion, it seems that the Working Group may wish to consider:

What is the appropriate number of States that could apply for amendment of the limitation of liability that should be required in paragraph 2? Should a second condition should be added, i.e. to set the minimum number of States required to apply for amendment of the limitation of liability?

---