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

Shipper's Obligations: Drafting proposal by the Swedish delegation

Note by the Secretariat

In preparation for the nineteenth session of Working Group III (Transport Law), the Government of Sweden submitted to the Secretariat the paper attached hereto as an annex with respect to liability for delay in the draft convention on the carriage of goods [wholly or partly] [by sea]. The Swedish delegation advised that the paper was intended to facilitate consideration of the topic in the Working Group by proposing revised text for some of the provisions on liability for delay. The Swedish delegation further advised that the revised text and commentary in the attached annex was prepared in light of the consideration of the topic of shipper's obligations by the Working Group during its eighteenth session, and on the basis of further informal consultations with other delegations. The Working Group may wish to consider the text in the attached annex in its further consideration of the provision on liability for delay of the draft convention.

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Annex

Liability for delay in the Draft convention on the carriage of goods [wholly or partly] [by sea] – a possible compromise solution

I. Introduction

1. At the eighteenth session, the Working Group decided that the approach to the treatment of liability for pure economic loss or consequential damages caused by delay on the part of the shipper or the carrier set out in "option three" (as described in A/CN.9/WG.III/WP.74) should be pursued as the optimal approach for the draft convention, subject to the Working Group's ability to identify an appropriate method to limit the liability of the shipper for pure economic loss or consequential damages caused by delay (A/CN.9/616, paras. 92, 93 and 100). During that session, the Swedish delegation presented a compromise solution on that matter. However, a number of delegations asked for a written presentation of that compromise proposal. The Swedish delegation has taken on the task to produce such a presentation in order to facilitate the future debate on this matter. The proposal is based on the consolidated text of the draft convention in document A/CN.9/WG.III/WP.81.

II. Carrier's liability for delay caused by a shipper – the question of causation

2. As explained in A/CN.9/WG.III/WP.74, paragraph 14, the intention behind the regulation of delay in the draft convention is that the carrier would never become liable to one shipper for a delay caused by an act or omission of another shipper. For example, if shipper A claims compensation from the carrier because of the fact that the discharge of the goods from the vessel was delayed in the port of destination, the carrier will in this situation be relieved from liability provided that it can prove that the delay was not due to fault on the carrier side, but to the fact that shipper B did not submit the documents required. Shipper B cannot in this situation be considered as a servant or contractor for whom the carrier is responsible.

3. However, at the eighteenth session, some delegations were concerned that carriers would nevertheless be found liable under the draft convention for a delay caused by one shipper in relation to all other shippers with goods on board that vessel (A/CN.9/616, para. 103). In order to accommodate the needs of those delegations, a clarification that the carrier would not be liable for loss or damage to the extent that it is attributable to an act or omission of another shipper could be added in draft article 18 as a new paragraph 3. Such a clarification could read as follows:

Article 18. Liability of the carrier for other persons

1. The carrier is liable for the breach of its obligations pursuant to this Convention caused by the acts or omissions of:

(a) Any performing party; and

(b) Any other person, that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

[2. The carrier is liable pursuant to paragraph 1 of this article only when the performing party's or other person's act or omission is within the scope of its contract, employment, or agency.]

3. The carrier is not liable to a shipper or a consignee for any loss or damage to the extent this is attributable to an act or omission by another shipper.

4. A concern that might be raised against the proposal to insert such a clarification in draft article 18 is that such a rule is already contained in draft article 17 (1) where it is regulated that the carrier is relieved of its liability if it can prove that the loss, damage or delay is not attributable to its fault or to the fault of any person whom it is responsible for according to draft article 18 (A/CN.9/616, para. 104). However, there is a risk, at least in some jurisdictions, that draft article 17 might be interpreted to the effect that the carrier would be found liable anyway in relation to a shipper having goods on board the ship, perhaps for an overall failure to put into place systems to prevent delays caused by another shipper. In such a situation, a clarification of this kind might be helpful.

III. Limitation of the shipper's liability for delay

5. At the eighteenth session of the Working Group, some delegations raised concerns about the potentially very high exposure to liability for the shipper, especially regarding pure economic loss (A/CN.9/616 paras. 105 and 106). One way of limiting this exposure is to put a cap on the liability of the shipper regarding economic loss due to pure delay as a result of a breach of the obligations in draft articles 27, 29 and 31, para. 1. This would make the risk exposure in case of a pure delay more predictable and, as a consequence of this, insurable. For economic loss due to the fact that the shipper is in breach of its obligations regarding accuracy of information and dangerous goods in draft articles 31, para. 2, and 32 it will still be fully liable regardless of whether there is a pure delay or not. The reason for not putting a cap on the liability for a breach of one of these obligations is that they are considered that vital to the carrier that a shipper who disregards them does not deserve the protection of a limitation of liability. In respect of breaches of its obligations under draft articles 27, 29 and 31, paragraph 1, the shipper will also be fully liable for consequential loss resulting from physical damage to the vessel, other cargo or personal injury. Regarding liability for physical damage to the vessel, other cargo or personal injury, a shipper already currently has unlimited liability according to both the Hague Visby Rules and the Hamburg Rules and this seems not to have caused any problems in practice.

6. If it is decided that the shipper's liability for pure delay should be limited, it becomes necessary to make sure that the limitation level does not apply to the obligation to pay demurrage or damage for the detention of the vessel arising out of charterparties or other transport contracts outside the scope of the draft convention.

7. It has proved difficult to link the limitation level to the weight or value of the goods or to the freight. Neither of these factors correspond with the risk. For example, a shipper, who is shipping waste might cause the same damage as a shipper who is shipping electronic equipment. Therefore, it seems preferable to establish a fixed sum as the limitation level. Such a type of liability could also be easily incorporated as a liability element in cargo insurance. Regarding the amount

of the cap, an overall objective should be that the limitation level ensures that shippers are fully liable in ordinary cases, at the same time as they are protected from excessive exposure in extraordinary cases in order to make the liability insurable. If a limitation level of 500,000 SDR is established, approximately between 260 and 320 claims for full freight from other shippers would be covered, based on the fact that the average freight rate of a container amounts to between 1,500 to 3,000 US dollars. A provision establishing such a limitation level could read as follows:

Article 30 ter. Limitation of shipper's liability for loss caused by delay

1. In case of economic loss due to delay, other than as a result of loss or damage to the vessel, other cargo or personal injury, the liability of the shipper for breaches of its obligations under this chapter, except for articles 31, paragraph 2, and 32, is limited to an amount equal to [500,000] SDR per incident.

2. Paragraph 1 does not apply to obligations to pay demurrage or damage for the detention of the vessel arising out of charterparties or other transport contracts outside the scope of this Convention[, incorporated into a transport document or electronic transport record].

IV. A general regulation regarding causation

8. At the eighteenth session, some delegations also indicated that there might be a need for the inclusion of a more general provision on causation in case of liability for delay in order to safeguard that general principles on this in national law are not affected (A/CN.9/616 paras. 107 and 108). Other delegations were of the view that such a provision was not necessary because of the fact that if the draft convention is silent, it follows automatically that national law applies. However, it could be argued that the mere regulation of the shipper's liability in chapter 8 might lead to the result that principles on causation established in national law would be undermined. A provision on causation has to be restricted on the carrier's side to cover only liability due to delay. Otherwise such a provision would be in contradiction with the carrier's right to limit the liability to the value of the goods in case of loss of or damage to the goods. A possible solution that the Working Group might wish to consider is to add a new paragraph (para. 4) to draft article 22. The article would then read as follows:

Article 22. Calculation of compensation

1. Subject to article 62, the compensation payable by the carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 11.

2. The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to their market price 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 delivery.

3. In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1

and 2 of this article except when the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of chapter 19.

4. Subject to article 63, economic loss due to delay in delivery of the goods is calculated according to rules and principles established under applicable national law.

9. The corresponding provision on the calculation of the loss due to the fault of the shipper will have to form a new article in chapter 8 on shipper's obligations. However, this provision should not be restricted to economic loss due to delay, but should apply to all types of loss and damage. Such a provision might read as follows:

Article 30 bis. Calculation of compensation

Subject to article 30 ter, loss or damage due to the breach of any of the shipper's obligations under this chapter is calculated according to rules and principles established under applicable national law.