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

Comments from Non-Governmental Organizations

Note by the Secretariat*

In preparation for the twentieth session of Working Group III (Transport Law), the International Federation of Freight Forwarders Associations (FIATA) and the International Multimodal Transport Association (IMMTA) submitted to the Secretariat their comments on the draft convention on the carriage of goods [wholly or partly] [by sea] (the draft convention) in the attached annex.

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

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



Annex

Comments from the International Federation of Freight Forwarders Associations (FIATA) – Scope of the draft convention

1. Freight forwarders need to know to what extent mandatory legal regimes become applicable when they act as contracting carriers. At present, this does not present any major difficulties, but the situation will become significantly different with any expansion of a contemplated convention on carriage by sea to cover carriage “door-to-door”.

2. This explains why FIATA, as has been earlier stated, opposes such expansion, which it believes would lead to confusion with respect to the required transport document, and applicable liability rules. In particular, it is thought to be inappropriate to apply a maritime liability to cases where customers expect the traditional liability for road and/or rail and/or air transport. For example, in the case of a contract for transport from northern Scandinavia to southern Italy by road and/or rail combined with a short sea transit by ferry to Germany, or, for a transport from Poland to Japan by the Trans Siberian railway to Vladivostok with a sea carriage from there to Japan, it would not seem logical to apply the contemplated convention.

3. With any expansion of the contemplated convention to cover more than the carriage by sea, it is necessary to clearly delimit the applicability, so that the contemplated convention does not apply when the preponderant part of the carriage is non-maritime. Such delimitation would, for all practical purposes, solve the much-debated issue of conflict of conventions and, indeed, conform with the methodology used in the most successful of the UNCITRAL conventions, namely the 1980 Convention on Contracts for the International Sale of Goods, which delimits the applicability of the convention when goods and services are included in the same contract (Art.3(2)) and services constitute the preponderant part. A failure to use such methodology for the contemplated convention, where it is particularly required, would expose UNCITRAL to criticism for not having used the same delimitation technique as it has used in its most successful convention to date.

Comments from the International Multimodal Transport Association (IMMTA)

4. At the IMMTA International Conference on Multimodal Transport (the IMMTA Conference), held in Karachi, on 3rd April 2007, discussions focused on various aspects of multimodal transportation, including operational, legal and insurance aspects. In relation to legal issues, IMMTA members considered in some detail the UNCITRAL Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]. This note reflects the relevant outcome of the Conference for consideration of the Working Group at its 19th session.

5. In relation to the legal framework governing multimodal transport, it was recalled at the IMMTA Conference that presently there was no widely acceptable international regime in force. The United Nations Convention on the International Multimodal Transport 1980 had not received the required number of ratifications to enter into force and the UNCTAD/ICC Rules for Multimodal Transport Documents 1992 was a set of contractual rules and as such its usefulness in achieving international uniformity was limited. The present international legal framework

consisted of various unimodal conventions, diverse regional, subregional and national laws and standard term contracts. As a result, the applicable liability rules greatly varied from case to case, giving rise to uncertainty as to the extent of a carrier's liability in a given situation.

6. It was generally agreed at the IMMTA Conference that with the development of containerisation, multimodal transport was becoming increasingly important and there was a need for a uniform, simple and transparent legal framework to govern liability for loss, damage and delay arising from this type of transportation. In this context, the UNCITRAL Draft Convention was examined at the IMMTA Conference. It was generally agreed by participants at the IMMTA Conference that the UNCITRAL Draft Convention merely extended a maritime liability regime to all contracts for multimodal transport, which included a sea leg.

7. Indeed, concerns were expressed by the participants at the IMMTA Conference regarding a number of provisions of the Draft Convention having a direct impact in relation to multimodal transport. Under existing laws and regulations governing multimodal transport, a multimodal transport operator (MTO) is responsible throughout the entire transportation. It was the view at the IMMTA Conference that this may not, however, be the case under the Draft Convention. Provisions of the Draft Convention dealing with the carrier's period of responsibility,¹ allow the possibility for the carrier to determine contractually the time and location of receipt and delivery of the goods. Furthermore, the Draft envisages situations in which a carrier may not be responsible for parts of the transport, acting as agent only,² or that some functions such as loading or discharging may be carried out by the shipper.³ Thus, under the Draft Convention, it was the view at the IMMTA Conference that there may not be one person responsible during the whole transportation period. While these provisions attempt to accommodate maritime practices, the participants at the IMMTA Conference believe that they create uncertainty and confusion in the context of multimodal transport.

8. As for the liability system, it is the view of the IMMTA Conference that article 26 takes the existing uncertainty concerning the legal regime applicable to multimodal transport one step further. By introducing a minimal network system, in cases of localized loss, it gives precedence to certain mandatory provisions of any international convention applicable to the segment of transport where loss or damage occurred. Thus, if loss can be localized and if there is a mandatory international regime applicable to that particular stage, then provisions dealing with liability, limitation of liability and time for suit of this international regime will apply, together with remaining provisions of the Draft Convention. In the view of the IMMTA Conference, a patchwork of two different regimes, which were not designed to work together, will apply to multimodal transport. It is also believed by the IMMTA Conference that national courts may have difficulty in determining which provisions of each convention should apply, hampering uniform interpretation and application of the convention.

9. In cases of non-localized loss or if no mandatory convention is applicable, then the complex maritime liability regime of the Draft Convention will apply to the

¹ Article 11, paras. (2) and (4).

² Article 12.

³ Article 14, para. (2).

entire multimodal transport, even if only a short sea carriage is involved. It is believed by the IMMTA Conference that this will often be the case, bearing in mind the difficulty in localizing a loss in relation to goods carried in containers and the fact that unimodal conventions are mainly European conventions and do not have global application.

10. It is the view of the IMMTA Conference that the Draft Convention does not seem to provide any advantage over the existing system. While it may be desirable to have a single and transparent convention to govern all contracts for international transport of goods, whether port-to-port or door-to-door, the extension of one unimodal regime to govern other transport modes does not seem to the participants at the IMMTA Conference to be an appropriate solution. Out of one hundred articles of the Draft Convention, only three relate to multimodal transport.⁴ The IMMTA Conference believes that there is a need to give serious consideration to the possible implications of the Draft Convention on multimodal transport. Overall, it is the view of the IMMTA Conference the Draft Convention is extremely lengthy and complex, which we believe is not conducive to achieving international uniformity.

11. In view of the above, the IMMTA Conference questioned the suitability of the UNCITRAL Draft Convention to govern modern multimodal transportation. In conclusion, the IMMTA Conference was of the view that the Draft Convention “did not address the particular challenges and problems of the multimodal transportation and it was unlikely that it would improve the current unsatisfactory situation. The [IMMTA] Conference expressed strong reservations concerning the suitability of the UNCITRAL Draft Convention to govern multimodal transport and requested that these concerns be transmitted to the UNCITRAL Working Group on Transport Law.”

⁴ Articles 1(1), 26 and [62(2)].