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

Comments from the UNCTAD Secretariat

Note by the Secretariat

On 21 September 2004 the Secretariat received comments by the United Nations Conference on Trade and Development. Those comments are reproduced in Annex I in the form in which they were received by the Secretariat.

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Annex I

Comments from the UNCTAD Secretariat on the liability of the carrier under Art. 14 of the draft instrument

Introductory remarks

1. Art. 14 of the Draft Instrument deals with the liability of the carrier for loss, damage or delay of the cargo. That is to say, the provision establishes rules, including rules on burden of proof, that determine under which circumstances a carrier shall be liable for loss, damage or delay of the cargo and under which circumstances the carrier shall be exempt from such liability. Losses for which the carrier is not liable need to be absorbed by cargo interests. Therefore, Art. 14 plays a pivotal role in the overall scheme of liability regulation and risk allocation as between carrier and cargo interests under the Draft Instrument.

2. The text of Article 14 (originally Art. 6.1) has undergone several attempts at revision, with the latest version being reflected in WP. 36. Attempts have been made to further clarify the text, notably by the CMI at its annual conference in Vancouver, where an improved draft was prepared.

3. The following comments seek to facilitate the further discussions within the Working Group by highlighting some central considerations relevant to matters regulated in Article 14. These comments should be considered in context with the substantive comments submitted by the UNCTAD Secretariat in relation to the original Art. 6.1 (see WP. 21/Add.1, Annex II at paras. 55-64).

I. Basis of liability and list of "excepted perils"

4. Art. 14 (1) sets out a general rule on liability of the carrier. If it is seen necessary to supplement this general rule with a list of exceptions/perils/events ("excepted perils") in Art. 14 (2), the content and wording of the listed "excepted perils" deserves careful consideration.

5. In the Hague-Visby Rules, a relevant list of exceptions is contained in Art. IV, r. 2 (a)-(q). Two of these exceptions, the so-called nautical fault and fire exceptions, contained in Art. IV, r. 2 (a) and (b), are available to the carrier in cases of negligence on the part of the carrier's people. The other exceptions (Art. IV, r. 2 (c)-(q)) are subject to the carrier's performance of his obligations and reflect circumstances where negligence of the carrier is not normally involved (such as events beyond the control of the carrier, acts or omissions of the shipper, defects in the goods or inherent vice).

6. Art. 14 (2) lists a number of "excepted perils" which, subject to some textual changes, correspond to Art. IV, r. 2 (c)-(q) of the Hague-Visby Rules. Whether a fire exception (and a currently deleted nautical fault exception) shall be included in the Draft Instrument, possibly in a separate provision, Art. 22, is still subject to discussion.[1]

[1] See WP. 36 at para. 9.

7. Art. 14 (2) (h) and (i) set out some new exceptions to liability, which are not contained in the Hague-Visby Rules and therefore deserve particular attention. Art. 14 (2) (h) and (i) need to be considered in context with draft Arts. 11 (2) 12, 13 (2), the provisions which—if adopted—would provide the carrier with certain new rights. Pending a final decision on these provisions, Art. 14 (2) (h) and (i) would also need to be placed in square brackets.

1. Art. 14 (2) (h)

8. This provision is the corollary to Art. 11 (2), a provision in square brackets, where it is stated that parties may agree that certain of the carrier's obligations in relation to the care, handling and carriage of the cargo shall be performed by or on behalf of the shipper. As has been pointed out in comments by the UNCTAD Secretariat on the original provisions (Art. 5.2.2 and 6.1.3 (ix))[2], this approach gives rise to concern in the context of contracts of adhesion, i.e. contracts on standard terms of the carrier, typically contained in a transport document and not subject to negotiation. In relation to these contracts, a carrier could, by way of including a clause in the transport document, decide unilaterally to delegate responsibility for the care of the cargo (e.g. loading, stowage and discharge) to the shipper/consignee. Furthermore, according to Art. 14 (2) (h), as drafted, the carrier would also be exempt from liability for cargo loss due to the negligence of his own agents and servants or of any performing parties in handling the goods "*on behalf of the shipper*".

2. Art. 14 (2) (i)

9. This "excepted peril" corresponds to rights of the carrier set out in Arts. 12 and 13 (2) (see WP. 32). Accordingly, when considering whether the carrier should be exempt from liability, as proposed in Art. 14 (2) (i), both these provisions need to be considered in context.

(a) According to **Art. 12, Variant A**, a carrier would be entitled to refuse to carry and, if necessary, destroy goods which "*reasonably appear likely ... to become, a danger to persons or property or an illegal or unacceptable danger to the environment*". The carrier's broad rights would arise "*notwithstanding*" Articles 10, 11 and 13 (1), i.e. notwithstanding the carrier's obligations in respect of carriage, care of cargo and seaworthiness of the vessel. Effectively this means that a carrier would not be liable even if negligently caused unseaworhiness of the vessel had given rise to the (potential) danger posed by the goods.

The rights of the carrier under this provision differ considerably from those under the Hague-Visby Rules, Art. IV, r. 6. As has already been pointed out in comments by the UNCTAD Secretariat on the original proposal (Art. 5.3[3]), several aspects of the draft provision give rise to concern. These include the degree of discretion afforded to the carrier, the fact that the carrier's rights shall not be subject to the carrier's compliance with his main obligations (in particular the seaworthiness obligation) and the absence of any safeguards against unreasonable claims or behaviour by the carrier in situations where dangerous goods are carried with the carrier's consent.

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[2] See WP. 21/Add. 1, Annex II at paras. 49-50 and 61.

[3] See WP. 21/Add. 1, Annex II at paras. 51-52.

An alternative proposal, **Art. 12, Variant B**, is more closely modelled after the text of Art. IV, r. 6 of the Hague-Visby Rules, but also provides the carrier with rights "*notwithstanding*" its obligations under Arts. 10, 11 and 13 (1). Thus, in contrast to the Hague-Visby Rules, the carrier would be entitled to jettison dangerous cargo without compensation, even in cases where, for instance, the vessel was unseaworthy due to negligence of the carrier.

(b) **Art. 13 (2)**, a provision in square brackets, would provide a carrier with a broad statutory right to sacrifice goods. Such a right is not contained in the Hague-Visby Rules or any other maritime liability convention and it is not clear why a binding rule to this effect should be introduced into the set of mandatorily applicable liability rules contained in the Draft Instrument. It should be noted that the right to sacrifice of cargo would arise irrespective of the causes of the peril and "*notwithstanding*" the carrier's main obligations under the Draft Instrument (Arts. 10, 11 and 13 (1)). Thus, it would seem that even if a peril was due to other cargo transported on the same vessel or due to negligently caused unseaworthiness of the vessel, a carrier would still be entitled to jettison cargo without compensation.

II. Allocation of the burden of proof and allocation of liability in cases of concurrent causes

10. Much of the discussion on the text of Art. 14 focuses on how to regulate the burden of proof and the allocation of liability in cases of concurrent causes. These issues are both important and complex.

1. The relevance of allocating the burden of proof

11. The legal burden of proof is a technical legal concept, which serves to determine the answer to an important practical question, namely: *if two parties argue, who needs to prove what*? In relation to any legal dispute this is a matter of great significance, which may affect the outcome of the dispute. This is particularly so in cases where evidence is difficult to obtain. The party bearing the burden of proof with regard to a particular issue or argument needs to provide relevant evidence. If it cannot do so, it will lose the argument and will have to accept defeat on the issue in question. Thus, whoever bears the burden of proof bears the risk associated with a lack of evidence.

12. The practical significance of allocating the burden of proof is well illustrated by a recent English decision on the liability of a warehousing company for loss of goods in its possession.[4] According to the relevant contract, the defendant warehousing company would be liable only in cases of negligence. The central question for decision by the court was: which party should bear the burden of proof regarding negligence. *Did the claimants need to prove that the company had been negligent or did the defendant company need to prove that it had not been negligent*? The answer to this question was crucial to the outcome of the claim, as there was virtually no evidence on the causes of the loss. Thus, whoever would bear

[4] *Euro Cellular (Distribution) Plc. v. Danzas Ltd. T/A Danzas AEI Intercontinental and another* [2004] 1 Lloyd's Rep. 521. For present purposes it is immaterial that the decision does not relate to the carriage of goods.

the burden of proof would have to bear the loss. In the event, the court decided that the burden of proof was on the defendant warehousing company, both for reasons of justice and of common sense: the company would be in a much better position to explain what had happened and, indeed, should be the party to provide an explanation. As the company was unable to disprove negligence, the court decided that it was liable for the loss claimed.

13. In relation to loss arising from the international carriage of goods by sea, evidence about the causes of a loss will often be difficult to obtain, particularly for the consignee or shipper of cargo, who may not have access to any of the relevant facts. Moreover, loss, damage or delay of cargo during transit are often due to a combination of factors and, in these cases, evidence about the extent to which different identified causes have contributed to a loss may be even more difficult to find. Against this background, it is clear that rules on the allocation of the burden of proof as between carrier and cargo interests are crucial to the overall allocation of risk as between the two parties.

2. The position under the Hague Rules, Hague-Visby Rules and Hamburg Rules

14. Despite significant differences in the text, under the Hague and Hague-Visby Rules, as well as under the Hamburg Rules, once a cargo claimant has established a loss, the *burden of proof in relation to the causes of the loss* is on the carrier. This is generally recognized. In the absence of sufficient evidence about the cause(s) of a loss, the carrier will be responsible for the (whole) loss. The carrier is therefore generally liable in cases of unexplained losses. In cases where there is a *combination of causes*, the carrier is liable for the whole loss, unless it can prove the *extent to which a quantifiable proportion of the loss was solely due to a cause for which he is not responsible*.

3. Burden of proof and allocation of liability for loss due to concurrent causes in Art. 14 of the Draft Instrument

15. While in relation to the final structure, content and text of Art. 14 a number of issues are still subject to debate, the revised text of Art. 14 (1)-(3) (WP. 36) suggest that the burden of proof relating to the *causes* of a loss shall be on the carrier. Accordingly, the carrier would bear the risk associated with a lack of evidence and would be liable in cases of unexplained losses. However, as parts of the revised text of Art. 14 (1)-(3) are still in square brackets, it is, at this stage, difficult to assess the overall effect of the proposed provisions, in particular in context with Art. 14 (4), the provision dealing with allocation of liability in cases where loss is due to a combination of causes (such as e.g. unseaworthiness and perils of the sea).

16. The draft text of Art. 14 (1)-(3) suggests, more or less explicitly (depending on whether some wording, currently in square brackets is included) that a carrier would also be required to prove *the extent* to which circumstances for which a carrier was not responsible had *contributed* to a loss. This would correspond to the approach adopted in the established maritime conventions, as set out above.

17. However, Art. 14 (4), which provides that liability shall be allocated on a proportionate basis, contains wording, in square brackets, which seems to reflect a

different approach, namely one which corresponds in substance to the second alternative included in Art. 6.1.4. of the original Draft Instrument (WP. 21[5]).

18. The second sentence of Art. 14 (4) provides that liability may be apportioned on a 50/50 basis as between carrier and cargo interests in cases where a court is "*unable to determine the actual apportionment*". This means that, in cases where evidence on the proportion of loss due to the different causes was insufficient to allow any assessment, the carrier would be liable only for 50 per cent of the loss. Therefore, in contrast to the Hague-Visby Rules and the Hamburg Rules, a carrier *would not bear the burden of proving the extent to which a quantifiable proportion of a loss was due to causes for which the carrier was not responsible*.

19. The practical consequences of this difference in approach would be significant. It needs to be borne in mind that a court can only decide—including on the apportioning of liability—on the basis of the evidence available to it, as adduced by the parties to a dispute. The question is how to deal with situations where evidence is not readily available to one or to both parties to a dispute. In this context, burden of proof serves to allocate risk as between the two parties. Under the Hague-Visby Rules, too, a court apportions liability according to the evidence before it. However, under the Hague-Visby Rules, as the carrier bears the burden of proof, he would be held liable for the entire loss (subject to a monetary cap) unless he could prove the *proportion* of loss not due to his fault. In contrast, under Art. 14 (4), as proposed, the situation would be markedly different. In the absence of sufficient evidence, a carrier's maximum exposure would be limited to liability for 50 per cent of a loss (subject to a monetary cap). In practice, a carrier would, therefore, only have an incentive to adduce any relevant evidence if this would reduce his liability even further. Effectively, a cargo claimant would bear the risk associated with a lack of evidence.

20. It is not entirely clear how this approach is to be reconciled with the approach on burden of proof reflected in Art. 14 (1)-(3), referred to above. This in particular if wording currently contained in square brackets was adopted and the carrier would be required (explicitly) to also prove *the extent* to which circumstances for which the carrier was not responsible have *contributed* to a loss.

21. Thus, it appears that a central question, which remains for consideration of the Working Group, is whether in respect of loss due to concurrent/combined causes, the Draft Instrument should follow the approach in established maritime liability regimes or should adopt a new approach. *Effectively, the question is whether, in cases of insufficient evidence on the extent of contributory causes of a loss, a carrier should be liable for the whole loss (Hague-Visby Rules) or, alternatively, whether the carrier should be liable for 50 per cent of the loss only*.

22. It has been suggested that a new approach to burden of proof and allocation of liability may be justified, in particular in view of the fact that the so-called nautical fault exception, contained in Art. IV, r. 2 (a) of the Hague-Visby Rules, may not be available to a carrier under the Draft Instrument. It should be noted, however, that while the applicability of the nautical fault exception may affect the outcome of a cargo claim in some instances, (i.e. where negligence in the navigation or

[5] For relevant comments by the UNCTAD Secretariat on the provision, see WP. 21/Add.1, Annex II at para. 64.

management of the ship causes or contributes to a loss), a change in approach to the general rule on allocation of liability as proposed in Art. 14 (4) could affect a much larger number of cargo claims, namely all cases in which negligently caused unseaworthiness of a vessel had contributed to a loss, but evidence on the relevant proportion was unavailable.

4. Claims by the carrier against cargo interests

23. It should be emphasized that any decision on burden of proof and allocation of losses due to concurrent causes in the context of Art. 14 would only be relevant in relation to cargo claims, but not in relation to claims brought by the carrier against cargo interests for losses of the carrier, e.g. for damage to the vessel due to the carriage of dangerous cargo under Art. 30. At present, it is not clear how burden of proof and allocation of liability would be regulated in cases where both dangerous cargo and unseaworthiness of the vessel may have contributed to cause a loss *to* the carrier. Such losses *sustained by* the carrier may, in practice, be of significant proportion (e.g. loss of the vessel) and the question of burden of proof and allocation of liability would thus be of considerable interest to potentially liable cargo interests. Under the Hague-Visby Rules, it is clear, at least according to English law, that a carrier would not be able to claim an indemnity from the shipper (cf. Art. IV, r.6) unless he could disprove negligence in respect of the unseaworthiness (cf. Art. IV, r.1) or prove the extent to which a quantifiable proportion of the loss was solely due to the shipment of dangerous cargo, carried without the carrier's knowledge/consent.

24. At present, the Draft Instrument does not include a provision similar to Art. IV, r. 1 of the Hague-Visby Rules and it is therefore not clear whether the position under the Draft Instrument shall be the same as under the Hague-Visby Rules or whether a shipper, in order to defeat a claim by the carrier, would also need to prove that the unseaworthiness which had contributed to the loss was due to the carrier's negligence. The Working Group may wish to consider whether to include a separate provision on burden of proof (similar to Art. IV, r. 1 Hague-Visby Rules) in Article 13, the provision dealing with the carrier's seaworthiness obligation.