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

Shipper's Obligations: Information presented by the Swedish delegation

Note by the Secretariat

In preparation for the sixteenth 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 shipper's obligations in the draft convention on the carriage of goods [wholly or partly] [by sea]. The Swedish delegation advised that the text was intended to facilitate consideration of the topic of shipper's obligations in the Working Group by compiling the views and comments of various delegations into a single document for discussion by the Working Group.

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



Annex

I. Introduction

1. Shipper's obligations were discussed during the thirteenth session of Working Group III (transport law) in New York, 3-14 May 2004. The deliberations and decisions are reproduced in the report A/CN.9/552, par. 118-161. The UNCITRAL secretariat was requested to prepare a revised draft of those provisions considered. The draft provisions on shipper's obligations were published in A/CN.9/WG.III/WP.39, par. 14-22. During the summer 2005 the delegation of Sweden distributed an informal questionnaire on shipper's obligations to interested delegations. The purpose of the questionnaire was to facilitate the debate on the subject and to investigate whether there was room for compromise regarding certain questions in the text. Replies to the questionnaire were submitted by a total of 19 delegations. One reply was submitted as a joint document from three different delegations. In between the distribution of the questionnaire and the publication of the report, a new consolidated version of the draft convention has been prepared and submitted for publication as A/CN.9/WG.III/WP.56. This report is based on that consolidated version, but it also refers to the original draft provisions in A/CN.9/WG.III/WP.39. The texts proposed in the report do not necessarily reflect the views of the delegation of Sweden, but represent possible compromises that the Working Group might wish to consider.

II. Delivery ready for carriage, draft article 28 (former article 25)

2. Article 28 contains a general obligation to deliver the goods ready for carriage, unless otherwise agreed in the contract of carriage. However it does not regulate where and when the goods have to be delivered to the carrier. Delegations were asked whether they wished to include a rule that, unless otherwise agreed, the shipper has to deliver the goods at the time and place indicated by the carrier. Around half of the delegations indicated that they do not find such a rule necessary. Some delegations are of the view that this is a commercial matter, which the parties would always agree on anyway in the contract of carriage. One other delegation was of the view that it followed implicitly from the existing text in article 28 that unless otherwise agreed the shipper has an obligation to deliver the goods at the time and place indicated by the shipper. A few delegations more strongly opposed the proposal because of the fact that there is a risk that the balance between the carrier and the shipper will be affected to the detriment of the latter and that there is no need for unification of the law here. Consequently, it was suggested that liability for late delivery should be left to national law.

3. Other delegations have stated that they would like to see a general rule such as the one suggested in article 28. None of these delegations has however presented any specific reasons for why they would like to have such a regulation.

4. As to the question whether the words "intended carriage" cover all parts of the carriage and not only the sea carriage, a majority of the delegations have felt that the text is clear and that there is no need to clarify that the goods must be packed

and stowed in order to withstand the sea carriage as well as the ancillary land carriages.

5. Despite the fact that no specific proposals regarding the relationship between the first and the second sentence of article 28 were made in the questionnaire, a significant number of delegations have commented on that issue. A majority of these delegations have come to the conclusion that the obligation to stow, lash and secure the goods inside a container in the second sentence is already covered by the more general obligation in the first sentence. The argument here seems to be that if the parties agree that the wares are to be delivered in a container, the shipper must not only load, handle, stow, lash and secure the wares themselves properly, for example by packing those in boxes which will withstand the carriage, but also secure the boxes inside the container. In other words, the latter obligation is seen as a part of the stowage of the wares.

6. On the other hand, one delegation has expressed the view that these are two separate matters, which both need to be regulated. Another reason for retaining the second sentence is that containers are subject to specific regulation elsewhere in the draft.

7. However, it could be argued that the general approach in the draft convention as a whole is that goods and their packing, including containers, are treated on equal footing. The fact that containers are explicitly included in the definition of “goods” in article 1(w), provided that the carrier or a performing party does not supply these, illustrates this. Looking at the other specific provisions on containers, these often serve more specific purposes compared to in article 28. For example, article 26 it is necessary to make a distinction between containerized cargo and other cargo, because of the fact that the carrier may carry the former type of cargo on deck without a specific agreement with the shipper.

8. If the text in article 28 is interpreted such that containers are not covered by the first sentence, but only by the second sentence, this will probably contradict the definition in art 1(w), in addition to creating a risk that the shipper will no longer be responsible for the condition of the container provided by him, but only for the stowage of the wares inside it. In practice, however, the problem is not only that the stowage of the wares inside the container is bad, but that the container itself is in such a bad condition that it cannot withstand the carriage.

9. On the basis of the discussion above the Working Group might wish to consider whether article 28 should read as follows:

“The shipper must deliver the goods ready for carriage, unless otherwise agreed in the contract of carriage, and in such condition that they will withstand the intended carriage, including their loading, handling, stowage, lashing and securing, and discharge, and that they will not cause injury or damage.”

III. Carrier’s obligation to provide information and instructions (draft article 29, former 26)

10. No proposal whether to delete article 29 as unnecessary was made in the questionnaire. Some delegations have, however, indicated that they would like to

see the draft article deleted in its entirety. The reasons for this are that the chapter regulates the obligations of the shipper and that this specific obligation is already covered by the general provisions on carrier obligations and liability set out elsewhere in the draft convention. However, a majority of the delegations seem to be of the view that such a provision is a useful regulation in relation to article 30 on the shipper's obligation to provide information and instructions.

11. A majority of the delegations would like to see both the words within square brackets in the first sentence and the bracketed second sentence deleted. According to these delegations, the carrier has an implicit obligation to provide accurate and complete information in a timely manner. Some of these delegations were of the view that the words within square brackets in the first sentence were acceptable and that it could be an idea to specifically point out that the information must be given in a timely manner.

12. A minority of delegations suggested keeping the words within square brackets because of the fact that it could be useful to state these obligations explicitly. One delegation wished to delete only the second sentence of the article. In addition to this, one delegation suggested that the word "such" ought to be included before the word "instructions" in the first sentence.

13. The Working Group might wish to consider a text that reads as follows:

"The carrier must provide to the shipper, on its request and in a timely manner, such information as is within the carrier's knowledge and such instructions that are reasonably necessary or of importance to the shipper in order to comply with its obligations under article 28."

IV. Shipper's obligation to provide information, instructions and documents (article 30, former 27)

14. The views of the delegations were divided with respect to article 30. Regarding the original and the proposed alternative text, some delegations have stated that they would like to retain the original text in article 30. Other delegations have stated that the alternative text is acceptable as a basis for further discussions. A few delegations that favoured the original text stated that the words "reasonably necessary for" in the chapeau and the words "may reasonably assume" in little (a) and (c) represent two different types of tests, one objective and one subjective. This means that in a situation where the document cannot be considered as reasonably necessary for the handling of the goods, the shipper has no obligation to provide it even if he is aware of the fact that the carrier does not have the information—this is the objective test. And likewise in a situation where the document is reasonably necessary, but where there are reasons to assume that the carrier already has the information, the shipper is under no obligation to provide the document this is the subjective test.

15. However, some delegations have also stated that they would like to see a provision where no subjective test is included—in other words, the shipper should have the obligation to provide all documents as soon as these are necessary in themselves for the handling of the goods. A subjective test would run the risk of causing much confusion in practice. Another reason for deleting the words could be

that both situations—where the actual document is not necessary and where the carrier is already aware of the information—are covered in the alternative text by the words “reasonably necessary”. A document could be either not necessary at all for the handling of the goods or not necessary because of the fact that the carrier already has the information.

16. One other delegation has proposed to delete “reasonably” in the chapeau in that the shipper would have to provide all necessary documents.

17. Some delegations have also asked for a reference to article 38(1)(a) regarding the description of the goods to be included in the original text of article 30(c). The liability for the description of the goods would then become a strict one according to 31(2). On the other hand some delegations have stated that the liability for breach of the article 30 ought to be entirely based on negligence. A strict liability is considered to put too much burden on the shipper.

18. Some delegations have felt that the words within the chapeau could be deleted because of the fact that these are to be considered as implied terms, while others have argued that these words should be kept in the text.

19. Regarding the reference to the timeliness, accuracy and completeness it must be noted that according to article 31(2), variant B, the shipper is deemed to have guaranteed them in relation to article 30(b) and (c).

20. On the basis of the discussion above the Working Group might wish to consider the following text as an alternative to article 30 in A/CN.9/WG.III/WP.56:

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

(a) The handling and carriage of the goods, including precautions to be taken by the carrier or a performing party;

(b) Compliance with rules, regulations and other requirements of authorities in connection with the intended carriage, including filings, applications, and licences relating to the goods;

(c) The compilation of the contract particulars and the issuance of the transport documents or electronic records, including the particulars referred to in article 38(1)[(a),] (b) and (c); the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic record is to be issued, if any.

V. Basis of shipper’s liability (draft article 31, former 29)

21. Article 31 regulates the liability of the shipper. In paragraph 1 it is stated that the general liability is based on negligence. Paragraph 2 then modifies the paragraph 1 by saying that for breach of its obligations under paragraphs 30 (b) and (c), the shipper has strict liability. The difference between variant A and B is here that according to variant A the strict liability comprises the obligation to provide this information, as well as its accuracy and completeness. According to variant B, only the timeliness, accuracy and completeness is covered by the strict liability. The

obligation to provide the information is covered by the general liability in paragraph 1. In that respect, it is a little bit odd that the word timeliness has been included in variant B—this means that the question whether the shipper has to provide the information and the questions whether this has been done in due time will be governed by different liability regimes.

22. A majority of delegations preferred variant A of paragraph 2. However, the reasons for this vary a lot. Some delegations have stated that they prefer variant A because of the fact that the text is more simple and clearer. Other delegations have stated that they want it to be clear that the information provided by the shipper is correct—something which is already covered by variant B. And finally some delegations have emphasized that strict liability should cover not only the accuracy and completeness of the information, but also the obligation to provide it.

23. Delegations who have spoken in favour of variant B tend to emphasize the balance between the liability of the carrier and the shipper. A strict liability that covers most of the obligations in article 30 would put too much burden on the shipper, taking into account that the carrier's liability is based on negligence. A further reason that might speak in favour of variant B is that the obligation of the shipper in article 30 is limited to provide information that is reasonably necessary. This makes it difficult to link the obligation with a strict liability. Another issue is that the information actually provided must be accurate and that the shipper will have a strict liability for this.

24. Whether the strict liability should cover the obligation to provide the information in article 30 (b) and (c) is a matter of policy. Some delegations have during the negotiations emphasized the importance of having a strict liability linked to the obligation in paragraph (b) and (c), especially paragraph (b).

25. Some delegations have also pointed out that they would like to limit the scope of the provision to the relationship between the shipper and the carrier. It has been proposed that the words "to the carrier" ought to be inserted in paragraph 1 and that paragraph 3 ought to be deleted.

26. Based on the discussions above the Working Group might wish to consider the following text as an alternative to article 31:

1. The shipper is liable to the carrier for loss, damage and injury caused by the goods, and for breach of its obligations under article 28 and article 30. The shipper is relieved of all or part of its liability if it proves that the cause or one of the causes of the loss, damage or injury is not attributable to its fault or to the fault of any person referred to in article 35.

2. The shipper is deemed to have guaranteed to the carrier the accuracy at the time of receipt by the carrier of the information, instructions and documents that it provides under article 30. It must indemnify the carrier against all loss, damages, delay and expenses arising or resulting from the information, instructions and documents not being accurate, unless the inaccuracy was caused by the carrier or any person referred to in article 19.

27. The alternative text is based on the assumption that the liability for not providing the reasonable information, documents, etc. ought to be based on negligence with a reversed burden of proof (the text mirrors in this respect the provision on carrier liability) and that the scope of the provision should be the

relationship between the shipper and the carrier. Retaining alternative A in the original text of paragraph 2 might modify this rule. The shipper will in that situation have a strict liability for providing the information in article 30 (b) and (c).

28. In paragraph 2 in the alternative text, the shipper has a strict liability for the information that he provides, unless the carrier or anyone for whom it is responsible caused the inaccuracy. The text covers all parts of article 30 and not only paragraphs (b) and (c).

29. Paragraph 3 has been left out as a consequence of the discussion above regarding the scope of the provision.

VI. Material misstatement by the shipper (draft article 32, former 29 bis)

30. A clear majority of the delegations have expressed the view that the provision is not acceptable. Many of these delegations have also proposed that it ought to be deleted. The reason for this is that it appears as a provision of a punitive character. There is no causation required between the misstatement and the liability for delay, loss or damage to the goods. It has also been argued that if there is for example a delay because of a material misstatement on the shipper's side it follows already from article 17 on the carrier's liability that the carrier is not liable for this.

31. Some delegations have spoken in favour of the provision. One reason for this was that it is particularly important that the shipper provide the carrier with correct information and that the latter may suffer damage because of a material misstatement. However, it could be argued that this is already covered by the liability for providing inaccurate information in article 30, especially the proposed paragraph 2 where the liability is strict regarding information which is provided by the shipper.

VII. Special rules on dangerous goods (draft article 33, former 30)

32. A majority of the delegations have expressed that they prefer either no definition at all or a more general and simplified definition than that proposed in A/CN.9/WG.III/WP.39. The reasons for not using the definition in the International Convention On Liability And Compensation For Damage In Connection With The Carriage Of Hazardous And Noxious Substances By Sea, 1996, ("HNS Convention") were that the HNS Convention fulfils a public interest, i.e. protecting the environment and third parties, rather than a private one, and that a technical definition like this one always runs the risk of soon being out of date. Those who preferred a general definition indicated that a general definition might inhibit the courts from applying varying interpretations of the notion of dangerous goods, and so promote uniformity.

33. In A/CN.9/WG.III/WP.56, the Secretariat has proposed a more general definition in draft article 33, paragraph 1. In paragraph 2 and 3 it is regulated that the shipper must mark and label the dangerous goods and that it has an obligation to inform the carrier of the dangerous nature or character of the goods. If the shipper

does not do so, it is strictly liable for the loss, damage, delay and expenses directly or indirectly resulting from such failure. Regarding the obligation to inform, the shipper is only liable if the carrier does not otherwise have knowledge of the dangerous character of the goods.

VIII. Assumption of shipper's right and obligation (draft article 34, former 31)

34. Some delegations have expressed the view that the provision ought to be deleted. The reasons for this are that the chapter should only regulate the liability between the carrier and the shipper and that the question of the position of the "free-on-board", or "FOB" seller does not belong in a convention on carriage of goods, but rather in a convention on sale of goods.

35. However, a majority of the delegations have expressed a preference for including a regulation on the liability of the FOB seller, who very often will be the actual shipper. The problem is viewed as a practical one and it is noted that the relation between the FOB seller and the carrier is not very clear. The effect of such a regulation will be that the carrier may claim compensation directly from the actual shipper and that the latter may make use of the defences in the chapter on shipper's obligations. Looking at the situation today in many jurisdictions, this is something that is regulated by general tort law.

36. A few delegations have also discussed the wording of the provision. The view of one of these delegations is here that the word "accepts" is too vague compared to other alternative word "receives".

37. Another delegation favours a provision where the actual shipper will be liable if it "agrees to" be named as the shipper in the contract particulars. The person considered as the shipper will also have the opportunity to escape its liability if it proves that it is not the shipper by indicating who is really the shipper.

38. Some delegations have also indicated that they would like to see an explicit provision regulating that the shipper and the actual shipper are jointly liable. However, one delegation has expressed the view that provided that the actual shipper is liable, the contractual shipper should be relieved of his liability. The reason for this view seem to be that otherwise the carrier will be put in a better position compared to an shipment under a "cost, insurance, freight", or "CIF" sale where the carrier may only claim compensation from the shipper (i.e. the seller under the sales contract), but not the consignee (i.e. the buyer under the sales contract).

39. On the basis of the discussion above the Working Group might wish to consider the following text:

1. *If a person identified as "shipper" in the contract particulars, although not the shipper as defined in paragraph 1(h), receives the transport document or electronic record, then such person is (a) subject to the responsibilities and liabilities imposed on the shipper under this chapter and under article 59, and (b) entitled to the shipper's rights and immunities provided by this chapter and by chapter 14.*

2. *Paragraph 1 of this Article does not affect the responsibilities, liabilities, rights or immunities of the shipper.*

IX. Vicarious liability of the shipper (draft article 35, former 32)

40. A majority of the delegations supports the article. One delegation is, however, of the view that it is not necessary to mirror the regulation of the carrier's liability and that this question should be left to national law. Among the delegations that favour an inclusion of a provision on vicarious liability of the shipper, some have commented on the wording of the text. One delegation has expressed the view that the first sentence is repetitious. Other delegations have suggested that it is necessary to explicitly state that the shipper is not liable in cases where the performance is delegated to the carrier or a performing party on the carrier's side, for example, under a "free in and out (stowed)", or "FIOS", clause.

41. On the basis of the discussion above the Working Group might wish to consider the following text:

1. *The shipper is liable for the acts and omissions of any person, including subcontractors, employees and agents, to which it has delegated the performance of its responsibilities under this chapter as if such acts or omissions were its own. Liability is imposed on the shipper under this article only when the act or omission of the person concerned is within the scope of that person's contract, employment or agency.*
2. *Notwithstanding paragraph 1 the shipper is not liable for acts and omissions of the carrier or a performing party on the carrier's side to which it has delegated the performance of its responsibilities under this chapter.*

X. Cessation of the shipper's liability (draft article 36, former 43(2))

42. The article was not dealt with in the questionnaire because of the fact that it was formerly located in the now-deleted chapter 9 on freight. The provisions of article 36 must be reviewed in connection with article 94. It seems that article 36 is already covered by paragraph 2 of article 94, which mandatorily regulates the responsibility and liability of the shipper and persons referred to in article 34. If the text in article 94 paragraph 2 is later deleted (the text is now placed within square brackets), the provisions of article 34 would contradict the principle in article 94, paragraph 1, (read *e contrario*) that it is possible to agree on terms more favourable for the shipper.
