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

Shipper's liability for delay: Document presented for the information of the Working Group by the Government of Sweden

Note by the Secretariat*

In preparation for the eighteenth session of Working Group III (Transport Law), the Government of Sweden submitted to the Secretariat the document attached hereto as an annex with respect to shipper's liability for delay in the draft convention on the carriage of goods [wholly or partly] [by sea]. The Swedish delegation advised that, following the consideration of the topic of the shipper's liability for delay by the Working Group during its seventeenth session (see A/CN.9/594, paras. 199 to 207), the document was intended to facilitate consideration of the topic in the Working Group at its eighteenth session.

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 its contents were communicated to the Secretariat.

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Annex

Shipper's Liability for Delay in the Draft Convention on Carriage of Goods by Sea—A Study of the Risks and Consequences

I. Introduction

1. During the seventeenth session of Working Group III on transport law in New York from 3 to 13 April 2006, the question whether the draft convention should include provisions on the shipper's liability for delay was discussed (see A/CN.9/594, paras. 199 to 207). A number of delegations asked for a study of the risks and consequences of having such a liability for delay included in the draft convention. The Government of Sweden has agreed to prepare such a study.

2. In part II of this study, the regulation of the liability of the shipper for delay in the Hague-Visby and Hamburg Rules is presented. Parts III and IV contain an account of the regulation in the draft convention of the liability for delay of the carrier and the shipper, respectively. It has proved to be necessary to take into account also the carrier's liability for delay, since its inclusion in the draft convention to a certain extent affects the actual liability of the shipper. In parts V and VI, some possible risk scenarios regarding liability for delay are outlined and analysed. Part VII contains a study on the insurability of liability for delay on the part of both the carrier and the shipper. Finally, in part VIII, different options regarding the regulation of liability for delay are presented and analysed.

II. Hague-Visby and Hamburg Rules

3. The Hague-Visby rules do not include any provisions on the liability of the carrier for delay. Consequently, a carrier can only be liable for delay if national law imposes such a liability on the carrier, or if the carrier in the contract of carriage has agreed to deliver the goods at a certain time. The Hamburg Rules include liability of the carrier for delay based on fault in article 5. The liability is limited to two and a half times the freight payable for the goods delayed (article 6 (1)(b)).

4. Pursuant to the Hague-Visby and Hamburg Rules, the shipper may be liable for loss, including loss as a result of delay, which the shipper causes through its fault (see article 4 (3) of the Hague Rules and article 12 of the Hamburg Rules). In addition, the shipper is strictly liable for loss as a result of inaccurate information furnished by him (see article 3 (5) of the Hague Rules and article 17 (1) of the Hamburg Rules). Such loss may include delay. According to article 13 (2)(a) of the Hamburg Rules, the shipper is also under the obligation to inform the carrier about dangerous goods and to mark and label them accordingly. The shipper is strictly liable for loss, damage or delay as a result of a breach of its obligation to so inform the carrier. Further, the liability of the shipper under these provisions is unlimited.

III. Carrier's liability for delay in the draft convention

5. Delay in delivery is defined in draft article 22 of the draft convention. According to this provision, delay in delivery occurs "when the goods are not delivered at the place of destination provided for in the contract of carriage within the time expressly agreed upon or, in absence of such an agreement, within the time it would be reasonable to expect of a diligent carrier, having regard to the terms of the contract, the characteristics of the transport, and the circumstances of the voyage or journey". This means that if the parties to the transport agreement have expressly agreed that the goods shall be delivered at a certain time, the carrier will be strictly liable for this obligation. (It is assumed here that it will be possible for the carrier to take on a stricter liability than that provided for in the draft convention, as referred to in draft article 94.) In all other cases, the carrier will be liable for delay caused by its fault. According to draft article 17 (1), the shipper would have to establish a *prima facie* breach by the carrier, i.e. that the goods were not delivered within a reasonable time and that loss occurred because of the delay. In cases where the carrier cannot be said to have guaranteed the time of delivery, the carrier could, according to paragraphs (2) and (3) of draft article 17, defeat the claim by establishing that the particular circumstances of the individual voyage justified the longer length of the voyage.

6. The compensation payable if goods are delayed is regulated in draft article 65. The draft convention as set out in A/CN.9/WG.III/WP.56 included two variants, however, the essence of both is, that the liability for consequential loss arising out of the delay is limited to one times the freight payable on the goods delayed. The compensation for physical loss or damage to the goods arising out of delay is calculated according to the general rule on liability for loss or damage to the goods. This means that according to draft article 23, the compensation will be calculated by reference to the value of the goods at the place and time of delivery. In addition, the carrier will have the right to limit the compensation to a certain amount per package or per kilogram of the gross weight of the goods lost or damaged.

7. If the delay causes physical loss or damage to the goods as well as consequential loss, such as loss of production, the shipper or the consignee will have the possibility to claim compensation for all loss, subject to the limitation provisions in draft articles 64 and 65. However, in a situation where the total loss exceeds the limit that is to be established in draft article 64, the shipper or the consignee will not be able to claim additional compensation for consequential loss equal to one times the freight. In case of a total loss, the limitation level in draft article 64 will instead form an absolute limitation level.

8. In addition to the liability for delay in draft article 17, the carrier will, according to the network principle in draft article 27, be liable for delay in relation to the shipper according to other mandatory transport conventions. A typical example here could be that the goods are transported by road under the Convention on the Contract for the International Carriage of Goods by Road, 1956, as amended by the 1978 Protocol (the CMR convention) or by rail under the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, Appendix to the Convention concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999 (the COTIF/CIM rules) from the port of discharge in Rotterdam to Berlin in Germany. If the delay occurs during this transport leg, the

carrier will be liable for delay limited to one times the freight according to the CMR convention or to four times the freight according to the COTIF/CIM rules.

IV. Shipper's liability for delay in the draft convention

9. According to draft article 28 and draft article 30, the shipper is under the obligation to deliver the goods ready for carriage and to provide the carrier with certain information, instructions and documents. The liability for delay, due to breach of these obligations, is regulated in draft article 31. During the sixteenth session of Working Group III, it was decided that the liability for breach of these obligations should be based on fault with an ordinary burden of proof (see para. 138 of A/CN.9/591). Only in cases where dangerous cargo is transported would the shipper be strictly liable for delay due to failure to inform the carrier of the dangerous nature of the goods or for the failure to mark or label such goods accordingly (see draft article 33). In addition to this, it was decided that the shipper would be strictly liable for loss or damage due to the fact that information and instructions actually provided to the carrier were inaccurate (see paras. 148 to 150 of A/CN.9/591).

10. The liability of the shipper in the present draft text of the convention is an unlimited one. This means that the shipper, once it is found liable, may have to pay compensation for any direct as well as indirect loss that the carrier suffers. The compensation will only be limited by general principles on causation in national law.

V. Effects of the current draft regulation of the carrier's liability for delay—possible risk scenarios

11. With regard to the carrier liability for delay, there are four scenarios that could possibly occur. The first one is that the ship is delayed for some totally external reason of a force majeure character listed in draft article 17 (3), for example a storm, a war, etc. Here, there is no causation between the action of the carrier and the loss that the shipper suffers and consequently, the carrier is not liable in this situation.

12. The second scenario is that the delay is caused by the carrier. Here, the question whether the carrier is liable will depend on whether the carrier can be said to have guaranteed the time of delivery or if the delay occurred as a result of the fault of the carrier. Standard practice today seems to be that carriers never guarantee that the goods are delivered at a certain time, i.e. carriers never take on a strict liability for delay. Normally, it is explicitly stated in the transport documents currently used on the market that the time of delivery is to be considered an estimated one. The reason for this is that there is often no need for an exact time. Shippers tend to use sea transport where there are larger volumes of goods of a relatively low value. Goods of a higher value, such as specially manufactured electronic equipment, where the date of delivery is often much more important, are usually transported by air. In order to find out whether the carrier was at fault in a situation where there is no explicit agreement on the time of delivery, a court would have to compare the normal time for a journey like the one agreed on and the actual

time that the journey lasted. Here, it is important to note that, like the time of delivery indicated in a transport document, the information in the timetables is not to be considered as exact. In addition to this, the court would have to take into account the characteristics of the transport and other circumstances of the individual journey. This would mean that where the master on board decides to reduce the speed because of heavy weather or where there is traffic congestion in a harbour, the carrier will not be liable for any resulting delay.

13. A third scenario is that the delay is caused by the shipper, for example, that the shipper has not provided the documents required for customs clearance. It is explicitly regulated in draft article 17 (3)(h) that in a situation like this, the carrier is relieved from liability for any delay in relation to the shipper.

14. A fourth scenario is that the delivery is delayed because of the act or omission of another shipper. An example of this could be where shipper A claims compensation from the carrier because of the fact that the discharge of the vessel was delayed in the port of destination. According to draft article 17 (1), the carrier will, in this situation, be relieved from liability if it can prove that the delay was not due to the fault of the carrier, 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.

15. The conclusion here is that the carrier's risk exposure regarding liability for delay is rather limited. This is also underlined by the fact that even if the vessel is delayed, this does not mean that the delivery of all cargo will automatically be delayed. For example, if the vessel arrives in the harbour two days late, but a part of the cargo was supposed to be stored in a terminal for four days waiting for transport by truck to the final inland destination, despite the delay of the vessel, the carrier will be able to deliver on time at the final destination. On the other hand, in certain situations the risk of late delivery at the final destination will increase because of the fact that goods will have to be stored while in transit due to delay during one of the previous legs of the transport. Also, the liability for delay imposed on the carrier as a result of the network principle in draft article 27 will, in practice, be rather limited, because of the fact that such liability will most often only concern a few containers, since the ship's cargo will be spread on different trucks and trains after the discharge of the container ship.

16. In addition to the fact that the risk of being liable for delay is rather limited, the carrier also has the right to limit the compensation to, at present, one times the freight payable on the goods delayed. This means that, in a worst case scenario regarding a voyage from Gothenburg to New York, where a vessel with 7,000 containers on board is detained and all of the cargo is delayed, the carrier will have to pay compensation of US$ 20,650,000 in total, based on the fact that the freight rate for the carriage of a 20 ft. container is US$ 2,950. Further, if there is a total loss, the loss due to delay will be regarded as part of the physical loss of the goods, which means that the shipper will not be able to claim any compensation separate from the compensation for the physical loss. In other words, the limitation level for physical loss will here form an absolute limitation level.

VI. Effects of the current draft regulation of the shipper's liability for delay—possible risk scenarios

17. Regarding the shipper's liability for delay, there are two possible risk scenarios which ought to be considered. The first one is that the shipper is not able to deliver the cargo ready for carriage in the port of loading. In the liner trade, this would result in the vessel sailing without having taken on board the containers belonging to that specific shipper. In the bulk trade, the shipper might be subject to liability for demurrage, etc., but this is something which is outside the scope of the draft convention.

18. The second scenario is that goods already taken on board a vessel give rise to delay of the vessel. If the delay depends on the fact that the shipper failed to inform the carrier about the dangerous character of the goods or failed to mark or label them accordingly, the shipper will be strictly liable for the resulting delay. The shipper will also be strictly liable for delay due to incorrect information and documents actually submitted to the carrier. In all other cases, the shipper will be liable only in the case where the shipper is at fault. A typical example here would be if it were found that containers belonging to one shipper were infected with insects and the whole vessel was ordered not to enter the port of discharge before the cargo had been fumigated. Another example would be if the customs authorities refused to let the vessel discharge her cargo because of the fact that there were documents missing regarding the goods in some containers. The carrier may here suffer a direct loss, such as costs for fumigation, costs for returning to a previous port for the discharge of certain containers, inspections on board, etc. However, these are risks that shippers are already facing today. It also seems that the direct loss of a carrier in such a situation will in most cases be rather limited.

19. The great risk here consists of the fact that the consequential losses that other cargo owners may suffer as a result of this may be enormous. But this is not something that will increase the risk exposure of the carrier. As noted above, the latter is not responsible for the acts and omissions of a shipper and consequently not liable in relation to other shippers for the loss they suffer because of those acts or omissions. Therefore, the risk of a recourse action by the carrier against the shipper is minimal here. Only in a situation where the delay has been caused by the carrier and the shipper jointly and the former has paid full compensation to the other shippers would there seem to be room for a recourse action. However, in practice, such a situation will not occur because of the provision on apportionment in draft article 17 (4). Instead the real risk seems to be of the shipper being sued by the other shippers in tort. But this is a risk that a shipper will always be faced with regardless of the liability rule in chapter 8 of the draft convention.

VII. Insurance coverage

20. It can be assumed that liability for delay on the carrier's side will be insurable by the protection and indemnity (P&I) clubs. The risk that the carrier will become liable for economic loss as a result of delay at all appears to be rather small and the risk that a worst case scenario would occur appears to be even smaller. This is illustrated by the fact that the national provisions on liability of the carrier for delay

in the Scandinavian Maritime Code of 1994 have so far not given rise to any case law. And if a worst case scenario would occur, the compensation would be limited to a certain amount. The additional risk for including liability for delay under the P&I insurance can therefore be assumed to affect insurance premiums only marginally.

21. Regarding insurance coverage of the risk of the shipper becoming liable to the carrier for delay, the picture is more complicated. Normally, general cargo insurance will not include any liability risks. This is the case with, for example, the Institute Cargo Clauses. On certain markets, like the Scandinavian market, for example, cargo insurance may cover minor liability risks. For example, if a cargo hold becomes contaminated in connection with the damage of the cargo, a shipper may be able to recover from the insurer some indemnification for costs for the cleaning of cargo holds. Pure economic loss will never be covered.

22. It is also uncertain whether such risks are covered by the general liability insurance of a company that acts as a shipper. As indicated above, the shipper will here be exposed to the direct loss the carrier will suffer, and in some cases also to the indirect loss, i.e. loss that other shippers suffer. However, it is important to note that in relation to the regulation proposed in the draft convention, these are not new risks. They already exist today. For example, a shipper that causes damage to the ship will also be exposed to the risk of having to indemnify the carrier not only for the physical damages to the vessel, but also for pure economic loss, such as loss of freight, etc. In addition the shipper will run the risk of being sued by other shippers for costs they have suffered because of the delay.

VIII. Alternative solutions to the problem and their effects

23. From a practical point of view there seem to be three possible options regarding the regulation of the liability for delay in the draft convention. One option is to leave the liability for delay completely outside the scope of the draft convention, except for the liability for delay as a result of the submission of inaccurate information (cf. article 3 (5) of the Hague Rules). In other words, all references to delay would be deleted. Regarding the carrier's liability for delay, this would in practice mean that the question would be left to national law, and there would be no uniformity. To leave out the regulation of the carrier's liability for delay would also create a discrepancy between, on the one hand, the draft convention, and on the other hand, the CMR convention and the COTIF/CIM rules, according to which the carrier has mandatory liability for delay. Because of the network principle adopted in draft article 27, the carrier will be exposed to such liability. Another consequence of not having liability for delay for the contracting carrier included in the draft convention would probably be that performing land carriers would be more exposed to claims regarding delay because of the fact that they often operate under national mandatory liability regimes, which include liability for delay.

24. It could also be argued that already today, door-to-door concepts form important parts of modern production systems and that a key element of such a concept is that the goods are delivered in time. In order to reduce costs, the production of components is often out-sourced at the same time, as warehousing is

kept at a minimum in the logistics chain. Deleting liability for delay would, in other words, to a certain extent undermine the idea that the draft convention should consist of modern legislation for the global shipping and logistics industry.

25. Regarding the shipper's liability for delay, a decision to delete all references to delay would not lead to the result that the shipper would have no liability for delay at all according to the draft convention. Despite the fact that there would be no specific reference to delay in draft article 31, the shipper would still under many jurisdictions be liable for delay as a consequence of the fact that the vessel was damaged or that documents were not submitted.

26. A question that might arise here, regardless of the fact whether or not a reference to delay is included in draft article 31, is whether the liability of the shipper ought to be limited and if so, what the limitation level ought to be. One advantage of having a limitation is that the risk exposure would otherwise be severe if the vessel were totally lost. The shipper would then be liable for direct loss (the vessel and other equipment) as well as for indirect loss (freight, etc.).

27. A second option would be to keep carrier liability for delay in the draft convention, but to delete the specific references to delay in the chapter on shipper's obligations. This would leave the carrier with uniform limited liability. As indicated above, this would not affect the shipper because of the fact that the carrier is not liable for the acts of a shipper in relation to other shippers. The advantage of such a solution is that while the delivery of the goods at the destination is a key obligation in the transport agreement, the same thing cannot be said about the obligations of the shipper to deliver the goods and certain documents to the carrier. The primary obligation of the shipper is to pay the freight. Consequently, the same need to create uniformity on the international level does not seem to exist regarding liability for delay on the shipper side as compared to liability for delay on the carrier side. As indicated above, the effect of such a deletion will not be that the shipper will not be liable for delay at all. The shipper will still be liable for delay that occurs as a result of damage to the ship or as a result of the submission of inaccurate information at the same time as the liability for other delay will be left to national law.

28. A third option would be to retain all references to delay on the part of the carrier as well as on the part of the shipper. In that situation, there might be a need for the inclusion of a limitation level regarding the shipper's liability that is acceptable for both the carrier and the shipper. It is not an easy task to establish such a level because of the fact that the type and amount of damage may vary substantially between different cases. One way of doing this would be to hold the shipper fully liable for physical loss, such as loss and damage to the ship and other equipment. Regarding other economic loss, direct or indirect, the shipper would be liable for loss equal to the value of the goods shipped. This is not a perfect solution because of the fact that cargo of rather low value may cause as much damage as more valuable cargo, but at least it will create a situation where shippers who are shipping large volumes of more valuable cargo will have to take on greater liability. An advantage with linking the limitation level to the value of the goods shipped instead of linking it to the weight of the goods is that the establishment of an SDR-formula could be avoided. A system based on the value of the goods would be reminiscent of the solutions often found in commercial sales contracts where the maximum damage payable is linked to the contract sum, i.e. the value of the goods sold. The limitation level regarding delay in delivery could be, for example, 15 or

30 per cent of the contract sum. However, because of the fact that shippers may sometimes ship rather small volumes, the limitation level here should be equal to the full value of the goods rather than a part of the value. A limitation level would promote predictability and would make it possible to create better insurance coverage on the part of the shipper, for example by adding a liability element to the existing cargo insurance or company liability insurance.