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

Addendum to compilation of replies to a questionnaire on door-to-door transport and additional comments by States and international organizations on the scope of the draft instrument

Note by the Secretariat

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Introduction

1. In January 2003, a document entitled “Compilation of replies to a questionnaire on door-to-door transport and additional comments by States and international organizations on the scope of the draft instrument” was published (A/CN.9/WGIII/WP.28). That document consisted of responses to a questionnaire circulated to interested non-governmental and inter-governmental organizations, as well as to States, in August 2002, and was intended to gather information regarding the practice of containerized transport and the use of door-to-door contracts by carriers. Included in that document were additional statements and contributions submitted to the Secretariat in connection with the preparation of the draft instrument. This document consists of responses and statements received by the Secretariat after the date of publication of the original compilation. Again, the questionnaire is reproduced as an annex to this note.

2. A set of responses to the questionnaire received from a non-governmental organization is reproduced in section I below.

3. Additional statements and contributions submitted to the Secretariat by non-governmental organizations in connection with the preparation of the draft instrument are reproduced in section II below.

4. The responses, statements and contributions referred to in paragraphs 2 and 3 above are reproduced in the form in which they were received by the Secretariat.

I. Replies to the questionnaire from non-governmental organizations

Ibero-American Maritime Law Institute

[Original: Spanish]

1 and 2. To have a uniform liability scheme for door-to-door transport covering the overseas leg would undoubtedly be useful for all concerned with international trade. The critical question is what the uniform rules will be based on and to what extent they can be incorporated in national and regional legal systems that contain rules relating to the different modes of transport—in some cases, public policy norms. By way of example, we would mention Cartagena Agreement Decisions 331 and 393 and the Agreement on International Multimodal Transport between the States Parties of MERCOSUR.

In the draft instrument that we are concerned with, it will be a question of implementing a *particular* regime for multimodal transport, already regulated—in general terms—in the 1980 United Nations Convention on International Multimodal Transport of Goods.

A “particular” liability regime might give rise to problems to the extent that it differs from the solution adopted in the 1980 Convention. That would be particularly so if the liability system were to diverge from the Hamburg Rules, which are in force and constitute the source of the 1980 Multimodal Convention.

3. The idea of assimilating land transport to sea transport is in conflict with the fact that the practices and applicable procedures differ in nearly all countries. This reflects the historical recognition that maritime transport is of a particular nature and subject to special risks, particularly the so-called “perils of the sea”. This recognition led long ago to the acceptance of a limitation of liability and the concept of “accidents at sea”. The provisions on exoneration from and limitation of liability contained in the Hague-Visby Rules would not seem to correspond to the *needs of the industry*, as they did more than half a century ago. The new trend in so-called “damages law” is in the direction of objective liability and complete compensation for damage caused. These new concepts must be taken into account, particularly where they apply to the transport of goods by land in many countries.

4. The ideal of a uniform system as mentioned above, comes into conflict with the different ontological and legal realities involving stevedoring companies, land carriers, warehouses, terminals, etc. The differences arise, inter alia, in the liability systems, the grounds for exoneration, the limitation of liability and the time limits for actions.

5. In the case of multimodal transport, one could allow for proceedings by the damaged party against the responsible party (localized damage) or any of those participating in the transport chain, on the assumption of joint and several liability—without prejudice to the right of the defendant to recover any compensation paid from the party actually responsible for the damage.

The argument in favour of this principle is the existence of a common, shared interest between the multimodal transport operator (MTO) and the successive carriers and among all these, together with the concept of multimodal transport as based on an underlying, indivisible, collective contract with a number of obligated parties, the parties being jointly answerable for the complete transport operation; the contractual relationship is formalized not initially but successively, each carrier acceding to the contract upon receiving the goods. The joint liability derives from the existence of a shared, common interest, particularly as joint and several liability is assumed in commercial matters. The principle is further justified by the disadvantageous position of the shipper with regard to identifying who is responsible for loss, damage or delay in the delivery of the goods. This problem arises continually in the transport of goods consolidated in containers.

6. This question refers to the application of a convention covering road transport, such as the Convention on the International Carriage of Goods by Road, applicable in Europe and not affecting the Ibero-American countries. The question would therefore have to be answered by countries that apply this regime and have adopted common solutions for land transport in a regional context. Purely theoretically, it might be supposed that there should be no difference between the liability system applying to sea and land, provided that the uniform system adopted contains common characteristics relating to the guarantee obligation assumed by the MTO towards the shipper.

7. Following up the above reply, a uniform liability regime could be beneficial as helping to improve legal certainty. Some authors add an economic factor relating to transport cost. However, this would have to be demonstrated in detail.

8. The differences in the liability systems for the different modes of transport involved in a door-to-door contract lead to: (a) uncertainty regarding legal proceedings in respect of damaged goods and regarding the conditions for safeguarding the claimant’s rights; (b) differences in the amount of compensation (complete or limited); (c) differences in the “burden of proof” depending on the mode of transport or the place where the damage occurred; (d) uncertainty affecting the claim

when the place or origin of the damage in the transport chain is not known; (e) the possible responsibility of the forwarder when the transport was not contracted for by the shipper. In this situation, consideration should also be given to the case of goods of various shippers being consolidated by the same forwarder and covered by a single transport document.

9. The possibility of direct claims against those responsible for damage in the case of subcontractors is in line with the principle of joint liability discussed above (reply 5).

10.Comments on the draft have been made in the sessions of the Working Group. Those comments are still valid. The scientific contribution made by the drafters is very valuable and important, leaving aside the question of the appropriate scope of application for the instrument—it is suggested that it should establish a "port-to-port' regime. The creation of a "particular" regime for multimodal transport (with a maritime leg) does not harmonize with the existence of a general regime for multimodal transport. On the other hand, useful progress has been made in the drafting of uniform regulations for certain aspects ignored in earlier sets of rules concerning transport (for example, with regard to electronic records, performing party, right of control, etc.).

In general, at the present stage of universal legislation (including the Latin American regional framework), given the differences between the liability systems for land carriers, including the liability of terminals, it would not seem opportune or desirable to extend the solutions governing the liability of the carrier under maritime law to the land legs of door-to-door transport.

II. Additional statements and contributions received from non-governmental organizations in connection with the preparation of the draft instrument

1. International MultiModal Transport Association (IMMTA)

[Original: English]

IMMTA is of the opinion that the present transport liability regimes are outdated, severely fragmented, and costly for their users, and that a better system would be highly desirable.

A new global approach that would cover all modes of transport in a common manner would be highly desirable. If it were possible to submerge all modes of transport into a single global regime, that would be an approach that might find favour among many of the transport users and providers. IMMTA is therefore of the opinion that this would be a desirable goal.

Should this prove to be too radical a shift in the way in which transport regimes may be modernized, then an alternative would be to work towards achieving coherence at least in the movement of goods from door to door regardless of the individual modes being used. However, this must not be a maritime convention extended beyond the port, but a true multimodal instrument. If this is not the case it will surely fail. For example, concerns of railways must be taken fully into account.

IMMTA strongly believes that the elaboration of any such new door-to-door liability regime must be undertaken with representatives from all interested modes and users participating in the work. Any work that is undertaking without full participation by all those parties will only produce yet another unworkable instrument that will fail to remedy the current unsatisfactory situation.

Any such new international liability regime would have to offer clear advantages as compared with the existing legal framework in order to succeed. Any measure that would turn out to be of a stop-gap nature would only add to the current complexity without providing any benefits.

Any new instrument would have to employ well-known language in order to be immediately comprehensible for transport courts. This would mean borrowing language from existing transport conventions to the largest possible extent. If there is a desire to modernize the language used in those conventions that were adopted at the beginning of the 20th century, then the drafters should look to those conventions that have been elaborated in the second half of the 20th century for guidance. Guidance might also be sought from the draft US COGSA text. In this connection the drafters must take great care in making the text clear and unconfusing.

The present draft text covers areas that lie outside existing conventions and the Working Group should therefore consider with great care the benefits of including those areas in a new instrument.

2. International Union of Marine Insurance (IUMI)

[Original: English]

The International Union of Marine Insurance (IUMI) was founded in 1874. It represents 53 national marine insurance associations from markets all over the world. IUMI members cover 80 per cent of the world premium in marine insurance totalling approximately USD 10.5 billion (2001).

As an international organisation representing insurers of both carriers and cargo interests, IUMI supports the creation of a modern uniform treaty for the carriage of goods by sea that would be fair, balanced and reasonable for all parties involved.

IUMI welcomes the initiative by UNCITRAL to promote the cause of harmonisation of international maritime law and greatly appreciates the contributions of CMI in preparing the Draft Instrument.

IUMI is pleased to respond to UNCITRAL' s invitation to commercial parties to participate in the creation of a modern Instrument and submits the following:

Scope of Application (Draft Article 4.2.1)

IUMI believes that the draft instrument should be extended to “door to door” shipments that involve an overseas leg. Such a clear legal framework would result in less disputes and simpler recovery proceedings because one of the major difficulties under the current system is establishing where the loss or damage took place and, consequently, which carrier is liable and which liability regime applies. Additionally, it can be difficult to identify the carrier and foreign jurisdiction clauses may pose problems. The ideal solution would be to have a uniform set of rules applicable throughout the carriage, rather than a network system, even if limited in scope, because the network system creates uncertainty. Easy access to recovery, a better understanding of the carrier’s liability and less paper work would be the result. To achieve this, we first need the support from the organizations representing all participants involved with the shipments, such as stevedores, terminal operators, truckers, railroads, and warehouse keepers.

However, domestic issues regarding jurisdiction may occur and international acceptance is not yet uniform. If a uniform system of liability cannot be achieved because of the existing international conventions governing single modes of transport, IUMI would like to see liability limits on the non-localized damages to be governed by the higher international mandatory provisions.

Performing Parties (Draft Article 1.17)

IUMI is strongly in favour of allowing direct claims against sub-contractors and would support a rule imposing joint and several liability on the contracting carrier and the actual carrier as well as against any intermediate carrier or forwarder sub-contracting the transport to another carrier. IUMI will emphasise that in this respect it is of great importance that the rules of the Convention be clear and unambiguous as to whether any intermediate carrier or forwarder may be sued. Under the CMR Convention the solution on this point seems to be left to the courts of each country. Such uncertainty must be avoided.

Liability of Carriers (Draft Article 4,5, 6)

IUMI believes that the present risk allocation should be modified. IUMI is in favour of eliminating the error in navigation or management defense. No statistical records are available to evaluate the reduction of cargo insurers risks, but underwriters estimate that the reduction of risk would be less than 4 %.

IUMI believes that the fire exemption should be deleted. No statistical records are available to evaluate the reduction of cargo insurers risks, but estimation is that it would be less than 2 %.

IUMI is also in favour of extending the seaworthiness obligation to the whole sea voyage. No statistical records are available to evaluate the reduction of cargo insurers risks, but estimation is that it would be less than 1 %.

Article 6.1.4 of the Draft Instrument

IUMI supports maintaining the present system of carrier liability for the entire loss except to the extent the carrier can prove that the loss was caused by an event for which it is not liable. Requiring the carrier and the claiming party to share the burden of proving the cause of the loss is impractical, since it implies that cargo has the same access to information concerning transit conditions and cargo handling performance as the carrier. This is patently not the case. IUMI estimation of the increase of cargo insurers risk, if the division of 50/50 of the loss would be applied, is over 10 %.

Mixed Contract of Carriage and Forwarding (Draft article 4.3)

IUMI is strongly opposed to the possibility of the carrier being able to contract out of the regime by adopting a role of agent only.

The carrier should not be allowed to change its role from principal to agent during the course of a voyage. In practice, it would be extremely difficult, if not impossible, to ascertain in which capacity the carrier was acting at different stages of the voyage. To allow a carrier to act as both an agent and principal during the course of a voyage will encourage strategic legal barriers and promote practices designed principally to avoid liability to save costs.

As drafted, the provision requires "express agreement" which, in many jurisdictions, might be satisfied by "boilerplate" pre-printed clauses. The carrier should not be allowed to reduce his role to that of an agent and to be relieved of the carrier's liability on the basis of "boilerplate" language on the transport document.

In liner trades, cargo owners do not have control over who the carrier contracts with for services, and to bring legal suit in an overseas jurisdiction following an expensive investigation into cause will be a major disincentive to pursue genuinely recoverable claims.

Notice of Loss (Draft article 6.9)

The proposed three-day time limit is not adequate and is in most cases impossible to meet in practice. This notice period was set a century ago at a time when cargo was less complex, damage was more obvious, and cargo handling at destination much less automated.

IUMI believes that a seven-day notice period would be reasonable for all shipments, whether door-to-door or port-to-port, because it would give consignees a realistic opportunity to inspect the goods. There is an increased volume of trade, and more security, inspection and reporting requirements for consignees after delivery. In some cases this may lead to an earlier identification of damage, but other priorities may delay notification to a carrier, such as automated inventory management systems and food safety testing.

Time for Suit (Draft article 14.1)

This is a matter of fundamental practical significance for cargo insurers. The short time limitation of one year causes unnecessary litigation in order to protect claims from being time barred.

While it is not possible to estimate the cost for unnecessary litigation and extra personnel accurately, legal proceedings can be in excess of 10% of the recovery claim amount. This litigation cost would be greatly reduced if the limitation period would be extended. IUMI believes that the period should be two years, the same as adopted in conventions such as the Hamburg Rules, the recently adapted Budapest Convention on Contracts for the Carriage of Goods by Inland Waterways 2000, and the Montreal Convention of 1999.

If the one-year time limitation is not extended, the limitation period should be tolled while the carrier is considering the claim. Consignees are obliged to give preliminary notice within a limited time following delivery. The carrier has the right to inspect the cargo at that time. It is always fairly self-evident that a recovery claim will ensue. Cargo interests have the obligation at the time of presenting their recovery claim to show that salvage - which can be protracted over a period of time, particularly if refining or remanufacturing is involved - has been effectively conducted. Best practice dictates that the most efficient method is to keep the carrier informed and involved throughout this process (e.g., by inviting comment or re-inspection). In addition, obtaining information from the carriers takes time, if it is made available at all, for which cargo should not be penalised. Investigations into cause can also be lengthy, particularly in jurisdictions where maritime safety authorities and/or the courts themselves investigate casualties and take some time in publishing their findings.

In addition, it is crucial that an extension of time is obtained on behalf of the proper parties and from the proper parties. This is often a complicated legal matter requiring the assistance of legal

experts and time-consuming investigations in order to identify who has title to sue, and who is liable under the contract of carriage.

We see little purpose in maintaining the one-year time bar, as it does not save any costs for carriers and can result in an arbitrarily short time bar to genuinely complex cargo claims. Further, the present system seems quite unfair as it rewards carriers that unnecessarily delay in handling a claim.

Limits of Contractual Freedom and Scope of application (Draft Articles 3 and 17)

Obviously, allowing parties to contract out of the Draft Instrument's provisions would reduce the uniformity of the regime. Thus, IUMI believes that there should be limited ability to contract out.

Contracting parties should not be entitled to contract out of the provisions. Under the Hague and Hague-Visby rules, parties may contract out of the provisions in the case of special agreements, under non-negotiable receipts, and where the subject of the agreement justifies special arrangements and is not an "ordinary commercial shipment" made in the "ordinary course of trade". We believe that this position should be maintained in the Draft Instrument.

Additionally, third parties should not be bound if the parties to an agreement are allowed to contract out of the Draft Instrument's provisions.

However, the provisions on charter parties, space and slot charters, and transport of live animals should not necessarily be mandatory.

Forum

Some serious concern has been expressed by some members of IUMI regarding the possible forum provision for litigation and arbitration of disputes. IUMI urges adoption of the language contained in the Hamburg Rules, in which claimants may select a forum from a list of options, including the place where the shipment originates or the place of delivery. The contracting carrier and the shipper should not be allowed to agree on a forum and impose that selection on a consignee that has not agreed.

Annex

QUESTIONNAIRE

1. Do you feel that it would be helpful to have a single liability scheme applicable to door-to-door shipments which involve an overseas leg?

2. If so, why?

3. Should the same law be applicable to the entire transport of the goods, both on land and sea?

4. Should all of the participants in the door-to-door carriage of the cargo, including stevedores, terminal operators, truckers, railroad, warehouses and others, be subject to the same liability regime as the ocean carrier?

5. Should the participants in door-to-door carriage, such as the stevedores, terminal operators, truckers, railroads, warehouse and others be subject to direct claims by cargo interests or their underwriters under a single multi-modal regime for damage caused by the particular participant?

6. In the event that existing conventions apply to land transport, such as the Convention on the International Carriage of Goods by Road (CMR), should those conventions continue to control the liability of the land carrier when the land carrier is involved in the carriage of goods over sea and land, or could the land carrier under certain circumstances be subject to the same liability regime as the ocean carrier?

7. What advantages, if any, do you see in applying a uniform liability regime to both land and sea transport in multi-modal carriage?

8. What problems are commonly experienced today, if any, as a result of the existing system of liability regimes for door-to-door carriage of goods?

9. Do you perceive any advantages to the industry if cargo interests or their underwriters are given the opportunity to make a claim directly against the subcontractor of the carrier who issues the bill of lading for damage or loss that occurred whilst in the subcontractor's custody?

10. Please take this opportunity to indicate if you have any further comments or observations in respect to the instrument as currently drafted by UNCITRAL.