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INLAND TRANSPORT COMMITTEE

Sub-Committee on Road Transport

Ad Hoc Working Party on
International Road Transport Contract

DRAFT CONVENTION CONCERNING THE CONTRACT FOR INTERNATIONAL TRANSPORT OF GOODS BY ROAD

Communications from Governments

SWITZERLAND

The Swiss Government has sent the Secretariat its comments on the Draft Convention concerning the Contract for International Transport of Goods by Road (TRANS/WP9/22). These comments are reproduced below.

15 December 1954

Article 1 (1(f), second part of the sentence)

"where the transport operation has not been completed, except as a result of total loss, it refers to the carrier who was performing the operation at the time of its actual termination."

The meaning of this passage is not altogether clear. What are the implications of the additional phrase "except as a result of total loss" and the reasons for its inclusion? The fact is, surely, that where the transport operation has not been completed as a result of total loss of the goods, the last carrier is also the carrier who was performing the operation at the time of its actual termination. In our view, the text must be made clear so as to leave no possible doubt on these points.

Article 1 (1 (g))

While this definition is perfectly clear from the legal point of view, there is some doubt whether it fully meets practical requirements. For it cannot be taken for granted that the layman will understand that live animals are included among the "objects" to which the transport contract may relate. However, the transport of live animals is expressly provided for under article 19 (3 (g)), and it is therefore suggested that the definition be amplified as follows:

" 'Goods' refers to the live animals or objects to which the transport contract relates."

Article 1 (1 (h))

The definition of "vehicle" should be widened to include articulated vehicles, which are not motor lorries and whose trailers are called "semi-trailers" in article 4 of the Convention on Road Traffic of 19 September 1949.

Article 2 (2)

"The present Convention shall cover cases where the goods, although not transloaded, are conveyed with the vehicle for part of the journey by some other means of transport."

It should be made clear that the Convention does not govern the transport contract between the road carrier and the operator of the other means of transport. Where a loaded lorry is conveyed by railway (e.g. through a tunnel), the railway administration must not be brought into the collective liability system established under articles 35 et seq.

Article 2 (4 (d))

"The present Convention shall not apply to:

.....

(d) transport performed under quite exceptional conditions, clearly outside the normal range of road transport operations and excluded from the terms of the present Convention by a written agreement between the parties, which must be reproduced in the consignment note (lettre de voiture) if such a document is issued."

This text is not entirely satisfactory, as it leaves the way open to abuses. It might leave the carrier free to claim that a particular transport operation clearly comes outside the normal range of road transport operations and hence to exclude it, in agreement with the consignor, from the scope of the Convention. There are some transport operations performed under quite exceptional conditions

there

which come within the range of road transport operations by virtue of the fact that they can only be performed by road. The wording might perhaps be made clearer by inserting a few examples of transport operations coming in this category (transport of hulls of boats, generators, large pieces of machinery, etc.). It is also not clear why it should be permissible for such transport operations to be effected without a consignment note being issued in respect of them. We therefore suggest that the concluding words, "if such a document is issued", be deleted. Finally, it might be considered logical to make article 42 subject also to this sub-paragraph of article 2.

Article 3 (3)

"Except when otherwise stated, the consignment note shall not represent a title to the goods".

Article 16 stipulates that the three copies of the consignment note must be marked "Consignment note - title to goods". Such being the case, we suggest that the meaning of the above text be brought out more clearly by wording it as follows: "Except when otherwise stated in the consignment note, the latter shall not represent a title to the goods."

Transport charges

Particulars of the transport charge are not required under article 5 (1), but are required under article 2 (9) of Annex D.1 to the Set of Rules. The necessary addition should be made to article 5 to bring the two texts into line; the need for bringing them into line was, in fact, recognized by the Working Party on Legal Questions as long ago as at its third session (see E/ECE/TRANS/SC1/64, page 13, end of penultimate paragraph). The transport charge is an essential element of the transport contract, and mention of it is essential when completing the latter. Such mention will make it easier to produce evidence in case of dispute. Moreover, the transport charge may be one of the charges due on the consignment note, which the consignee is required to pay under article 12 (2). If it were not mentioned, it would also be much more difficult to ensure the application of article 38 (b), second sentence. Finally, it is clear that such mention is in line with practical requirements for consignment notes representing a title to the goods.

Article 5 (2 (d))

"Where applicable the consignment note shall also contain the following particulars:

.....

(d) The charges for which the consignor would assume liability."

It is suggested that, for greater clarity, the provision should repeat the definition of charges given in article 17, paragraph 1, of the CIM.

Article 7 (3)

"The consignor shall be entitled to request the carrier to check the gross weight of the goods or their quantity otherwise expressed. The carrier may claim the cost of such checking where local custom at the place of loading entitles him to do so."

We are at a loss to understand why the carrier should only be entitled to claim the cost of checking the gross weight where local custom at the place of loading warrants his doing so, or why the arrangements for paying the cost of such checking should differ from those applied in respect of the check on the contents of packages (article 7 (4)). We recommend that the two paragraphs be merged into a single paragraph worded as follows:

"3. The consignor shall be entitled, on payment of a special fee, to request the carrier to check the gross weight of the goods or the quantity otherwise expressed and the contents of packages."

The present paragraph 5 would become paragraph 4 and would read as follows:

"The findings in respect of the checks referred to in paragraph 3 above shall be entered in the consignment note."

Alternatively, the new paragraph 4, with the necessary changes, might become the last sentence of paragraph 3.

Article 11 (1, last sentence)

"The right of disposal shall, however, pass to the consignee, if it is so stipulated by the consignor in the first copy of the consignment note".

The stipulation referred to above should also be included, in our view, in the third copy of the consignment note - that retained by the carrier, for whom its inclusion is a matter of importance, as he has to know, and if necessary be able to prove, that the consignor has renounced the right to dispose of the goods. The application of Article 13 (2) would thereby be facilitated. Furthermore, the carrier would no longer need to require the production of the first copy of the consignment note, as provided for in article 11 (5).

Article 12 (1, first sentence)

"The consignee shall be entitled, on the arrival of the goods at the place of destination, to request that the second copy of the consignment note, which accompanies the goods, be handed over and the goods delivered to him."

It would be advisable, in our view, to stipulate that the second copy of the consignment note should be handed over to the consignee and the goods delivered to him "against payment of any charges due", as laid down in Article 16, paragraph 1 of the CIM.

Article 13

"1. Where the transport operation cannot be undertaken or continued in accordance with the terms of the consignment note, or where the impediment is temporary or it remains possible to complete the operation otherwise than as stipulated in the consignment note, it shall rest with the carrier to decide whether it is advisable in the interests of the consignment to seek the instructions of the person who is entitled to dispose of the goods under the provisions of article 11 or to forward the goods on his own initiative by alternative routes or means.

2. Where, for any reason the completion of the transport operation is, or becomes impossible before the arrival of the goods at the place of destination, the carrier shall seek the instructions of the person who is entitled to dispose of the goods under the provisions of article 11."

What is meant by the words "alternative means" at the end of paragraph 1? Would it not be advisable, for the sake of greater precision, to use the term "means of transport"?

It is essential in the carrier's interest to specify, in paragraph 2, the form in which he is required to seek instructions. A telephone conversation is always open to question. We suggest that the instructions should be in writing.

Article 14 (2)

"Even if he has refused the goods, the consignee may still take delivery of them so long as the carrier has not carried out instructions to the contrary from the consignor."

The present text fails to regulate the question of charges resulting from inability to make up his mind on the part of a consignee who takes delivery of the goods after first refusing them. This is a gap which we suggest should be

filled. (Article 15 (2) provides only that the carrier shall recover the cost of reporting the circumstances giving rise to his request for instructions and the expenses entailed in carrying out such instructions; it does not cover cases where there are no instructions but merely a delay in taking delivery on the part of the consignee.")

Furthermore, we consider that consignees who refuse the goods should still be entitled to take delivery of them, not so long as the carrier has not carried out instructions to the contrary but so long as he has not received such instructions; in other words, the consignee would be refused this right from the moment the carrier receives contrary instructions from the consignor, even though he has not yet carried them out (see CIM, Article 25, paragraph 1, sub-paragraph 3).

The following wording is therefore suggested:

"Even if he has refused the goods, the consignee may still take delivery of them <u>subject to reimbursement of the charges resulting from his delay in taking a decision</u> and so long as the carrier has not <u>received</u> instructions to the contrary from the consignor".

<u>Article 16 (4)</u>

"The carrier may not exercise against the <u>bona fide</u> receiver the rights conferred on him under article 6 (1) and under article 9".

The precise bearing of this provision is not clear. Perhaps the Small Committee might wish to redraft it so as to make it clearer.

<u>Article 18 (b)</u>

"Articles 11 to 15 shall apply with the following modifications to consignment notes representing a title to the goods:

(a) .....

(b) Contrary to Article 12, paragraph 1, the carrier shall deliver the goods to the receiver, but only against the first copy of the consignment note;"

Seeing that, under Article 3 (2), the existence of the transport contract remains unaffected even if the consignment note has been lost, it may be asked how, in the event of its being lost, delivery will be effected, what proofs will be required and how the carrier will obtain a receipt. These, we feel, are questions which should be dealt with.

Article 19 (3 (b))

"Lack of, or defective condition of packing in the case of goods which, by their nature, are liable to wastage or to be damaged when not packed or when not properly packed;"

Even though it is taken from the CIM (Article 27, paragraph 3 (b)), we feel that the term "not properly packed" should be made more precise.

We suggest the following wording: "... or when packed in a manner unsuited to the transport conditions and the nature of the goods".

Article 19 (3 (c))

"Handling, loading, stowage or unloading of the goods by the person entitled to dispose of them;"

To facilitate the production of evidence in case of dispute, it is advisable, in our opinion, to stipulate that the above-mentioned operations, which relieve the carrier of liability, must be referred to in the consignment note in exactly the same way as in the case of transport by rail (see CIM, article 27, paragraph 3 (c)). A provision of this type would be altogether to the advantage of the carrier, who would thereby find it all the easier to invoke successfully the presumption referred to in article 20 (2).

Irregular, incorrect or incomplete description of articles which are not to be accepted for transport; irregular, incorrect or incomplete description of articles accepted only subject to certain conditions or the failure to observe the prescribed precautions in respect of such articles; consignments accompanied by an attendant

Why does the draft not repeat the clauses set forth under paragraphs 3 (e) and (g) of article 27 of the CIM, which are calculated to safeguard the carrier's legitimate interests? . We suggest their inclusion in the Convention unless the authors of the text have had plausible reasons - not discernible to us - for deciding otherwise.

Article 19 (5)

"The carrier shall not be liable for loss of weight (freinte) or normal wastage in transit, the extent of which shall be determined in accordance with local custom at the place of destination."

The French word "freinte" describes a particular type of wastage in transit and is not currently used except in the grain trade. It is, it would seem,

sufficient, to refer to "normal wastage in transit". We further suggest the re-wording of the second part of the sentence, which contains a provision scarcely compatible with that of article 25, paragraph 1. The compensation payable in case of loss exceeding normal wastage in transit is to be calculated, in fact, in accordance with the value of the goods at the place where they were accepted for transport, on the basis of a quantity determined in accordance with the local custom at the place of destination. In our view, it would be better to omit the second part of article 19 (5), so as to avoid complications.

Article 22

"The person entitled to dispose of the goods may, without being required to furnish other proof, regard goods as lost when they have not been delivered within thirty days following the expiry of the agreed time-limit, or, failing an agreed time-limit, within sixty days from the time when the carrier took the goods into his charge."

We consider a time-limit of sixty days to be too long in the case of short-distance transport between two neighbouring countries. In cases where there is no agreed time-limit, we are inclined to suggest the same time-limit of thirty days from the time when the goods are taken into the carrier's charge.

Article 23

Only the receiver is mentioned in this article. It is obvious, however, that the consignee should also be referred to. It is true that it would appear from article 1 (1 (e)) that the "receiver" also covers the "consignee". If such is really the case, however, it is rather difficult to understand the sense of article 18 (c), which states that "The receiver shall enjoy the rights conferred on the consignee". The word "receiver" seems to have been used in a narrow sense in article 18 and in a broad sense in article 23. It would be advisable, we feel, to make a careful re-examination of the terminology in this case. (This question also concerns article 32).

Article 25 ((1), sub-paragraph 3, first sentence)

"Nevertheless, the compensation may not exceed ..... francs per kg. of the total gross weight entered in the consignment note."

The commercial and industrial circles which we have consulted are in favour of the introduction of the system specified in article 31, paragraph 1, of the CIM. We would be inclined to support that solution. However, the Swiss organization for the motor transport industry has come down against that system

in view of the repercussions it would have owing to the fact that the General Agreement on Economic Regulations for International Road Transport (Annex E.1 to the Set of Rules, 2 (b)) requires the carrier to insure his liability for total as well as partial loss of and damage to the goods carried. The organization in question even feels that to limit that liability to 10 francs per kg. of weight short, as proposed by the IRU, is going too far; however, it is prepared, it says, to agree to that figure if necessary, but makes it clear that it must in no case be exceeded.

In these circumstances, we refrain for the moment from expressing an opinion. We shall do so once we are presented with the proposals which the IRU and the International Chamber of Commerce are to send the Executive Secretary of the Economic Commission for Europe in accordance with the decision adopted at the second joint session of the Working Party on Legal Questions and the Working Party on the Development and Improvement of Transport of Passengers and Goods by Road (see TRANS/WP9/26, paragraph 24).

Article 26 (1)

"The consignor may declare, in the consignment note, a value for the goods exceeding the limit laid down in article 25, and may also fix the amount of a special interest in delivery in the event of loss or damage or of delay, against payment, at the request of the carrier, of surcharges to be agreed."

This provision does not indicate the currency in which the amount of interest in delivery may be expressed. Should the choice of currency be free, we feel that a problem of conversion would arise which would have to be solved by adopting a provision similar to that of article 25 (4).

Article 26 (2)

"The declaration of a special interest in delivery in the event of delay presupposes that a time-limit has been agreed."

For practical reasons, i.e. to make it easier for the layman to apply the Convention, we recommend that it be repeated here that the time-limit and the special interest in delivery must both be mentioned in the consignment note.

Article 28

"Where, under the law deemed applicable by the court in which proceedings are taken, the prejudice caused in the execution of a contract

subject to the present Convention may also give rise to an extra-contractual claim based on the same fact or on the same default, such claim shall also be governed by the present Convention".

To make actions resulting from an Aquilian liability subject to the provisions of the Convention is likely, we feel, to occasion considerable difficulties. How, in fact, can an extra-contractual claim based on the law deemed applicable be governed by the Convention, which itself contains no provisions dealing with claims of that kind? The latter should be settled in accordance with the law declared applicable. We therefore suggest that article 28 be deleted.

Article 29 (1)

"The carrier shall not be entitled to avail himself of the provisions of the present Convention which exclude or limit his liability, or which shift the onus of proof, if the prejudice suffered is due to his wilful misconduct or to such default on his part as, under the law applied by the court in which proceedings are taken, is deemed equivalent to wilful misconduct".

In the interests of simplicity, we suggest that the liability here referred to should be dealt with in the same manner and in the same terms as the corresponding railway liability (CIM, article 37).

Article 29 (2)

"Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the prejudice was caused as aforesaid by any representative or agent of the carrier in the performance of his duties. Nevertheless, in the case of representatives, the compensation payable by the carrier shall not exceed the limits laid down in the present Convention, unless the carrier was, or should have been, aware of the value of the goods".

We suggest that this provision be replaced by a text similar to that of article 40, paragraph 1, of the CIM. There is no reason, in our view, to make a distinction between the carrier's liability and that of his staff or provide for differential treatment according to whether representatives or agents are concerned.

Interest on compensation

It is pointed out that no reference is made in the Convention to interest on compensation. We suggest the adoption of a provision modelled on article 38 of the CIM.

Article 30

"In all cases in which the carrier is liable under the terms of the present Convention, but the extent of his liability is not specified therein, it shall be determined by the law deemed applicable by the court in which proceedings are taken".

It would be advisable to replace this provision by a more general clause of the type figuring in article 53 of the CIM; this clause would be included in Chapter VIII, which might be headed "Miscellaneous Provisions (or Clauses)" and would consist of article 42, relating to "Nullity of stipulations contrary to the Convention", and a new article 42 bis (former article 30 amplified), relating to the "Application of national law".

Chapter VI: Claims and actions

We suggest the inclusion of a provision whereby anyone submitting a claim or bringing an action must produce the consignment note (see CIM, article 43, paragraph 3, and article 42, paragraph 3, last sub-paragraph).

Article 33 (1)

"Any legal proceedings based on the transport contract may be brought before a competent court of the State within the territory of which

(a) the defendant is normally resident, or has his principal place of business, or the branch or agency through which the transport contract was concluded, or

(b) the place of departure or the place of destination of the transport operation is situated".

We recommend that this provision be re-examined. We fail to understand the reason for sub-paragraph (b) and question the need for it. Why provide expressly for the possibility of taking proceedings before the court of the State in which the place of departure is situated? Generally speaking, the place of departure and the carrier's normal place of residence are one and the same. As regards the place of destination, is it really desired to give the carrier the option of suing his debtor there in order to obtain payment of the transport charge? Or

should the consignor and the consignee be empowered to sue the carrier at the place of destination and not only at the latter's normal place of residence? In our view, it would be going too far to allow the consignee that possibility, especially as the general practice is for the carrier, acting as the consignor's principal, to perform the entire transport operation from the place of departure to the place of destination. And what, finally, of the court of the intermediate carrier who is a defendant in proceedings initiated under article 37? It is inconceivable that he should be actionable at the place of departure or at the place of destination on the ground, say, of a delay due to something which happened during that part of the transport operation performed by him.

Article 34 ((2), second paragraph)

"The onus of proof of the receipt of the claim, or of the reply and of the return of the documents, shall rest on the party relying thereon."

The comma after the word "réception" (receipt) in the French text should be deleted.

Article 37

"Except in the case of a counter-claim or an objection in law raised in an action concerning a claim based on the same transport contract, legal proceedings in respect of liability for loss, damage or delay may only be brought against the first carrier, the last carrier and the carrier who was performing that portion of the transport operation during which the act causing the loss, damage or delay occurred."

It would be better to say: "..... legal proceedings in respect of liability for loss, damage or delay may only be brought against the first carrier, the last carrier or the carrier who was performing ....." since there is no doubt that the sole intention is to enable a choice between the three carriers; were that not the case, difficulties would arise from the point of view of the court (article 33 (1)).

Article 40 (1)

"No carrier against whom a claim is made under articles 38 and 39 shall be entitled to dispute the validity of the payment made by the carrier making the claim if the amount of the compensation was determined by a court of law, provided he was notified of the proceedings and had an

opportunity of entering an appearance".

It would be desirable for the intermediate carrier to take part in the production of evidence during the initial action; his presence may also assist in bringing about a settlement. We suggest, therefore, using the wording of article 50, paragraph 1, of the CIM.

Article 40 (2)

"A carrier wishing to take proceedings to enforce his right of recovery shall make all other carriers concerned, with whom he has not reached a settlement, defendants in the same action".

Article 50, paragraph 2, of the CIM is more specific, since it goes on to state: "if this is not done, the right of recovery of the plaintiff against any carrier not so made defendant shall be extinguished".

Article 40 (3)

"In the case of claims between carriers the period of limitation laid down in article 34, paragraph 1, shall be extended by six months".

This six-months' extension of the period of limitation is too short. Disputes between the parties to the transport contract (article 34) may, in point of fact, take a long time to settle. We recommend, therefore, that this provision, which has no counterpart in the CIM, be deleted. Should its retention be deemed necessary, a longer period of extension should be provided for.

Article 41

"Carriers shall be at liberty to agree to provisions other than those laid down in articles 38, 39 and 40".

It does not seem possible, during the stage envisaged in article 40, to leave the parties free to agree between themselves to provisions derogating from that article.

It is out of the question, for example, for a carrier who wishes to bring a claim to use a derogatory clause in the contract so as not to make all other carriers concerned with whom he has not reached a settlement defendants in the same action (article 40 (2)). Article 40 relates to cases where legal proceedings have been initiated; the rules governing the conduct of such proceedings must be independent of the will of the parties concerned, and cannot be waived by their mutual agreement. We suggest therefore that the reference to article 40 should be deleted from article 41.

....

Article 42 (second paragraph)

"In particular, a benefit of insurance in favour of the carrier or other similar clause, and any clause conferring competence on courts of law in non-Contracting States shall be null and void, it being understood that a clause conferring competence on an arbitration board shall be admissible if it requires the board in question to apply the present Convention".

What is the scope of this provision in the light of Article 33 (1) and (3)? Logically, it must be granted that the claimant, by virtue of the arbitration clause accepted by him when concluding the transport contract, has surrendered the rights conferred on him by article 33 (1). It is doubtful whether article 33 (3) is applicable to arbitral awards. The arbitration board will not really be able to apply the Convention, as far as these two points are concerned. We therefore urge that the possibility be studied of establishing clearly the relation between articles 33 and 42.

Article 48 (1)

"Ninety days after the last deposit by date of ratifications or accessions by /three/ States, the present Convention shall enter into force in respect of each of the States which have ratified or acceded to it at the time of such deposit".

We suggest the following wording: ".... or accessions by five States ...."

Article 51

"If, as a result of denunciations, the number of Contracting States is reduced to less than /three/, the Convention shall cease to be in force as from the date on which the last of such denunciations takes effect".

Substitute the word "five" for the word "three".

Article 53

"Any dispute between Contracting States relating to the interpretation or application of the present Convention which has not been settled by other means may, at the request of one of the Contracting States concerned, be referred for decision to the International Court of Justice".

This provision should be brought into line with that of article 60 of the CIM by wording it as follows:

".... may, at the request of the parties, be referred for decision to the International Court of Justice".

Annex 2. Provisions relating to unpacked furniture carried during removals

Article 2

"Notwithstanding the provisions of article 25, paragraph 1, the removal contractor's liability shall be limited, failing an itemised and numbered inventory, to ..... francs per object up to a maximum total of ..... francs per cubic metre of the furniture covered by the contract, "franc" being understood to mean the gold franc referred to in the said paragraph".

We reserve the right to propose the deletion of this provision, depending on the wording finally chosen for article 25 of the Convention. We will here merely point out that article 31 of the CIM applies to removals in the same way as to other transport operations.

Article 4

"Contrary to the provisions of paragraphs 1 and 2 of article 32, reservations may always be made within five days (excluding Sundays and public holidays) from the date of delivery, the day on which delivery is completed not being counted in the five days".

This qualifying clause could be dispensed with by setting at five days (or possibly at seven days, as in article 45, paragraph 2 (d (i) of the CIM) the time-limit laid down in article 32 of the Convention.

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Addendum 1 : FRANCE

24 January 1955

Under Article 15 of the preliminary draft convention annexed to the report of the Small Committee (TRANS/WP9/22), the carrier may, in certain circumstances, sell the goods entrusted to him. In addition, Article 24 provides that the carrier may unload, destroy or render innocuous goods of a dangerous nature if he was unaware of their nature at the time when the transport contract was concluded.

The rights which it is proposed to give to carriers, however, can be granted only provided the relevant Customs formalities, and incidentally other formalities mainly connected with police and health regulations, are observed.

It would therefore appear that a provision to that effect should be added to the preliminary draft.

Moreover, Article 19 relieves the carrier of his liability for damage or loss arising out of particular circumstances enumerated in the article.

To avoid any difficulty of interpretation, it would seem advisable to specify in this Article that the carrier's liability towards the Customs administrations shall be unchanged and that any obligations he may have contracted towards them shall stand.
