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Working Party on Customs Questions
affecting Transport

Ad hoc Group of Experts
on Phase II of the TIR revision process
(Second session, 24-26 June 1998,
agenda item 3)

CUSTOMS CONVENTION ON THE INTERNATIONAL TRANSPORT OF GOODS UNDER COVER OF TIR CARNETS (TIR CONVENTION, 1975)

Proposals for amendments to the TIR Convention, 1975
Phase II of the TIR Revision Process

PLEASE NOTE: The distribution of documents of the Inland Transport Committee and its subsidiary bodies is no longer "restricted". Accordingly, the secretariat has adopted a new numbering system whereby all documents other than reports and agendas of the Working Party will be numbered as follows: TRANS/WP.30/year/serial number. Reports and agendas of the Working Party will retain their previous numbering system (e.g., TRANS/WP.30/177).

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(b) Status and functions of the international organization

Transmitted by the experts from the Russian Federation

Note: At the first session of the group of experts (2 and 3 April 1998), the experts from the Russian Federation indicated that they would transmit a new proposal on the issues relating to the guaranteeing system of the TIR Convention (TRANS/WP.30/1998/5, para. 15). This new proposal is reproduced below:

1. The provision in article 6, paragraph 2 of the TIR Convention whereby national guaranteeing associations incur liability in connection with operations under cover of TIR carnets issued by foreign associations is convenient for Customs authorities but completely unrealistic in practice.

2. National guaranteeing associations are non-profit-making voluntary organizations established by carriers in their own countries and do not have the funds to meet liabilities incurred by them in respect of foreign carriers.

3. The de facto recognized international guaranteeing system established by the International Road Transport Union (IRU) presupposes that such liabilities will be covered by an international guaranteeing chain. However, except for the first link in this chain (art. 6, para. 2 of the TIR Convention), other links have not been reflected in the Convention and are outside the sphere of legal regulation of the Contracting Parties.

4. The proposed amendments to the Convention adopted by the Administrative Committee of the TIR Convention on 27 June 1997 resolve some questions connected with the guaranteeing system but, in the Russian delegation's opinion, they are insufficient.

5. During the discussion of the Russian delegation's proposals on this matter (document TRANS/WP.30/R.186) at the meeting of the group of experts on 2 April 1998, the view was expressed that the first part of these proposals could be accepted.

6. It would therefore seem appropriate to consider amending the TIR Convention by adding an article 6, new paragraph 3, as follows:

"3. An international organization may be recognized by the Contracting Parties as the body organizing the centralized guaranteeing system provided that this organization assumes responsibility for the functioning of the system, using insurance, a guarantee fund and other arrangements to meet the liabilities incurred."

7. Since many experts felt that it would be inappropriate for the procedure governing the relationship between the international organization and its member associations to be set forth in detail in an annex to article 3 (as proposed by the Russian delegation), it might be possible in our view to add another paragraph to the proposed article 6, new paragraph 3, as follows:

"The procedure governing the relationship between the international organization and its member associations with respect to the functioning of the centralized guaranteeing system shall be defined in agreements concluded between the international organization and the said associations and approved by the TIR Executive Board."

8. The latter is necessary because all the links in the guaranteeing chain have the principal task of providing for the interests of the budgets of the States parties to the Convention and cannot be viewed within the framework of private law. The guaranteeing chain is financed from the funds of the carriers of the Contracting Parties and it is therefore necessary to verify the contents of such agreements.

9. The proposed procedure would, in particular, promote the unification of agreements between the international organization and associations and would exclude the possibility of some associations being given advantages over other associations.

(h) Definition of the holder of TIR Carnets

Note: At the first session of the group of experts (2 and 3 April 1998), the experts from Denmark and the Russian Federation agreed to transmit further information on the liability concepts used in their countries (TRANS/WP.30/1998/5, para. 38). The information received from the expert of Denmark is reproduced below:

Transmitted by the expert from Denmark

Modern transport techniques

10. The TIR Convention applies to the transport of goods in road vehicles, combinations of vehicles or in containers across one or more frontiers between a Customs office of departure of one Contracting Party and a Customs office of destination of another Contracting Party, provided that some part of the journey is made by road (article 2 of the Convention).

11. This means that part of the journey could be performed by ship.

12. Today, it has become more and more common to ship semi-trailers or containers without the tractor units. At the port where the ship's voyage ends, the onward transport by road is then performed by using a different tractor unit.

Liability

13. According to article 8, paragraph 1 of the Convention, the guaranteeing association concerned is liable, jointly and severally, with the persons from whom taxes and duties are due (directly liable).

14. According to article 8, paragraph 7 of the Convention, the competent authorities shall require payment from the persons directly liable before making a claim against the guaranteeing association.

15. Who are those persons “directly” liable?

16. There is no clear definition in the Convention, but in most Contracting Parties the holder of the TIR Carnet is considered as the person “directly” liable for the payment of duties and taxes.

17. The views of the ECE Working Party WP.30 and the TIR Administrative Committee are expressed indirectly in the comments to article 8, which allow for the interpretation that the “person” mentioned in paragraph 1 is “the holder”. As nobody else than the guaranteeing association is mentioned in this paragraph, the holder must necessarily be the person “directly liable”.

18. In accordance with the legislation of the Russian Federation, however, the transporter (driver) is considered to be the person “directly liable”.

Problems arising from the interpretation of the Russian Federation

19. As a result of this interpretation of the person “directly liable” by the Russian Federation, it is not allowed to transport goods in semi-trailers or containers on the onward journey, following the sea transport leg, under cover of TIR Carnets of a different nationality than that of the transport operator (driver).

20. Under a TIR transport operation, an export procedure will normally be completed at the same time as the TIR Carnet is discharged on the territory of the country of export. On arrival (following export procedures and the sea journey) the TIR Carnet will be re-opened on entry into the territory of the next Contracting Party.

21. The interpretation of the “person liable” by the Russian Federation leads to a situation where the TIR Carnet will not be opened before the end of the sea journey since it is not allowed to use the same TIR Carnet for the onward part of the transport leg.

22. As a consequence, the guaranteeing (issuing) associations in the countries of export will not be able to issue TIR Carnets (and thus loose income from their sale) unless tractor units from the country of export are also shipped together with the semi-trailers and containers. This would however lead to a very considerable increase in transport costs and in the duties and taxes payable on the goods.

Possible solution

23. The need to define the TIR Carnet holder has often been expressed in past meetings of the Working Party (WP.30). However, if the Russian Federation is unable or unwilling to change their position and their national legislation in this respect, it will not be possible and feasible to define the TIR Carnet holder as the person directly liable (and authorized).

24. The only solution would then be the establishment of a new TIR Carnet which would allow the transfer of the liability from one operator to the other - a multi-user TIR Carnet.

25. The introduction of such an additional Carnet will certainly give rise to a number of problems as its use will require the approval of the international insurers as well as an authorization procedure for sub-contractors.

26. Therefore, there is a need to further discuss this matter.

Transmitted by the expert from the Russian Federation

Possibility of TIR carnets being used by transport operators
who are not TIR carnet holders

27. The TIR Convention employs the terms “TIR carnet holder” and “carrier” or “transport operator”. It does not, however, provide a clear definition of these terms or of the relationship between them. In practice, this gives rise to a number of serious problems for Customs authorities when establishing who is liable for breaches of the TIR procedure.

28. Article 36 of the TIR Convention provides that “any breach of the provisions of this Convention shall render the offender liable in the country where the offence was committed to the penalties prescribed by the law of that country”. Under the customs laws of the CIS States, full liability vis-à-vis the Customs authorities in the case of carriage of goods, including payment of Customs dues, rests with the transport operator.

29. At the same time, annex 6 explanatory note 0.11-1 assumes that liability for Customs payments rests with the TIR carnet holder, which in point of fact does not follow from the actual text of the Convention. Paragraph 7 of article 8, where this question is touched upon, speaks only of “persons directly liable for Customs payments” without any further explanation. Paragraph 7 of article 8 is therefore interpreted in different ways by different parties to the TIR procedure, who may consider that person to be either the transport operator or the consignee, or else the holder of the TIR carnet.

Against a background of such uncertainty, the conclusion deriving from explanatory note 0.11-1 is inconsistent with annex 6 to the TIR Convention, according to which the explanatory notes do not modify the provisions of the Convention but merely make their contents, meaning and scope more precise.

30. In our view, paragraph 7 of article 8 of the TIR Convention cannot be considered in isolation from paragraph 1 of article 8, which refers to the Customs laws and regulations of the country in which an irregularity has been noted in connection with a TIR operation (by analogy with article 36 of the Convention). On this basis, we consider that the persons referred to in paragraph 7 of article 8 as being directly liable for Customs payments must be determined by the national Customs laws. If not, the Customs authorities may find themselves in a situation where penalties are imposed on one person while another is held liable for Customs payments.

31. Some inconsistency also exists as regards the question of who can be held liable for any divergence between the information provided in the goods manifest of the TIR carnet and the actual contents of the road vehicle or container. According to annex 6, explanatory note 0.17-1, liability in such an event may rest with the carrier, while under paragraph 2 of article 39 it is the holder of the TIR carnet who is liable.

32. All the above-mentioned inconsistencies are resolved if we assume that the carrier of the goods is identical with the TIR carnet holder. This also follows indirectly from paragraph 2 of article 26, which speaks of the carnet being used by its holder in the course of a transport operation.

33. The amendments to the TIR Convention adopted by the Administrative Committee in June 1997 (new annex 9, part II) confirm the conclusion that transport under cover of the TIR carnet must be effected by the carnet holder. Thus, in order to have access to the TIR procedure a person must:

- Have proven experience or, at least, capability to engage in regular international transport (holder of a licence for carrying out international transport, etc.);
- Give an undertaking in a written declaration of commitment to comply with all Customs formalities required under the Convention at the Customs offices of departure, en route and of destination.

Furthermore, the authorization issued by the competent authorities is to use (not to obtain) TIR carnets.

The above arguments prove that persons obtaining access to the TIR procedure (i.e. the possibility, subject to certain additional conditions, of obtaining TIR carnets from associations) must perform the transport operations themselves, rather than transmit the TIR carnet they have received to another person.

34. If a person having obtained access to the TIR procedure is to have the right to transmit his or her TIR carnets to another person (whether or not that person also has access to the TIR procedure), it is essential to define clearly in the TIR Convention how liability in respect of the Customs authorities, including payment of Customs dues, shall be apportioned and transmitted between the holder of the TIR carnet and the de facto carrier. Until this is done, authorizing the use of TIR carnets by transport operators who are not carnet holders is premature.
