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**INLAND TRANSPORT COMMITTEE**

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

**Revision of the Convention**

**Amendment proposals for the Convention**

**Transmitted by the International Road Transport Union (IRU)**

1. Following the presentation by the International Road Transport Union (IRU) on the organization and functioning of the TIR guarantee chain during the one-hundred-and-eighth session of the Working Party, the IRU was invited to transmit an official document containing an overview of how the IRU understands the guarantee/surety issue within the framework of the TIR Convention (TRANS/WP.30/216, para. 53 (c)).

2. The IRU always maintained that the guarantee/surety provided by the Association by virtue of the TIR Convention is both **dependent** and **subsidiary** to the main debt:

(a) The **dependence** of the guarantee/surety provided by the Association means concretely that:

- (a) The **dependence** of the guarantee/surety provided by the Association means concretely that:
- the guarantor's debt does not exist if the debt of the person(s) directly liable does not exist, is not valid or is ineffective;
  - the guarantor is never liable beyond the extent of the secured debt;
  - the guaranteeing Association can oppose the creditor with the same exceptions and objections as the main debtor;
  - the extinguishment of the debt of the main debtor entails the extinguishment of the guarantor's debt.
- (b) The subsidiarity of the guarantee/surety provided by the Associations means concretely that the guarantor cannot be called upon before all efforts have been undertaken by the competent authorities to ensure that the payment is made by the person(s) directly liable.

3. In order to obtain an objective legal opinion on these fundamental questions, the IRU has mandated Luc Thévenoz, Professor in the Civil and Commercial Departments of the University of Geneva and Director of Geneva's "Centre de droit bancaire et financier" (Centre of banking and financial law), to provide an independent definition of the character and extent of the guarantee/surety supplied by the Associations within the framework of the TIR Convention. Professor Thévenoz is internationally recognized for his competence in dealing with legal issues relating to financial matters. He was also 'Director of the Centre of European Legal studies of the University of Geneva' and holds many important positions such as 'Member of the Swiss Federal Bank Commission'. The analysis performed by Professor Thévenoz resulted in the attached note transmitted in French (French being the original version), translated into English and Russian.

4. The IRU is of the opinion that the dependent and subsidiary character of the guarantee/surety provided by the Associations within the framework of the TIR Convention is obvious. This is confirmed by the enclosed analysis. However, the inconsistencies in the translations of the various versions of the TIR Convention are confusing. The current revision process should take into account the necessary amendments in order to put an end to these linguistic discrepancies.

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Annex

Note on the concept of guarantee according to the TIR Convention

[IRU translation from the French original, reviewed for consistency by the authors]

1. According to the TIR System established by the Customs Convention on the International Transport of Goods under Cover of TIR Carnets of 14 November 1975 ("TIR Convention"), established national associations authorized by each Contracting State guarantee the payment of duties and taxes payable to the Customs authorities of that State in case of non-discharge of a TIR operation, whether the TIR Carnet covering this transport operation was issued by the national guaranteeing association itself or by an association in another Contracting State. These guarantees, in each Contracting State, are subject to contract between the authorized national association and the Customs authorities of that State. The International Road Union (IRU) was mandated to organize and to ensure the effective functioning of this international guarantee system. Furthermore, the commitments made by each national guaranteeing association are covered by a financial institution under a global contract concluded and administered by the IRU acting both on its own behalf and on behalf of its member associations.
2. The precise nature of the guarantees which the associations must underwrite is difficult to define. The text of the TIR Convention uses various and sometimes contradictory notions. The problem is compounded by differences in terminology between the three authentic versions – French, English and Russian – of the TIR Convention<sup>1</sup>. Moreover, the commitments made by each national association are subject to a contract concluded with the Customs authority having authorized the association, such contract being subject to the national law of the Contracting State concerned. One notices delicate questions of interaction and compatibility between the national legal institutions used and the notions used by the TIR Convention.
3. To characterize the guarantees stipulated by the TIR Convention is extremely important since it serves to define the primary or subsidiary character of the liabilities of national associations, their scope, and the possible exceptions and objections (defences) that national associations can raise against demands for payment by Customs authorities.

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<sup>1</sup> Art. 64 of the TIR Convention

4. The purpose of this note is to determine the principal characteristics and nature of the guarantees which the TIR Convention seeks to impose on national associations. We shall start with defining the conceptual framework for our analysis using illustrations drawn from Swiss, French and English law (I). We shall then characterize the guarantee commitments contemplated by the TIR Convention (II) so as to conclude by stating the characteristics that must be conformed to by the guarantee agreements subject to the national legislation of the various Contracting States (III). Finally, with the view to a future revision of the TIR Convention, we shall make some editorial recommendations (IV).

## **I. ANALYTICAL FRAMEWORK FOR GUARANTEE COMMITMENTS**

5. The TIR Convention, being an international treaty, is not subject to any given national law. If the legal notions and mechanisms stipulated by it bear comparison with the institutions of the various national legal systems, they can neither be incorporated into, nor interpreted according to, any specific national law. They are autonomous concepts that call for autonomous characterisation. Therefore, it is appropriate to start by establishing an analytical framework for the guarantee mechanisms that is not specifically tied to any given legal system. Thus institutions in national legal systems, which correspond in name to the terms used in the TIR Convention, may only be used as indications to facilitate the interpretation of the TIR Convention.

6. Personal guarantee arrangements generally involve three parties: the creditor whose claim is guaranteed ("creditor"), the debtor whose debt is guaranteed ("debtor") and the person guaranteeing the debtor's debt ("guarantor"). We shall use this terminology in a neutral and generic fashion, distancing ourselves from any meaning the words might have under certain national legal systems.

7. Whatever their designation under national legal systems and their specific regimes, commitments undertaken by a guarantor may be analysed according to two principal criteria. The first criterion relates to the relationship between the guarantor's debt and the secured debt. It involves determining to what extent the guarantors' debt depends on the secured debt, for its existence, for its validity, for inherent objections and exceptions (defences), and for its extinguishment. It is a question of the dependent or independent nature of the guarantee. The second criterion relates to the measures that the creditor is obliged to undertake vis-à-vis the debtor before being entitled to address the guarantor. It is a question of the primary or subsidiary nature of the guarantee.

**First criterion: dependent or independent guarantee**

8. The first criterion relates to the relationship between the guarantor's debt and the secured debt. It involves determining to what extent the guarantors' debt depends on the secured debt, for its existence, for its validity, for inherent objections and exceptions (defences), and for extinguishment.

9. A guarantee is independent when:

- the guarantor's debt exists even if the secured debt does not exist, is invalid or is ineffective;
- the guarantor may be liable to a larger extent than the debtor, in particular because he may not be able to oppose the creditor with all or some of the objections and exceptions allowed the debtor;
- the extinguishment of the debtor's debt does not necessarily or automatically entail the extinguishment of the guarantor's debt.

10. Conversely, the dependence of the guarantee with respect to the secured debt is characterized notably by the fact that:

- the guarantor's debt does not exist when the secured debt does not exist, is invalid or is ineffective;
- the guarantor is never liable beyond the extent of the secured debt;
- the guarantor may oppose the creditor with the same objections and exceptions as the debtor;
- the extinguishment of the debtor's debt entails the extinguishment of the guarantor's debt.

11. This criterion must not be understood as having only two possible values (binary). Examination of national laws shows that independent guarantees, almost by necessity, are subject to certain limits (fraud, legal abuse, etc.). Conversely, dependent guarantees can present some independent features (e.g. securing a debt which the guarantor knows is subject to avoidance for misrepresentation or the like).

**Second criterion: primary or subsidiary character of the guarantee**

12. The second criterion is the primary or subsidiary character of the guarantor's debt. It deals with the conditions for the use of the guarantee. A guarantee is primary when the guarantor may be pursued before or at the same time as the secured debtor. A guarantee is subsidiary, to an extent that needs to be defined each time, if the creditor is obliged to undertake certain measures before being allowed to demand payment from the guarantor. For example, the highest degree of subsidiarity requires an official

declaration of the debtor's insolvency, the initiation of collective proceedings against the debtor, even a final statement of non-collection of all or part of the debt. Partial subsidiarity may be stipulated or provided for in the applicable legislation: a private or official demand of the debtor without success, initiation of enforcement procedures, etc.

### **Illustrations**

13. It is possible to illustrate the analytical framework proposed here by applying it to a few types of guarantees provided for in some national legal systems. We shall take these examples from Swiss, French and English law as well as from the European Community case law. We have selected Swiss law because it is the law applicable at the IRU's seat, because it is the law applicable to many of the contractual relationships within the TIR System (deeds of engagement by the national associations towards the IRU, contract with the Zurich Insurance Company being the financial institution guaranteeing the guarantee commitments towards the national Customs authorities) and because it is often chosen for international business transactions. French law was retained because the Civil Code is the source and crucible for the law of numerous States and because French is one of the official languages of the TIR Convention and was the language of the preparatory work for the 1975 TIR Convention. Finally, we have retained English law because it plays the same role of crucible for legal systems within the common law tradition and because English is another official language of the TIR Convention.

### **Swiss Law**

14. Swiss law defines the porte-fort (Art. 111 of the Swiss Code of Obligations, "CO") as a contract through which one person promises to the other an action by a third party and undertakes to pay compensation if this third party should fail to execute the prescribed service. The porte-fort is a particular type of independent guarantee, a general form of which is recognized in case law without being enshrined in legislation. The guarantor's debt is independent of the secured debt and one finds all the consequences related to independence as described above. The guarantor's liability is primary: the guarantor can be pursued directly if the debtor fails to execute, without the creditor being obliged to undertake preliminary measures vis-à-vis the debtor. However, the parties are free to make provision for a different regime.

15. Swiss law also includes the engagement solidaire of the guarantor with the debtor ("solidarité passive", art. 143 ff. CO). When it arises, the obligation of the guarantor is identical in substance to that of the debtor. The obligation of the guarantor is distinct from that of the debtor, but is materially dependent on it to a large extent (with some reservation such as set-off). The guarantor's liability is primary: the creditor may demand payment indiscriminately from one or other of the debtors (débiteurs

solidaires). Either of the debtors may be subject to enforcement proceedings without any measures being taken against the other.

16. Under Swiss law, the cautionnement (art. 492 ff. CO) gives rise to a guarantee characterized by an almost complete dependence on the secured debt<sup>2</sup>. In principle, the surety (caution) is obliged to oppose the creditor with all the objections and exceptions available to the debtor, lest he lose any recourse against the debtor. There are two forms of cautionnement that are not distinguishable by their degree of dependence (first criterion) but rather by their degree of subsidiarity (second criterion) with respect to the secured debt. The liability of the ordinary surety is strictly subsidiary: the creditor may only pursue it after the failure of his proceedings against the principal debtor (beneficium excussionis), and notably after the realization of any pledge. The cautionnement solidaire is only partially subsidiary: the surety may be pursued as soon as the debtor is late in the payment of his debt and the creditor has unsuccessfully summoned him to pay up, or in case the debtor's insolvency is manifest. Under certain conditions, the surety enjoys beneficium excussionis for pledged goods and claims. In either form of surety, the surety contract can vary the scope of the beneficium excussionis.

### **French Law**

17. French law includes both the porte-fort (Art. 1120 of the French Civil Code, "CCfr") and the garantie indépendante which stems from contractual practice. Both institutions are characterized by the independence – and, in principle, the primary character – of the guarantor's liability. The engagement solidaire is also conceivable as a form of personal surety with a risk, however, of being re-characterized as a cautionnement.

18. Cautionnement is defined in Art. 2011 CCfr in these terms: "he who stands surety for an obligation agrees vis-à-vis the creditor to meet this obligation if the debtor fails to meet it himself". Cautionnement under French law is similar to cautionnement under Swiss law. It is characterized by the dependence of the surety's debt on the secured debt: cautionnement can only exist for a valid obligation (Art. 2012 CCfr), it cannot exceed that which is due by the debtor (Art. 2013 CCfr) and the surety (caution) may oppose the creditor with all the exceptions available to the principal debtor which are inherent to the debt. One distinguishes a cautionnement simple, in which the liability of the surety is strictly subsidiary (with beneficium excussionis in particular) from a cautionnement solidaire in which the

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<sup>2</sup> Traditionally, Swiss legal authors say that the surety's liability is "accessory" to the secured debt (see also Art 114 CO).

liability of the surety is primary. In the latter case, however, the parties have the possibility to stipulate the required measures that the creditor must take before pursuing the surety.

### **English Law**

19. In a contract of guarantee, the guarantor's liability is dependent on the secured debt. In principle, the guarantor is not liable beyond the secured debt (principle of coextensiveness). Moreover, the guarantor's obligation to pay the amount requires non-performance by the debtor. "There is no liability on the guarantor unless and until the principal has failed to perform his obligations."<sup>3</sup> Unless explicitly stated, and contrary to the ordinary suretyship under Swiss and French law, in principle the secured creditor is not obliged to undertake any measures against the debtor prior to pursuing the guarantor. The term "surety" is generally used as a synonym for "guarantor" in a "contract of guarantee"<sup>4</sup>.

20. Through a contract of indemnity, the guarantor undertakes a commitment independent of that of the debtor. In principle, the guarantor is liable not only in the event of non-performance by the debtor (especially when due to the latter's insolvency), but also if the guaranteed obligation should prove null and void. The guarantor's liability is also primary, since the secured creditor may pursue the guarantor without having to take preliminary measures against the debtor.

### **Court of Justice of the European Communities**

21. A judgement dated 15 May 2003<sup>5</sup> rendered by the Court of Justice of the European Communities relates to a dispute on a contract of surety, through which a French insurance company guaranteed, vis-à-vis the State of the Netherlands, the obligations payable by the Dutch guaranteeing associations within the framework of the TIR System. The Court had to decide whether the dispute comes under the concept of "civil and commercial matters" of art. 1 para. 1 of the Brussels Convention<sup>6</sup>. To this end, the Court – which did not have to interpret the TIR Convention<sup>7</sup> – offers a description for surety ship common to all Contracting States to the Brussels Convention<sup>8</sup>:

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<sup>3</sup> G. ANDREWS/R. MILLET, *Law of Guarantees*, 3<sup>rd</sup> ed., London 2000, N. 1.05.

<sup>4</sup> Cf. R. GOODE, *Commercial Law*, 3<sup>rd</sup> edition, London 2004, p. 798, note 2.

<sup>5</sup> CoJEC Judgement of 15 May 2003 in the case *Préservatrice foncière TIARD SA vs Staat der Nederlanden*, C-266/01, Rec. 2003 p. I-04867.

<sup>6</sup> The Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters has replaced the Brussels Convention as of 1 March 2002.

<sup>7</sup> In the above-mentioned judgement, the CoJEC observes in recital 32 that: " In the first place, the legal relationship between the Netherlands State and PFA is not governed by the TIR Convention. Although Chapter II of that Convention defines the obligations of a national guaranteeing association authorized by a Contracting State under Article 6 thereof, in the version applicable at the material time the TIR Convention does not contain any provisions defining the extent of the possible undertakings imposed on a guarantor by a State as a condition for a decision



22. "According to the general principles which stem from the legal systems of the Contracting States, a guarantee contract represents a triangular process, by which the guarantor gives an undertaking to the creditor that he will fulfil the obligations assumed by the principal debtor if the debtor fails to fulfil them himself."

23. " Such a contract creates a new obligation, assumed by the guarantor, to guarantee the performance of the principal obligation imposed on the debtor. The guarantor does not take the place of the debtor, but guarantees only to pay his debt, according to the conditions specified in the guarantee contract or laid down by legislation. "

24. " The obligation thus created is accessory, in the sense that, first, the creditor cannot bring proceedings against the guarantor unless the debt covered by the guarantor is payable and, second, the obligation assumed by the guarantor cannot be more extensive than that of the principal debtor. The accessory nature of the obligation does not however mean that the legal rules applicable to the obligation assumed by the guarantor must be in every particular identical to the legal rules applicable to the principal obligation ".

25. The Court thus provides a transnational (or at least European) notion of suretyship, characterized by its accessory or dependent nature, without pronouncing on its subsidiarity.

## **II. DEFINITION OF THE GUARANTEE UNDERWRITTEN BY NATIONAL ASSOCIATIONS ACCORDING TO THE TIR CONVENTION**

26. The analytical framework having been defined, it is now possible to characterize the guarantee that the TIR Convention imposes on national associations. We shall start by evoking the principles governing interpretation of the TIR Convention (A) as well as its choice of terminology (B). On the basis of rules set out in the TIR Convention (C) and in light of case law and practice, we shall characterize the guarantee taken up by national associations, in regard of the two proposed criteria (subsidiarity and dependence).

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authorising national guaranteeing associations. "

<sup>8</sup> CoJEC Judgement of 15 May 2003 in the case *Préservatrice foncière TIARD SA vs Staat der Nederlanden*, C-266/01, Rec. 2003 p. I-04867, recitals 27-29. The original dutch word "borgtochtovereenkomst" has been ~~translated~~ - by the Court of Justice services - by "cautionnement" in French and "guarantee" in English.

**A. Principles governing interpretation of the TIR Convention**

27. As an international treaty, the TIR Convention is subject to the rules of interpretation of the Vienna Convention of 23 May 1969 on the Law of Treaties, and first and foremost to its Art. 31 (1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Art. 31 (3)( b) states that account shall be taken, together with the context, of any subsequent practice adopted in the application of the treaty by which the parties reached agreement with respect to its interpretation. Furthermore, Art. 33 governs the interpretation of treaties authenticated in two or more languages, as is the case of the TIR Convention whose French, English and Russian texts are equally authentic.

28. The TIR Convention does not merely establish obligations binding the Contracting States. It also stipulates obligations that arise, through contracts subject to national law, on the part of national associations as legal persons under private law, towards the public authorities (Customs authorities). Although subject to national legislation, these obligations must comply with the requirements set out in the TIR Convention. On this topic, one can refer to the judgement of 23 September 2003 by the Court of Justice of the European Community, recital 45, "BGL's rights and obligations are governed simultaneously by the TIR Convention, Community law and the guarantee contract, subject to German law, which it concluded with the Federal Republic of Germany."<sup>9</sup>

29. As an international treaty, the TIR Convention must be interpreted autonomously since it is not linked to any specific national legislation. The usage of legal terms taken from national legal systems ("caution", "surety", "guarantee") can help us to establish the "ordinary meaning to be given to the terms of the treaty (...)"<sup>10</sup>. However, the fact that such notions are not used as consistently as one might wish, within each language version and between them, makes it difficult to confer an absolute meaning on them. Nevertheless, it is appropriate to first examine what conclusions can be drawn from the use of the chosen words. Below, we do this for the French and English texts (B). We shall then focus on the rules of the TIR Convention that allow us to define the character of the guarantee as dependent or independent (C) and primary or subsidiary (D). In this context, we shall take into account the practice adopted by Contracting States in the application of the TIR Convention as stipulated by Art. 31 (3) of the Vienna Convention of 23 May 1969.

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<sup>9</sup> CoJEC Judgement of 23 September 2003, *Bundesverband Güterkraftverkehr und Logistik eV (BGL) vs. Bundesrepublik Deutschland*, C-78/01, Rec. 2003 p. I-09543, recital 45.

<sup>10</sup> Art. 31 (1) of the Vienna Convention of 23 May 1969 on the Law of Treaties

**B. The terminology in the TIR Convention**

30. The French version of Art. 1 (q) of the TIR Convention defines the "association garante" as "une association agréée par les autorités douanières d'une Partie Contractante pour se porter caution des personnes qui utilisent le régime TIR." Here the concepts of guarantee ("garantie") and suretyship ("cautionnement") are used synonymously. The fact that the word "garante" is associated to the expression "se porter caution" that evokes the cautionnement in French and Swiss law as well as defined by the Court of Justice of the European Communities in its above-mentioned Judgement of 23 September 2003, suggests the dependence of the guaranteeing debt in relation to the secured debt.

31. In English, the same Art. 1 (q) mentions "guaranteeing association" and "act as surety". Here again, these two notions seem to be used synonymously. Both suggest a form of dependent guarantee, particularly since the term indemnity (which covers independent guarantee commitments) is not used, either in this Article or in any other provision of the TIR Convention.

32. The French version of Art. 6 concerning the "responsabilité des Associations garantes" again uses the expression "se porter caution". However, the English terminology in the same Art. 6 is not "act as surety" but "act as guarantor", which seems to confirm the idea that guarantee and surety are used as synonyms. Again, the choice of words in French and in English points more to a form of dependent guarantee.

33. In Art. 8 (1) of the French text, the words "conjointement et solidairement" are used to characterize the liability of national guaranteeing associations, echoing the expression "jointly and severally" used in the English version. The legal concepts evoked by the terms "conjointement et solidairement" are contradictory in some national legal systems. They are incompatible under French law: joint obligations ("obligations conjointes") are shared between the creditors or the debtors, where each creditor may only claim his share and each debtor can only be sued for his part of the debt; whereas for 'joint and several' debtors ("débiteurs solidaires"), each may be called upon to pay the totality of the common debt<sup>11</sup>. Under Swiss law, the terms "conjointement et solidairement" are also contradictory<sup>12</sup> even though "conjointement" has a less rigid meaning than under French law. However, "conjointement et solidairement" is currently used in Swiss business practice in the English sense of "jointly and severally" that refers to a well-known concept in English law, similar to 'joint liability' in

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<sup>11</sup> On "obligations conjointes" and "obligations solidaires", see in particular F. CHABAT, *Leçons de droit civil. Tome II/Premier volume: Obligations, théorie générale*, 9<sup>e</sup> édition, Paris 1998, N. 1051ss.

<sup>12</sup> P. ENGEL, *Traité des obligations en droit suisse*, 2<sup>e</sup> édition, Berne 1997, p. 829 s.

countries of the civil-law tradition. The English expression indicates that the creditor has the choice of either, pursuing each debtor for a part of the debt, or pursuing any of them for the total amount. It suggests a dependent or even identical nature of both debts. It also suggests a primary (rather than subsidiary) nature of the guarantee.

34. Intermediate conclusion. The terminology used in the Convention strongly suggests a form of dependent guarantee. However, the subsidiary nature of suretyship contradicts the primary nature of “solidaire” or ‘joint and several’ obligations. Interpretation of the terminology used in the TIR Convention being ambiguous, it is the rules stated in the TIR Convention giving the scope of the guarantee and the terms for its implementation that will enable us to characterize this guarantee. These rules are essentially set out in Chapter II of the TIR Convention entitled "Issue of TIR Carnets - Liability of Guaranteeing Associations". We shall only examine those that serve to characterize these guarantees within the analytical framework set out above.

### **C. Provisions of the TIR Convention establishing the dependant nature of the guarantee**

35. Art. 8 (1) defines the debt of guaranteeing associations as being the unpaid duties and taxes, together with any default interest. The amount of the guarantee is therefore limited to the amount of the secured debt with an upper limit per TIR Carnet agreed contractually as per Art. 8 (3)<sup>13</sup>. The limitation of the guarantor's debt based on the debtor's obligation confirms the dependent nature of the guaranteeing associations' commitment.

36. The second sentence in Art. 11 (3) declares that a guaranteeing association that has paid shall be reimbursed the amount paid ‘if, within the two years following the date on which the claim for payment was made, it has been established to the satisfaction of the Customs authorities that no irregularity was committed in connection with the transport operation in question.» This rule confirms decisively the dependence of the guarantee with respect to the secured debt since the inexistence of the latter entails the inexistence of the former giving rise to a reimbursement of unjustified settlements. If this were a guarantee of an independent character, the payment by the guaranteeing association would not be subject to reimbursement.

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<sup>13</sup> The explanatory note to this Article recommends setting this limit at USD 50,000 per TIR Carnet.

37. Although this question was not the subject of dispute, the Court of Justice of the European Communities seems to have adopted the same point of view in a judgement dated 23 September 2003<sup>14</sup>. Called upon to interpret the Commission Regulation (EEC) No 2454/93 of 2 July 1993, the CoJEC found that, according to the contract that binds the German national association (BGL) to the Customs authorities of that State, which is a *selbstschuldnerische Bürgschaft* under German law - the guaranteeing association was entitled to oppose the creditor with the same exceptions as the principal debtor, and was therefore legally entitled to furnish the proof of the place where the offence or irregularity had been committed.

38. The first conclusion one can draw in view of these various rules is that the guarantee commitment by national associations is dependent on the secured debt in the sense of art. 8 (1) of the TIR Convention, i.e. that there must exist at least one debtor who is directly liable for payment. This dependence should therefore entail the following consequences:

- the guaranteeing association's debt only exists inasmuch as the secured duties and taxes have been established;
- the guaranteeing association is liable up to the amount of the duties and taxes due, together with any default interest, but only up to the maximum amount per TIR Carnet set by the contract binding it to the Customs authority;
- the guaranteeing association may oppose the Customs authorities with the same exceptions and objections that are available to the principal debtor of the duties and taxes due;
- the extinguishment, for any reason, of the duties and taxes due entails the extinguishment of the guarantee.

39. These consequences resulting from the dependent nature of the commitment must be examined in light of the precise contents of the contracts of guarantee concluded between the national associations and Customs authorities subject to the national legislation of each Contracting State.

**D. Provisions of the TIR Convention establishing the subsidiary nature of the guarantee**

40. Art. 8 (1) of the TIR Convention stated that the national association is liable "jointly and severally with the persons from whom the sums mentioned above are due". Taken in isolation, these words might

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<sup>14</sup> CoJEC Judgement of 23 September 2003, Bundesverband Güterkraftverkehr und Logistik eV (BGL) vs Bundesrepublik Deutschland, C-78/01, Rec. 2003 p. I-09543.

suggest the primary liability of the guarantor. But other rules in the TIR Convention, to the contrary, bear witness to the subsidiary nature of the guarantee, as we shall see.

41. Art. 8 (7) of the TIR Convention rules that "the competent authorities shall so far as possible require payment [of sums due] from the person or persons directly liable before making a claim against the guaranteeing association." Following an amendment that entered into force on 12 May 2002, the explanatory notes further stipulate that the measures to be taken by the competent authorities in order to require payment from the persons directly liable "shall include at least notification of the non-discharge of the TIR operation and/or transmission of the claim for payment to the TIR Carnet holder." This rule implies that the guarantor's commitment is subsidiary to some degree since the secured creditor (i.e. the Customs authorities on behalf of the State) has to take certain measures in relation to the principal debtor before invoking the guarantee. The terms "require" in the English version and "requérir" in the French text of the TIR Convention have a stronger meaning, which should imply more sustained efforts than such terms as "request" or "claim" for instance. Furthermore, Art. 8 (7) refers to persons "directly liable" ("directement redevables" in the French version), thus one must deduce that the guaranteeing associations are only subsidiarily liable.

42. The practice followed by the IRU, the national associations and by a number of Contracting States is demanding as to the measures to be taken by the Customs authorities. Customs authorities have the prerogative of public authority which affords them enforcement means in accordance with their national legislation, as well as any assistance through Conventions that might exist between other States, enabling them to obtain payment from the persons directly liable much more effectively than national associations or the IRU on the latter's behalf. This is why national associations and the IRU expect the Customs authorities to take measures that go noticeably beyond the mere sending of a registered letter.

43. Supporting this practice, one notes that Art. 42bis of the TIR Convention stipulates, "the competent authorities [...] shall take all necessary measures to ensure the proper use of TIR Carnets." Additionally, Annex 9 to the TIR Convention requires the competent authorities to revoke the authorization of national carriers in case of serious offence against Customs legislation. Furthermore, Article 38 stipulates the possibility for the authorities to exclude from their territory any person guilty of a serious offence against the Customs laws or regulations applicable to the international transport of goods. The requirements vis-à-vis the Customs authorities relating to the implementation of the means offered them by their legislation are also based on the Explanatory Note 0.11-2 of the Article 11(2) of the TIR Convention: "In deciding whether or not to release the goods or vehicle, Customs authorities should not, when they have other means in law of protecting the interests for which they are responsible, be influenced by the fact that the guaranteeing association is liable for the payment of duties, taxes and default interest payable by the holder of the Carnet".

44. First instance and appeal courts of several Member States have been called upon to rule that regular prior notification of the debtor is necessary lest the competent authorities lose the right to claim for payment. Since 2002, this minimum requirement has been laid down in Explanatory Note 0.8.7. The Supreme Administrative Court of Bulgaria has on its own part, laid down stringent requirements, and considers that the authorities must take all possible and necessary action to enforce collection of the amount due and that the guaranteeing association may only be pursued if the debtor is incapable of paying<sup>15</sup>. However, these court rulings should be replaced in their context, in particular because they are based on contracts of guarantee subject to the national legislation of the Contracting State involved, where each has its own substance.

45. The second conclusion one can draw is that the very letter of the TIR Convention establishes the subsidiary nature of the obligations of the guaranteeing association. The degree of this subsidiarity – i.e. the concrete measures that must be taken by the Customs authorities before claiming payment from the national association, deserves to be expressed in a clearer way in Article 8(7) and its Explanatory Note, in order to correct the uncertainty and lack of consistency in the application of the TIR Convention by the various Contracting States. This uncertainty and lack of consistency is even more unsatisfactory since all guaranteeing associations are subject to the same global contract with a financial institution, the Zurich Insurance Company, concluded and administered by the IRU.

### **III. Summary of conclusions relating to the characterisation of the obligations of guaranteeing associations**

46. As we have shown, the contract of guarantee, which the TIR Convention foresees to bind each authorized national association to the Customs authorities of the Contracting State in which it is established, must entail a dependent and subsidiary commitment. The guarantee is dependent in that the guaranteeing association cannot be liable beyond the duties and taxes payable by those persons covered by the TIR Carnet, and in that they can oppose the Customs authorities with the same objections and exceptions as those persons. The guarantee is also subsidiary given that the TIR Convention stipulates that the competent authorities must, as far as possible, require the payment due from the persons liable before making a claim against the guaranteeing association.

### **IV. Recommendations for the revision of the TIR Convention**

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<sup>15</sup> In particular, the interpretative decision No3 of 23 March 2003 by the Supreme Administrative Court of the Republic of Bulgaria.

47. As a matter of priority, a revision of the Convention should clarify Art. 8 (7) of the TIR Convention, for instance as proposed by the European Community: "Before making a claim against the guaranteeing association for the payment of the sums mentioned in paragraphs 1 and 2 of this Article, the competent authority shall make every effort to ensure that the payment is made by the person or persons directly liable."<sup>16</sup>

48. A neutral wording should be preferred over references to legal concepts used in national legal systems. In place of such references, the guarantee mechanism should be described in functional terms through rules defining the dependence between the commitment of national organisations and secured rights, and the desired degree of subsidiarity. In particular, the wording " jointly and severally " (conjointement et solidairement) should be avoided, since it is a source of confusion.

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<sup>16</sup> United Nations/Economic and Social Council/Economic Commission for Europe/Inland Transport Committee, TRANS/WP.30/2004/14, 2 April 2004, *Customs Convention on the international transport of goods under cover of TIR Carnets. Revision of the Convention. Amendment proposals transmitted by the European Community*, p.6.