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INLAND TRANSPORT COMMITTEE

Working Party on Customs Questions  
affecting Transport  
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CUSTOMS CONVENTION ON THE INTERNATIONAL TRANSPORT  
OF GOODS UNDER COVER OF TIR CARNETS  
(TIR CONVENTION, 1975)

Application of the Convention

Interpretation of article 8, paragraph 7 of the Convention

Appeal to the guarantee of the guaranteeing associations

Transmitted by the International Road Transport Union (IRU)

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**A. THE BASES**

1. The bases are:

- article 6 which fixes the principle of the liability of the guaranteeing association,
- article 8.1 which specifies that the guaranteeing association will be held jointly and severally with the persons liable,
- article 8.7 which imposes, as far as possible, the collection of the taxes and duties from the person directly liable,
- article 11 which fixes the conditions of appeal to the guarantee of the guaranteeing associations when the discharge of a TIR Carnet is not confirmed, that is to say when the proof of the presentation of the goods, of the vehicle and of the TIR Carnet at the Customs office of destination, or of the transfer of the goods to a different Customs regime, could not be provided.

2. In cases where proof of the regular discharge of the TIR Carnet or of the transfer of the goods to a different Customs regime, or even of the payment of the duties and taxes cannot be provided following an official notification addressed both to the guaranteeing association and to the holder, it can be considered that the Customs debt is born. From then on it is up to the Customs authorities to undertake the necessary steps to obtain the payment of the eluded duties and taxes.

3. Therefore, the Customs authority has two types of debtors:

(a) The person directly liable who is without doubt the one on which the obligation to pay the duties and taxes rests because the goods have been imported or put into circulation. First comes the holder of the TIR Carnet. But when he is able to identify the consignee of the goods, the latter becomes the person directly liable.

(b) The guaranteeing association which is, for its part, jointly and severally liable.

**B. DEFINITION**

4. Joint liability and several liability are two different legal notions.

5. Since each national law has its own solutions, it can be generally considered that "joint liability" and "several liability" are defined as follows:

Joint liability: Liability of two debtors, each one for his own part and each one benefiting of the right to dispute and to divide the debt.

Several liability: Identical liability of two or several debtors towards a creditor. But because of the measures of solidarity the creditor has a more or less limited liberty of choice of the debtor against whom he will take the steps to appeal to the guarantee.

6. Therefore, joint and several liability are two distinct legal notions that are however brought together and associated in article 8.1 of the TIR Convention. Consequently, the association of these two types of distinct liabilities in article 8.1 makes sense only within the framework of the provisions of article 8.7 that limit the effect of the principle of solidarity by the duty of the Customs authorities to request - before the introduction of a claim at the guaranteeing association - the payment of the Customs duties and taxes from the person directly liable for these duties and taxes (Carnet holder, transport operator, consignee, importer,...).

7. As a result, the guaranteeing association becomes responsible for the payment of the Customs debt, limited to US\$ 50,000.-, on the condition that the person directly liable is late in the payment of his Customs debt and that he was summoned in vain to settle it or that his insolvency be well known, or also that it is not possible to contact him by use of normal procedures and means available to a State administration.

#### **C. CONSEQUENCES FOR APPEAL TO THE GUARANTEE**

8. Consequently, the wording of article 8.1, which specifies joint and several liability, makes sense only if this paragraph is seen in the context of article 8.7. Therefore, it will only be in terms of specific facts that it will be possible to determine under which regime of liability the guaranteeing association can be implicated and which procedure must be used by the Customs authorities. The following conclusions must therefore be defined:

(a) Whenever possible, the Customs authorities must request the payment of duties and taxes from the Carnet holder who is the first one liable. As long as he does not demonstrate that he has delivered the goods to a known consignee, he is indeed presumed to have benefited himself of the fraudulent introduction of the goods on the market. On the other hand, should the holder prove that he has delivered the goods to an identified person, the holder is not the beneficiary of the fraud any more, but it is the consignee who becomes the main person liable.

Therefore the following cases notably enter into this category:

(i) When the transport operator or the consignee or the importer or sometimes the exporter is established in the country of the claiming Customs authorities;

(ii) Each time the Customs authority has under its control the goods and the vehicle (explanatory note 10.01);

(iii) Or even each time the proof of the reception of the goods by a consignee is established in the country of the claiming Customs authority.

If the person that is directly liable does not comply, then and only then does the appeal to the joint and several guarantee of the association become possible.

The Customs authority must then issue the request for payment to the guaranteeing association and join a copy of the documentation proving the steps it took towards the person directly liable or any other person and which proved to be unfruitful and thus allowing the justification of the appeal to the joint and several guarantee of the guaranteeing association.

(b) Each time the appeal to the main person liable is not possible, that is to say that this person cannot be reached, has disappeared or is simply not identifiable, i.e. each time the procedures and means available to a State administration do not allow to reach the main person liable, then the joint and several liability of the guaranteeing association comes into being. The Customs authority must then send a request for payment to the guaranteeing association on the basis of its binding guarantee.

#### **D. PROOF TO BE PRODUCED TO BENEFIT FROM THE JOINT AND SEVERAL GUARANTEE OF THE GUARANTEEING ASSOCIATION**

##### **I. Principles**

9. The appeal to a guarantee, whatever its nature, supposes that the creditor demonstrates and justifies his right to benefit from the guarantee. This right manifests itself in particular with the proof that the debt held on the debtor(s) is:

- certain, i.e. established in its principle and its amount;
- cash, i.e. that it can be expressed in a determined amount of money;
- due, i.e. that the creditor can require its payment.

##### **II. Consequences on the appeal to the guarantee of a guaranteeing association**

10. The wording of articles 8.1. and 8.7 as well as the general principles of the applicable law establish clearly that any creditor who requires the payment of a debt by a guarantor must justify vis-à-vis the guarantor his right for the payment. Thus, towards the guaranteeing association, the Customs administration will have to:

(a) Establish that the appeal to the guarantee really is the consequence of the use of a TIR carnet regularly taken into charge. To this end, it will produce, with the notification of non-discharge, a copy of the manifest of entry on its territory, voucher No 1.

(b) Express its requirements within the deadline prescribed by the TIR

Convention (article 11).

(c) Establish that the appeal to the guarantee of the main person liable came to nothing or that the appeal to this guarantee was impossible because of factual and legal circumstances which should be indicated.

(d) Specify and detail - per TIR carnet number - the calculation of the duties, taxes and excise due in order to allow the guarantor to verify its exactness and in particular to check whether the total amount claimed does not exceed the amount of the guarantee given by the association according to its Deed of Guarantee towards the authorities concerned.

11. Under such conditions, the appeal to the joint and binding guarantee of the guaranteeing association can be established. The guaranteeing association still has the right to dispute and to oppose such a payment claim in line with existing international and national regulations.

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