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Working Party on Customs Questions affecting Transport

(One-hundred-and-tenth session, 14 – 17 June 2005,
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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

Guarantee/surety

Note by the secretariat

A. BACKGROUND

1. At its one-hundred-and-ninth session, the Working Party was informed that the secretariat had requested the view of the Office of Legal Affairs of the United Nations concerning the general understanding of the concepts guarantee/surety and that an answer would be received in the near future (TRANS/WP.30/218, para. 47).

2. Since then, the secretariat has received observations from the International Trade Law Division of the Office of Legal Affairs (the UNCITRAL secretariat). They are not limited to the issue of guarantee/surety but also cover other areas in which the secretariat had requested a legal opinion. The observations are contained in the annex to this document.

3. The Working Party may wish to study the observations by the UNCITRAL secretariat in relation to document TRANS/WP.30/2005/6, transmitted by the IRU.

Annex
(English only)

**Text of a letter dated 1 February 2005 transmitted by Mr. J. Sekolec, Director ,
International Trade Law Division, office of Legal Affairs of the United Nations (Vienna)
to Mr. J. Capel Ferrer, Director, UNECE Transport Division, Geneva**

By way of an e-mail forwarded on 26 January 2005 to the Secretary of the United Nations Commission on International Trade Law (UNCITRAL), attaching a Memorandum from the United Nations Economic Commission for Europe dated 21 October 2004, the opinion of the UNCITRAL secretariat has been sought regarding a number of issues with respect to the Customs Convention on the International Transport of Goods under Cover of TIR Carnets Convention, Geneva 1975 (TIR Convention). While perhaps additional opinions of the legal officers of the Treaty Section should be sought in addition to those of the UNCITRAL Secretariat, in particular as regards the interpretation of the Vienna Convention on the Law of Treaties, we may offer the following observations with respect to the issues raised.

(1) The Vienna Convention on the Law of Treaties (the Vienna Convention)

Article 4 of the Vienna Convention states that it applies only to treaties concluded after its entry into force, i.e. 27 January 1980. The TIR Convention, 1975 would thus fall beyond the scope of application of the Vienna Convention. However, Article 3 of the Vienna Convention also states that the non-applicability of the Vienna Convention “to international agreements concluded between States and other subjects of international law ... shall not affect: ... (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention”. In addition, the provisions of the Vienna Convention may provide guidance in a general sense, regardless of whether they are specifically applicable.

While there is no specific provision with respect to the legal status of the titles used in a convention, the following articles of the Vienna Convention may be of particular interest with respect to the matters in issue:

Article 31. General rule of interpretation

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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Article 33. Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Article 79. Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected:
 - (a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;
 - (b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or
 - (c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.
2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:
 - (a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;
 - (b) an objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.
3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and the contracting States agree should be corrected.
4. The corrected text replaces the defective text *ab initio*, unless the signatory States and the contracting States otherwise decide.
5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy of it to the signatory States and to the contracting States.

(2) The liability of the guaranteeing association

Some confusion has arisen whether, pursuant to the provisions of the TIR Convention, the “guaranteeing association” is intended to act as surety or as guarantor for persons using the TIR procedure. In particular, there appears to be a conflict between the provisions set out in the English language version of Article 1(q) (“act as surety”), Article 6, paragraph 1 (“act as guarantor”), and Article 8, paragraph 1 (guaranteeing associations “shall be liable, jointly and severally with the persons from whom the sums... are due, for payment”). Complicating the interpretation of these provisions is the use of the phrase “*se porter caution*” in the French text of Article 1(q) and Article 6, paragraph 1 (not Article 8, paragraph 1, as set out in the UN/ECE Memorandum) of the TIR Convention. Note that Article 64 of the TIR Convention states that the English, French and Russian language texts are equally authentic.

“*Caution*” is defined in “*Vocabulaire Juridique*” (2nd edition, Gérard Cornu) as:

“Personne qui s’engage envers le créancier, à titre de garantie, à remplir l’obligation du débiteur principal, pour le cas où celui-ci n’y aurait pas lui-même satisfait (C.civ., a. 2011) et qui, n’étant en principe tenue qu’à titre subsidiaire, peut exiger que le débiteur principal soit d’abord discuté dans ses biens.”

From the perspective of United States law, “Black’s Law Dictionary” defines “guarantor” as a “person who becomes secondarily liable for another’s debt or performance in contract to a strict surety who is primarily liable with the principal debtor”, and “surety” as “one who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefore; One who undertakes to pay money or to do any other act in event that his principal fails therein; A person who is primarily liable for payment of debt or performance of obligation of another.”

Further, Black's provides the following assistance:

“Guarantor and surety compared. A surety and guarantor have this in common, that they are both bound for another person; yet there are points of difference between them. A surety is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. He is an original promisor and debtor from the beginning, and is held ordinarily to every known default of his principal. On the other hand, the contract of guarantor is his own separate undertaking in which the principal does not join. It is usually entered into before or after that of the principal, and is often founded on a separate consideration from that supporting the contract of the principal. The original contract of the principal is not the guarantor's contract, and the guarantor is not bound to take notice of its non-performance. The surety joins in the same promise as his principal and is primarily liable; the guarantor makes a separate and individual promise and is only secondarily liable. His liability is contingent on the default of his principal, and he only becomes absolutely liable when such default takes place and he is notified thereof. “Surety” and “guarantor” are both answerable for debt, default, or miscarriage of another, but liability of guarantor is, strictly speaking, secondary and collateral, while that of surety is original, primary, and direct. In case of suretyship there is but one contract, and surety is bound by the same agreement which binds his principal, while in case of guaranty there are two contracts, and guarantor is bound by independent undertaking.”

By contrast with the established use of the terms “guarantor” and “surety” by United States jurisdictions, it should be pointed out that under the law of England as described in “Halsbury's Laws of England” (4th edition), “in English legal usage, the words ‘guarantor’ and ‘surety’ are interchangeable”. Halsbury's Laws of England also notes that “However, in many American jurisdictions, the terms are distinguished to signify different types of obligations undertaken: see Laurence Simpson, *Handbook of the Law of suretyship* (1950) and *WT Rawleigh Co v Oversteet* 32 SE 2d 574 (1944)”.

It would seem that the intention of the French language version of the text of the TIR Convention is to use the concept of “guarantor” rather than the concept of “surety” as understood in the law of the United States. Further, the Russian language version of the text also uses the word “guarantor” rather than “surety” in both Articles 1(q) and Article 6, paragraph 1 of the TIR Convention. However, it is unclear whether Russian law distinguishes between a “surety” and a “guarantor”, and this is a detail that is not capable of being ascertained in the time allotted for the preparation of this response.

The above remarks suggest that only the English version (if interpreted by reference to the laws of the United States) introduces a degree of confusion by using the word “surety” in Article 1(q) and “guarantor” in Article 6, paragraph 1, thus leaving open the possibility of understanding different meanings that may not have been foreseen by the authors of the TIR Convention. Since in some jurisdictions the legal definitions of ‘surety’ and ‘guarantor’ are quite distinct, resort should be had to the intent of the negotiating States in order to ascertain which concept was intended. It has been suggested that assistance in this regard may be had to Article 8, paragraph 1, which sets out the “joint and several liability” of guaranteeing associations with persons from whom payment of the sums are due pursuant to the provisions of the TIR Convention.

With respect to the notion of “joint and several liability”, the UNCITRAL secretariat’s most recent experience came in its Working Group III (Transport law), which is in the process of preparing a Draft instrument on the carriage of goods [wholly or partly] [by sea]. The Working Group engaged in the following discussion with respect to joint and several liability (Report of Working Group III (Transport law) on the work of its thirteenth session, A/CN.9/552, paragraph 12):

“Joint and several liability

12. Questions were raised regarding the relationship between paragraph 6 and paragraph 5 (which expressed the principle that, where more than one maritime performing party was liable, such liability was joint and several). With respect to paragraph 5, the view was expressed that the common law concept of “joint and several liability” might not be interpreted as strictly equivalent to such civil law concepts as “*responsabilité solidaire*” or “*responsabilidad solidaria*” which, in turn, differed from such notions as “*responsabilité conjointe*” or “*responsabilidad mancomunada*”. It was widely felt that further elaboration might be necessary to make it clear in all languages that, where several parties were held liable under paragraph 5, each party was individually responsible for compensating the total loss, subject to any statutory limit applicable and also subject to the recourse action that party might exercise against other liable parties.”

Black’s Law Dictionary defines “joint and several liability” as follows:

“Describes the liability of copromisors of the same performance when each of them, individually, has the duty of fully performing the obligations, and the obligee can sue all or any of them upon breach of performance. A liability is said to be joint and several when the creditor may demand payment or sue one or more of the parties to such liability separately, or all of them together at his option.”

At first sight, it might seem that the above understanding of the concept of “joint and several liability” would fit better with a notion of “primary and direct responsibility” as understood in the United States version of the concept of “surety”. However, in practice, the concept of “joint and several liability” would fit with both concepts of “surety” and “guarantee” (the difference being that a surety, as understood under United States law, is responsible jointly and severally by default, whereas a guarantee, in particular under civil law, would not necessarily imply a joint and several liability but would often be expressly designated by the parties as resulting in such joint and several liability). Thus, the use of the term “joint and several liability” does not appear conclusive of the Contracting Parties’ intention.

Another source to which resort could be had in seeking the intention of the negotiating Parties is the *travaux préparatoires* of the TIR Convention. Should such review of the *travaux préparatoires* fail to reveal evidence of the intention of the negotiating parties, it would appear that the Contracting Parties to the TIR Convention will have to clarify their intent. This ambiguity might lend itself to the amending procedure set out at Article 59 of the TIR Convention, where the mechanism exists for the Contracting Parties to clarify the intention of the provisions in all language versions of the Convention.

(3) Function and formal value of titles in the text of the Convention

As noted above, the Vienna Convention does not consider the legal status of titles used in a convention.

The UNCITRAL Secretariat has had a varied experience with respect to the use of titles in its Conventions. While several of its Conventions have titles for each article, (e.g. the UN Convention on the Assignment of Receivables in International Trade, 2001, or the Hamburg Rules, 1978), others have titles only for section and chapter headings (e.g. the UN Convention on Contracts for the International Sale of Goods, 1980, or the UN Convention on International Bills of Exchange and International Promissory Notes, 1988). Further, the practice can vary even within a subject area, as, for example, in the case of the UNCITRAL Model Law on International Commercial Arbitration, 1985, which has titles for its articles, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, which has no titles at all. In the experience of the UNCITRAL Secretariat, there has been no systematic approach with respect to the use of titles in an instrument regarding either a given subject matter, or a particular type of instrument, such as a model law. In addition, the Secretariat has found that the practice can also vary from State to State. The only consistent aspect has been that the issue of titles for articles in an instrument has always been subject to discussions by States in the course of negotiations. For example, a footnote to the title of article 1 of the UNCITRAL Model Law on International Commercial Arbitration states that “Article headings are for reference purposes only and are not to be used for purposes of interpretation”.

Thus, the view of the UNCITRAL secretariat is that, as with all conventions, decisions concerning the appropriate titles for articles in the TIR Convention are, ultimately, in the hands of the negotiating Parties or the Contracting Parties, if the text has already been concluded. Further, as noted above, the amending formula is found at Article 59 of the Convention.

(4) The application of Article 42 *bis*

While the proposed amendment to Article 42 *bis* would seem to be prudent in removing ambiguity and in ensuring that obligations are achievable, it must be reiterated that the Contracting Parties to the TIR Convention must, in the end, decide whether these amendments are warranted. Again, resort to the Article 59 amendment procedure may be considered.
