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Working Party on Customs Questions affecting Transport

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Item 4 (b) (i) of the provisional agenda

Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention, 1975): Revision of the Convention

Amendment proposals to the Convention

Note by the secretariat

I. Background and mandate

1. The TIR Administrative Committee, at its sixty-sixth session, considered, inter alia, a proposal by the delegation of the Russian Federation, to amend Article 11 with a new paragraph 4 bis. Recognizing that there was little scope for progress on the proposal in its current form, the Committee decided to transmit the item to the Working Party for further consideration (see ECE/TRANS/WP.30/135, paras. 42 and 43).
2. The Working Party is invited to consider document ECE/TRANS/WP.30/2018/8, which provides a succinct summary of the discussions, so far, on the issue in AC.2 as well as further clarifications by the delegation of the Russian Federation.

II. Original Russian proposal

3. At the end of the amended paragraph 4 insert a new paragraph 4 bis to read:
“If the guaranteeing association does not pay the amount[s] mentioned in Article 8, paragraphs 1 and 2, within the period of three months set in the Convention, the competent agencies[authority/authorities] may claim payment of such sums through the courts within a period established in agreement with the national guaranteeing association.” (see ECE/TRANS/WP.30/AC.2/2014/14, para. 6)”.

III. Considerations by the Committee

4. At its sixty-second session (October 2015), the Committee considered this proposal. The delegation of European Union was of the view that the corresponding Explanatory Note 0.11.4 already provides for a substantive equivalent to this proposal. As such, the delegation of the European Union proposed that the conversion of the existing Explanatory Note into a new paragraph 4 bis may be a possibility for consideration. The delegation of Switzerland was of the view that the existing text is sufficient, and that further detailed provisions in this regard can be incorporated in the national guarantee agreement between customs authorities and national guaranteeing associations. After extensive discussions, the Committee was of the view that Explanatory Note 0.11.4 cannot be looked at in isolation from the rest of article 11 and that, in light of this amendment proposal, it would be advisable for all Contracting Parties to review Article 11 in conjunction with their current practices and legislation, as well as to revisit Chapter 5.4 of the TIR Handbook on enquiry and recovery procedures. Against this background, the Committee decided to revert to its discussions on this issue at its next session (see ECE/TRANS/WP.30/AC.2/127, para. 34 (d)).

5. At its sixty-third session (February 2016), the Committee continued its consideration of this proposal. The delegation of the Russian Federation provided further clarifications on the rationale of this proposal, namely that it had transpired in national legal proceedings that the lack of specification of a concrete time frame during which the customs authorities could resort to the national judicial system had in some cases resulted in diverging interpretation of the provisions. In the course of discussions, the Committee noted various other proposals for addressing this concern such as by amending Explanatory Note 0.11.4 or by converting the Explanatory Note into a new paragraph 4 *bis*. The Committee requested the secretariat to prepare a document, based on the views expressed during the discussion, as a basis for further consideration on this amendment proposal at the next session.

6. At its sixty-fourth session (October 2016), the Committee considered document ECE/TRANS/WP.30/AC.2/2016/19, prepared by the secretariat and containing various ways to amend Article 11 and Explanatory Note 0.11.4 based on the original proposal of the Russian Federation. The delegation of the Russian Federation reiterated its justification for this proposal, namely that according to some national civil codes, the specific timeframe for the customs authorities to resort to the national judicial system is limited to a rather short period of time, which is not enough for customs authorities to complete the investigation in due course. In this case the provisions of law are superior to the terms and conditions agreed between the customs authorities and the national guarantee association. To overcome this restriction, a provision within the text of the Convention is needed, that would enable customs authorities to establish, in their contract with the national guaranteeing association, timeframes based on the internationally binding text of the Convention, which enjoys a higher legal value compared to the national civil legislation. Against this background, the delegation of the Russian Federation urged the Committee to support the original version of this proposal and expressed the view that the alternative formulations provided in document ECE/TRANS/WP.30/AC.2/2016/19 were not suitable for the purposes as explained. The Committee thanked the delegation of the Russian Federation for its extensive explanations and decided to revert to this proposal at its next session (see ECE/TRANS/WP.30/AC.2/131, para. 45 (a)).

7. At its sixty-fifth session (February 2017), the Committee continued its discussions, during which the delegations of Azerbaijan and Belarus in principle could agree with the proposal, and the delegation of the European Union maintained its previously stated position, namely that it would not be able to support this proposal. In view of continued

interest of some delegations to consider this proposal, and due to time constraints, the Committee decided to revert to this issue at its next session (see ECE/TRANS/WP.30/AC.2/133, para. 43 (a));

8. At the sixty-sixth session, the delegation of the Russian Federation confirmed its previous position that the amendment would enable customs authorities in the Russian Federation to establish, in their agreement with the national guaranteeing association, timeframes based on the internationally binding text of the Convention, which enjoys a higher legal value compared to national civil legislation. The delegations of Switzerland and of European Union maintained their previously stated positions on this amendment, namely that they would not be in a position to support the proposal, and that the matter could be addressed differently, considering that it refers to a complication encountered only in one Contracting Party. The delegation of Belarus was of the view that a compromise wording could be found and, therefore, discussions on the formulation of the text of the proposal should continue. The delegation of Azerbaijan was of the view that, in the interest of avoiding legal duplication, the first sentence of the Explanatory Note should be deleted if a new article 4 bis was added to Article 11.

IV. Explications by the delegation of the Russian Federation

9. In a written statement, received by the secretariat at the end of the sixty sixth session of AC.2 “The Russian delegation stressed that the main idea of the [proposal for new Article] 4 bis is to give the competent authorities and the guaranteeing association the power to come to an agreement with regard to the maximum period, within which the competent authorities have the right to address the courts with claims against the guaranteeing association, notwithstanding the provisions of national legislation. As soon as this power will be given by the TIR Convention, this has legal power superior to national legislation. In this situation, the reference to national legislation, which is now in Explanatory Note 0.11.4 cannot solve the issue, because, in this case, the agreement will be subject to national law and cannot include terms that exceed those provided by national legislation.”

V. Current status of the amendment proposal for new Article 11, paragraph 4 bis

10. It is the understanding of the secretariat that, further to the latest discussions in the Committee, the Committee is requesting the Working Party to examine as follows:

Proposal by the Russian Federation for a new Article 11, paragraph 4 bis:

“4 bis If the guaranteeing association does not pay the amount[s] mentioned in Article 8, paragraphs 1 and 2, within the period of three months set in [by] the Convention, the competent authorities may claim payment of such sums through the courts within a period established in agreement with the national guaranteeing association.”

11. In this case, in order to avoid duplication, Azerbaijan proposes to delete the first phrase of Explanatory Note 0.11.4:

“0.11.4 bis If a guaranteeing association is asked, in accordance with the procedure set out in this article, to pay the sums referred to in Article 8, paragraphs 1 and 2, and fails to do so within the time-limit of three months prescribed by the Convention, the competent authorities may rely on national regulations in requiring payment of the sums in question because what is

involved in such cases is a failure to carry out a contract of guarantee entered into by the guaranteeing association under national law. The time limit also applies in the event that the guaranteeing association, on receipt of the claim, consults the international organization referred to in Article 6, paragraph 2 over its position concerning the claim.”

12. Proposal by the European Union to convert the existing Explanatory Note 0.11.4 to Article 11, paragraph 4 bis, as a basis for further discussion:

“4 bis If a guaranteeing association is asked, in accordance with the procedure set out in this article, to pay the sums referred to in Article 8, paragraphs 1 and 2, and fails to do so within the time-limit of three months prescribed by the Convention, the competent authorities may rely on national regulations in requiring payment of the sums in question because what is involved in such cases is a failure to carry out a contract of guarantee entered into by the guaranteeing association under national law. The time limit also applies in the event that the guaranteeing association, on receipt of the claim, consults the international organization referred to in Article 6, paragraph 2 over its position concerning the claim.”

VI. Considerations by the secretariat

13. When reviewing the above proposals as they currently stand, the secretariat wonders about the following:

(a) should the final phrase of current Explanatory Note 0.11.4 not remain with Article 11, paragraph 4, considering that the time limit referred therein is the time limit mentioned in Article 11, paragraph 4?

(b) does the text proposed by the Russian Federation materially constitute the conversion of the first phrase of Explanatory Note 0.11.4, as proposed by the delegation of the European Union at the sixty-second session of AC.2? In the view of the secretariat, the Russian proposal aims at achieving a longer deadline to refer a claim to court than stipulated in national legislation, further to arrangements laid down in the agreement with the association. The current text of Explanatory Note 0.11.4, however, stipulates that, in case the guaranteeing association does not pay within the deadline of three months, as prescribed by Article 11, paragraph 4, the competent authorities can enforce payment by means of the applicable legal provisions regarding breach of contract.

(c) does the proposed text of new Article 11, paragraph 4 bis really help the Russian customs authorities in achieving their goal of having a longer deadline to refer a claim to court than prescribed by national legislation? On the assumption that the agreement between customs and national association is governed by private law, a clause therein, going beyond the deadline prescribed by national legislation, could easily be contested as in breach of national law. In the context of the issue, customs authorities are encouraged to make full use of the period of two years in order to prepare a fully substantiated claim for submission to the national association for payment, rather than seeking an extension of the period to bring the case to court in case the national association fails to pay the claim within the given period of three months.

VII. Considerations by the Working Party

14. The Working Party may wish to provide guidance to the secretariat how to pursue the matter.
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