

AIJA Prague 2014 Congress
Transport Law Commission (TLC)
"Traps and pitfalls in international and domestic road transport regulations"

WORKSHOP QUESTIONNAIRE

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1. Inland road transport

1.1. Which rules govern domestic, i.e. non international, road transport in your jurisdiction? Are the rules mandatory or can be deviated from by contracts?

The mandatory domestic rules providing for the regulation of road transport agreements are: (i) the Civil Code; (ii) the Consumer Protection Code (when applicable); (iii) Law No. 11,442/07, which provides for the carriage performed on public roads by individuals or companies; and (iv) Resolutions of the National Terrestrial Transportation Regulatory Agency ("ANTT"). These laws cannot be deviated from by contracts.

1.2. When is the road carrier liable for loss, damage and delay? Please describe the basis of liability and any liability exceptions available to the carrier.

According to the provisions of the Civil Code, each and every carriage agreement shall contain the invulnerability clause ("*cláusula de incolumidade*"), whereby the carrier commits to perform, with care, the agreed shipping of the passengers and/or goods. The carrier is liable for the damage arising from: (i) the cargo deterioration and loss; (ii) delays and suspensions of trips; and (iii) the damages to people and their luggage.

Therefore, the carrier's liability lies in the breach of the clause of invulnerability as well as of the carriage agreement, and shall be rebutted with the occurrence of external fortuitous event or wrongful conduct of the victim or of a third party.

Recent court precedents have understood that the internal fortuitous event, although unpredictable and inevitable, is covered by the risk of the activity of transport services. For instance, mechanical events in transport vehicles do not exempt the carrier from his liability.

Brazilian legal system also recognizes the objective and non-contractual strict liability of the carrier towards third parties and victims of damages, both equated to the status of consumers pursuant the Consumer Protection Code. The legal concept of "consumption by match" ("*consumo por equiparação*") authorizes the application of the provisions of the Code, which is based in the defect or malfunction of the product or service, and not in the breach of an agreement. The liability of the carrier, under the Consumer Protection Code, is objective and, as such, obviates the statement of guilt of the carrier. For its configuration, the interested party shall only demonstrate the relation between the damage and the carrier's conduct.

Both the Civil Code and Law 11,442/07 provide that the carrier is liable for damages arising from loss, damage or failure and those caused by delay in its delivery from the moment of receipt of the cargo and its delivery to the addressee. The liability of the carrier only ceases upon the receipt of cargo by the recipient.

Law 11,442/07 also lists liability exceptions other than those prescribed in the Civil Code: (i) damages caused by act or fact attributable to the consignor or consignee of the cargo; (ii) inadequacy of package; (iii) own or latent defect of the cargo; (iv) force majeure or fortuitous event; and (v) the existence of insurance by the carrier against loss or damage of the cargo.

1.3. Is the carrier entitled to limit liability for loss, damage and delay

and, in the affirmative, can the limits be broken?

Provided that there is no consumer relationship involved, the Civil Code assigns to the contracting parties the prerogative to agree to the inclusion, in the carriage agreement, of a clause limiting the amount of damage eventually awarded. The clause does not properly feature a limitation on the liability of the carrier, but only restricts the amount owed to the aggrieved in respect of losses and damages. This limit cannot be insignificant.

1.4. Are there any deadlines within which the cargo interests shall give notice for claim? In the affirmative, please set out the deadlines and the consequences of non compliance.

As per Law 11,442/07, the cargo interests may give notice for claim starting from the occurrence of the delay. Delay is verified when the goods are not delivered within the deadlines specified in the contract or the bill of lading. If the goods are not delivered within thirty (30) calendar days after the date specified in the contract or the bill of lading, the consignee or any other person entitled to claim the goods may consider them lost.

In the event of delivery of the goods, the Civil Code foresees that the consignee or any other person endorsing the bill of lading must receive and check them for any partial loss or noticeable malfunctions. Existing one or both of these defects, the cargo interests must submit a notice for claim against the carrier within ten (10) days of delivery, under penalty of decay of the right to claim damages resulting from transport.

1.5. Please describe time bars applicable to claims for loss, damage, delay as well as other claims for breach of contract by the carrier.

Law 11,442/07 establishes that the claim founded in tort, arising from the breach of the carriage agreement, must be exercised within one year from the moment the interested party became aware of the damage.

The deadline for filing the indemnity action is prescriptive. If the holder of

the claim does not exercise it within the prescriptive period established in the Law, he shall lose his right of action and will not be allowed to take legal action to seek compensation.

In the case of road transport, the action of indemnification expires in one year, in case of loss of the goods, after the thirtieth day after the one in which, according to the regulation, should have been made delivery (art 9 of Decree Law No. 2.681).

Although the Consumer Protection Code and the Civil Code prescribe, respectively, periods of five years and three years for filing the suit for damages, given the specialty of Law 11,442/07 governing the carriage of cargo in public roads, the prescribed period prevails over the other limitation periods that would also be able to discipline the matter, and thus shall be applied.

2. REGULATORY

2.1. Which rules road carriers have to complied with in order to be admitted in the market of road carriage of goods?

Not applicable.

2.2. Does national rules provide more restrictive requirements than EU Regulation for the admission to the market of domestic road carriage? In the affirmative, is there an issue of conflict between EU and national legislation?

Not applicable.

2.3. Which are the relevant sanctions in case of breach of EU and/or national legislation regarding the admission to the market of domestic road carriage? And which are the remedies, if any?

Not applicable.

2.4. Do national rules provide more restrictive requirements. for the admission to the market of international road carriage? In the affirmative, is there an issue of conflict between EU and national legislation?

Not applicable.

2.5. Which are the relevant sanctions in case of breach of EU and/or national legislation regarding the admission to the market of international road carriage? And which are the remedies, if any?

Not applicable.

2.6. In case your Country is not an EU member, which are the relevant requirements that law provides in order to admit haulers to run the business of road carriage?

The admission of haulers to run the business of road carriage is conditioned to the enrollment of the interested company in the ANTT, under the National Registry of Road Carriers Cargo (*Registro Nacional de Transportadores Rodoviários de Carga - "RNTRC"*).

The following requirements shall be met so a company can be qualified as a cargo road transport entity (*Empresa de Transporte Rodoviário de Cargas - "ETC"*)^[1]:

- (i) the company must be enrolled before the National Taxpayers Registry (*Cadastro Nacional de Pessoas Jurídicas - "CNPJ"*);
- (ii) the company must be duly incorporated and have cargo road transportation as its core business;
- (iii) the company's shareholders and managers must have undisputed reputation;

^[1] According to ANTT's Resolution 3,056/09, Article 4, II.

- (iv) the company must appoint an individual as its responsible technician, who shall have at least three (3) years of experience in cargo road transportation or degree from a specific course;
- (v) the company cannot have any union fee ("*contribuição sindical*") dept pending;
- (vi) the company must be the owner or lessee of one (1) or more vehicles with aggregate transport capacity of, at least, 500 kg, and each vehicles shall be registered before the Brazilian Transit Council – CONTRAN.

If all formalities described above are met, ANTT issues a Certificate of National Registry of Cargo Road Transportation (*Certificado de Registro Nacional de Transportador Rodoviário de Carga* – "CRNTRC")^[2], allowing the company to develop cargo road transport activities.

2.7. Do the road carriers have to comply with particular rules to grant safety and security during trips?

The transportation of hazardous cargo is regulated under Decree 96,004/88, which approved the Regulation for Road Transportation of Hazardous Cargo, and also by the rules and procedures set out in Resolutions edited by ANTT, among which stand out, due to their importance, Resolution 3,665/2011, which updates the Regulation for Road Transportation of Hazardous Cargo and the Resolution 420/2004, which approved several technical Instructions on the matter.

Any company that transports hazardous cargo shall observe the requirements set forth under these rules, which shall bear the following documents:

- (i) Certificate of Inspection for Carriage of Hazardous Products (*Certificado de Inspeção para o Transporte de Produtos Perigosos* – "CIPP"), issued by the National Institute of Metrology, Standardization and Industrial Quality

^[2] According to ANTT's Resolution 3,056/09, Articles 10 and 39, I.

(*Instituto Nacional de Metrologia, Normalização e Qualidade Industrial – “INMETRO”*) or another entity accredited by INMETRO;

- (ii) Vehicle Inspection Certificate (*Certificado de Inspeção Veicular - “CIV”*) issued by Inmetro accredited bodies.
- (iii) tax clearance documents related to the cargo;
- (iv) declaration of the consignor appointing that the cargo is stored according to applicable standards;
- (v) emergency instructions, pursuant to information provided by the manufacturer of the product; and
- (vi) other licenses or authorizations issued by applicable authorities (e.g. ANVISA, Federal Police/Ministry of Justice, Ministry of Defense).

The compliance with the technical standards set by ANTT shall be monitored by INMETRO and Brazilian Federal Highway Police.

2.8. Are the road carriers entitled to pretend extra costs over the agreed freight for, as example, fuel surcharge and/or other costs?

Generally, no.

3. MISCELLANEOUS

3.1. Are there any other particular aspects, not covered by the above questions, which have to be highlighted (briefly) in your jurisdiction?

A) International Cargo Road Transportation

Brazil, due to its geographical situation, historically maintains international land transport agreements, especially road agreements with almost every country in South America. The agreements with Colombia, Ecuador, Suriname and French Guiana are currently under negotiation.

The Agreement on International Road Transport of the Southern Cone countries, which includes rail and road transport, includes Argentina, Bolivia, Brazil, Chile, Peru, Paraguay and Uruguay. The agreement between Brazil and

Venezuela only concerns road transport. The Southern Common Market (Mercosur), a Treaty of Integration with greater amplitude entered into between Argentina, Brazil, Paraguay and Uruguay, absorbed the Agreement on International Road Transport of the Southern Cone countries.

Besides these international agreements, Brazilian companies engaged in the international cargo road transportation must be authorized by ANTT to perform such activity, by means of the Original Licence (*Licença Originária* – “LO”)¹. Transportation licenses shall be issued by local authorities of other countries (of the country of destination and/or the country where the cargo will transit), those licenses are referred to in ANTT regulation as Complementary Licence (*Licença Complementar* – “LC”)².

The LC must be requested to the competent foreign authority in up to one hundred and twenty (120) days as from the issuance of the LO by ANTT³. The company shall submit the LC to ANTT in up to 180 from the issuance of the LO⁴.

The company must also obtain Certificates of Periodical Vehicle Inspection (*Certificado de Inspeção Técnica Veicular Periódica* – “CITV”)⁵ in relation to vehicles used in international cargo road transportation. Such certificates are valid for one (1) year⁶.

Also, the company shall obtain Inspection and Registry Certificate (*Certificado de Cadastramento e Vistoria* – “CCV”), which is issued by the Federal Police Department⁷. Such document attests the company’s good standing in light of regulation applicable to immigration.

B) Multimodal Cargo Transportation

As provided under Law 9,611/98, multimodal transportation is the activity

¹ According to ANTT’s Resolution 1,474/06, Article 3.

² According to ANTT’s Resolution 1,474/06, Article 8.

³ According to ANTT’s Resolution 1,474/06, Article 8.

⁴ According to ANTT’s Resolution 1,474/06, Article 8, paragraph 1.

⁵ According to ANTT’s Resolution No. 1,474/06, Article 4, paragraph 2.

⁶ According to Mercosur/GMC Resolution No. 75/97, Exhibit, Item I.5.

⁷ According to Federal Decree No. 2,381/97, Article 7.

governed by a single agreement, using two or more transportation modalities (e.g. railway and ports), carried out by a single company qualified as Multimodal Transport Operator (*Operador de Transporte Multimodal* – “OTM”). OTM is the legal entity contracted to perform multimodal transport cargo, from source to destination, either directly or through third-parties.

Multimodal transportation also requires prior authorization from ANTT⁸. In order to develop international multimodal activities, the OTM must also be licensed by the Federal Revenue Office, for customs and taxation control purposes⁹. If granted, the license is valid for 10 years.

Although Law 9,611/98 requires prior authorization for the exercise of OTMs’ activities, we have not identified in this legislation mention to any penalties for OTMs without the proper certificate.

There is a debate concerning the need to modify the OTM legislation. The current legislation brings a tax conflict due to the multiple certificates an OTM must issue in order to perform a multimodal transport: not only does the OTM have to issue one certificate to each part of the trip, but he also has to issue another to the entire itinerary. As the OTM must pay tax for each certificate issuance, double taxation of the activity occurs. In order not to have excessive and unjust tax costs, many OTMs do not register their activities.

⁸ According to: (i) Law No. 9,611/98, Article 6; (ii) Federal Decree No 3,411/00, Article 2; and (iii) ANTT’s Resolution No. 794/04, Article 1.

⁹ According to: (i) Law No. 9,611/98, Article 6; (ii) Federal Decree No 3,411/00, Article 2; and (iii) ANTT’s Resolution No. 794/04, Article 1.