



**Economic and Social
Council**

Distr.
GENERAL

ECE/TRANS/WP.24/2009/3
8 January 2009

Original: ENGLISH

ECONOMIC COMMISSION FOR EUROPE

INLAND TRANSPORT COMMITTEE

Working Party on Intermodal Transport and Logistics

Fifty-first session
Geneva, 19-20 March 2009
Item 6 of the provisional agenda

**RECONCILIATION AND HARMONIZATION OF CIVIL LIABILITY REGIMES IN
INTERMODAL TRANSPORT**

Excerpts of considerations by the Working Party

Note by the secretariat

I. INTRODUCTION AND MANDATE

1. The Working Party, at its fiftieth session, noted that on 3 July 2008 the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (Transport Law) had concluded its work on the preparation of a Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. The draft Convention was transmitted to the General Assembly of the United Nations for adoption, possibly in November 2008. Following adoption, a signing ceremony is planned to be held in autumn 2009 in Rotterdam. The convention would come into force upon accession or ratification by at least 20 countries.

2. The Working Party also noted that the text of the UNCITRAL convention contained a number of still controversial issues that might not facilitate its entry into force. These were related to the following issues:

(a) The convention is very complex and covers untried and new legal “territories” that may need to be tested by tribunals in case of litigations among carriers and shippers.

(b) The convention was designed as a mainly maritime convention with the aim to create a modern and uniform law for the international carriage of goods by sea. The convention is however not limited to port-to-port carriage, but may also apply to the carriage of goods by other modes of transport, as long as a sea leg is involved. Even though this issue was addressed in the convention by clarifying that international conventions in the field of road, rail and air transport prevailed in such cases, this may still raise demarcation issues with existing legal regimes governing road, rail and inland water transport (such as CMR or COTIF).

(c) The convention tends to shift, via its provision on volume contracts that are only vaguely defined, from a mandatory liability system protecting “weaker” parties, to a legal regime based on the freedom of contract. It may thus favor large carriers at the expense of small shippers.

3. The Working Party decided to revert to this subject at one of its next sessions to evaluate the impact and value-added of the convention for intermodal transport operations in the UNECE region (ECE/TRANS/WP.24/121, paragraphs 51-53).

4. With a view to facilitating this evaluation, the secretariat is providing below excerpts of earlier deliberations of the Working Party on civil liability regimes in intermodal transport that highlight the issues at stake and could provide guidance for further action (the full reports and the documents referred to are available on the website of the Working Party).¹

II. EARLIER DELIBERATIONS OF THE WORKING PARTY

A. Forty-eight session of the Working Party (1-2 October 2007)

Documentation: ECE/TRANS/WP.24/117, paragraphs 48-51

5. The Working Party noted that the industry representatives of ESC,² IRU³ and IMMTA⁴ confirmed the views expressed earlier by the Working Party, in particular that the present draft instrument, in addition to being extremely complicated, would establish another layer of international - mainly maritime based - transport law that did not address the concerns of European shippers and intermodal transport operators. It might also come in conflict with existing European land transport legislation (CMR, COTIF/CIM, SMGS) and well-established business practices. The Working Party had been of the opinion that the approach taken in a study commissioned by the European Commission in 2005 (Informal document WP.24 No. 1 (2006) was more appropriate and a step in the right direction as it foresaw a simple, transparent, uniform and strict liability framework that placed liability on a single multimodal transport operator; ECE/TRANS/WP.24/111, paragraphs 14-18).

¹ <<http://www.unece.org/trans/wp24/welcome.html>>.

² European Shippers' Council.

³ International Road Transport Union.

⁴ International Multimodal Transport Association.

B. Forty-sixth session of the Working Party (4 October 2006)

Documentation: ECE/TRANS/WP.24/113, paragraphs 17-21

6. The Working Party noted that the public consultation on logistics for promoting freight intermodality, organized by the European Commission on 25 April 2006, had not led to conclusions on the importance of the problem of multimodal liability nor on possible ways of addressing it in a European or pan-European context. Rather the views expressed by various stakeholders reflected those voiced during the two “hearings” with concerned industry groups that had been organized by the UNECE already in 2000 (TRANS/WP.24/2000/3; TRANS/WP.24/2002/6). Similar divergent views were reflected in position papers presented by CLECAT, GETC and IRU (Informal documents No. 6 and 11 (2006)).

7. On behalf of the Working Party, the secretariat had contributed to this consultation by transmitting a document that contained a summary of the considerations of the Working Party on this subject. It was stressed in the document that any new civil liability system for multimodal transport must be cost-effective, acceptable to the transport industry, uniform and compatible with the existing unimodal liability regimes. It would also need to be easily understood, transparent and provide for strict liability covering all types of losses (damage, loss, delay), irrespective of the modal stage where such loss occurred and of the causes of such loss. The document also set out criteria that would need to be fulfilled regarding the allocation of responsibility between carriers and shippers (ECE/TRANS/WP.24/2006/5).

8. Recalling the specific mandate of the Inland Transport Committee (ECE/TRANS/162, para. 4) and recognizing that a large part of European intermodal transport operations extended well beyond and takes place outside the boundaries of the European Union and thus seemed to call for a pan-European solution, the Working Party felt that it still was premature to initiate work on a pan-European civil liability regime for intermodal transport covering road, rail, inland water and short sea shipping. The continuing considerations within the European Commission and the increasingly complex and complicated draft instrument under preparation in the framework of the United Nations Commission on International Trade Law (UNCITRAL) have not provide so far sufficiently clear indications and arguments for the value-added of such a new initiative.

C. Forty-fifth session of the Working Party (30 March 2006)

Documentation: ECE/TRANS/WP.24/111, paragraphs 14-18

9. The Working Party reviewed the latest activities of UNCITRAL on the preparation of a draft instrument on the carriage of goods wholly or partly by sea. It was felt that, in addition to being extremely complicated, the present draft instrument would establish yet another layer of international, maritime based, transport law and did, to a large extent, not address the concerns of European intermodal transport operators and their clients. In its present form, it also might come in conflict with existing European land transport legislation and well-established business practices (European benchmarks: CMR, COTIF/CIM and SMGS). It was also felt that the new draft regime did not address the concerns of European Governments to promote a uniform and transparent European liability regime for intermodal transport operations that ensured a level playing field among all modes.

D. Forty-third session of the Working Party (8 March 2005)

Documentation: ECE/TRANS/WP.24/107, paragraphs 23-25

10. The Working Party noted that the UNECE Inland Transport Committee had expressed interest in establishing a civil liability regime applicable to European intermodal transport, covering road, rail, inland water and short sea shipping. It had requested the Working Party and its informal ad hoc group to continue to closely monitor and evaluate all pertinent activities in this field and to prepare, if appropriate, proposals for solutions at the pan-European level (ECE/TRANS/162, para. 104).

11. Noting that the results of a study commissioned by the European Commission as part of its activities on a freight integrator action plan covering also civil liability regimes applicable to intermodal transport was planned to be completed in autumn 2005, the Working Party decided to revert to this issue at its September 2005 session.

E. Fortieth session of the Working Party (29 September - 1 October 2003)

Documentation: ECE/TRANS/WP.24/101, paragraphs 24-28

12. The Working Party noted that its ad hoc expert group, at a session held in Geneva on 8 and 9 September 2003, had felt that this “coming to shore” of the originally maritime transport instrument, i.e. its extension to all transport contracts whenever a sea leg is included, might come into conflict with the existing European inland transport law, such as CMR for road or COTIF for rail. As this legislation had proven its value for efficient European inland transport operations, it was considered as the benchmark and basis for any multimodal transport convention - rather than maritime legislation with its considerably lower liability and responsibility levels applicable to carriers.

F. Thirty-eighth session of the Working Party (7-9 October 2002)

Documentation: ECE/TRANS/WP.24/97, paragraphs 38-51

13. The Working Party recalled that its programme of work contained as a priority item, the “... analysis of possibilities for reconciliation and harmonization of civil liability regimes governing combined transport operations.” Following a request by the Inland Transport Committee to investigate existing difficulties for combined transport operations (ECE/TRANS/128, paragraph 86), the Working Party decided to further consider possible difficulties arising from differences in modal liability regimes and/or gaps in full coverage during combined transport operations (TRANS/WP.24/1999/1).

14. The Working Party felt that, taking account of the developments in the various international fora and the requirements of the users of combined and multimodal transport in the UNECE region, further work in this field should focus, at this stage, on developing a civil liability regime for multimodal transport in the UNECE region based on an overland transport approach, possibly including short sea shipping. The Working Party requested the secretariat to initiate a process to draft a legal instrument for this purpose.

15. The Working Party was informed by the secretariat that its ad hoc expert group had considered a first draft for a Convention for multimodal overland transport. The draft will be elaborated further before being submitted to the Working Party, taking into account the

development in this field within other intergovernmental organizations, in particular the United Nations Commission on International Trade Law (UNCITRAL) and the United Nations Commission on Trade and Development (UNCTAD). The ad hoc expert group invited the Working Party to provide it with its preliminary views concerning the inclusion of short sea shipping and to provide the group with guidance concerning the limits of liability that should be prescribed.

G. Thirty-seventh session of the Working Party (18-19 April 2002)

Documentation: ECE/TRANS/WP.24/95, paragraphs 46-53

16. At its thirty-fifth session, the Working Party requested the secretariat to explore the possibility of organizing a world-wide forum to bring together all government representatives and experts on civil liability in multimodal transport with the aim to reach a final conclusion concerning the question of harmonization (TRANS/WP.24/91, paras. 40-46). The Working Party also requested the secretariat, as an intermediate step, to explore the possibilities of aligning the liability clauses of the legal instruments governing European overland transport, in particular road and rail transport (TRANS/WP.24/91, para. 51).

17. The Working Party considered the discussion paper prepared by its ad hoc expert group containing an overview of the various possibilities for harmonization of the liability rules and outlining proposals for further action in this field (TRANS/WP.24/2002/6).

18. The Working Party also took note of the European Commission study on the economic impact of carrier liability on intermodal transport (TRANS/WP.24/2002/7).

19. The Working Party felt that, based on the developments in the various international fora and the requirements of the users of combined and multimodal in the UNECE region, further work in this field should focus, at this stage, on developing a civil liability regime for multimodal transport in the UNECE region based on an overland transport approach, possibly including short sea shipping. The Working Party requested the secretariat to initiate a process to draft a legal instrument for this purpose.

H. Thirty-fourth session of the Working Party (6-8 September 2000)

Documentation: ECE/TRANS/WP.24/89, paragraphs 31-40

20. At the request of the Inland Transport Committee (ECE/TRANS/133, para. 70), the secretariat convened another informal meeting of experts (Geneva, 29 and 30 May 2000) to investigate further the possibilities of harmonizing civil liability regimes taking into account current activities in this field and to consult, in particular, with shippers and clients on the necessity of a new legal regime and on specific problems shippers encountered in this context.

21. The Working Party considered in detail the results of this meeting (TRANS/WP.24/2000/3) and welcomed in particular the participation of a large number of parties involved in modern transport chains which had not yet been consulted, such as express carriers and representatives of shippers and the manufacturing industry.

22. The Working Party took note that experts representing mainly maritime interests as well as freight forwarders and insurance companies generally did not favour the preparation of an

international mandatory legal regime on civil liability covering multimodal transport operations. Experts, however, representing road and rail transport industries, combined transport operators, transport customers and shippers felt that work towards harmonization of the existing modal liability regimes should be pursued urgently and that a single international civil liability regime governing multimodal transport operations was required.

23. The Working Party noted that many trade and transport operators were in favour of a reliable, predictable and cost-effective civil liability system with simple and transparent provisions, covering also temporary storage and transshipment operations. Such a system would facilitate just-in-time delivery transport services and, above all, eliminate the present uncertainties in cases of loss, damage and delay in delivery, including cases of non-localized loss or damages.

24. The Working Party took also note of the appeal by some experts to make combined transport easier, to protect weak actors in commercial transactions and to facilitate trade and transport through the establishment of a balanced and clear legal framework in the field of civil liability.

I. Thirty-third session of the Working Party (10-11 April 2000)

Documentation: ECE/TRANS/WP.24/87, paragraphs 34-36

25. The Working Party welcomed the overview of existing civil liability regimes covering international transport of goods that had been prepared by the secretariat (TRANS/WP.24/200/2). It took note of information provided by the secretariat on specific problems encountered in multimodal transport (i.e. transport covered by a single transport contract utilizing more than one mode of transport), which were not yet solved at the international level. Attention was also drawn to further problems that might result from the continued proliferation of different national civil liability regimes and from national legislation that might influence international transport, such as the present draft Carriage of Goods by Sea Act (COGSA) of the United States of America. The Working Party recognized in this context that even well-functioning private contractual law arrangements were not a panacea in solving civil liability problems encountered in multimodal transport as they were nullified in case they ran counter to the provisions of international conventions or mandatory national legislation.

J. Thirty-second session of the Working Party (6-8 September 1999)

Documentation: ECE/TRANS/WP.24/85, paragraphs 32-37

26. The Working Party recalled that its programme of work contained as a priority item, the “analysis of possibilities for reconciliation and harmonization of civil liability regimes governing combined transport operation”. Following an informal meeting of interested experts (Frankfurt, 7 and 8 December 1998) which considered the feasibility and the approach to be taken to resolve possible difficulties arising from differences in modal liability regimes and/or gaps in full coverage during combined transport operations (TRANS/WP.24/1999/1), the Inland Transport Committee had requested that further investigations should be made in order to ascertain the existing difficulties for combined transport operations (ECE/TRANS/128, para. 86).

27. The Working Party took note of a study commissioned by the European Commission highlighting problems associated with the lack of a coherent liability regime for multimodal transport operations.

28. At the request of the Working Party, the secretariat convened another informal meeting of experts (Geneva, 12 and 13 July 1999) to consider in depth the conclusions of the first expert group meeting and to provide guidance to the Inland Transport Committee on its deliberations relating to the preparation of legal instruments in this field and on the arrangements and procedures necessary in order to finalize such an instrument within a reasonable time frame.

29. The Working Party endorsed in principle the results of this second expert meeting, as contained in document TRANS/WP.24/1999/2. It felt however that the detailed features of a possible new international legal instrument, such as its scope (all modes of transport or only inland modes) or its regime (mandatory or default (with an opting-out clause)) should be determined at a later stage. Apart from substantive and legal reasons, the features of any new legal instrument depended also on the political chances of acceptability of such a regime by UNECE member States. The views of the multimodal or combined transport clients and operators as well as those of insurance companies were of utmost importance in this respect and should be heard during the preparation of a possible legal instrument.
