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**POSSIBILITIES FOR RECONCILIATION AND HARMONIZATION
OF CIVIL LIABILITY REGIMES GOVERNING COMBINED TRANSPORT**

UNECE Comments to the UNCITRAL Draft Instrument on Transport Law

Note by the secretariat

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1. INTRODUCTION

1. This paper includes three parts. The introductory remarks briefly explain UNECE involvement in the field of multimodal transport, part II summarizes the comments of the UNECE secretariat to the draft instrument on transport law presented by the UNCITRAL secretariat and part III presents some general conclusions.

2. The comments were prepared at the invitation of the UNCITRAL secretariat to be included in the background paper that will be submitted by the secretariat to the UNCITRAL Working Group on Transport Law, at its next meeting (15-26 April 2002) in New York.

3. The UNECE administers some fifty international conventions and agreements in the field of transportation, such as the Convention on the Contract for the International Carriage of Goods by Road (CMR), the International Convention to Facilitate the Crossing of Frontiers for Goods Carried by Rail, etc. The UNECE is also co-author of the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (CMNI) together with the Central Commission for the Navigation of the Rhine and the Danube Commission. In 1998, UNECE was mandated by its member Governments (all European and Central Asian States, Canada, Israel and the United States of America) to study the possibilities for reconciliation and harmonization of civil liability regimes governing multimodal transport. Two expert groups' hearings were convened in 2000, at which a large number of Governmental experts and representatives of shippers, freight forwarders, insurers, multinational companies, manufacturers, maritime, road, rail and combined transport interests participated. As a result of these hearings, two trends could be clearly identified: there was a large consensus on the principle of working towards achieving more transparent, harmonized and cost-effective rules to regulate multimodal transport, but there was no agreement on the approach to be adopted towards achieving this objective and, first of all, on whether this could and should be achieved through a new Convention or through other alternative means. 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. However, experts 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.

4. During recent discussions between the UNECE, UNCTAD and UNCITRAL secretariats, it was agreed that possible work on the desirability and feasibility of a new international legal instrument covering door-to-door issues should be undertaken with the active involvement and substantive contributions of the three United Nations Governmental organizations as well as in cooperation with other interested United Nations organizations and with the participation of all competent non-governmental organizations and industry groups.

2. COMMENTS

(a) Mandate of work

5. The starting point for UNCITRAL's work on the draft instrument on transport law^{1/} can be found during the discussions on future work in the area of electronic commerce, following the adoption of the UNCITRAL Model Law on Electronic Commerce at UNCITRAL's twenty-ninth session, in 1996. The session considered a proposal to include in UNCITRAL's work programme "a review of current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules where no such rules existed and with a view to achieving uniformity of laws"^{2/}.

6. It was stated during that session that "the review of the *liability regime* was not the main objective of the suggested work; rather, what was necessary was to provide modern solutions to the issues that either were not adequately dealt with or were not dealt with at all in treaties"^{3/}.

7. The Commission decided that the UNCITRAL secretariat "should be the focal point for gathering information, ideas and opinions as to the problems that arose in practice and possible solutions to those problems. Such information-gathering should be broadly based and should include, in addition to Governments, the international organizations representing *the commercial*

^{1/} Also referred to hereinafter as the Instrument.

^{2/} UNCITRAL document A/CN.9/497 "Possible future work on transport law" – Report of the Secretary-General, paras.1 and 2.

^{3/} Ibid., para. 5, emphasis added.

sectors involved in the carriage of goods by sea^{4/}. The CMI stated at the Commission's thirty-first session in 1998 that it welcomed the invitation to cooperate with the secretariat in soliciting views of the sectors involved in the international carriage of goods and in preparing an analysis of that information^{5/}.

8. At its thirty-fourth session the Commission decided to establish a working group to consider issues of future work on transport law. With regard to the mandate of the working group, the Commission decided that considerations should cover initially port-to-port transport operations (including liability issues). However the working group could study the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations. Depending on the results of those studies, the working group could recommend to the Commission an appropriate extension of its mandate. The Commission also agreed that the work would be carried out in close cooperation with interested intergovernmental as well as international non-governmental organisations^{6/}.

9. In conclusion, the mandate given concerns the revision of maritime law and is limited to port-to-port transport operations. That explains the fact that the parties invited to contribute by the secretariat were sea transport related interests.

10. The UNECE secretariat welcomes UNCITRAL's initiative to harmonise and modernise maritime transport law. With regard to the study of the desirability and feasibility of dealing with door-to-door transport operations, the UNECE secretariat supports the Commission's recommendation that this work should be carried out in close cooperation with all interested parties and is willing to actively participate in it.

^{4/} Ibid., para. 6, emphasis added.

^{5/} Ibid., para. 7. CMI set up a Working Group (May 1998) and an International Sub-Committee (ISC) (November 1999) to consider in what areas of transport law, not at present governed by international liability regimes, greater international uniformity may be achieved; to prepare the outline of an instrument designed to bring about uniformity of transport law; and thereafter to draft provisions to be incorporated in the proposed instrument including those relating to liability. In September 2000, the CMI Executive Committee confirmed that the ISC's terms of reference should extend to considering how the instrument might accommodate other forms of carriage associated with the carriage by sea. The CMI Singapore Conference, held in February 2001, discussed the Outline Instrument and concluded that multimodalism should be dealt with in the Instrument.

^{6/} UNCITRAL document A/CN.9/WG.III/WP.21 of 8 January 2002 "Transport Law – Preliminary draft instrument on the carriage of goods by sea", para. 23, pg. 8.

(b) **Scope of application of the Instrument**

11. The Instrument is called draft instrument on transport law. According to the title, it does not deal with maritime transport issues in particular. According to the definition of its scope of application (Chapter 3) combined with the definition of the contract of carriage (Article 1.5) the Instrument will apply whenever a sea leg is involved. There was some discussion about the relative importance of the other modes of transport compared to the sea leg, but it was finally decided that the Instrument “should contain provisions applying to the full scope of the carriage *irrespective of whether or not the movement on land may be deemed subsidiary* to that by sea, providing carriage by sea is contemplated at some stage”^{7/}.

12. The Instrument goes beyond maritime transport and port-to-port issues; it expands to door-to-door issues.

(c) **Door-to-door transport and the network system**

13. The extension of the liability coverage from the tackle-to-tackle carriage under the Hague-Visby Rules or port-to-port carriage under the Hamburg Rules to door-to-door carriage is said to respond to the reality of containerized transport of goods. According to Article 4.2.1 of the Instrument, the liability limits which, according to the explanatory notes to Article 6.7, will be drafted along the lines of the Hague-Visby Rules, shall apply in all cases of non-located damage. This means that the liability rules drafted with a view to a mere maritime transportation may extend to other modes of transport such as a transport by road, rail and inland waterways. Such an approach seems, however, to be questionable when the Instrument has not taken into account the views of the parties involved in other modes of transport than sea, as well as the point of view of the shippers, which finally create the transport demand. Rather the Instrument only reflects the view of the maritime transport related interests.

^{7/} CMI document “Singapore I – Door-to-door transport”, para. 3.2, at http://www.comitemaritime.org/singapore/issue/issue_door.html, emphasis added.

14. According to the comments to Article 4.2.1 of the Instrument, it is necessary to make provisions for the relationship between this Instrument and conventions governing inland transport which may apply. This Article provides for an as minimal as possible network system. The draft Instrument is only displaced where a convention, which constitutes mandatory law for inland carriage, is applicable to the inland leg of a contract for carriage by sea, and it is clear that the loss or damage in question occurred solely in the course of inland carriage^{8/}.

15. The broad scope of the Instrument may create conflict of conventions in cases where other unimodal conventions address the issue of multimodal/combined transport as well as in some narrowly defined instances. An example may be the case when a lorry transporting the goods by road is carried over part of the journey by sea (for example, from France to the United Kingdom), and the goods have not been unloaded from the vehicle and the damage has not been localised. In such a situation both CMR and the Instrument are likely to apply. Article 2 of CMR says that CMR applies to the whole carriage in this situation and Chapter 4 of the Instrument requires the Instrument to be mandatorily applicable as long as it cannot be proved where the loss or damage occurred^{9/}. This conflict of conventions should, however, be avoided.

16. There is certainly a need to further explore the possibilities of harmonization of the liability rules relating to a maritime transport on one hand and to an inland transport on the other hand. If rules governing the applicable law in a multimodal transport shall still be needed, further consideration should also be given to the different national solutions which exist today. Thus, the Netherlands provides in cases of non-localized damage in a multimodal transport for the applicability of the regime most favourable to the consignor. In contrast, Germany provides in cases of non-localized damage in a multimodal transport for the applicability of a single set of rules that follow mainly the CMR. However, special rules are provided for notice of loss, damage or delay and the limitation period.

17. Multimodal transport and containerised multimodal transport (intermodal transport) often involve a sea leg, but at the same time, and especially in Europe, multimodal transport involves to a major extent only inland transport modes (often referred to as combined transport). The CMI subcommittee found that although bills of lading were still used, especially where a negotiable document was required, the actual carriage of goods by sea sometimes represents only

^{8/} UNCITRAL document A/CN.9/WG.III/WP.21 of 8 January 2002 "Transport Law – Preliminary draft instrument on the carriage of goods by sea", para. 49, page 21.

^{9/} See comments to Chapter 4 of the Instrument.

a relatively short leg of an international transport of goods^{10/}. Consideration should be also given to the relative economic importance of the sea leg in intermodal transport. In the view of the UNECE secretariat, if and when a clear mandate is obtained on the elaboration of a multimodal transport convention, it is necessary, given the increasing integration of all modes of transport into the international logistic chain, that the new regime applies to all possible combinations of modes of transport and should not be restricted to the presence of a sea leg. It is also indispensable that representatives from all modes involved in multimodal transport, as well as from the shippers and from other interested parties be consulted and participate in the elaboration of such an instrument.

18. According to Article 6.3.1 of the Instrument, liability is imposed on “performing parties” – those that perform the – contractual – carrier’s “core obligations” under the contract of carriage. Where a performing party’s liability is questioned directly by the cargo claimant’s interests, it means that the claimant has been able to localize the loss or damage. In cases where the performing party performs the carriage preceding or subsequent to sea carriage, according to Article 4.2.1 of the Instrument, he will be subject, by virtue of the network system, to another legal mandatory regime. Quid in this case of the application of the defences provided for in Article 6.3.3 (also incorporated in 6.3.1 (a))?

(d) Carrier’s liability

19. If a future instrument shall cover other modes of transport than transport by sea, a comparative analysis is needed as to the liability provisions. In most unimodal conventions, such as the CMR, the liability provisions are mandatory. The Instrument provides, however, for several opting-out possibilities. One is found in Article 4.3 (Mixed contracts of carriage and forwarding), which gives the carrier the possibility to act as an agent in respect of a specified part of the transport of goods and thereby to limit his liability to due diligence in selecting and instructing the other carrier. Another one can be found in Article 4.1.2, which gives the carrier, by contractually defining the period of responsibility, the right to restrict his liability (Articles 5.2.1 and 6.1.1). Similar provisions cannot be found in conventions such as the CMR or COTIF.

^{10/} UNCITRAL document A/CN.9/497, para. 13

20. Moreover the carrier's exceptions are drafted merely with the view to a pure maritime transport. This can especially be seen in Articles 6.1.2 and 6.1.3 of the Instrument. The UNECE secretariat supports the view that when work begins on the elaboration of an instrument covering door-to-door transport, consideration should be given to exceptions granted under other unimodal transport law conventions as well.

3. CONCLUSIONS

21. When it comes to finding solutions for the issue of civil liability in multimodal transport, the UNECE secretariat strongly feels that further work to be undertaken in this field should not be based on the specific requirements of any particular mode of transport. Instead, it is necessary that all relevant interested parties be consulted and participate in the elaboration of such an instrument.

22. The UNECE secretariat considers it important to reconcile, in the longer term, civil liability rules for multimodal transport in a single regulation, thereby doing away with the present situation of legal uncertainty and forum shopping. Consequently it is necessary to avoid the creation of a number of multimodal transport regulations which may even overlap. Given the special situation in maritime law regulations, the UNECE secretariat believes that UNCITRAL has taken an important step towards the revision and modernisation of the law governing international carriage of goods by sea. In this context, the contributions made by CMI are significant.

23. The UNECE secretariat believes that, at this stage, the Commission should concentrate its efforts on port-to-port solutions. Coverage of door-to-door transport necessitates more studies and consultations. The Instrument as it stands does not seem appropriate for covering multimodal transport, as it does not take into consideration all necessary factors, some of which have been developed above.

24. The UNECE secretariat proposes therefore that the discussion of port-to-port issues during the forthcoming UNCITRAL Working Group on Transport Law meeting (15-26 April 2002) be separated from the discussion on door-to-door transport.

25. The UNECE secretariat has proposed to organize a joint UNCITRAL-UNCTAD-UNECE global hearing of all relevant industries and other parties interested in multimodal transport, which would assist in determining the desirability and feasibility of a new international instrument on multimodal transport contracts, including liability issues.
