



**Economic and Social
Council**

Distr.
GENERAL

TRANS/WP.24/2002/6
5 March 2002

Original: ENGLISH

ECONOMIC COMMISSION FOR EUROPE

INLAND TRANSPORT COMMITTEE

Working Party on Combined Transport

(Thirty-seventh session, 18 and 19 April 2002,
agenda item 9)

**POSSIBILITIES FOR HARMONIZATION
OF CIVIL LIABILITY REGIMES GOVERNING MULTIMODAL TRANSPORT**

UNECE ad-hoc expert group on civil liability in multimodal transport

Note by the secretariat

The secretariat has prepared this note as a basis for discussion with a view to outlining the issues at stake as well as the various options discussed in different international fora in this complex field of civil liability systems governing modern multimodal transport operations. Delegations may wish to consult at the national level with other competent Ministries concerned in order to provide guidance to the Working Party on further work to be undertaken in this field.

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A. INTRODUCTION

1. The Working Party on Combined Transport aims at contributing to the development and promotion of combined and multimodal transport¹ in the countries of the UNECE region. Its programme of work contains 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, para.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).

2. Following the recommendations of a small working group (TRANS/WP.24/1999/2), the Working Party requested the secretariat to initiate an informal consultative process with participation by government representatives and representatives of the interested intergovernmental organizations as well as international organizations representing the interests of the transport industry, insurance and shippers as well as private companies. The results of the two hearings organized by the secretariat are contained in document TRANS/WP.24/2000/3. The consultation showed considerable differences of the various interested parties to the question of unification or at least harmonization of existing mandatory regimes.

3. At its thirty-fifth session, the Working Party considered that it was important to consolidate work in the field of civil liability. 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 of coming to 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).

4. This discussion paper, developed by the secretariat in cooperation with the ad-hoc expert group on civil liability in multimodal transport² summarizes recent activities of some international organizations in the field of civil liability in multimodal transport of goods, reviews some existing civil liability systems for multimodal transport and their respective pros and cons and outlines proposals for further action in this field.

¹ In the joint UNECE, ECMT, EC “*Terminology on Combined Transport*” (2001), multimodal transport is defined as carriage of goods by two or more modes of transport; intermodal transport refers to the movement of goods in one and the same loading unit or road vehicle by two or more modes of transport without handling the goods themselves in changing modes; combined transport is the intermodal transport where the major part of the European journey is by rail, inland waterways or sea and any initial and / or final legs carried out by road are as short as possible.

² Hereinafter referred to as the UNECE group of experts.

B. WORK ON CIVIL LIABILITY IN MULTIMODAL TRANSPORT

I. The issue

5. As it has been observed in previous reports of the UNECE group of experts, multimodal transport operations are not only increasingly being used in modern transport and trade procedures, especially for containerized cargo, but such operations, in particular if they involve combined transport, are also promoted through current transport policies in many European countries with the objective of exploiting as much as possible the inherent advantages of the various land transport modes (road, rail and inland water transport) towards sustainable transport development and relieving pressure from the increasingly overburdened European networks.

6. Multimodal transport is characterized by the fact that transportation of goods is done on the basis of one contract (frequently a general contract without specification of mode or modes of transport) concluded with one multimodal transport operator (MTO) for which one transport document is issued. The MTO is responsible for the whole transport. The different modes of transport to be used are often not known or determined by the consignor/consignee at the start of the transport operation. The MTO may perform the entire transport himself, but in practice he often performs only part of it (and sometime no part of it at all) and sub-contracts some parts. This gives him the flexibility to perform door-to-door transport in the best, fastest, cheapest way, thus responding to modern just-in-time delivery needs.

7. This relatively new reality of multimodal transport is not regulated at the international level by a uniform and comprehensive instrument, such as the unimodal conventions regulating road, rail and inland waterways transport, mainly in Europe, or sea and air transport on a global basis³. If the place where the cargo injury occurred has been identified (localized damage), the civil liability system governing multimodal transport (i.e. the sharing of risks and responsibilities between the cargo and the MTO/carrier's interests) mainly depends on the leg during which the damage occurred and is based on solutions provided by the unimodal instrument which would have been applied to that particular leg if a separate contract had been concluded. In case of non-localised damage, the solutions proposed differ following the instrument applicable. Unimodal instruments often differ quite substantially with regard to their provisions on civil liability as they have been developed independently from each other. What is apparently missing is a uniform and predictable civil liability system that regulates multimodal transport.

³ The Convention on the Contract for the International Carriage of Goods by Road (CMR), Geneva, 1956; the Convention concerning International Carriage by Rail (COTIF) and the Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM), Appendix B to the Convention, Berne, 1980; the newly adopted Convention of the Contract for the Carriage of Goods by Inland Waterway (CMNI), Budapest, 22 June 2001; the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague Rules), Brussels 1924 amended by the 1968 Protocol (Hague-Visby), Brussels, 1968; the UN Convention on the Carriage of Goods by Sea, Hamburg, 1978 (Hamburg Rules); the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw, 1929 (Warsaw Convention) and its Protocols as well as the Convention for the unification of certain rules for international carriage by air, Montreal, 28 May 1999, not yet in force (Montreal Convention).

8. An attempt towards uniformity was the 1980 UN Convention on Multimodal Transportation of Goods (MT Convention), which has failed to attract sufficient support to enter into force. The MT Convention provides for a uniform civil liability system except with respect to the limits of liability in case of localized damage. In such cases, the limits of liability provided by an international convention or the mandatory national law, which would have been applicable to the particular leg of transport where the damage occurred, will apply (*but only*) if they are higher than the limits provided for in the MT Convention (Article 19, MT Convention).

9. The UNCTAD/ICC Rules for Multimodal Transport Documents 1992, which are based on the MT Convention, as well as the contractual arrangements which incorporate those Rules, such as FIATA Bill of Lading (FBL) 1992, BIMCO's Multidoc95, provide a uniform solution in cases where the damage has not been localized. In cases of localised damage, the basis of liability is the same as for non-localized damage (presumed fault or neglect), while for the liability limits a network approach is adopted, according to which existing international or national civil liability provisions applicable to the leg during which the damage occurred will prevail (whether the limits they provide for are higher than those provided by the Rules or not).

10. The use of such contractual arrangements to regulate multimodal transport is optional and they will only take effect to the extent that their provisions are not contrary to the mandatory provisions of international conventions or national legislations applicable to the contract.

11. The lack of a uniform liability system in force creates considerable uncertainty as to the law applicable to multimodal transport operations and the ensuing financial consequences for the shipper and the MTO. For both parties, it is difficult to assess in advance the risks involved. It also makes separate cargo insurance a requirement in addition to the liability insurance taken by the MTO. The above uncertainties are reflected in the insurance premiums. Eventual litigations are also very costly. All this militates against the use of multimodal transport and favours the use of unimodal solutions, such as pure road transport.

12. The lack of a uniform international civil liability system in force has caused a proliferation of unilateral national solutions which further complicate the situation and illustrate "the urgency of trying to achieve uniformity at international level"⁴.

13. This has prompted a number of international organizations to initiate work on possible measures to improve the situation. The following paragraphs briefly summarize recent activities dealing with civil liability in multimodal transport.

⁴ Asariotis, Bull, Clarke, Herber, Kiantou-Pampouki, Moràn-Bovio, Ramberg, de Wit, Zunarelli, "Intermodal Transportation and Carrier Liability", final report, June 1999 (European Commission financed study; EC Contract NR. EI-B97-B27040-SIN6954-SUB), para. 12.

II. Recent activities

14. UNECE organized during 2000 two “hearings” of various governmental and non-governmental parties with an interest in civil liability systems governing multimodal transport. The results of the hearings have been published in document TRANS/WP.24/2000/3⁵ and were discussed at the thirty-fourth session of the Working Party.

15. At the hearings the fact that loss and damage often occur during transshipment and warehousing operations was discussed. Gaps in liability exist during transport-related operations, as these are not subject to any international mandatory regime⁶. National legal systems differ widely as to both their source and content.

16. The issue of multimodal transport operations to and from developing countries and regions was also raised. These countries having no (or no clear) legislation in this field, uncertainty with regard to the applicable law leads to difficulties in obtaining civil liability cover for multimodal transport operators (MTOs), higher insurance premiums, and, as a result, higher transport prices. The absence of a uniform international civil liability regime in this case becomes an impediment to trade facilitation and development.

17. It was also reported that damages due to delay of delivery occur frequently. It was claimed that the operator responsible for those delays could easily be tracked down. The problem of unimodal regulations of sea transport that do not provide for liability of the operator in case of delay in delivery was raised. This seems not to be acceptable to shippers as it is not in line with modern requirements of just-in-time delivery. As well, other transport modes’ operators consider this fact as not acceptable as it does not provide a level playing field among modes of transport.

18. At the UNECE hearings it was reported that rules concerning procedural aspects vary considerably depending on the forum and the regime applicable, which makes it difficult to bring a timely suit against the right carrier in the right forum. Contractual limitation periods, which are often shorter, may be misleading, as they are invalid in cases where a particular mandatory national or international regime applies.

19. In accordance with the plan of action adopted by UNCTAD X, the UNCTAD secretariat has conducted a study on the implementation of multimodal transport rules⁷. The study reviews existing instruments dedicated to multimodal transport at a worldwide, regional, subregional and national level.

⁵ Referred to hereinafter as UNECE hearings.

⁶ The United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (1991) has never come into force.

⁷ UNCTAD/SDTE/TLB/2 of 27 June 2001, “Implementation of Multimodal Transport Rules”, hereinafter referred to as the UNCTAD study.

20. The study concludes that the desire to reach uniformity of the law governing multimodal transport is far from being achieved. The present situation may be characterized by uncertainty as to the law applicable to multimodal transport operations⁸.

21. The OECD Maritime Transport Committee (MTC) organized a Workshop on Cargo Liability⁹ in January 2001. The workshop was meant to discuss issues of modernization of current regimes¹⁰. The study and the conclusions of the workshop deal with unimodal liability regimes in maritime transport, but they are also of interest for multimodal transport.

22. UNCITRAL is currently conducting a review of existing 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 exist and with a view to achieving uniformity of laws¹¹. A Working Group on Transport Law will meet from 15 to 26 April 2002 in New York with the mandate of studying port-to-port (including liability) issues. In the future, the Working Group may study the desirability and feasibility of dealing with door-to-door transport operations.

23. The background document of the UNCITRAL secretariat for the forthcoming meeting of the Working Group contains a preliminary "Draft instrument on transport law" prepared by the Comité Maritime International (CMI)¹². The instrument aims at harmonizing and modernizing, among others, the existing liability regimes in maritime transport. To a certain extent, it also covers multimodal transport. On this issue the draft instrument is only based on maritime provisions¹³.

24. According to its communication on "Intermodality and Intermodal Freight Transport in the European Union¹⁴", the European Commission plans to develop a framework for the implementation of a European intermodal freight transport system that will ensure optimum integration of the various transport modes (road, rail, inland waterway and sea transport) as a

⁸ UNCTAD study, para. 251

⁹ Cargo liability refers to liability regimes for maritime transport. There are mainly three of them in force in different countries of the world: the original Hague Rules (1924), the updated version known as the Hague-Visby Rules (1968, further amended in 1979), and the Hamburg Rules (1978).

¹⁰ A consultant was commissioned by the MTC to analyse existing regimes and to identify those issues where there is still considerable disagreement amongst the various parties affected by these regimes. The consultant's document, which formed the basis of the discussion at the workshop, is available on the MTC's web site at: <http://www.oecd.org/dsti/sti/transport/sea/index.htm>. These documents will be referred to hereinafter as the OECD workshop and the OECD study.

¹¹ UNCITRAL A/CN.9/497, "Possible work on transport law – Report of the Secretary-General", paras. 1 and 2.

¹² UNCITRAL A/CN.9/WG.III/WP.21, "Transport Law – Preliminary draft instrument on the carriage of goods by sea – Note by the Secretariat", of 8 January 2002. The draft instrument is included as an annex to this document (pp. 9 ff). It will be hereinafter referred to as UNCITRAL draft instrument.

¹³ Some comments of the UNECE secretariat on the CMI instrument and mainly on its approach of multimodal transport issues have been transmitted to the UNCITRAL secretariat. 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. Comments provided by the UNECE and UNCTAD secretariat are published as an addendum (UNCITRAL A/CN.9/WG.III/WP.21/add.1) to the working paper containing the draft instrument to be discussed by the UNCITRAL Working Group.

¹⁴ COM (97) 243 final (29.5. 1997).

means of averting the anticipated freight traffic congestion and enhancing the competitiveness of alternatives to road transport. The Commission proposes a four-part strategy to remove the obstacles to the generalized use of intermodal transport, among them the identification and elimination of obstacles to intermodality and the associated friction costs. Existing intermodal liability arrangements have been identified as an area of friction costs¹⁵.

25. As part of the programme on intermodal (multimodal) transport of goods within the European Union, the European Commission has conducted a study on intermodal transport and carrier liability¹⁶. The study reviews the present liability arrangements and aims at identifying possible approaches to solve the current deadlock.

26. The study has identified the need for a customer-oriented approach¹⁷, which, while favouring competition between transport operators, ensures the efficient and cost-effective movement of goods, door-to-door, throughout the EU¹⁸.

27. As a follow-up, and to establish the different economic interests at stake, the Commission launched an investigation into the economic impact of intermodal liability arrangements¹⁹, the objective being that “if it appears that liability arrangements are placing an undue financial burden on some stakeholders or generating substantial cost-inefficiencies for others, the European Commission will organize a Round Table with all parties to discuss the issue further”²⁰. It should be noted that the survey only covers the EU zone and that only 107 questionnaires filled by the shippers (representing only 11% of all distributed questionnaires) could be used in the analysis. Another 30 business and trade associations’ representatives collaborated in the study.

28. The survey suggests that the average cargo value of intra-EU freight by mode tends to be low relative to the limitation of liability. It appears that shippers are not very knowledgeable of

¹⁵ For a definition of “friction costs” see also IM Technologies Limited, “*The Economic Impact of Carrier Liability on Intermodal Freight Transport*”, final report, 10 January 2001, (EC contract No: B99-B2 7040 10-SI2.81489/P E1 99 002/ETU/IM). According to this report friction costs arise when transport modes are not interoperable and interconnected. Such costs include those arising from loss, damage, delay and consequential losses – “actual losses” – plus those arising from the administration of the regime that supplies insurance and deals with claims – “administrative costs” (p. 1).

¹⁶ Asariotis, Bull, Clarke, Herber, Kiantou-Pampouki, Moràn-Bovio, Ramberg, de Wit, Zunarelli, “*Intermodal Transportation and Carrier Liability*”, final report, June 1999 (EC Contract NR. EI-B97-B27040-SIN6954-SUB). This study will be referred to hereinafter as the EC study on intermodal transportation and carrier liability.

¹⁷ According to the EC study on intermodal transport and carrier liability (see para.9, p. 9), it is clear that substantial costs associated with claims handling and litigation could be avoided by both cargo interests and operators (or their liability insurers), if the legal liability – framework were simpler and less fragmented. Current regulation of liability is neither cost-effective, nor does it provide adequate protection for the customer: in view of the uncertainties about incidence and extent of a carrier’s liability, separate cargo insurance is a necessity. This, however, does not cover all risks, such as delay. It also invites recourse actions against carriers caught by mandatory liability by cargo insurers and results in a peculiar and costly reshuffling of the costs of incurred losses to the benefit of no one.

¹⁸ Cf. also COM (97) 243 final, para. 81

¹⁹ IM Technologies Limited, “*The Economic Impact of Carrier Liability on Intermodal Freight Transport*”, final report, 10 January 2001, (EC contract No: B99-B2 7040 10-SI2.81489/P E1 99 002/ETU/IM), p. 1. This study will be referred to hereinafter as the EC study on the economic impact of carrier liability on intermodal freight transport.

the many different carrier liability regimes which could apply. The survey found that in the EU zone insurance is used by both the carriers and the shippers. The replies analysed also suggest that only about 20-30% of the cargo insurance claims is recovered from the carrier insurance and that this could be due to the fact that many insurance companies provide both carrier and cargo insurance and/or that the administrative cost for recourse is too high to be financially worthwhile. The survey also found that the rate of loss is less than 0.1%; that land based carriers appear to have less favourable loss records than those of air and maritime carriers and that this could be due to the different levels of containerization of the different modes. Also the level of disputed claims related to loss and damage in the EU zone, according to the survey appears to be very small. The survey estimates total friction costs²¹ for existing intermodal transport operations in Europe to be around EUR 500-550 million per annum.

C. CIVIL LIABILITY SYSTEMS FOR MULTIMODAL TRANSPORT

I. Existing systems for multimodal transport

29. As mentioned above, different instruments regulating multimodal transport provide for different solutions with respect to civil liability issues. A brief review of the liability systems of some of these instruments, focusing only on the regulation of the MTO/carrier's civil liability, is presented in the following paragraphs.

30. The network system makes all aspects of the liability of the MTO, in case of localized damage, subject to the provisions of the international convention or the national law that would have been applicable to the particular leg of transport during which the loss or damage occurred. There exist different types of network systems.

31. Dutch law²² provides in case of localised damage for a system in which not only the liability of the carrier, but the whole of the relationship between the carrier and the consignor is determined by the regimes which apply to the different parts making up the multimodal transport, whether the unimodal applicable law is mandatory or directory.

32. An example of an "as minimal as possible" network system is offered by chapter 4 of the UNCITRAL draft instrument according to which 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 the inland carriage. In this case only provisions directly relating to the liability of the carrier (including limitation and time for suit) and mandatorily applicable to inland transport

²⁰ This is stated in the foreword by François Lamoureux to the EC study on intermodal transportation and carrier liability.

²¹ For the definition of friction costs, see footnote 15 *supra*.

²² Dutch Civil Code "*Burgerlijk Wetboek*", Book 8, Title 2, Chapter 2, Sections 40-52. The special provisions on multimodal

apply directly to the contractual relationship between the carrier on the one hand and the consignor or consignee on the other. The COTIF/CIM also adopts a similar approach.

33. German law²³ provides for a network system in case of localized damage. Carrier's liability for loss of or damage to the goods and delay in delivery is determined by the law applicable to the leg in the course of which the relevant incident occurred. All other rights and obligations of the parties involved are governed by the general transport law.

34. The network system does not bring a uniform and clear solution in the international multimodal transport of goods. It is necessary to identify the stage at which the damage occurred. This is increasingly difficult to achieve in the case of containerized transport. Supposing the leg where the cargo injury occurred can be located, the regimes governing unimodal transport can be so disparate, depending on the countries and modes concerned that it is difficult to make risk assessments in advance. Furthermore, what happens in case the cargo injury cannot be located, or when it occurred during more than one leg?

35. In such cases, the Dutch system provides for the regime most favourable to the consignor to apply if the multimodal carrier fails to exempt himself from liability and several regimes are susceptible to apply. The minimal network system of the UNCITRAL draft instrument provides that the instrument prevails during the whole door-to-door transit period. In cases of non-localized cargo injury the German law provides that the carrier's liability is subject to the regulations of the general transport law.

36. Shippers and forwarders make widespread use of model contractual agreements, such as FIATA FBL 1992 and BIMCO's Multidoc95, which incorporate the UNCTAD/ICC Rules 1992. According to the Rules, both in cases of localized and non-localized damage, the MTO is presumed at fault unless he proves that there has been no fault or neglect by himself, his employees, agents or subcontractors. With regard to the limitation of his liability in case of attributed damage, limits set by an applicable international convention or mandatory national law different from those provided by the Rules, will apply. In this modified network principle the basis of liability is the same (presumed fault or neglect), independently of the damage (non-) localization, while the limitation of liability in case of localized damage is based on the network system.

37. As mentioned above, the MT Convention adopts the network principle to establish the limits of liability in case of attributed damage only to the extent that the limits provided for by the international convention or the mandatory national law which could have applied to the particular leg of transport, are higher than those provided for in the MT Convention. The

transport contained therein entered into force on 1 April 1991.

²³ The German Transport Law Reform Act "*Transportrechtsreformgesetz*" came into force on 1st July 1998.

UNCTAD study found that “a number of legislations, following the approach of the MT Convention, adopt a modified network liability system based on presumed fault or neglect²⁴”.

38. In conclusion, the main characteristic of network liability systems for multimodal transport is that, in case of localized damage, the regime heavily depends on the mode and/or place within the transport chain where the injury occurred. This leads to unpredictability. When the damage cannot be localized, different solutions are available: a uniform solution (MT Convention not yet in force); a uniform contractual solution which can be overridden by mandatory provisions of conventions or national laws applicable to the multimodal transport contract (UNCTAD/ICC Rules); the extension of a modal regime to the whole transport (extension of the maritime transport regime according to the UNCITRAL draft instrument); the application of the general transport law (based on the CMR) in Germany; a solution which depends on the circumstances of the particular case and favours the cargo interests (Dutch law), etc. In practice, it is very difficult in containerized transport to determine where the damage occurred.

39. A uniform system (as opposed to the network systems) would provide for a uniform regulation of the MTO/carrier’s civil liability in multimodal transport in both cases of localized and non-localized damage. Such a uniform solution would be based on the existence of a multimodal transport contract (if accepted as a contract *sui generis*) without making reference to the unimodal regimes which would have been applicable to the different legs of transport if separate unimodal transport contracts had been concluded.

II. Harmonization of unimodal systems?

40. “Harmonization” is desirable even within existing international unimodal civil liability regimes. As far as the terms in a unimodal convention are not clearly defined in the convention itself, they are subject to differing interpretations by courts in different countries as well as to “evolving” interpretations by courts in the same country²⁵. Different interpretations (which may favour the carrier or the consignor/consignee’s interests) greatly influence the sharing of risks and liabilities (the unimodal civil liability regime) and favour forum shopping.

41. Reviewing unimodal conventions (to harmonize their civil liability regimes) is theoretically possible²⁶. However, according to the findings of the UNECE group of experts, the possibility of aligning existing unimodal liability regimes within reasonable time limits appears very remote. With regard to inland transport, Contracting Parties to the CMR Convention do not

²⁴ UNCTAD study, para. 247.

²⁵ An example is the interpretation of “wilful misconduct” in Article 29-1 CMR, which, if proved, bars the road carrier from relying upon the provisions of Chapter IV which exclude or limit his liability or which shift the burden of proof.

²⁶ See Article 49 CMR, Article 19 COTIF, Article 36 CMNI, Article 32 Hamburg Rules, Article 16 Hague Rules and Article X Hague-Visby.

seem to favour any major modification of its provisions and the newly adopted CMNI and COTIF/CIM still deviate from each other and from other unimodal conventions.

D. FUTURE WORK ON CIVIL LIABILITY IN MULTIMODAL TRANSPORT

I. General considerations

42. There is widespread agreement that current regulations (or absence of regulation) of multimodal transport are unsatisfactory. Civil liability regimes that govern multimodal transport are derived from unimodal instruments, which reflect a different reality of technology, communication and unimodal transportation of goods. The distribution of risks and responsibilities is inadequate in solving modern multimodal transport problems. Furthermore, the existing regulations of multimodal transport are not transparent: many factors require clarification before a simple question can be answered: who is liable (and to which extent) for delay, loss of or damage to the goods²⁷. This is undesirable and costly.

43. All risks are insurable; thus both transporters and cargo interests will finally receive compensation for their part of responsibility. The insurance industry plays both sides. But if the sharing of risks is not balanced and/or the allocation of responsibilities not clear, then insurance premiums will reflect it, and that not only between transporters and cargo interests, but also between different modes of transport.

44. While examining the alternatives for a better regulation of civil liability in multimodal transport, the question of the desirability and feasibility of a new International Private Law Instrument will certainly be considered. A detailed and comprehensive study will need to be conducted on this issue.

45. It is generally accepted that “after twenty years, the UN Convention on International Multimodal Transport of Goods has not entered into force and is unlikely to do so in the near future, although a significant proportion of its provisions have been used in the preparation of a number of national and regional/subregional legislation²⁸”.

46. Alternatives to a convention may be model rules, the standard forms, standard terms, and other “soft law” instruments which may be more widely and more readily acceptable, but which do not really produce uniformity as long as overriding effect is given to international unimodal conventions or to national laws and regulations.

²⁷ EC study on intermodal transport and carrier liability, para.8.

²⁸ UNCTAD study, para. 253.

II. What kind of uniform solution?

47. It will certainly be for the study on the desirability and the feasibility of a new International Private Law Instrument on multimodal transport to determine also the features of the new instrument. Nevertheless, different fora have already been discussing the characteristics of a new successful instrument and have proposed several options. Some of these considerations have been summarized below.

48. During the UNECE hearings, experts representing mainly the road and rail transport industries, combined transport operators as well as customers and shippers felt that work towards harmonization of the existing modal liability regimes should be pursued and a single international civil liability regime governing multimodal transport operations was required²⁹. They stressed the urgent need for a reliable, predictable and cost-effective civil liability system. According to them, in case a mandatory global regime was not feasible, a regional approach should be taken to arrive at a solution in due course. Experts mainly representing maritime interests, freight forwarders and insurance companies did not favour the preparation of a new mandatory legal regime covering civil liability in multimodal transport operations. However, during the preparation of the UNCITRAL draft instrument on transport law, maritime transport interests were very much in favour of a regime covering multimodal transport (although by extension of the maritime regime).

49. With regard to the geographical scope of application of a new International Private Law Instrument, it is argued that a regional solution would be easier to negotiate. The UNECE constituency furthermore includes two major trading poles (European Union and North America). If an agreement could be reached within the UNECE framework, it may become the nucleus of a global UN solution³⁰. From a procedural point of view, all interested UN member States may participate in UNECE's work and all UN member States that are not ECE members can accede to UNECE Conventions.

50. A more regional solution would be to concentrate on a Convention applicable to the European continent only. The EC study on the economic impact of intermodal carrier liability recommends to the EC to seek incremental improvements focusing first on harmonizing the conditions for the road, railway and inland water modes, which form the core modes for intra-EU freight. The study recommends that it would be more pragmatic to aim for a regional solution covering the EU, the accession countries and the neighbouring countries, suggesting that this

²⁹ As mentioned *supra* in para. 41, according to the group of experts, harmonization of civil liability regimes of different inland transport conventions appears impossible for the near future.

³⁰ The EC study on intermodal transportation and carrier liability suggests that although, in principle, an International Convention would be the best means of ensuring the application of a unified system at international level, an inter-regional Convention, agreed between two of the important trading blocks (EU-US), could lead the way towards a broad international consensus by providing a significant political impetus (para. 16).

would be an easier solution as CMR, COTIF/CIM and CMNI have similar spatial coverage. The uniformity achieved in this case would be limited to the European continent³¹.

51. The Working Party on Combined Transport (WP.24) requested the UNECE secretariat, as an intermediate step, to explore the possibilities of harmonizing the liability clauses of the legal instruments governing European overland transport, in particular road and rail transport (TRANS/WP.24/91, para.51).

52. The UNECE group of experts has also expressed the view that, in accordance with the objective of the WP.24, it might be sufficient to address civil liability problems relating to inland transport only. However, since short-sea shipping is covered by maritime shipping liability schemes and with a view to avoiding a proliferation of different international legal instruments addressing civil liability issues in transport, the experts felt that all modes of transport, possibly also air transport, needed to be covered in one and the same international civil liability regime (TRANS/WP.24/1999/1, para. 12).

53. Any instrument, whether global or regional, should not lose sight of the fact that the aim is to have at the end a global solution for multimodal transport which is not limited to a certain combination of modes of transport and which does not exclude any of them (such as air or maritime transport).

54. There is general agreement that, in order to be successful, a new civil liability system for multimodal transport must be cost-effective, acceptable to the transport industry, uniform and compatible (i.e. address the issue of overlap and conflict) with existing unimodal regimes³². With regard to the allocation of responsibilities between carriers and shippers the following criteria could be considered:

- ♦ the allocation must be conducive to the public policy aims of Governments (e.g. customer-oriented approach, trade facilitation, sustainable and safe transport, level playing field between different modes of transport, etc);
- ♦ it should have the prospect of early acceptance and uniform implementation region-wide / worldwide especially by the world's main trading nations;
- ♦ it should be as clear, simple and predictable as possible;
- ♦ it should provide for an efficient and economical distribution of risk;
- ♦ it should provide for a balanced allocation of responsibilities which recognizes the rights and obligation of both carriers and shippers;

³¹ Another possibility considered by the EC study on intermodal transportation and carrier liability is the adoption, at the EU level, of a uniform regime by way of secondary EC legislation (para. 17).

³² See EC study on intermodal transportation and carrier liability, p. 10. See also the OECD study and workshop recommendations.

- ♦ it should provide for coverage of transport related operations (transshipment and warehousing);
- ♦ it should include coverage of delay in delivery (when delivery times have been agreed upon and not) and consequential economic loss;
- ♦ it could provide for a certain freedom to contract, under certain conditions, different limits of liability than those provided for in the regime.

55. When studying the civil liability system of a possible new instrument, consideration will be given to existing unimodal regimes. To facilitate the adoption of a new instrument by countries which have already adhered to unimodal conventions, a new convention should, arguably, make for convergence with the cargo liability regimes in force for other transport modes. As mentioned above, there are great differences between them in relation to the distribution of risks for loss, physical and economic damage, between cargo and carriers' interests, and in relation to the extent of carrier liability. Consequently, when determining the level of convergence between a new instrument on multimodal transport and existing instruments regulating unimodal transport, consideration should be given to the respective importance and relevance of the latest (such as geographical spread, support by the world's largest trading nations, support by the shippers and the carriers' communities, etc.)³³.

56. The UNECE group of experts had proposed to prepare an independent international legal instrument including all modes of transport, transshipment (handling) and temporary storage of cargo and Intermodal Transport Units (ITUs) whose basic civil liability provisions might be modelled along the lines of CMR (TRANS/WP.24/1999/1, para.14). Since the CMR seems to be considered as the transport law benchmark by industry in the ECE region, in particular for cargo liability agreements, an alternative could be the adoption of a protocol to the CMR providing for an extension of the CMR to cover multimodal transport. However, more flexibility concerning liability limits might be provided for in this case³⁴.

57. Pending the adoption of a new comprehensive transport convention, the EC study proposes, as a temporary solution at the EU level, to promote CMR as a contractual regime, replacing otherwise applicable national law for losses arising during any stage of the intermodal

³³ Cf. with this respect a study by Vestergaard Pedersen, "Modern Regulation of Unimodal and Multimodal Transport of Goods" in *Scandinavian Institute of Maritime Law Yearbook (SIMPLY) 2000*, p.52. The author suggests that CMR, COTIF-CIM and the Warsaw system for road, rail and air transport of goods respectively have obtained a very substantial geographic spread and support from the relevant states and are considered to be very successful uniform regulations of international transport of goods, thus creating a high degree of uniform regulation in their respective fields of transportation, even though they generally need to be modernized.

³⁴ Article 41 of CMR stipulates that any contractual modification of the limits of carrier liability, including the increasing of these limits, which favours cargo interests, will be considered null and void. The other unimodal conventions allow the parties to agree on higher limits of liability.

transport³⁵. It seems, however, questionable whether such a solution merely on the EU-level, addressing only 15 or possibly 22 countries, is a viable solution in this respect.

58. To ensure the largest acceptability, the new multimodal regulation could be non-mandatory and apply by default (unless the parties agree to opt-out)³⁶. To ensure the largest uniformity, the new regulation could be applicable by default to multimodal transport contracts (contracts for several different modes of transport performed by different means of transport, provided that a definition making such a contract a contract *sui generis* could be achieved) as well as to general contracts (that do not have specific provisions on the modes and means of transport which shall be employed) and provide for opting-in possibilities for unimodal transport contracts (providing for one mode of transport)³⁷.

59. Arguably a future convention on general and multimodal transport contracts with such a scope will not be in conflict with existing conventions on unimodal transport of goods³⁸.

60. The solutions proposed by some organizations include such a non-mandatory international convention, similar to the UN Convention on the International Sale of Goods (1980), which should apply by default³⁹. To ensure predictability, such a regime, although non-mandatory would provide for its core provisions (such as the civil liability regime) to be overriding, i.e. take precedence over any conflicting contractual provisions⁴⁰. To be acceptable to the industry, some of the mandatory provisions on civil liability (for example, the limits of

³⁵ See EC study on intermodal transportation and carrier liability, para. 17, p.11.

³⁶ Cf. also prof. J. Ramberg's opinion in "*The future of International Unification of Transport Law*" reprinted at <http://www.forwarderlaw.com/feature/ramberg2.htm>. The author questions the feasibility of having a new mandatory regime without possibilities for the parties to opt-out and argues that a new by default convention, like the amendments of the German Handelsgesetzbuch, would permit the contracting parties to agree on a more workable system than under the contemporary unimodal conventions. According to him, it may well be that competition between carriers would induce them to abstain from opting out and that may in itself be a reason to dislike a non-mandatory convention as it would allow more sophisticated competitors to get the upper hand. Also the EC study on intermodal transportation and carrier liability suggests that "if a non-mandatory (but overriding) "default" system were adopted, a carrier who did not wish to assume extensive liability would be able to opt out of the regime. Adherence to the regime would be a matter of commercial decision-making. However, a cost-effective regime, which offers a high degree of protection, would be particularly attractive to cargo interests and thus be competitive (cf. para. 24, p. 12).

³⁷ Cf. also the conclusions of the EC study on intermodal transportation and carrier liability, p.34 f. The study proposes a voluntary liability system which should be applicable – by default, if the parties do not chose to opt-out – to all intermodal (multimodal) transports intra, into and out of the EU and which should also enable contracting parties to any (unimodal) transport contract to adopt its provisions (opt-in) (in which case it would replace all otherwise applicable law).

³⁸ Cf. also Per Vestergaard Pedersen, "Modern Regulation of Unimodal and Multimodal Transport of Goods" in *Scandinavian Institute of Maritime Law Yearbook (SIMPLY) 2000*, pp. 39-42, 70 ff. The author sustains that, generally speaking, the conventions on unimodal transport of goods only apply as mandatory law to the respective *unimodal transport contracts* and not to the respective *unimodal actual transports* performed under other unimodal, general or multimodal transport contracts.

³⁹ Cf. UNCTAD study, para. 253.

⁴⁰ EC study on intermodal transportation and carrier liability, para. 20.

liability) could nevertheless be subject to modification⁴¹ under certain well-defined conditions⁴².

61. As mentioned above, it is crucial that any new instrument defines as completely as possible its main provisions and terms related to civil liability regimes, so as to avoid, to the extent possible, diverging interpretations by courts.

III. Further work

62. The UNCITRAL Working Group on Transport Law has the mandate to study the desirability and the feasibility of dealing with door-to-door transport operations, or certain aspects of those operations, if necessary. The Commission has agreed that the work would be carried out in close cooperation with interested intergovernmental organizations working on transport law such as UNCTAD, UNECE, etc⁴³.

63. A Group of Experts on Multimodal Transport convened under the auspices of UNCTAD⁴⁴ has recommended the UNCTAD secretariat to investigate the feasibility (desirability, practicability and acceptability) of a new international instrument on multimodal transport, and by doing so to take into account the views of all interested parties.

64. In a resolution on intermodality and intermodal freight transport⁴⁵, the European Parliament called on the European Commission to devote particular attention to drafting regulations on intermodal door-to-door liability and developing a corresponding transport document.

65. A first step in the right direction would be that all intergovernmental organizations involved (at least all UN organizations) define a common approach to this issue, establish a common agenda, consult on further steps to be undertaken, and clarify their respective roles and contributions. Probably, a small group of experts representing all the organizations could be created to deal with this issue. With a view to assisting in this process, a study on the desirability and feasibility of a new International Private Law Instrument for multimodal transport could be organized.

⁴¹ EC study on intermodal transportation and carrier liability (para. 21) suggests that the new regime should provide for liability in excess of established minimum levels.

⁴² The German Transport Law Reform Act "*Transportrechtsreformgesetz*" subjects multimodal transport contracts to the general transport law and allows the parties to deviate from the provisions of the general transport law only if the relevant contractual terms are individually negotiated, or in certain cases if certain printing techniques are used to highlight amid the fine-printed general terms and conditions. Special printing techniques are required to be used to fix other amounts for the carrier liability than the prescribed one (8.33 SDRs per kilogram of gross weight), if within the limits set in the law itself (between 2 and 40 SDRs). Amounts beyond those limits are possible only if they are individually negotiated.

⁴³ UNCITRAL A/CN.9/WG.III/WP.21, para. 23, p. 8.

⁴⁴ Geneva, 26-27 November 2001.

⁴⁵ Official Journal of the European Community, C 262/241, 18 January 2001, para. 31.

66. Another step forward could be the organization of a global “hearing” of all public and private interests involved in multimodal transport, as already proposed by the UNECE.
