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ECONOMIC COMMISSION FOR EUROPE

INLAND TRANSPORT COMMITTEE

Working Party on Combined Transport

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

Report of an informal group of experts
(Geneva, 12 and 13 July 1999)

A. MANDATE

1. In line with its programme of work to analyse "... possibilities for reconciliation and harmonization of civil liability regimes governing combined transport operations", the Working Party considered, at its thirty-first session, the results of a meeting of experts that had been held in Frankfurt (Germany) on 7 and 8 December 1998 (TRANS/WP.24/83, paras. 31-36). The report of this meeting in Frankfurt is contained in document TRANS/WP.24/1999/1. The experts had considered the possibilities and the approach to be taken to resolve possible civil liability problems arriving from single transport contracts relating to several modes of transport and from gaps in the full coverage of all operations in multimodal transport.

2. The Working Party, considering the report of the expert group felt that, in principle, the conclusions contained therein could be endorsed. However, in order to comply with the request of the Inland Transport Committee to make further investigations to ascertain the existing difficulties for combined transport operations as a result of differing and/or lacking international civil liability regimes (ECE/TRANS/128, para. 86), the Working Party requested the secretariat to convene another meeting of experts.

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3. The experts were also requested to provide guidance to the Working Party and the Inland Transport Committee on the need to prepare an international legal instrument in this field. Furthermore, possible arrangements and procedures to be used in order to finalize such an instrument within a reasonable time frame should be explored (TRANS/WP.24/83, para. 35).

B. ATTENDANCE

4. The informal group of experts met in Geneva on 12 and 13 July 1999.

5. The meeting was attended by Government experts from Austria (Mr. M. Radl, Ministry of Transport), Belgium (M. H. Maillard, Ministry of Communications and Infrastructure), Germany (Mrs. B. Czerwenka, Federal Ministry of Justice), the Netherlands (Mrs. M. Masclee and Mr. J. Hilt, Ministry of Transport) and the United Kingdom (Mr. P. Dean, Department of the Environment, Transport and the Regions).

6. The following experts have also been invited by the secretariat to attend the meeting: Mr. H. Carl, United Nations Conference on Trade and Development (UNCTAD); Mr. G. Mutz, Inter-governmental Organization for the International Carriage by Rail (OTIF); Mr. T. Leimgruber, International Rail Transport Committee (CIT); Mr. J. Hammer, International Federation of Freight Forwarders Associations (FIATA); Mrs. L. Ventura, International Union of Railways (UIC); Mr. W. Czapski and Mr. P. Wildschut, International Road Transport Union (IRU); Mrs. J. Marshall, European Intermodal Association (EIA); Mr. R. Colle, International Union of Combined Road/Rail Transport Companies (UIRR); Mr. A. Schindler, German Road Transport Association (BGL).

C. CONCLUSIONS OF THE MEETING

I. Current activities covering international liability regimes

7. The group of experts was informed that the revised COTIF Convention governing international railway transport has been approved recently. The revision has led to a certain harmonization with the provisions of the CMR Convention. The maximum level of compensation recoverable from the railways in case of loss or damage has however remained unchanged at 17 SDR per kilogramme of gross weight. The revised COTIF also covers terminal haulage by road as long as this does not involve international transport and is specifically mentioned in the transport contract.

8. The group of experts also noted that a liability regime covering inland waterway transport (CMNI) was likely to be finalised this year by a joint expert group of the UN/ECE and the Rhine and Danube Commissions. This international regime does not contain provisions on multimodal transport and will contain levels of compensation based on maritime law (i.e. Hague-Visby rules).

9. The group of experts was also informed that the new Convention for the Unification of Certain Rules for International Carriage by Air, concluded at Montreal on 28 May 1999, aimed at modernizing and consolidating the Warsaw Convention. The minimum level of compensation recoverable in cases of loss or damage to goods or in cases of delay is 17 SDR per kilogramme. The Convention contains specific rules on “combined carriage”.

10. Furthermore, the group of expert was informed that the UIRR has approved new General Conditions on Combined Transport covering road/rail transport operations from the morning of the day when the transport of the container, the swap-body or the vehicle starts at the terminal until mid-night of the day of arrival by train at the terminal of final destination, including all necessary transshipment operations en route.

11. The group of experts also noted that the UNCTAD/ICC Rules for Multimodal Transport Documents were increasingly used, also for multimodal transport operation including the maritime leg. Also the FIATA Bill of Loading (FBL) based on the UNCTAD/ICC Rules was becoming increasingly popular.

12. Finally, the group noted that in Germany, the Law on Freight, Freight Forwarding and Warehousing has been revised recently and now also covered multimodal transport operations based on the “network approach”.

II. Liability problems encountered in multimodal transport

13. The group of experts recognised that multimodal transport operations were not only increasingly used in modern transport and trade procedures, particularly for containerised cargo, but that such operations, particularly if they involved combined transport¹, were also promoted through current transport policies in many European countries with the objective to exploit as much as possible the inherent advantages of the various land transport modes (road, rail and inland water transport) towards sustainable transport development and to relieve pressure from the increasingly overburdened European road networks .

¹Combined transport is defined as “intermodal transport where the major par 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. “Intermodal transport is defined as “the movement of goods in one and the same loading unit or road vehicle, which uses successively two or more modes of transport without handling the goods themselves in changing modes” (joint UN/ECE, ECMT, EC definition).

14. These multimodal transport operations² are often characterised by the following:

- S Goods are carried on the basis of a single transport contract involving several modes of transport and several sub-contractors;
- S The modes of transport to be used are often not known or determined by the consignor at the start of the transport operation;
- S The increasing use of intermodal transport units (ITUs) able to be utilized on various modes of transport complicates the making out of transport contracts;
- S Modern just-in-time concepts require reliable and punctual transport services which lead to an increased importance of coverage of risks related to delay in delivery;
- S Use of a chain of operators leads to uncertainty as to which party is to deal with incidents and to difficulties in determining time, place and mode of transport where damages or losses of cargo has occurred;
- S Terminal operators, being at the end of the line, are very often asked by the customer to deal with all problems of loss, damage or delay irrespective of where or why it occurred.

15. As a consequence of the above features characterizing modern transport services, the applicability of the relevant liability regimes often can no longer be determined and assessed correctly neither by the consignor nor by the multimodal transport operator nor by the insurance industry. Thus, frequently the determination of the extent to which the carrier is liable causes problems, particularly in multimodal transport operations. Private-law contractual arrangement, such as those based on the UNCTAD/ICC Rules for Multimodal Transport Documents do not solve these problems as they are optional and its provisions only apply as long as they are not contrary to international law and/or to the numerous national regulations applicable to transport contracts (including transshipment operations and temporary storage of goods or ITU's).

16. This creates considerable uncertainty as to the applicable legal regime and to the ensuing financial consequences for the consignor and the transport operator. This makes separate cargo insurance a requirement in addition to the liability insurance taken out by the transport operator, not to mention other potential risks, such as delay in delivery. Given the above uncertainties, insurance premiums tend to be high.

² Multimodal transport is defined as “transport of goods by at least two different modes of transport under a single transport contact”.

17. Uncertainty about which liability regime is relevant and which party is responsible for claims is a very serious problem for the insurance industry. Without proper claims records or an ability to forecast or contain risk, the insurance industry will and is in some cases no longer able to provide insurance coverage for the operator. Without the sustaining quality of the insurance industry, multimodal and/or combined transport operators will find it difficult to survive.

18. The group of experts felt that the current lack of a uniform liability regimes governing multimodal transport operations clearly mitigated against the use of such operations by consignors and freight forwarders, as it added to the inherent complications of such transport operations and further discriminated against its use compared to single mode operations.

III. The need for an international liability regime covering multimodal transport contracts

19. An international legal regime providing easily understandable, transparent, uniform and cost-effective liability provisions for all relevant multimodal transport operations, including transshipment and temporary storage, from the point of departure to the point of final destination, would establish a level playing field for all types of transport operations. In the case of loss or damage of cargo or in case of the increasingly important delay in delivery, such a regime would also allow for a speedy and cost-effective handling of claims and could thus considerably reduce the amount of legal proceedings.

20. In this context, the group of experts was of the opinion that it would be extremely difficult to ascertain quantitatively the cost and benefits of such a new legal regime (or the absence of such a regime) given the diversity of possible transport operations involved and the lack of transparency of the insurance markets. However, further analyses might be made in this respect, possibly based on a questionnaire.

21. The group of experts realized that earlier attempts to establish an international legal regime addressing the liability of operators involved in multimodal transport operations had failed. The United Nations Convention on International Multimodal Transport of Goods of 1980 as well as the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (1991) have never come into force. As a result, countries establish increasingly national solutions. This leads to a proliferation of different liability regimes complicating further the present situation. Existing private-law contractual arrangements, based on the UNCTAD/ICC Rules for Multimodal Transport Documents of 1992, while apparently enjoying an increasing acceptance also by maritime transport operators, are not a solution in this respect.

22. In view of these considerations and given the obvious advantages of a uniform international civil liability regime reducing transportation cost and promoting efficient multimodal and combined transport operations, the group of experts felt that a new attempt had to be made to arrive at internationally uniform and mandatory legislation on liability in international transport based on the existing uni-modal liability regimes.

23. The group of experts was also of the view that such a new international regime should be prepared at the global scale and should not be restricted to sub-regional or regional areas. Such a regime should also not exclude some modes of transport, such as air or maritime transport, given the increasing integration of all modes of transport into the international logistics chain.

24. Two experts felt however that the scope of a new international regime should be restricted to inland transport only, including short sea shipping. They were of the view that the present liability regimes for inland modes on the one hand and for deep sea shipping and air transport on the other hand were too different, particularly as far as the maximum levels of compensation are concerned.

25. With a view to arriving at a new international regime on civil liability in transport, the group of experts considered various options for its preparation:

- S A mandatory international legal regime;
- S An international legal regime with an opting-out clause
(the parties to the transport contract may exclude the application of the regime by explicitly stating its non-applicability);
- S An international legal regime with an opting-in clause
(the parties to the transport contract apply the regime by explicitly stating its application in the transport contract (default system)).

26. Considering the pro's and con's of the various options and with a view to arriving at a uniform regime, the group of experts recommended to establish mandatory regulations governing multimodal transport contracts. Such regulations would also be in line with the mandatory character of the existing uni-modal liability rules and regulations, such as CMR, COTIF, Hague-Visby, Warsaw Rules and Conventions, etc.

27. One expert felt that in order to allow more flexibility and to arrive at a solution acceptable to all parties, any newly prepared international legal instrument should contain an opting-out clause. Other expert felt, however, that an opting-out clause could allow single operators within the transport chain to prohibit the uniform application of the new liability regime within transport chains.

28. Another expert felt that the UIRR general conditions should be a basis for an international convention that should be limited to inland transport only. Such an approach would be different from the “network approach”, as the UIRR general conditions are based on a certain minimum amount of liability even when the damage can be located and even if the party responsible for the damage would be liable with only a smaller compensation in accordance with applicable law.

29. Nevertheless, in view of the well established and large-scale application of the existing uni-modal international liability regimes which could only be modified or replaced over very long time periods, the group of experts recommended to take a so-called “network approach” which would become applicable to the transport of goods by all modes of transport under a single contract. In case of damage, loss or delay in delivery of cargo, the provisions of such a new international regime would apply, unless one of the parties to the contract was able to prove that damage, loss or delay of the cargo occurred during transport by a particular mode. In such a case the liability will be established as if a separate contract had been made out for carriage with this mode of transport and the liability of the carrier would be determined by the law which would have been applicable to that part of the transport chain.

IV. Institutional arrangements

30. The group of experts recommended that in line with its programme of work (work programme activity 02.9) the proposed legal instrument should be prepared under the auspices of the UN/ECE, in cooperation with UNCTAD and other interested governmental and non-governmental organizations.

31. The secretariat should ensure that, during the preparatory process, all parties concerned are involved, including maritime and aviation interests. The actual drafting of the legal instrument should be entrusted to a small group of experts convened by the secretariat which should report regularly to the UN/ECE Working Party on Combined Transport (WP.24) and the UN/ECE Inland Transport Committee (ITC) on problems encountered and progress made.

32. Since many of the required provisions of such a new international liability regime existed already in one form or another and since the issues at stake have been considered already at length in various international and national fora, the group of expert was of the view that a time period of two years should be sufficient to conclude the preparatory work on the legal instrument.

33. In order to provide a solid basis for a decision to be taken by the ITC at its forthcoming session in February 2000, the group of expert established a small drafting group, composed of experts from Germany, UNCTAD, OTIF, EIA and the UN/ECE secretariat which would work by correspondence (e-mail). This group would prepare, by December 1999, a first outline of an international Convention on the

Liability of Operators in Multimodal Transport (CMTL). This outline could then be considered by the group of experts at a further meeting to be held on 10 and 11 January 2000 in Geneva.

V. Follow-up action and decisions to be taken

34. The group of experts recommends the WP.24 and the ITC to decide on the establishment of an international legal instrument on the liability of operators in multimodal transport (CMTL) with the following features:

- S Legal form: Independent United Nations Convention or Agreement
- S Regime: Mandatory
- S Scope: All modes of transport (road, rail, inland water transport, sea and air)
- S Principle: Network approach (complementary to existing liability regimes)
- S Coverage: Multimodal transport operations, incl. transshipment and temporary storage.

35. The group of expert invited the WP.24 and the ITC to consider these proposals with a view to their endorsement allowing work on the preparation of such a legal instrument to start already in early 2000.
