



General Assembly

Distr.: Limited
29 January 2003
English
Original:

**United Nations Commission
on International Trade Law**
Working Group III (Transport Law)
11th session
New York, 24 March – 4 April 2003

Transport Law: Preparation of a draft instrument on the carriage of goods [by sea]

Information document provided by the United Nations Conference on Trade and Development (UNCTAD)

Note by the Secretariat

In preparation for the eleventh session of Working Group III (Transport Law), during which the Working Group is expected to proceed with its reading of the draft instrument contained in document A/CN.9/WG.III/WP.21, the Secretariat of the United Nations Conference on Trade and Development (UNCTAD), on 16 January 2003, submitted the text of a document entitled “Multimodal transport: the feasibility of an international instrument—*Overview and discussion of responses to the UNCTAD questionnaire on Multimodal Transport Regulation and issues arising for further consideration*”. That document is reproduced as an annex to this note in the form in which it was received by the Secretariat. It summarizes the text of a report published by the UNCTAD Secretariat in English only under the title “Multimodal transport: the feasibility of an international instrument” (UNCTAD/SDTE/TLB/2003/1).



Annex

**MULTIMODAL TRANSPORT:
THE FEASIBILITY OF AN INTERNATIONAL LEGAL INSTRUMENT**

Overview and discussion of responses to the UNCTAD questionnaire on Multimodal Transport Regulation and issues arising for further consideration

1. In view of the continuous growth of multimodal transportation and against a background of an increasingly complex and fragmented legal framework at the international level,¹ the UNCTAD secretariat conducted a study on the feasibility of establishing a new international instrument on multimodal transport. In order to ascertain the views of all interested parties, both public and private, a questionnaire was prepared by the UNCTAD secretariat and circulated widely. The questionnaire was sent to all Governments and intergovernmental and non-governmental organisations, including all relevant industry associations, as well as to some experts on the subject (TDN 932(2) SITE).
2. The secretariat received a total of 109 replies to the questionnaire, 60 from the Governments of both developed and developing countries and 49 from industry representatives and others. Replies received from industry representatives reflect the views of virtually all interested parties. They include the views of operators of transport services (maritime, road and rail), freight forwarders, providers of logistics services and terminal operators, liability insurers, cargo insurers as well as shippers and users of transport services.
3. A report, which sets out in some detail the views and opinions expressed in the responses to the questionnaire, has since been completed by the UNCTAD secretariat (*Multimodal Transport: The Feasibility of an International Legal Instrument*, UNCTAD/SDTE/TLB/2003/1) and is available on the UNCTAD website.²
4. As the views and opinions expressed in the context of the questionnaire may be of assistance to the UNCITRAL Working Group on Transport Law, in its deliberations on the scope of application of the proposed Draft Instrument, this document is being submitted for consideration. Due to restrictions of space, this document only reproduces parts C. IV and C. V of the UNCTAD Report (“Overview and discussion of responses” and “Issues arising for further consideration”), together with a table presenting a breakdown of responses received.³ For a more detailed reflection of currently held views and opinions, the full UNCTAD Report may be consulted.

¹ See UNCTAD Report *Implementation of Multimodal Transport Rules* and accompanying comparative table, UNCTAD/SDTE/TLB/2 and Add. 1, available on the UNCTAD website.

² <http://www.unctad.org>. The UNCTAD Report *Multimodal Transport: The Feasibility of an International Legal Instrument* (UNCTAD/SDTE/TLB/2003/1) is also available on the UNCITRAL website (www.uncitral.org).

³ The text of parts C. IV and C. V has remained unchanged, but response rates have been included, as appropriate. The table reproduces the individual questions contained in the questionnaire in abbreviated form. Percentage values have been rounded to the nearest full unit.

Breakdown of responses to UNCTAD questionnaire on Multimodal Transport Regulation

1. (a) Do you think that the existing legal framework is satisfactory? (b) Do you think that it is cost-effective?	Yes 17%	No 83%
	24%	76%
2. What in your view, are the reasons why the 1980 MT Convention did not attract sufficient ratifications to enter into force?	N/A	
3. Do you think that an international instrument governing liability arising from multimodal transportation would be desirable?	Yes 92%	No 8%
4. If so, which of the following approaches do you consider the most appropriate? (a) New international instrument to govern multimodal transport; (b) Revision of the 1980 MT Convention; (c) Extension of a sea-carriage liability regime to all MT contracts involving a sea-leg; (d) Extension of a road-carriage liability regime to all MT contracts involving a road-leg; (e) Other.	(a) 39% (b) 26% (c) 13% (d) 13% (e) 9%	
5. If concerted efforts were made towards the development of a new international instrument, would you support these efforts?	Yes 98%	No 2%
6. Should any possible instrument governing multimodal transportation cover liability for delay?	Yes 90%	No 10%
7. Which of the following liability systems would you think is most appropriate in any instrument governing MT: (a) Uniform system (b) Network system (c) Modified system	(a) 48% (b) 28% (c) 24%	
8. If you have expressed a preference for 7(b) or (c), which types of provisions should vary: (a) Only the provisions on limitation of liability; (b) Other types of provisions.	(a) 59% (b) 41%	
9. Should liability for loss, damage or delay under any international instrument be: (a) (i) Fault-based: liability only in case of fault (ii) Strict: liability irrespective of fault. (b) In any event, liability should be subject to certain exceptions.	(i) 53% (ii) 47%	
	Yes 85%	No 15%
10. Please express any views you may have on the question of monetary limitation of carrier's/MTO's liability.	N/A	
11. Should any international instrument governing MT be in the form of: (a) A convention which applies on a mandatory basis and provides mandatory rules on liability; (b) A convention which applies on a non-mandatory basis, but provides mandatory rules on liability; (c) Other.	(a) 58% (b) 35% (c) 7%	
12. Under existing laws and regulations on MT the contracting carrier/MTO is responsible throughout the entire transport. Should any international instrument governing multimodal transport: (a) Adopt the same approach; (b) Allow the contracting carrier/MTO to contract out of certain parts of the transport or out of certain functions related to the performance of the contract by including a clause to this effect in the transport document (or electronic equivalent).	(a) 76% (b) 24%	
13. Which international convention(s) governing liability in the field of carriage of goods by sea, land and air have been ratified or acceded to by your country?	N/A	

OVERVIEW AND DISCUSSION OF RESPONSES TO THE UNCTAD QUESTIONNAIRE ON MULTIMODAL TRANSPORT REGULATION

5. In this part, the main results of the questionnaire, detailed in part C.III of UNCTAD Report *Multimodal Transport: The Feasibility of an International Legal Instrument* (UNCTAD/SDTE/TLB/2003/1), are summarized and discussed.

1. Assessment of status quo and desirability of international instrument

6. A large majority of respondents (83%), both among Governments and non-governmental and industry representatives, consider the present legal framework unsatisfactory, with a clear majority (76%) considering the present system not to be cost-effective. The vast majority of respondents across the board (92%) consider an international instrument to govern liability arising from multimodal transport to be desirable and virtually all (98%) indicated they would support any concerted efforts made in this direction.

7. In practice, it is clear that the level of support would depend on the content and features of any possible new instrument. However, the general assessment of the status quo suggests that there is both a demand for a more detailed debate and willingness to further engage in an exchange of views.

2. Suitability of different approaches

8. As regards the most suitable approach, which might be adopted, views are, to a certain extent, divided. However, around two thirds of respondents from both Governments and non-governmental quarters (65%) appear to prefer a new international instrument to govern multimodal transport or a revision of the 1980 MT Convention. In further discussions considering this approach, the views expressed on why the 1980 MT Convention did not attract sufficient ratifications to enter into force should be of some interest. Several central issues have emerged from the responses, in particular that the 1980 MT Convention, at least at the time, may not have appeared attractive enough to shippers interests while at the same time containing elements which carrier interests found not acceptable. A number of respondents expressed their support for a new legally binding instrument based on rules which are currently used in commercial contracts, namely the UNCTAD/ICC Rules.

9. A minority of respondents (13%), representative mainly of parts of the maritime transport industry, appeared to favour the extension of an international sea-carriage regime to all contracts for multimodal transport involving a sea-leg and some respondents expressly stated their support for the proposed Draft Instrument on Transport Law, which adopts this approach.⁴ Another minority of respondents (13%), representative mainly of parts of the road transport industry, considered the

⁴ UNCITRAL document A/CN.9/WG.III/WP.21. Under the Draft Instrument, as currently proposed, the substantively maritime liability regime would be applicable to a wide range of claims arising from contracts for multimodal transportation involving a sea-leg, in particular (a) in cases where loss cannot be localized; (b) in cases where loss was attributable to a land or air leg of transport but no international unimodal convention applied. See Articles 1.5 and 4.2.1 Draft Instrument. See also UNCTAD commentary, footnote 5, below.

extension of an international road-carriage regime to all contracts for multimodal transport involving a road-leg to be the most appropriate approach.

10. Overall, the responses indicate that - with the important exception of the maritime transport industry - there appears to be only limited support for the approach adopted in the Draft Instrument on Transport Law. Accordingly, there is significant scope for the exploration of other options in consultation with all interested parties in transport.

3. Important features and key-elements of any possible international instrument

11. The following picture emerges from the responses:

3.1 Delay

12. The vast majority of respondents (90%) think any instrument governing multimodal transport should address the issue of delayed delivery, albeit some believe that liability for delay should only arise in certain circumstances and should be limited at a level equivalent to the freight or a multiple thereof.

3.2 'Uniform, 'network' or 'modified' liability system

13. As regards the type of liability system, which may be most appropriate, views are, as may be expected, divided, with just under half of all respondents (48%) expressing support for a uniform liability system and, among the remainder of respondents, broadly equal numbers expressing support for a network liability system (28%) or for a modified liability system (24%).

14. Among those favouring a network or a modified liability system, a majority (59%) believes only the limitation provisions should vary depending on the unimodal stage where loss, damage or delay occurs. This view appears to be particularly prevalent among respondents representing Governments. Others, particularly among non-governmental respondents, believe that matters like basis of liability or exceptions to liability and time for suit should vary.

15. Early agreement on the most appropriate type of liability system, including the extent to which liability rules should be uniform, would clearly be central to the prospect of success of any discussions on a new international instrument.

3.3 Limitation of liability

16. Closely linked to the question of the appropriate type of liability system is the issue of limitation of liability on which, again, views are at this stage divided.

17. Overall, a majority of respondents provided comments supportive of or accepting the need for limitation of liability. However, the responses reflect a broad variety of views on the issue. A considerable number, both among Governmental and industry respondents, question the whole idea of limitation of liability whereas others, particularly those representing the maritime and freight-forwarding industry, emphasize the desirability of limitation of liability in line with unimodal conventions, in particular due to the continued relevance of unimodal conventions in the context of recourse actions by multimodal carriers against unimodal sub-contracting carriers.

18. In relation to the various possible monetary levels of limitation mentioned, it is noticeable that those concerned with or representing the interests of sea carriers tend to advocate lower limitation amounts than most other respondents.

19. Limitation of liability is clearly a central issue, as views on limitation appear to both affect and be influenced by views on the nature and type of liability system. Although in negotiations for any international convention the issue of limitation of liability traditionally arises at a relatively late stage in the proceedings - once agreement on substantive rules has been achieved - it may be that some earlier principled discussions on possible levels of limitation would benefit constructive debate on other central issues.

3.4 Basis of liability

20. Both among Governments and among other respondents, broadly equal numbers expressed support for (a) a fault-based liability system (53%) and (b) a strict liability system (47%). However, a clear majority across the board (85%) considered that certain exceptions to liability should apply in any event.

3.5 Mandatory or non-mandatory?

21. Overall, a majority of all respondents (58%) considered that any international instrument should be in the form of a convention, which applies on a mandatory basis and provides mandatory liability rules.

22. However, a sizeable minority (35%) considered that a non-mandatory convention, which could be contracted into or out of but provided mandatory liability rules overriding any conflicting contractual terms, would be appropriate. This suggests that it may be worthwhile to explore in more detail the advantages and disadvantages of possible non-mandatory options for an international instrument.

3.6 Contracting carrier's responsibility throughout the multimodal transaction

23. A clear majority of respondents from all quarters (76%) considered that any international instrument governing multimodal transportation should adopt the same approach as existing statutory and contractual multimodal liability regimes by providing for continuing responsibility of the contracting carrier/MTO throughout the entire transport.

24. In particular, the responses indicate that the use of standard clauses in a transport document (or electronic equivalent) to limit the scope of contract and thus the contracting carrier's responsibility and liability is generally not considered to be acceptable.

25. In this respect, the responses may be of particular relevance to any further consideration of provisions in the Draft Instrument on Transport Law under the auspices of UNCITRAL. As has been pointed out by UNCTAD in its commentary,⁵ Articles 5.2.2 and 4.3 of the Draft Instrument, as proposed, would arguably allow a

⁵ Available as part of the background documentation for the UNCITRAL Working Group Transport Law in all UN languages (UNCITRAL document A/CN.9/WG.III/WP.21/Add.1). The *UNCTAD commentary*, with the text of the Draft Instrument integrated for ease of reference, is also available on the www.unctad.org website (UNCTAD/SDTE/TLB/4).

contracting carrier to disclaim liability arising out of (a) certain functions (e.g. stowage, loading, discharge) and (b) certain parts (stages) of the contract performed by another party. In its current form, the Draft Instrument does not preclude the use of standard terms to this effect in the transport document (or electronic equivalent) and thus does not safeguard against abusive practice. As a result, a shipper might engage a carrier to transport its goods from door-to-door against the payment of freight and find that the carrier, under terms of contract issued in standard form by the carrier, was not responsible throughout all stages of the transport and/or for all aspects of the transportation. This situation would not conform to the legitimate expectations of transport users, who in many cases arrange with one party for the transportation of goods from door-to-door so as to ensure that one party will be responsible throughout all stages of the transaction. Responses to the UNCTAD questionnaire suggest strong opposition across the board to any change in approach along the lines currently proposed in the Draft Instrument.

ISSUES ARISING FOR FURTHER CONSIDERATION

26. The main aim of the UNCTAD questionnaire was to take a step towards establishing the feasibility of a new international multimodal liability regime, in particular, the desirability in principle of international regulation, the acceptability of potential solutions and approaches and the willingness of all interested parties, both public and private, to pursue this matter further.

27. The large number of responses to the questionnaire and the detail, in many cases, of the comments provided by public and private parties across a broad spectrum suggests that there is a general willingness to engage in an exchange of views on future regulation of liability for multimodal transport. This is encouraging, given the continuous growth of multimodal transportation against a background of an increasingly fragmented and complex legal framework at the international level. Both users and providers of transport services as well as Governments and other interested parties clearly recognize that the existing legal framework is not satisfactory and that, in principle, an international instrument would be desirable. However, views on how the aim of achieving uniform international regulation may be accomplished are divided, partly as a result of conflicting interests, partly due to the perceived difficulty in agreeing a workable compromise, which would provide clear benefits as compared with the existing legal framework.

28. The apparently broad divide in opinion on closely linked key issues, such as type of liability system (uniform, network or modified), basis of liability (strict or fault-based) and, importantly, limitation of liability may be seen as an obstacle to the development of a successful international instrument. However, it may equally be seen as a reflection of the fact that - despite the expansion of multimodal transportation and a proliferation of national multimodal liability regimes - there has, in recent times, been little focused debate, involving all interested parties at the global level.

29. The need for increased dialogue on controversial matters as well as on potential ways forward is illustrated by the fact that some possible options, which have tentatively been suggested by a number of respondents have yet to be explored in any international forum.

30. For instance, several respondents indicated support for the development of a binding international liability regime based on commercially accepted contractual solutions, i.e. the UNCTAD/ICC Rules. The UNCTAD/ICC Rules share significant characteristics with the 1980 MT Convention in that both operate a modified liability system, which (entirely or to an extent) retains the network-approach in relation to limitation of liability. However, while the 1980 MT Convention has not generated much support within the transport industry, the UNCTAD/ICC Rules have clearly been quite successful and have been adopted by FIATA in their FBL 92 and by BIMCO in Multidoc 95. As proposals for a legally binding international instrument building on the UNCTAD/ICC Rules as a basis for negotiations have not yet been considered in any international forum, their further exploration may be worthwhile.

31. An altogether different approach to liability regulation for international multimodal transport lies in proposals for the development of a non-mandatory regime, which provides uniform and high levels of liability. Proponents of this approach argue that such a non-mandatory regime would, as a matter of commercial decision-making, appear an attractive proposition to both shippers who are interested in a simple and cost-effective regime and to carriers who wish to offer such a regime as part of their service. A non-mandatory solution of this kind has not yet been considered in any international forum⁶ and may also be worth investigating.

32. Although it would be presumptuous to try to foreshadow the substance and development of any further detailed discussions involving all interested parties, it appears that there is significant interest in further constructive debate. In order to facilitate and support this process, it would seem that the convening of an informal international forum under the auspices of UNCTAD, together with other interested UN organizations, such as UNCITRAL and UNECE, would be both appropriate and timely. The forum would enable frank discussion of controversial key issues highlighted in this report and serve as a platform at which priorities and potentially attractive ways forward may be explored more fully by all interested public and private parties. While, clearly, there is at present much controversy regarding the best approach that might be pursued in relation to several key issues, certain areas of consensus have also emerged. These, it is hoped, will serve as a basis for constructive and fruitful discussion of possible regulation of multimodal transportation.

⁶ For a European study discussing this approach, see *Intermodal Transportation and Carrier Liability*, Luxembourg, Office for Official Publications of the European Communities, 1999.