

FINAL REPORT

TREN/CC/01-2005/LOT1/LEGAL ASSISTANCE ACTIVITIES

STUDY ON THE DETAILS AND ADDED VALUE OF ESTABLISHING A (OPTIONAL) SINGLE TRANSPORT (ELECTRONIC) DOCUMENT FOR ALL CARRIAGE OF GOODS, IRRESPECTIVE OF MODE, AS WELL AS A STANDARD LIABILITY CLAUSE (VOLUNTARY LIABILITY REGIME), WITH REGARD TO THEIR ABILITY TO FACILITATE MULTIMODAL FREIGHT TRANSPORT AND ENHANCE THE FRAMEWORK OFFERED BY MULTIMODAL WAYBILLS AND OR MULTIMODAL MANIFESTS.

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1. Executive Summary.

Currently, transport documents and liability rules for multimodal freight transport are characterised by a **patchwork of different legal regimes** deriving from diverse international conventions (applying different mandatory rules as regards liability requirements, exclusion clauses, limits of liability, time bars for suit, etc.), national legislations, contractual arrangements and professional practices within the transport sector.

Transport services and regulations historically evolved along national lines and have led to different sets of rules on documentation and other administrative requirements and procedures, implying a considerable amount of red tape. Moreover, **each transport mode has given rise to the emergence of distinct transport operators and transport documents**. At present, multimodal transport within the EU is done on the basis of either a set of multiple transport documents per mode, or on the basis of a single transport document issued by a multimodal transport operator (e.g. CMR consignment note).

Similarly, as regards **carrier liability for loss, damages or delays in delivery on multimodal freight journeys, there is no uniform mandatory liability regime**, neither at global level, nor at European level. Instead, different liability rules based upon international unimodal conventions establishing different mandatory liability regimes for each mode (some of them govern multimodal carrier liability to a certain extent), national transport liability laws in the EU Member States (which have given rise to national case-law), (sub-) regional agreements (multimodal liability rules enacted by the Andean Community, MERCOSUR, ALADI and ASEAN) and contractual arrangements apply to multimodal freight transport. In other words, liability rules for multimodal freight transport are fragmented and complex, rendering it almost unpredictable for transport operators to estimate the liability risks that they incur when relying upon multimodal transport. Currently, for multimodal consignments, a consignor can either choose to “go the unimodal way”, i.e. to deal with a series of carriers and non-carriers (e.g. terminal operators, warehouses, etc.) operating under separate contracts for each mode of transport in order to have his goods delivered to the consignee, or to “go the multimodal way”, i.e. to mandate one single intermediary – the multimodal transport operator – under a single contract to choose the most suitable mode of transport and deal with all subcontractors involved in the consignment.

Electronic transport documents are, in theory, already available as regards some transport modes. However, they are far from being widespread in day-to-day business. The electronic format proves to be more problematic when its application concerns negotiable transport documents, i.e. when transport documents are evidencing title. In the absence of a uniform legal framework, again, electronic alternatives to documents of title have been developed on a contractual basis.

The present study aims at assessing to which extent the identified lack of uniformity as regards multimodal freight transport documents and multimodal carrier liability proves to be a barrier to seamless, streamlined, flexible and

sustainable multimodal freight transport within the EU. In addition, it analyses to which extent a widespread use of electronic transport documents would be suitable for multimodal freight transport.

The study draws, first of all, a **clear picture of the current situation** as regards transport documents, electronic transport documents and liability rules for multimodal freight journeys and describes all initiatives that have been or are currently being undertaken in each of these fields. In a second instance, it depicts the **outcome of a consultation**, which was held to collect the views of all multimodal transport stakeholders on the need for a uniform regime in the EU as regards multimodal (possibly electronic) transport documents and liability and on the actions that would be best-suited to serve their interests in this respect. The stakeholders comprised the 27 EU Member States, the Secretariats of the existing and draft international conventions, the Secretariats of present contractual arrangements, port authorities, airports, ship-owners, custom agents, freight forwarders, carriers (road, rail, air, combined, maritime and inland waterways), providers of logistics services, terminal operators, infrastructure managers, intermodal centres, insurance companies (cargo insurers and liability insurers), banks, shippers (consignors and consignees), transport workers and academic experts. This consultation process consisted of a written consultation, based on a questionnaire that was sent to 183 stakeholders and to which 58 responses were received, and 29 interviews with selected stakeholders representing the various categories of interested parties.

The overall conclusion of the consultation is that opinions widely diverge on the way forward. A majority of stakeholders is in favour of the state of play. However, many stakeholders come up with alternative policy proposals, many other stakeholders favour a single document with a mandatory uniform liability regime, many stakeholders favour a single document with a voluntary standard EU fall-back liability clause, and many other stakeholders favour a single document with a mandatory standard EU fall-back liability regime applicable in the absence of contractual arrangements.

In deciding whether to take further action or not, **the European Commission will firstly need to deal with the issue of liability and defer the issue of a single document to a later stage.** Moreover, **as dematerialisation of transport documents may eliminate the need for any documentation altogether, the issue of dematerialisation and switch towards an electronic format should be dealt with simultaneously with the transport document issue.**

The involvement of and approval by the EU Member States on this matter is undoubtedly vital if the European Commission is to take any further action. However, most of the EU Member States hold that, given the nature of the questionnaire, it is not for ministries or administrations but for the industry to answer it. That is the reason why most of the Member States circulated the questionnaire with their domestic industry. Some Member States only referred to the responses of their industry and did not respond to the questionnaire (e.g. UK, Portugal, Cyprus, and Belgium). Others referred to the responses of their industry, but also responded to the questionnaire (e.g. Lithuania, Slovak Republic and Romania). **An involvement of the industry would therefore be**

essential in any further impact assessment. If the industry were to voice its approval to an envisaged action, Member States would follow. Given that the issue affects several international conventions and widespread contractual arrangements, an **open discussion with the Secretariats of these conventions and contractual arrangements should be maintained.**

Furthermore, any action at European level would need to take account of the following conclusions:

A single transport document.

- **Single transport documents for multimodal transport are already operating in the EU.** The most frequently used are the FIATA Multimodal Transport B/L, the COTIF CIM Consignment note, the CMR Consignment note and the CIM-UIRR note. Retaining a unique document – in both a negotiable fashion and non-negotiable fashion - for all transport modes would unlikely bring about uniformity and foster multimodal transport. Less paperwork is, without doubt, welcome. However, it is not capable of providing for uniformity (the objective of the present study), given that the underlying regimes, and not the documents, seem to be at the heart of the debate.
- Even though carriers in the EU do not presently seem to give any consideration to the INCOTERMS, which they consider as exclusively governing the seller/buyer relationship without any bearing on their business or legal status, some stakeholders demonstrated that **account should be taken of the INCOTERMS** because of their interrelationship with transport documents and payment conditions. In order to avoid legal gaps in situations in which certain transport documents are used in combination with certain INCOTERMS, any proposal for a single transport document should, with respect to its negotiable version, ensure that the seller obtains a “certified copy of the original” or other document to which sufficient validity is granted for payment purposes.
- **Economic, social and environmental impacts of a single document throughout all transport modes.** A single document would generate overall positive economic effects for all parties involved in multimodal transport, as it may simplify and reduce the costs and delays of administrative procedures and bureaucracy, decreasing – to a certain extent - friction costs deriving from the modal switch. However, these positive economic effects are only capable of promoting the overall use of multimodal transport to a relatively limited extent. This is because it appears, from the stakeholder consultation, that neither documentation nor liability issues are determinant in the decision-making process of whether to use unimodal or multimodal transport. Other factors, such as the typical speed and costs of a particular transport mode, are decisive. In addition, the stakeholder consultation shows that a single document would be unlikely to have an impact on the freight rates for multimodal transport services. For fullness, it has to be observed that, in the short term, a switch towards a single document may generate some investment costs to allow market players to adapt their paperwork to the new standard documents. From a financial perspective, the stakeholders indicate that a single transport document is likely to have no bearing on the willingness of insurers and banks to issue insurances and bank guarantees for multimodal freight transport.

To the relatively limited extent that it were to encourage modal shifts, a single transport document would indirectly encourage that some of the currently unimodal road transport be replaced by environmentally more friendly multimodal journeys, e.g. Motorways of the Seas initiative. However, as mentioned above, this effect is estimated to be negligible, given that more or less bureaucracy does not seem to be critical in deciding whether to opt for unimodal or multimodal transport. A switch towards electronic transport documents would, however, be capable of reducing paperwork, thus generating positive environmental impacts.

Electronic transport documents.

- **Almost all stakeholders are in favour of electronic transport documents.** Acceptability by the private and the public sector does not seem to be an issue for the launch of electronic transport documents, nor does there seem to be a cost-issue. The main hurdles are of a legal and technological nature, i.e. there is still uncertainty as to the status of electronic transport documents from a legal perspective and many companies are not geared-up to use electronic transport documents from a technological perspective.
- Most stakeholders held that electronic transport documents should be **visualized using a standard internet connection** and that they should be **released in a printable format**. Opinions are divided about the suitability of **electronic signatures**, often considered too complex and burdensome.
- Two interesting examples to follow when fostering electronic transport documentation are, on the one hand, the **IATA e-freight pilot project** (operative since 2007) and, on the other hand, the **electronic COTIF/CIM Consignment note**. Two lessons are to be learned from these initiatives. On the one hand, the IATA e-freight pilot project shows that dematerialisation of transport documents is pointless if the accompanying documents are not simultaneously dematerialised. On the other hand, account should be taken of the differences in technological achievements reported by several EU Member States, e.g. electronic COTIF/CIM consignment notes are frequently being printed out when crossing the border between Austria and Hungary.

A single liability regime.

- There is a **general dissatisfaction** with the available transport documents and liability regime expressed at the start of the questionnaire. In addition, most stakeholders consider that their **own transport mode is being hindered** by the current liability regimes (e.g. road hauliers consider that road transport is hindered and sea transport is favoured whereas maritime carriers consider that sea transport is hindered and road transport is favoured). However, when the stakeholders were questioned about the ideal solution to tackle the lack of uniformity, **nearly all stakeholders referred to their own regime**. We observed that stakeholders are, generally speaking, mainly knowledgeable of the regime governing their own transport mode. Put differently, there is a **lack of dialogue between the different modes**.
- **Option A – a status quo/no action** – was the option chosen by most stakeholders. Given that this somehow contradicts their general dissatisfaction expressed at the start of

the questionnaire, it probably translates the fact that, even though they are unsatisfied with the present situation, stakeholders do not wish to see any EU action but rather global action. Hence the message of “no action” to the EU.

- A vast majority (50/58) of stakeholders are **in favour of a uniform carrier liability regime.**

However, a majority of stakeholders are in favour of harmonisation **at a global level.** Most of the stakeholders supporting a global regime consider that a **European regime** would add a **new layer of complexity to the already complex cargo liability regimes.**

Among the far lesser number of stakeholders in favour of **European harmonisation,** the majority considers **global harmonisation as an ultimate goal and view European harmonisation as a stepping stone towards global convergence.**

In other words, there is a **general consensus amongst all stakeholders** that an ideal world should provide for **global harmonisation,** irrespective of whether this needs to be preceded by a regional, European regime or not.

Prior to any impact assessment, a **fundamental policy choice** should be made as to whether the European Commission wishes to harmonise at a **horizontal or vertical level.** The European Commission’s starting point in this legal study is that harmonisation of multimodal carrier liability implies a “horizontal” harmonisation of carrier liability throughout the different modes of transport at a European level. However, harmonisation could also be conceived as a “vertical harmonisation” of carrier liability per transport mode at a global level. In addition, account should be taken of the fact that transport documents and liability are not always the main hurdles to multimodal transport. Feedback was received from one Member State that its transport players do not operate multimodal transport because of an entrenched lack of mutual confidence. The shortcomings and bottlenecks of the absence of a European Maritime Space were also frequently highlighted. The absence of a European Maritime Space implies that maritime trade between France and the Netherlands is essentially treated in the same way as trade between France and China.

- The lack of uniformity of liability regimes is not only a problem at a carrier level, but also at a **subcontractor level.** This has historically been ignored by the international conventions. However, the identified lack of uniformity is a problem within the **consignor-carrier relationship** and the **consignor-subcontractor relationship.** Therefore, any action should take account of both levels in order to ensure a balanced approach. Reference should be taken from the UNCITRAL Proposal and the NSAB 2000 General Conditions, which duly take account of both the consignor-carrier relationship and the consignor-subcontractor relationship.
- **Liability and insurances are conceptually two very distinct matters.** At present, the situation is such that large maritime liners make use of comprehensive insurances (global P&I and open cover insurances), whereas insurances are less common for rail or inland

waterways carriers. Some stakeholders hint towards a compulsory cargo insurance. In this respect, two remarks need to be made. First of all, it needs to be underlined that, irrespective of the cargo insurance coverage that may or may not be concluded by the shippers, the underlying legal liability of the carriers would remain unaffected. In other words, an insurance coverage is not capable of solving liability issues; it can only soften its perception. Cargo insurance compensations are not based upon legal liability but upon the declared loss of or damage to the cargo (hence, its unsuitability to cover delays in delivery). The wrong impression is often created with shippers that cargo insurances absolve them from their liability. Secondly, the European insurance sector would strongly oppose any mandatory cargo insurance, as this would deprive insurers from discretion when deciding upon the risks that they are willing to insure, which is essential to their business.

There seems to be **two big blocks of thought in the EU**. One block, dominated by the maritime carriers, ship-owners, liners and well-known maritime countries such as Denmark and the UK, urges for a signature and ratification of the **UNCITRAL Proposal at a global level**. Another block, mainly dominated by shippers and shortsea shipping operators, opposes the UNCITRAL Proposal (considered to be biased in favour of carriers) and urges for the **creation, in the short term, of a contractual regime, based on the CMR, at a European level to foster global uniformity in the long term**. Amongst those stakeholders, many hold that the UNCITRAL Proposal does not promote the Motorways of the Sea initiative because it essentially addresses transoceanic trade on the basis of negotiable documents. We observe that, by its very nature, maritime transport is prone to a global regulation, whereas inland transport is more suitable for regional agreements. Proof is the essentially "European" COTIF/CIM Rules and CMR.

An **alternative way** is provided **by the Netherlands**, which proposes a system based on an extension of the applicability of all unimodal conventions to other transport modes performed prior to or after the Convention's mode. In other words, in a similar way as the UNCITRAL Proposal, which is a **"maritime-plus" convention**, the other conventions should be made **"road-plus", "rail-plus"**, etc. In doing so, each unimodal carrier may satisfy his customers by being able to offer a multimodal product on a single set of terms to which both are accustomed and for which both are insured. This system would elaborate on an already existing tendency in some modern unimodal transport conventions, e.g. COTIF-CIM Rules and the Montreal Convention. In the Netherlands' view, the European Commission should take political initiatives aimed at achieving amendments to the existing unimodal conventions.

Others (e.g. the European freight forwarders association) voice that there is **no need for EU-action**, given their satisfaction with the current situation, whilst at the same time **opposing the UNCITRAL Proposal**.

In making its policy choice, the European Commission should obtain **reliable statistics** in order to get a clear understanding of the percentage of multimodal transport in the EU that would remain uncovered by the UNCITRAL Proposal. This would allow the European

Commission to **understand to which extent the UNCITRAL Proposal might be a “harmonising tool” for the EU.**

- As to the **scope of any European action**, the present legal study suggests that any **action limited to intra-EU transport would only be accepted as a temporary solution, i.e. a trampoline towards global harmonisation.** A vast majority of stakeholders favoured a global regime and almost all stakeholders that favoured a European regime considered that the most suitable regime would not be restricted to intra-EU transport but should also cover inbound and outbound EU transport. One should not forget that, because of Europe’s geography, transport from one Member State to another frequently involves transit through non-EU countries (e.g. transport from Bulgaria to Germany involves transit through Serbia and Montenegro). In this respect, the European Commission needs to take account of two well-established transboundary arrangements affecting some EU Member States: (i) the railway freight SMGS-regime of the OSJD (Organisation for Co-operation of Railways between 25 contracting countries, including Azerbaijan, Belarus, Iran, Kazakhstan, Russia, China, Korea, Vietnam and some European Member States (e.g. Bulgaria, Lithuania); and (ii) the NSAB 2000 General Conditions of the Nordic Association of Freight Forwarders, representing the national freight forwarders' associations of Denmark, Finland, Norway and Sweden. However, purely legal considerations may require EU action to be confined to intra-EU transport in the short term to allow for a wider application in the long run.
- **The timing of the present study coincides with the adoption of the UNCITRAL Proposal by the UN General Assembly on 11 December 2008**, authorising the opening for signature of the Convention at a signing ceremony to be held on 23 September 2009 in Rotterdam (the Netherlands) and recommending that the UNCITRAL Proposal be given the formal name of “Rotterdam Rules”¹. Stakeholders from both sides – i.e. the supporters of and the opponents to the UNCITRAL Proposal – are quite confident that the US will likely sign and ratify the Proposal. The European Commission should therefore make a policy choice as to whether it will (i) adopt a wait-and-see approach; or (ii) continue its plans for action, irrespective of the outcome of the UNCITRAL Proposal. Some stakeholders advocate that a *status quo* is not an option because of the fact that either the UNCITRAL Proposal is backed-up by the US and comes into force, or the US will revise its domestic COGSA unilaterally, in which case the EU would need, in their opinion, its own regime to protect the interests of its industry. With respect to this observation, we note that it is true that the US is aware that its COGSA needs and urgent revision. However, the scenario that the US, which has been one of the main drivers behind the launching of the UNCITRAL Proposal, would prefer to incorporate it in US law instead of signing and ratifying the UNCITRAL Proposal, is unlikely. In 1992, the Maritime Law Association of the United States began to review its COGSA. Soon thereafter, the Comité Maritime International formed an International Subcommittee on Transport Law which began drafting a new international instrument on cargo liability with the intention of delivering that draft to UNCITRAL for governmental action. These two efforts tracked each other closely in form and content up until 1996, when the Maritime Law Association of the

1 General Assembly Resolution; http://www.uncitral.org/pdf/english/workinggroups/wg_3/res122e.pdf and text of the Convention: http://www.uncitral.org/pdf/english/workinggroups/wg_3/convent_e.pdf

US decided to support legislation in the US to unilaterally address the issues by amending COGSA. However, according to a press release of the World Shipping Council², this legislation ("Senate Redraft"³) failed to gain sufficient support and was abandoned in favour of the international effort at UNCITRAL level to draft a new Convention. *"An already completed draft for such adjustment is for time being put in the drawers of Congress because this body prefers to fall in line with an international instrument"*⁴. We note, in this respect, that the US is not a party to the Hague/Visby Rules (which it has incorporated in its COGSA), nor to any of the CMR Convention, COTIF/CIM Rules or CMNI Convention. It has signed the Hamburg Rules in 1979 but has not ratified them. It has signed and ratified the Warsaw Convention and Montreal Protocol no. 4 to the Warsaw Convention, and has signed (but not ratified) Additional Protocol no. 3 to the Warsaw Convention. It has, furthermore, signed and ratified the Montreal Convention. We expect that, if the US signs and ratifies the UNCITRAL Proposal, many countries will follow, e.g. the UK, to which the USA is a « key » maritime trading partner (moreover, the UK has communicated its official position in favour of the UNCITRAL Proposal). This would probably trigger the entry into force of the UNCITRAL Convention. In the unlikely event that the US were not to sign and ratify the UNCITRAL Proposal, this could possibly stop the international momentum of the UNCITRAL Proposal at once. Many contracting parties, for whom the US is a key trading partner, would be less motivated to sign the Proposal. *"It may be expected that ratifications by any of these countries, in particular US and China, may induce others, for instance in Eastern Europe and Asia, to follow suit."*⁵

- If the **European Commission does not adopt a wait-and-see approach** and does not hold off until the outcome of the UNCITRAL Proposal becomes sufficiently clear, it will likely face the **opposition by several EU Member States** that are in favour of the UNCITRAL Proposal (e.g. Denmark and the UK). We observe that the UNCITRAL Proposal does not allow for any reservations.

Unless all EU Member States were made to sign a new Convention on multimodal transport, any EU-action would trigger the need for **wide-ranging negotiations** of (i) reservations to the multimodal application of the existing unimodal conventions, e.g. CMR, CMNI, COTIF/CIM Rules, to the extent that these conventions allow for reservations and following the applicable procedure under these conventions, in accordance with Section II of the 1969 Vienna Convention on the Law of Treaties; or (ii) modifications of these conventions in line with Article 41 of the 1969 Vienna Convention on the Law of Treaties. In this context, account needs to be taken of the fact that the CMR Convention bans any modification in the following terms: *"The Contracting Parties agree not to vary any of the provisions of this Convention by special agreements between two or more of them, except to make it inapplicable to their frontier traffic or to authorize the use in transport operations entirely confined to their territory of consignment notes representing a title to the goods"*⁶. However, if all EU Member

2 http://www.worldshipping.org/iss_3.html

3 HOOPER Chester D. and DEORCHIS Vincent M., "Comparison between Senate Staff Working Draft of the MLA Proposed Amendments to COGSA dated 24 September 1999 and the Final Draft of the UNCITRAL Convention as reported at page 60 in A/CN.9/645 of UNCITRAL's Working Group III", 2008.

4 See also VAN DER ZIEL G.J., "Survey on History and Concept", in Transportrecht vol. 27, July/August 2004.

5 VAN DER ZIEL G.J., "Survey on History and Concept", in Transportrecht, vol. 27, July/August 2004.

6 Article 1.5 of the CMR Convention.

States were to sign a new Convention on multimodal transport, it would take precedence over previous international conventions entered into by the EU Member States in accordance with Article 30 of the 1969 Vienna Convention on the Law of Treaties, e.g. the UNCITRAL Convention (assuming it enters into force).

- Irrespective of whether the EU takes action or not as regards multimodal transport documents and liability, **some stakeholders identified the need to take action as regards two ancillary issues** that are held to lack a suitable legal regime: (i) combined road/rail transport falling outside of the scope of the CMR and the COTIF/CIM Rules (e.g. when a container is loaded separately - i.e. without the vehicle - on a train in a different state than the state where it was transported by road, neither the CMR Convention (because the container is unloaded from the vehicle) nor the COTIF/CIM rules apply (because the supplementary road leg took place in a different state); and (ii) combined road/ferry transport falling outside of the scope of the CMR.
- **The creation of a Working Group on Multimodal Liability** would be a useful tool to ensure further progress and dialogue. This Working Group should include national experts from each of the 27 Member States – who would act as an intermediary with their industry - as well as representatives from each of the Secretariats of the Unimodal Conventions and of the contractual arrangements and the head of Working Group III on the UNCITRAL Proposal.
- **Option D as Proposed Policy Option.**
 - **Option A – status quo/no action:** Even though this is the most popular option in the midst of stakeholders, it is not capable of attaining the objective of the present study, i.e. to provide for a simple, transparent and predictable legal framework to govern multimodal transport in the EU. This is because, at present, there is no seamless, streamlined, flexible and sustainable multimodal transport in the EU.
 - **Option B – opt-in network system:** This option would probably not provide any added value to the presently existing contractual arrangements such as the FIATA Rules or BIMCO conditions. Given its contractual “opt-in” nature, it is not capable of increasing legal certainty and uniformity within the EU. Indeed, there is no harmonised regime on which parties can rely in the absence of an express agreement. Besides, problems stemming from the mandatory nature of international conventions covering multimodal transport to a lesser or greater extent remain unsolved.
 - **Option C – modified network system:** Even though this option seems at first sight legally viable to attain the objectives of the study, it does not provide any guidance in case of legal gaps or clashes related to the interpretation of the international unimodal conventions for the clauses to which the network regime applies. It is therefore not capable of providing for legal certainty and predictability.
 - **Option D - modified uniform system whereby uniform, mandatory rules apply except as regards liability limits, which can be contractually opted-out,** i.e. liability limits are based on a default system, the application of which is triggered

unless the parties agree otherwise. Such a system will be voluntary as regards liability limits because parties will be able to contract-out, nevertheless if parties do not opt-out, it is applicable in its entirety and parties are unable to amend it. The “opt-out” nature of the liability limits, i.e. the fact that a harmonised regime applies automatically when parties have not reached or concluded an agreement on liability limits, avoids legal gaps and increases the levels of both legal certainty and uniformity. This legal construction is, in our view, suitable for the attainment of the objectives of the present study. We refer to Section 8.2, Proposed Liability Regime.

- **Option E – pure uniform system:** This option would legally be possible through the adoption of a European Convention between all EU Member States but would be politically unviable, given that it would trigger fierce opposition from most stakeholders and would not enjoy sufficient support from the Member States. It would certainly end in a similar way as the UN Multimodal Proposal of 1980.

- **Proposed Liability Regime.**

It needs, first of all, to be noted that an endorsement of the UNCITRAL Proposal and a parallel European Convention for non-sea plus multimodal transport would legally be feasible but politically unviable. Furthermore, the text of the UNCITRAL Proposal adopted in December 2008 does not allow for any reservation.

➤ *Workable Proposal for action at EU level from a Legal Perspective.*

In line with the conclusions of the stakeholder consultation, any attempt of harmonisation at EU-level should **focus on carrier liability** before dealing with transport document issues and electronic transport document issues.

In order to ensure an approximation of carrier liability regimes for multimodal freight transport, lifting barriers to a seamless, streamlined, flexible and sustainable multimodal transport within the EU, a workable proposal for action at EU level would be to launch a political debate at EU-level (involving the Member States and their respective industries) in order to **persuade all EU Member States to sign a new Convention**. This political debate could be opened by a formal Communication, in which the European Commission would set out its intentions and invite interested parties to comment upon them.

The proposed new Convention would promote a **modified uniform regime, providing for uniform, mandatory rules except as regards liability limits, where parties would be able to contractually opt-out**. The emphasis on contractual freedom is consistent with the current practice of the industry to adopt contractual arrangements operating a modified network regime based on “opting-in” under the UNCTAD/ICC Model Rules, BIMCO Multidoc, BIMCO Combiconbill, BIFA STC, FIATA Multimodal Transport B/L or UIRR General Conditions.

Indeed, the proposed new Convention would recommend that the consignor and the multimodal carrier in intra-EU multimodal freight transport contracts, irrespective of

whether they include a maritime leg or not, expressly **assign the liability limits of their multimodal transport contract to "one main transport mode"**. This express assignment of multimodal transport contracts to a single mode would allow the parties to effectively "hang" their multimodal contract to a single mode **as regards liability limits**. By qualifying their contract as "mainly rail", for example, parties would refer to the applicable international unimodal rail convention – COTIF/CIM Rules - as regards liability limits.

In the absence of such express assignment, the liability limits of the international unimodal convention corresponding to the **"main mode" of the multimodal transport journey would apply by default**. The "main mode" of multimodal transport journey would be determined **by the longest trajectory, expressed in km**. A multimodal transport journey accounting for 70% of road transport, 20% of air transport and 10% of rail transport, would, consequently, trigger the application of the applicable international unimodal road convention (CMR Convention). In cases of **disagreements** as to which is the "longest mode", the presently highest carrier liability limit of **17 SDR/kg** would apply.

To summarise, the regime would be as follows:

- **Nature of the regime**: The Convention between EU Member States would provide, on the one hand, for **mandatory uniform rules for all matters other than liability limits** and, on the other hand, for **liability limits of which parties would be able to opt-out**. In other words: uniform provisions for all clauses except liability limits;
- **Type of regime**: The proposed regime would be a **modified uniform system**.
- **Basis of liability**: Our recommendation would be that the proposed regime be a **fault-based regime**. This is, in the first instance, because the majority of stakeholders who responded to Question 40 is in favour of ordinary fault- or negligence-based liability rules. Secondly, strict liability is, to date, only used for extra-contractual claims based on hazardous activities where fault or negligence can be extremely hard to prove, obliging the operator to assume the high risks of his activity (e.g. nuclear third party liability, liability for maritime oil pollution, etc.). Strict liability would therefore not be suitable in a contractual relationship relating to commercial transport activities.
- **Liability limits**: **Contractual freedom** to expressly "assign" the multimodal contract for liability limits: rules of the assigned mode apply;
 - ⇒ **Default system** in the absence of an express contractual assignment:
 - in the absence of an express assignment, the rules of the "longest mode" apply;
 - in cases of disagreements as to which is the "longest mode": 17 SDR/kg.

A **detailed explanation of the envisaged regime** is provided for in the following paragraphs:

- *Uniform rules for all contractual provisions except liability limits.*

Given that carrier liability limits appear to be the essential conflicting issue hindering convergence towards a single multimodal freight transport regime, the creation of uniform rules on all other contractual provisions would not pose insurmountable challenges and a compromise between the EU Member States should be reached to the extent that it is

reasonably in line with the established practice of the unimodal conventions and currently widespread contractual arrangements (e.g. a single party - namely the multimodal transport operator - would be presumed liable for loss, damages or delay throughout the multimodal transport journey and exclusions would be expressly listed in cases of *force majeure*, strikes, etc., the possibility for the multimodal transport operator to reverse this presumption if he proves that he took all possible measures to avoid the loss, damages or delay; time bar for suit of 1 or 2 years, etc.).

In this respect, the proposed regime replicates the existing regimes of the Andean Community, MERCOSUR and ALADI and the draft ASEAN regime. These (sub-) regional agreements are "modified uniform" regimes, which create a uniform framework, and their reliance upon the network principle (through references to mandatory international conventions) is restricted to the liability limits. We observe that the failed UN Multimodal Proposal of 1980 was characterised by a similar structure. However, the authors of this Study do not believe that its failure was due to the uniform rules that it had introduced on matters unrelated to liability limits.

➤ *Basis of the liability limits: contractual freedom.*

The envisaged regime would guarantee the parties' contractual freedom to determine which liability limits will apply to their multimodal transport journey, leaving the ultimate solution up to the natural economic interplay of negotiation and bargaining between parties.

This approach would, therefore, be in line with the Member States' desire - repeatedly expressed throughout the consultation process - to mould the liability limits of any regime according to the needs and interests of their industry. Indeed, Member States recurrently observed that it was not for ministries or administrations to provide answers to the questionnaire and, instead, circulated the questionnaire with their domestic industry to trigger its contribution.

This approach would also be in line with the general principle of Freedom of contract provided for in article 1.102 of the Principles of European Contract Law 1998⁷. It would, moreover, please common lawyers, whilst providing for a systematic and predictable system by default, likely to please continental civil law practitioners.

Given that it would give precedence to contractual freedom as regards liability limits, this regime would be an ideal compromise to combine the stakeholders' desire for uniformity with their reluctance towards EU-approximation, which is feared to hinder global uniformity and, instead, add an unnecessary layer of EU/non-EU differentiation. The primacy of contractual freedom would ensure the parties' ability to autonomously apply a single liability regime of their choice to the liability limits of their European multimodal transport journey. However, in the absence of an express determination, the European default-system would ensure legal certainty and minimise timely and costly judicial

7 Hardbound ISBN 90-411-1305-3 published in November 1999 by Kluwer Law International P.O Box 85889, 2508 CN Hague, The Netherlands.

proceedings for multimodal transport journeys in the EU.

The primacy of contractual freedom would somehow consecrate the existing widespread global practice of contractual arrangements (UNCTAD/ICC Model Rules, BIMCO Multidoc, BIMCO Combiconbill, BIFA STC, FIATA Multimodal Transport B/L, the UIRR General Conditions, or the NSAB General Conditions of the Nordic Freight Forwarders).

It may be adduced that the carrier will often not know in advance which transport mode will be applied for a particular multimodal journey. It may well be that a freight forwarder or transport integrator ignores which transport modes he will apply at the time of the conclusion of the contract. However, for the sake of predictability, the system encourages parties to reach a workable compromise on liability limits in case of loss/damage by effectively "hanging" their contract to a single convention.

- *Default system: the "longest mode" (or 17 SDR/kg in case of disagreement on the "longest mode").*

If parties have not expressly agreed upon the applicable liability limits, a default system should attempt to be as close as possible to the real economic risks that the parties to multimodal transport journey are taking. An economically correct calculation of the "risks" that are undertaken by the multimodal carrier would be to take account of both the length of the trajectory of each employed transport mode within the multimodal journey and the typical risks of damage/loss characterising a certain mode. However, given that this would be too complex a calculation to be made at a contractual level, the proposed system only retains the length of the trajectory as an objective parameter, even though this does not represent a truthful reflection of the risks incurred by the carrier.

In case of contractual disagreements over the "longest" mode, the highest level of liability limits provided by the international conventions – i.e. 17 SDR/kg – would apply by default. The liability limit of 17 SDR/kg would apply, irrespective of the transport modes involved in the multimodal journey, i.e. it would also apply to a journey involving only road and inland waterways transport. This is because of the fact that, if no "common" denominator is set, the regime would split again into too many variants and deviations that would undermine all benefits of a single and transparent regime.

To some extent, the system mimics the applicable regime under Dutch national law. Its fall-back clause is aimed at avoiding any "free-rider" approach by the carrier, whose interests will be best served by a clear and express assignment of the multimodal contract to an applicable mode upfront. The high limit by default also drives towards competition between the carriers, who will try to provide for an "attractive" liability arrangement to their clients. It may be alleged that this will allow more sophisticated carriers to get the upper hand. However, the system would be fully compatible with European competition law principles.

➤ *Geographic scope of the regime.*

Given the prominence of contractual freedom, the proposed regime would not hinder parties to apply a uniform regime throughout international multimodal transport journeys. In order to take account of the trends towards global trade, the aim of the regime would be that it becomes, in the long run, applicable both to intra-European multimodal transport journeys and journeys starting or ending in the EU (outbound/inbound EU transport).

However, due to legal technicalities, it is not practically possible to ensure the applicability of the new regime to European inbound and outbound multimodal transport in the short term, but only to intra-EU multimodal transport. This is because the regime will formally be shaped as a Convention between the EU Member States (see below), which would take precedence over previous international conventions entered into by the EU Member States in accordance with Article 30 of the 1969 Vienna Convention on the Law of Treaties, e.g. the UNCITRAL Convention (assuming it enters into force). This Convention could, however, not ensure that the regime applies to multimodal transport originating or ending outside of the EU. Indeed, in a hypothetical scenario that the UNCITRAL Proposal were to enter into force in Germany and Turkey, the new Convention would not take precedence over the UNCITRAL Convention and would, consequently, not apply to EU-inbound multimodal journeys from Turkey to Germany, in accordance with Article 30.4 (b) of the 1969 Vienna Convention on the Law of Treaties.

It would, nonetheless, be advisable for the EU to engage in diplomatic efforts to promote its new regime world-wide and allow non-EU Member States to join the new regime. That is why it is of utmost importance that the regime comes over as “attractive” to non-EU Member States due to its simplicity and transparency.

Indeed, as will be demonstrated in the following paragraphs, to be viable, an intra-EU regime would necessarily have to be a trampoline towards a broader geographic applicability of the regime in the long run.

- A vast majority of stakeholders favoured a global regime and almost all stakeholders that favoured a European regime considered that the most suitable regime should not be restricted to intra-EU transport but should also cover inbound and outbound EU transport. They essentially allege that freight transport has evolved throughout the years into an essentially global activity. Given that global uniformity is favoured by a vast majority of stakeholders, an intra-European Regime in the long term would therefore obtain so much opposition that it would be doomed to fail. It would only be accepted as a temporary trampoline towards global harmonisation. Moreover, practically speaking, an intra-EU regime would add obstacles and hinder uninterrupted cargo transport in cases where, because of Europe’s geography, transport from one Member State to another involves transit through non-EU countries (e.g. transport from Bulgaria to Germany involves transiting through Serbia and Montenegro). Proof of the international nature of cargo transport is also given by the fact that many EU Member States are party to well-established transboundary arrangements: (i) the railway freight SMGS-regime of the “OSJD”

(Organisation for Co-operation of Railways between 25 contracting countries, including Azerbaijan, Belarus, Iran, Kazakhstan, Russia, China, Korea, Vietnam and some European Member States (e.g. Bulgaria, Lithuania); and (ii) the NSAB 2000 General Conditions of the Nordic Association of Freight Forwarders, representing the national freight forwarders' associations of Denmark, Finland, Norway and Sweden). The new EU regime should therefore allow these commercial trading partners to "opt in" the new EU system and pave the way for gradual convergence.

- Furthermore, from a strictly legal perspective, the scope of the existing international unimodal cargo transport conventions is not limited to the territory of their contracting states. For example, the Hague Visby Rules apply if the port of loading is located in a contracting state, the Hamburg Rules apply when the port of loading or the port of unloading are located in a contracting state and the CMR Convention applies when the place of taking over of the goods and the place designated for delivery are situated in two different countries of which at least one is a contracting country. Neither are the existing regional NSAB 2000 General Conditions of the Nordic Association of Freight Forwarders restrictive either as regards their application. According to its Introductory Conditions on Applicability, they apply to members of the Nordic Association of Freight Forwarders but other parties can also agree to apply them. Finally, none of the draft multimodal transport Proposals delimits its scope in a restrictive fashion. The UN Multimodal Proposal 1980 is intended to apply to multimodal freight consignments whenever the taking in charge or delivery happens in a contracting state. The UNCITRAL Proposal applies to "*contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State: (a) the place of receipt; (b) the port of loading; (c) the place of delivery; or (d) the port of discharge*". Finally, the ISIC Proposal does not restrict its application to cargo transport starting and ending in the territory of its contracting states, but also includes transport to and from the EU. In the light of the above, it would be legally and practically speaking not advisable to limit the scope of a new multimodal European regime to transport both starting and ending in the EU. However, from a legal/technical perspective, a temporary intra-EU regime would be unavoidable.
- We refer, in this context, to Professor Ramberg's statement: "*an easily understandable, transparent, uniform, cost-effective and all-embracing system on a global rather than national, sub-regional or regional level is otherwise unattainable, since any mandatory convention with extended carrier liability, if at all possible to achieve, would share the unfortunate fate of the 1978 Hamburg Rules and the 1980 Multimodal Transport Convention. The solution to establish an overriding regime with opting-in or opting-out possibilities is for this reason recommended in the EU study Asariotis, Bull, Clarke, Kiantou-Pampouki, Morán-Bovio, Ramberg, de Wit and Zunarelli, "Intermodal transportation and Carrier Liability", June 1999.*"⁸

8 RAMBERG Jan, "The future of international unification of transport law", in Dir. mar., 2001, 643.

➤ *Does the proposed regime attain the objective of the Study?*

Yes. The proposed regime would be capable of providing a simple, transparent and predictable legal framework to govern multimodal transport liability in the EU.

➤ *Interplay with existing liability regimes.*

If all EU Member States were to sign and ratify the new Convention, a conflict of laws with the existing international unimodal conventions – to the extent that these conventions apply to the unimodal legs of multimodal transport journeys or otherwise provide multimodal provisions, i.e. to the extent that they deal with the "*same subject matter*"⁹ as foreseen by Article 30 of the Vienna Convention of 1969 on the Law of Treaties – would be avoided. Indeed, under the Vienna Convention of 1969 on the Law of Treaties, the later European Convention would prevail as regards multimodal transport rules. As already mentioned above, it is acknowledged that the CMR Convention bans modifications¹⁰. However, this provision stems from the fundamental objective of the CMR Convention of "*standardizing the conditions governing the contract for the international carriage of goods by road*", as set out in its Preamble. A new EU Convention on multimodal transport would, in our view, not be able to undermine this fundamental objective to standardize international unimodal road carriage, nor would it qualify as a "special agreement" in the sense of Article 1.5 of the CMR Convention. Moreover, a literal interpretation of this provision would infringe, in our opinion, the *lex generalis* of the 1969 Vienna Convention on the Law of Treaties, which generally allows modifications by parties to multilateral treaties (Article 41 of the 1969 Vienna Convention).

In the event that the UNCITRAL Proposal was to enter into force, the same principles would apply and the later European Convention would equally prevail as regards its multimodal transport rules between EU Member States and, hence, for intra-EU transport. The UNCITRAL Convention would, however, validly apply to unimodal maritime journeys, effectively replacing the Hague and Hamburg Rules (and in the event that the US was to sign and ratify, the COGSA). In other words, the UNCITRAL Convention would apply in Europe as a "maritime" instead of a "maritime plus" convention. Yet, given the prominence of contractual freedom, nothing would hinder the parties to a multimodal transport journey including a sea leg (even a minimal sea leg) to qualify their multimodal transport contract as a "maritime" contract and, consequently, refer to the application of liability limits of the UNCITRAL Convention. It is crucial for the prevalence of the new proposed EU Convention over the UNCITRAL Convention that the EU adopts a wait-and-see approach and that the regime be adopted after the entry into force of the UNCITRAL Convention. Indeed, if it were to precede its entry into force, the EU Convention would be incapable of prevailing over the UNCITRAL Convention and, hence, unable to bring about its desirable harmonisation.

⁹ Article 30 of the 1969 Vienna Convention does not require that both conventions cover an identical subject-matter but that both conventions overlap to a lesser or greater extent. Otherwise, its application would be almost non-existing, given that the scope of different conventions rarely coincides in all aspects.

¹⁰ Article 1.5 of the CMR Convention.

We reiterate, in this respect, that the applicability of the new regime to intra-EU multimodal transport would be ensured, but that its applicability to inbound and outbound European transport could only be ensured by allowing that non-EU Member States gradually accede to the EU Convention on the long run.

On the interplay with the existing national multimodal transport laws, in particular the Dutch Civil Code and the German Commercial Code, the new Convention would not conceptually clash with the contents of these national laws, which – we recall – provide for a network regime with a default system respectively based on the highest liability limit and on the CMR-threshold. We observe, in this respect, that a new Convention between EU Member States of a legislative nature as described above would enjoy supremacy over national law, even though the methods of national implementation of international conventions vary from country to country. In some countries, international conventions are self-executing, having force of law as a consequence of their ratification; in other countries, some sort of implementing legislation is required, which may vary from the promulgation/publication to the enactment of a Convention to the translation of substantive provisions of the Convention into terms of national law. In the Netherlands, the recognition of the supremacy of international conventions is embedded in direct and clear constitutional provisions (the Dutch Constitution of 1956 as amended in 1983, Articles 66 and 95) and in Germany, recognition derives from the appropriate interpretation of constitutional provisions. *“The consequence of the recognition of the supremacy of international conventions, especially if it arises from a constitutional provision, is that, in case of conflict between a national rule and an international convention provision, the national rule will not be applied and also the ex officio examination of the opposition of the national rule to the international convention by courts”*¹¹.

➤ *Formal shape of the regime: a Convention.*

This proposal would formally need to take the shape of a Convention between the EU Member States because a Convention would be the only formal way to enable it to prevail, as regards EU Member States, over earlier international conventions providing for multimodal freight carriage arrangements.

Binding EU legislation (a Regulation, Directive or Decision), by contrast, would need to respect prior international conventions providing for multimodal freight carriage arrangements. Indeed, as will be set out in detail below, the European Community is bound by the Montreal Convention, to which it is a contracting party. Moreover, in the light of its recent proposal to accede to COTIF, the European Community may also find itself bound by COTIF in the near future.

The European Court would, therefore, be competent to annul any secondary EU legislation conflicting with the Montreal Convention. As regards the other international unimodal conventions and the UNCITRAL Convention (if it were to enter into force), EU secondary

11 BERLINGIERI Francesco and ANTAPASSIS Anthony, *“Implementation and Interpretation of International Conventions”*, CMI Yearbook 2007-2008, p.308.

legislation would, strictly speaking, not need to be consistent with these conventions in order to be valid according to the ECJ's established case-law. This is because the European Community is not a contracting party to these conventions. However, in view of the customary principle of good faith, which forms part of general international law, and of Article 10 of the EC Treaty, the ECJ would take account of these conventions when interpreting the provisions of EU secondary legislation.

Non-binding EU legislation (recommendations, opinions and communications) is not considered to be a suitable solution given that, because of its very non-binding nature, it would be unlikely to promote any approximation of laws.

However, we consider that, once a modified uniform approach is attained for international multimodal freight transport, the European Community could enact secondary legislation (a Regulation with direct effect or a Directive to be transposed into national law) in order to ensure that the rules of the new Convention would also be applicable in purely domestic multimodal transport journeys within each Member State.

➤ *Political viability of the regime.*

As indicated above, the parties that are already applying contractual arrangements (UNCTAD/ICC Model Rules, BIMCO Multidoc, BIMCO Combiconbill, BIFA STC, FIATA Multimodal Transport B/L, the UIRR General Conditions, or the NSAB General Conditions of the Nordic Freight Forwarders) will welcome the safeguarding of their contractual freedom to determine carrier liability limits.

Stakeholders within the "two big blocks of thought" identified above – i.e. maritime supporters of the UNCITRAL Proposal, on the one hand, and the continental supporters of the CMR, on the other hand – would not be likely to oppose the regime, because the system safeguards their possibility to contractually control the applicable liability limits. Yet they would need to be convinced about the need for a European regime in an initial stage because they will likely fear that EU-particularities will hinder global transport.

Some multimodal carriers – freight forwarders and transport integrators – may initially oppose the upfront assignment of the multimodal contract to a specific mode, adducing that they often ignore the transport modes that they will employ at the time of the conclusion of the carriage contract. However, the regime is aimed at providing legal certainty both to the carrier and the consignor and the fall-back system applicable by default in the absence of a contractual agreement on the transport mode is based on the objective parameter of "length" of the trajectory.

➤ *Relationship between the consignor and the multimodal carrier's subcontractors.*

The regime would only apply to the multimodal contract between the consignor and the multimodal carrier, and not to the relationship between the consignor and subcontractors of the multimodal carrier. It is our opinion that the disadvantages that could arise from a situation of imbalance between the multimodal carrier and the subcontractor are outweighed by the fact that, in this situation, multimodal carriers will not take advantage

of potentially less onerous liability rules and consignors will be encouraged to sue the multimodal carrier. The unimodal contracts between the multimodal carrier and its subcontractors will be governed by unimodal rules.

- **Proposed action on (electronic) Transport Documentation.**

As will be mentioned below in Section 7.5 (a), **liability should be dealt with first, and the issue of a single document should be deferred to a later stage and dealt with simultaneously with the issue of dematerialisation.**

Our general recommendations are that, once the liability issues are dealt with, **a single transport document be created as a “voluntary” model applicable to intra-EU journeys, but equally capable of being applied (in the long run) to inbound and outbound EU journeys.** This single transport document should be drafted in two different versions: a negotiable and a non-negotiable version because the different functions of these respective documents would not allow for one standard model. The requirements upon such a single transport document should be aligned as much as possible with the UNCITRAL Proposal in order to guarantee uniformity and avoid additional red-tape at EU level. If the voluntary use of this single transport document would be capable of reducing bureaucracy and administrative paperwork, time and costs, the industry would automatically start using it and its success, even overseas, would be guaranteed.

As regards dematerialisation, **the newly proposed Convention should allow that paper documents be replaced by electronic records.** Again, this should, at this stage, be a **voluntary choice of the transport operators.** The Convention should, however, not provide for a detailed guidance on the electronic format of these records, in order to allow the Convention to adapt to technological developments (similarly to the Montreal Convention, which allows a replacement by electronic records but does not provide any details on its implementation, such as the e-freight project). As a general rule, the electronic records should be authenticated by electronic signatures in accordance with the **1999/93/EC Directive on Electronic Signatures**, which has been transposed in the legislation of all Member States. We also refer to **“The Economic Impact of Carrier Liability on Intermodal Freight Transport” mandated by the European Commission to IM Technologies Limited in 2001**, which recommended the creation of a common e-commerce business-to-business platform including (i) the freight contract, (ii) insurances and (iii) a system of monitoring the status of deliveries from door-to-door (to ease the identification of the liable party), which would, in the opinion of the authors of the study, save costs and benefit both unimodal and multimodal transport¹².

12 IM TECHNOLOGIES LIMITED, Executive Summary and Final Report (p.43) of *“The Economic Impact of Carrier Liability on Intermodal Freight Transport”*, London 10.1.2001, for use and information of the European Commission.

2. List of Acronyms:

Andean Community: Trade bloc comprising the South-American countries of Bolivia, Colombia, Ecuador and Peru (created in 1969, based on the 1969 Cartagena Agreement and named "Andean Pact" until 1996).

ALADI - Asociación Latinoamericana de Integración: trade integration association of 12 Latin American countries (Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela) based on the Montevideo Treaty of 1980.

ASEAN - Association of Southeast Asian Nations: geopolitical and economic organisation of countries located in Southeast Asia, created in 1967. Its current members are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

BIFA - British International Freight Association: a freight forwarders organisation promoting the international freight distribution industry and representing the UK international freight services industry, whose members operate in European road and rail distribution, maritime intermodal services, air freight consolidation and forwarding, customs broking and consultancy, packing of goods for export, warehousing and distribution, and logistics and supply chain management.

BIFA STC - BIFA Standard Trading Conditions: standard trading conditions for the exclusive use of BIFA corporate members.

BIMCO - Baltic and International Maritime Council: international shipping association composed of ship-owners, ship-brokers and agents and other entities with an interest in or associated with the maritime industries.

BIMCO Combiconbill - BIMCO Combined Transport Bill of Lading: transport document created by BIMCO covering combined transport revised in 1995, BIMCO Bulletin Vol.91, 1996.

BIMCO Multidoc 95 - BIMCO Multimodal Transport Bill of Lading: transport document created by BIMCO covering multimodal transport, BIMCO Bulletin, No.1, 1996.

B/L - Bill of lading: document issued by a carrier, e.g. a ship-owner, acknowledging acceptance on board of specified goods as cargo to be shipped against payment to a named destination for delivery to a (usually identified) consignee.

Budapest Convention: Budapest (UNECE) Convention on the Contract of Carriage of Goods by Inland Waterways, 3 October 2000.

Carrier: operator with whom the consignor concludes the contract of carriage and who is liable for the transport of merchandise, directly or indirectly through a third party.

CEA : Comité Européen des assurances.

CER: Community of European Railway and Infrastructure Companies.

Charter: price paid to the carrier for the freight transport.

Chartering agent: operator who rents a vessel from a ship-owner in order to exploit it and is liable as the effective carrier before the shippers.

CIM Rules: APPENDIX B to the Berne (OTIF) Convention concerning International Carriage by Rail, 9 May 1980, providing for Uniform Rules concerning the Contract for International Carriage of Goods by Rail.

CIT: Comité International des Transports Ferroviaires.

CLECAT: European Association for Forwarding Transport Logistics and Customs Services.

CMI: Comité Maritime International.

CMR: Geneva (UN) Convention on the Contract for the International Carriage of Goods by Road, 19 May 1956.

COGSA = US Carriage of Goods by Sea Act, Title 46 of the United States Code, Appendix- Shipping, Chapter 28 Carriage of Goods by Sea, 1300.

Combined transport: concept employed by the European Commission to designate the intermodal freight transport between Member States of the European Union, where the journey is made normally by train, sea or waterways, with the minimum route by road, exclusively in the first and final phase of the journey.

Co-modality: the efficient use of different transport modes both on their own and in combination to achieve an optimal and sustainable utilisation of resources, guaranteeing a high level of both mobility and environmental protection. This concept was introduced by the European Commission in 2006 and introduces a new approach in European transport policy, not seeking to oppose transport modes but to find an optimum solution to exploit each separate transport mode and their combination.

Consignee: operator to whom merchandise is to be delivered, responsible for its receipt.

Consignment: goods covered by the same contract of carriage.

Consignor: operator delivering/committing merchandise and by whom/in whose name/on whose behalf a contract of carriage has been concluded with a third party (carrier, freight forwarder, etc.).

Continental traffic: circulation of vehicles on the European continent.

COTIF: Berne (OTIF) Convention concerning international carriage by rail, 9 May 1980, as amended by the Vilnius Protocol (3 June 1999), in particular APPENDIX B (Uniform Rules concerning the Contract for International Carriage of Goods by Rail, CIM RULES).

Customs agent: operator entrusted by the customs authorities with the management of the required documentation for freight import/export, who is responsible for the payment of taxes, tariffs and duties and the receipt of the necessary licences/certificates from the custom authorities on behalf of the user, exporter or importer.

ECSA: European Community Ship-owners Associations.

EDI: electronic data interchange.

EIA: European Intermodal Association.

EILU: European Intermodal Loading Unit constructed in accordance with the essential requirements set out in Annexes I and II and the requirements for interoperability of the Amended Proposal for a Directive of the European Parliament and of the Council on intermodal loading units of 30.04.2004 (COM (2004) 361 final), with a standard design and maintenance, suitable for all modes.

EIRAC: European Intermodal Research Advisory Council.

ESC: European Shippers' Council.

eUCP = electronic UCP : a supplement to UCP providing for similar electronic rules.

FIATA: Fédération Internationale des Associations de Transitaires et Assimilés (International Federation of Freight Forwarders Associations).

FIATA Multimodal Bill of Lading: transport document created by FIATA to cover multimodal transport.

Freight forwarder: intermediary who takes the necessary measures and/or provides additional services for the transport of goods and other services on behalf of the consignor, i.e. optimising logistics solutions, deciding on the transport mode, instructing logistics companies and taking care of the administrative procedures (e.g. customs, freight documents).

Freight Forwarding Services: services of any kind relating to the carriage, consolidation, storage, handling, packing or distribution of the goods as well as ancillary and advisory services in connection therewith, including but not limited to customs and tax, official declarations, insurance, document collection and payment.

Freight villages: break areas of a transport and logistics chain where value-added activities and technical functions are concentrated.

Hague/Visby Rules: Brussels (CMI) International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 25 August 1924, as amended by the Visby

Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading in 1968. A final amendment was made in the SDR Protocol in 1979.

Hamburg Rules: Hamburg (UN) Convention on the carriage of goods by sea of 31 March 1978.

IATA: International Air Transport Association.

IMF: International Monetary Fund.

IMO: International Maritime Organisation.

INCOTERMS = International Commercial Terms, the last version of which dating back to 1 July 1990.

Intermodality: carriage of goods in one single unit or vehicle through the sequential use of two or more modes of transport without handling the goods when switching from one transport mode to another. The concept has been extended to all transport of goods that uses two or more different transport modes in an integrated fashion, without loading or unloading, within a door-to-door transport chain.

Intermodal transport operator: transport operator responsible for intermodal door-to-door transport.

INTERTANKO: International Association of Independent Tanker Owners

Iron highways: combined road/rail transport services of high traffic rates, e.g. Channel.

IRU: International Road Transport Union

ISIC Study - Integrated Services in the Intermodal Chain Study of 28 October 2005, commissioned by the European Commission, containing a proposed multimodal transport regime.

ITU - Intermodal Transport Unit, which can take 3 distinct forms: (i) standard shipping containers/ISO containers/isotainers (containers that can be loaded and sealed intact onto container ships, railroad cars, planes and trucks); (ii) swap bodies (standard freight containers usually built too lightly to be stacked or to be lifted from the top); or (iii) semi-trailers (trailers without a front axle supported either by a road tractor or by a detachable front axle assembly -dolly- or by the tail of another trailer) suitable for intermodal transport.

Last mile: final leg of delivery from the consignor to the consignee.

L/C - Letter of credit: document containing a payment undertaking given by a bank (issuing bank) on behalf of a buyer to pay a seller a given amount of money on presentation, within specified time limits and at a specified place, of specified transport documents representing the supply of goods. These transport documents need to conform to the terms and conditions set out in the L/C, i.e. the bank will only pay if they comply with the terms and conditions set out in the L/C (the bank examines the transport documents representing the goods and not the goods themselves).

Liability regime: regime which establishes who shall be liable for loss of/damage to merchandise between the time of taking over of the goods and the time of delivery (as well as for delays in delivery) and the extent of the liability.

LLMC: London (IMO) Convention on limitation of liability for maritime claims of 19 November 1976, replacing the Brussels Convention 10 October of 1957 and amended by the LLMC Protocol of 1996.

Logistics service provider: transport operator with logistics assets other than just transport equipment (e.g. warehouses, cross-docking platforms, storage areas) enabling cargo availability and replenishment of stocks.

Lo-Lo = Lift-on - Lift off = transshipment with lifting equipment (e.g. lifting of a container onto a ship).

Longshoreman: operator in charge of freight ground handling and loading/unloading of a vessel.

MERCOSUR – Mercado Común del Sur: regional trade agreement among Argentina, Brazil, Paraguay and Uruguay and Venezuela founded in 1991 by the Treaty of Asunción.

Montreal Convention: Montreal (IATA) Convention for the Unification of Certain Rules for International Carriage by Air, 28 May 1999.

Motorways of the Sea: combined shortsea/road transport services on shortsea shipping corridors parallel to overland routes (e.g. Western Baltic Area between Germany, Denmark, Norway and Sweden with high-quality ferries and Ro-Ro services).

Multimodality: carriage of goods by two or more different transport modes on the basis of a multimodal transport contract, irrespective of whether the goods are handled or not. Intermodal transport is a type of multimodal transport.

Multimodal transport contract: single contract for the carriage of goods by at least two different modes of transport.

Multimodal transport document: document which evidences a multimodal transport contract, the taking in charge of the goods by the multimodal transport operator, and an undertaking by him to deliver the goods in accordance with the terms of that contract.

Multimodal Transport operator: operator responsible for the door-to-door transport of a single load unit of goods, whose responsibility is presently determined by the various unimodal regimes. He takes responsibility for the entire journey. In doing so, he either performs the provision of transport services throughout the entire journey or procures the performance of some or all transport legs from subcontractors, acting in all cases as a principal (i.e. not as an agent of the consignor).

NSAB: Nordic Association of Freight Forwarders.

Ocean liners: ships designed to carry cargo on regular long-distance maritime routes.

OSJD: Organisation for Cooperation Railway Lines.

OTIF: Organisation for International Carriage by Rail.

Ro-ro = Roll on–Roll off = transshipment with rolling equipment (e.g. transshipment of full trucks including their tractors by rail, e.g. on Transalpine routes).

SDR: Special Drawing Right, as defined by the International Monetary Fund.

Sea Waybill: shipping document that is only a receipt of cargo taken “on board” a vessel and which, unlike a bill of lading, is not a document of title.

Ship-owner: owner of a vessel, which is registered under his name and either exploited directly or rented.

Shipper: sender/consignor or receiver/consignee of goods for transportation.

Shipping agent: representative of the ship-owner/chartering agent in the port, who deals with all shipping documents before the local authorities, assists the crew and the ship.

Shortsea feeder traffic: carriage of maritime containers from ports of call for intercontinental liner services to minor regional ports and seaports in the surrounding area.

Short sea shipping: freight transport by sea between European ports or between ports located in Europe and third countries ports of closed seas, which are natural borders of Europe.

SMGS Agreement: OSJD Agreement on International Goods Transport by Rail of 1951, as modified in 1998.

Terminal operator: an operator who is responsible for and physically controls the operation of a terminal, in his quality of owner or under a contract to provide services to the owner.

Transport document: document (air waybill, bill of lading, carrier's certificate, etc.) that serves as evidence of acceptance and receipt of goods for carriage and may also serve as a document of ownership (title).

Transport integrator: an operator who concludes a contract for the international carriage of goods which involves at least two different modes of transport and who assumes responsibility for the performance of the contract of transport.

Transport operator: see **carrier**.

Transshipment: movement of the ITU from one transport mode to another, using Lo-Lo or Ro-Ro equipment.

UCP= Uniform Customs and Practice for Documentary Credits: a set of rules on the issuance and use of L/C, standardized by the ICC. Its latest version, UCP600, was approved by the ICC in 2006 and formally commenced on 1 July 2007.

U.I.R.R: International Union of Combined Road-Rail Transport Companies.

UN: United Nations.

UNCITRAL: United Nations Commission on International Trade Law.

UNCITRAL Proposal: UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, adopted by the UN General Assembly on 11 December 2008.

UNCTAD: United Nations Conference on Trade and Development.

UNCTAD/ICC Model Rules: UNCTAD Rules for Multimodal Transport, ICC publication no 481, Paris 1992.

UNECE: United Nations Economic Commission for Europe.

Unimodality: carriage of goods by one transport mode.

UN Multimodal Proposal 1980: Proposal for a United Nations Convention on International Multimodal Transport of Goods, signed at Geneva on 24 May 1980.

Warsaw Convention: Warsaw (IATA) Convention for the Unification of Certain Rules Relating to International Carriage by Air, 12 October 1929. This Convention has been amended by The Hague Protocol (1955), supplemented by the Guadalajara Convention as regards rules on International Carriage by Air Performed by a Person Other than the Contracting Carrier (1961) and amended by Additional Protocol no.1 (1975), Additional Protocol no.2 (1975), Additional Protocol no. 3 (1975) and Montreal Protocol no.4 (1975).

WTO: World Trade Organisation.

3. Outline of the existing situation.

3.1 An identified need for multimodal transport in the EU.

In the absence of a universally accepted definition of “multimodal” and “intermodal” freight transport – its definition varies from one international, regional or national instrument to another – all definitions agree that it covers door-to-door transport of a single load unit of goods by means of multiple transport modes. Generally, it is agreed that the “intermodal” transport is a type of “multimodal” transport. Similar to multimodal transport, intermodal transport concerns the carriage of goods in one single unit or vehicle through the sequential use of two or more modes of transport, but with the particularity that the cargo is not (un-) loaded or handled when switching from one transport mode to the other.

Arguing for a comprehensive, holistic approach to transport policy, the 2006 mid-term review of the Commission White Paper “*Keep Europe Moving*”¹³ – which introduced the concept of a single “transport integrator”¹⁴ – concluded that the European Union needs to establish a framework that encourages the optimisation of the individual modes of transport (more environmentally friendly, safe and energy efficient), as well as their combination in multi-modal transport chains for a sustainable transport system by co-modality. In other terms, the review advocates an efficient use of different modes on their own and in combination in order to create an optimal and sustainable use of resources.

In the wake of this review, the 2007 Commission Freight Transport Logistics Action Plan¹⁵ contains tangible actions for promoting and encouraging the performance of multimodal transportation as a drive for a competitive and sustainable freight transport system in Europe. Among these actions, the Freight Transport Logistics Action Plan wishes to see freight transport simplified and its quality improved through multimodal transport chains, capable of standardising transport documents and creating a single point of interface for freight transport administration, as well as unifying freight transport liability regimes throughout the distinct transport modes. Improving the quality of service in freight transport is important if modal alternatives to road are to be rendered more attractive. In this context, the Freight Transport Logistics Action Plan states that rail in particular should strive to improve its performance while the integration of waterborne modes in the transport logistics chain should be enhanced. In its endeavours to improve performance in logistics chains, the Plan specifically looks at the service levels in multimodal transshipment hubs.

13 Communication from the Commission to the Council and the European Parliament, “*Keep Europe Moving – Sustainable mobility for our continent. Mid-term review of the European Commission’s 2001 Transport White Paper*”, SEC (2006) 768, Brussels 22.06.2006, COM (2006) 314 final.

14 We note that the European Commission does not define a “transport integrator” as a profession *sui generis*. In the EU, mutual recognition therefore applies to each of the unimodal transport operators but not to the transport integrator as such.

15 Communication from the Commission, “*Freight Transport Logistics Action Plan*”, {SEC (2007) 1320} {SEC (2007) 1321} Brussels, 18.10.2007, COM (2007) 607 final.

In the same mindset, the 2007 Commission Communication on a Freight-oriented Rail Network¹⁶, committed to creating better conditions for shifting freight from road onto rail in the coming years, stresses the creation of both multimodal corridors giving priority to freight and co-modality.

3.2 Multimodal Transport Documents.

(a) Transport documents in international unimodal Conventions and their multimodal applications.

Transport services and regulations historically evolved along national lines and have led to different sets of rules on documentation and other administrative requirements and procedures, implying a considerable amount of red tape. Moreover, each transport mode has given rise to the emergence of distinct transport operators and transport documents.

Transport documents are documents issued by the carrier of the goods on maritime, inland waterways, air, rail, road or combined freight transport journeys. Transport documents come in various forms and each serves some, but not necessarily all of the following functions:

- 1) Receipt for the goods, evidencing loading, dispatch, or taking in charge and indicating the state of the goods received;
- 2) Contract of carriage between the shipper and the carrier;
- 3) Invoice from the carrier for the charges;
- 4) Negotiable document exchangeable for money, allowing goods to be sold in transit; and
- 5) Document of title representing ownership of the goods, which will only be released by the shipper against presentation of a signed original document.

Transport documents can be divided into two main categories: the negotiable and the non-negotiable documents. Non-negotiable transport documents do not allow the transfer of title, whereas negotiable transport documents affect the ownership of the goods. When a negotiable transport document is used, the consignee can obtain property of the merchandise by surrendering the original transport document to the carrier. When this sale of goods is made upon a letter of credit ("L/C") or documentary collection basis and consequently involves banks, the consignee needs to pay the bank or sign a promissory note in order to receive the original transport document from the bank. An example of a negotiable transport document is a maritime bill of lading ("B/L") issued "to order of shipper": the consignee will own the goods after he surrenders the original bill of lading to the carrier (all other copies marked "original" then become void). Quoting Professor Zekos: "*the bill of lading has three characteristics: it is a receipt, a contract of carriage and a document of title*"¹⁷. If the sale was made upon a bank's L/C, the bank will surrender the original B/L to the consignee but may refuse payment to the shipper if there

16 Communication from the Commission to the Council and the European Parliament towards a rail network giving priority to freight, {SEC (2007) 1322}, {SEC (2007) 1324}, {SEC (2007) 1325}, Brussels, 18.10.2007, COM (2007) 608 final.

17 ZEKIOS, Georgios I, "*The e-bill of lading contract: An e-standard form contract of carriage or merely an evidential document.*" (http://www.droit.univ-nantes.fr/labos/cdmo/centre-droit-maritime-oceanique/cdmo/neptunus/nept/nep32/32_3.pdf).

are discrepancies between the B/L and the L/C. Indeed, the issuing bank substitutes its creditworthiness for that of the buyer, guaranteeing the seller payment for the goods provided that the terms of the L/C are met. When using non-negotiable transport documents, the consignee does not need to surrender the original transport document to the carrier in order to obtain the merchandise (due identification suffices). However, in this case, the consignee does not obtain the ownership of the goods. An example of a non-negotiable transport document is a Sea Waybill, which simply evidences receipt of the goods, contract of carriage and invoice for the carriage charges. This type of documents is used when issues as ownership and financing are no-brainers. We observe that the legal common law figure of “*estoppel*”, implying that delivery is conclusive evidence of receipt (no possibility of disapproving delivered goods) can only be applied to negotiable documents.

Freight transport, both globally and within the EU, is governed by a myriad of transport documents and accompanying documents. A non-exhaustive list of all transport documents and accompanying documents is attached in **Annex 8** to the present Final Report. At present, multimodal transport within the EU is done on the basis of either a set of multiple transport documents per mode, or on the basis of a single transport document issued by a multimodal transport operator (e.g. CMR).

The nature (negotiable/non-negotiable, to order/to a named consignee) and type (bill of lading, consignment note, air waybill, etc.) of transport document used in relation to freight transport depends on the chosen transport mode, mandatory national law requirements, mandatory international conventions and agreements between the consignor and consignee in this respect. We note that the conventions provide for **different transport documents with a different legal value.**

Indeed, **some international unimodal transport conventions only apply to the contract of carriage if a specific transport document is used.** The Hague/Visby Rules, for example, require the use of a B/L (or any similar document of title relating to the carriage of goods by sea) which conclusively evidences the receipt of the cargo by the maritime carrier. **The transport documents play an important role as evidence:** e.g. some are *prima facie* evidence of the receipt of the goods by the carrier, whereas others are also *prime facie* proof of the contract of carriage.

Importantly, **to the extent that the international unimodal conventions are applicable to exceptional multimodal scenarios** (see below in Section 3.3 (a)), the **transport documents issued under these conventions may, in effect, be used as a “multimodal transport document”.**

The Report now proceeds to set out a brief overview of the unimodal transport documents provided for by the international unimodal conventions, with a reference to as the situations in which they are used as “multimodal transport documents”.

Sea

The **Hague/Visby Rules** (Brussels (CMI) International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 25 August 1924, as amended by the Visby Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading in 1968 and the SDR Protocol in 1979) **mandatorily require a B/L or a similar document of title relating to the carriage of goods by sea** in order to apply to the contract of carriage. The maritime B/L provides for prima facie evidence of the receipt by the carrier of the goods as therein described. Proof to the contrary is not admissible when the B/L has been transferred to a third party acting in good faith. **The transport documents under the Hague/Visby Rules do not have any multimodal functions.**

The **Hamburg Rules** (Hamburg (UN) Convention on the carriage of goods by sea of 31 March 1978) broadened the scope of the Hague/Visby Rules given that they **allow both B/Ls and other documents evidencing the contract of carriage by sea**. The transport document used under the Hamburg Rules needs to evidence a contract of carriage by sea and the taking over or loading of the goods by the carrier. If the B/L contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods, of which the carrier or other person issuing the B/L on his behalf knows or has reasonable grounds to suspect that they do not accurately represent the goods actually taken over or, where a "shipped" B/L is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person must insert in the B/L a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking. If the carrier or other person issuing the B/L on his behalf fails to note on the B/L the apparent condition of the goods, he is deemed to have noted on the B/L that the goods were in apparent good condition. Except for particulars in respect of which and to the extent to which a reservation has been entered, (a) the B/L is prima facie evidence of the taking over or, where a "shipped" B/L is issued, loading by the carrier of the goods as described in the B/L; and (b) proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein. A B/L which does not set forth the freight or otherwise indicate that freight is payable by the consignee or does not set forth demurrage incurred at the port of loading payable by the consignee, is prima facie evidence that no freight or such demurrage is payable by him. However, proof to the contrary by the carrier is not admissible when the B/L has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication. **The transport documents issued under the Hamburg Rules do not have any multimodal functions.**

Air

The **Warsaw Convention** (Warsaw (IATA) Convention for the Unification of Certain Rules Relating to International Carriage by Air of 12 October 1929) only provides that the **carrier** of goods has the **right to require** the consignor to make out and hand over to

him a document called an **"air consignment note"** and that every consignor has the right to require the carrier to accept this document. The air consignment note is prima facie evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of carriage. The statements in the air consignment note relating to the weight, dimensions and packing of the goods, as well as those relating to the number of packages, are prima facie evidence of the facts stated; those relating to the quantity, volume and condition of the goods do not constitute evidence against the carrier except to the extent that they both have been, and are stated in the air consignment note to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods. **Air consignment notes under the Warsaw Convention do not have any multimodal functions.**

Its successor, the **Montreal Convention** (Montreal (IATA) Convention for the Unification of Certain Rules for International Carriage by Air of 28 May 1999) stipulates that an **air waybill** shall be delivered for the carriage of air cargo, made by the consignor in 3 original parts. This air waybill is prima facie evidence of the conclusion of the contract, the acceptance of the cargo and the contractual conditions of carriage. **Air waybills are, under some specific circumstances, multimodal transport documents**, namely when the carrier substitutes air by another transport mode without the consent of the consignor, in which case the carriage is presumed to be air transport and the air waybill will apply from door to door (airlift and road substitution as feeder service).

Road

The **CMR Convention** (Geneva (UN) Convention on the Contract for the International Carriage of Goods by Road of 19 May 1956) provides that the **contract of carriage shall be confirmed by the making out of a consignment note**, made by the sender in 3 original copies (signed by the sender and the carrier). The consignment note provides for prima facie evidence of the making of the contract of carriage, the conditions of the contract and the receipt of the goods by the carrier. If the consignment note does not contain any reservations by the carrier, it shall be presumed, unless the contrary is proved, that the goods and their packaging appeared to be in good condition when the carrier took them over and that the number of packages, their marks and numbers corresponded with the statements in the consignment note.

The consignment notes issued under the CMR Convention are, under some specific circumstances, multimodal transport documents. Indeed, the CMR consignment notes are, in effect, multimodal transport documents when the CMR Convention applies a uniform regime to intermodal transport which is carried in a Ro-Ro fashion by some other means of transport ("piggyback journey"). When part of the journey is, for example, made on board a Ro-Ro vessel, the CMR consignment note bears the remark "*transport to ship*" and indicates the intended port of loading, vessel and port of discharge. In addition, the second original of the consignment note must bear the "*on board*" endorsement of the Ro-Ro vessel operator with the date of rolling on the ship, the

port of loading, the port of discharge with the stamps of port authorities, to comply with art.35 of the CMR Convention.¹⁸

Inland Waterways

The **CMNI Convention** (Budapest (UNECE) Convention on the Contract of Carriage of Goods by Inland Waterways of 3 October 2000) stipulates that the carrier shall issue a transport document for each carriage. Furthermore, it states that this shall be a **B/L only if the shipper so requests and if it has been so agreed before the goods were loaded or before they were taken over for carriage**. The lack of a transport document or the fact that it is incomplete shall not affect the validity of the contract of carriage. The originals of a B/L shall be documents of title issued in the name of the consignee, to order or to bearer. The transport document provides for *prima facie evidence*, unless proof to the contrary, of the conclusion and contents of the contract of carriage and of the taking over of the goods by the carrier. In particular, it shall provide a basis for the presumption that the goods have been taken over for carriage as they are described in the transport document. When the transport document is a B/L, it is deemed *prima facie* evidence in the relations between the carrier and the consignee.

The transport documents issued under the CMNI are, under some specific circumstances, multimodal transport documents. Indeed, this is the case when the CMNI Convention applies a uniform regime to combined inland waterways/sea carriages when (i) the cargo remains in the same vessel during the entire journey (i.e. no transshipment), (ii) the inland waterway leg is longer than the maritime leg and (iii) no maritime B/L has been issued in accordance with applicable maritime law. *"CMNI convention (the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (CMNI)) applies on contracts concerning the carriage of goods solely by inland waterway but it is also applicable if the purpose of the contract is the carriage of goods, without transshipment, both on inland waterways and in waters where maritime regulations apply, unless a marine bill of lading has been issued in accordance with the maritime law applicable, or the distance to be travelled in waters to which the maritime regulations apply is the greater. It appears that an inland waterway transport document issued subject to CMNI Convention (either in the form of a consignment note or a bill of lading) can be deemed to be a combined river/sea transport document, when it indicates a carriage over river and sea without transshipment."*¹⁹

18 Art.35 of the CMR Convention provides that a successive carrier (e.g. Ro-Ro vessel operator or a railway company) shall only be held responsible for loss or damage occurred during the time when goods were under his responsibility if he has accepted the goods and the CMR consignment note. Since the forwarders acting as combined road/sea or road/rail transport operators are considered to be carriers under the CMR Convention, the name and address or stamp of all successive carriers should appear in the second copy of the consignment note.

19 CIOAREC Vlad, "CIM Consignment Note for Combined Transport: Rail Waybill or Combined Transport Document?" in Forwarder Law, 9 July 2007, http://www.forwarderlaw.com/library/view.php?article_id=461

Rail

The **COTIF** (Berne (OTIF) Convention concerning international carriage by rail, 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999), and in particular its **CIM Rules** in Appendix B to it (Uniform Rules concerning the Contract for International Carriage of Goods by Rail) stipulate that the **contract of carriage must be confirmed by a consignment note** which complies with a uniform model. However, the absence, irregularity or loss of the consignment note shall not affect the existence or validity of the contract which shall remain subject to these Uniform Rules. The consignment note shall be signed by the consignor and the carrier. The consignment note provides prima facie evidence of the conclusion and the conditions of the contract of carriage and the taking over of the goods by the carrier. If the carrier has loaded the goods, the consignment note shall be *prima facie* evidence of the condition of the goods and their packaging indicated on the consignment note or, in the absence of such indications, of their apparently good condition at the moment they were taken over by the carrier and of the accuracy of the statements in the consignment note concerning the number of packages, their marks and numbers as well as the gross mass of the goods or their quantity otherwise expressed. If the consignor has loaded the goods, the consignment note shall be *prima facie* evidence of the condition of the goods and of their packaging indicated in the consignment note or, in the absence of such indication, of their apparently good condition and of the accuracy of the statements in the consignment note solely in the case where the carrier has examined them and recorded on the consignment note a result of his examination which tallies. However, the consignment note does not provide *prima facie* evidence in a case where it bears a reasoned reservation. A reason for a reservation could be that the carrier does not have the appropriate means to examine whether the consignment corresponds to the entries in the consignment note.

The transport documents issued under the COTIF/CIM Rules are, under some specific circumstances, multimodal transport documents. This is the case when the COTIF/CIM rail rules apply uniformly to (i) the rail leg and the domestic road or inland waterways leg of multimodal journeys governed by a single contract; and to (ii) the rail leg and the domestic or international sea or inland waterways leg of multimodal journeys, when these supplementary legs are listed in the 1999 CIM List of Maritime and Inland Waterway Services. **In these cases, the unimodal CIM consignment note is not used, but a multimodal transport document especially tailored for these purposes** (see below in Section 3.2 (b) *Multimodal transport documents*).

(b) Multimodal transport documents.

Whereas unimodal transport documents relate to unimodal transport journeys, multimodal transport documents relate to door-to-door transport.

As mentioned under (a) above, some unimodal transport documents are, in effect, used as multimodal transport documents in certain specific scenarios in which the international unimodal conventions apply to multimodal transport journeys.

However, there are also specific multimodal transport documents, which have been designed to principally apply to multimodal transport journeys (even though some of them also apply to unimodal journeys, e.g. Multidoc MTBL). A non-exhaustive overview of the main multimodal transport documents is provided in the following paragraphs.

The International Chamber of Commerce (ICC) issued in 1973 the so-called ICC Uniform Rules for a Combined Transport Document. The Rules, which were subsequently revised in 1975, formed the basis of the Combined Transport Document "Combimodoc", issued by the Baltic and International Maritime Council (BIMCO) in 1977.²⁰ In the late 1980's, the Committee on Shipping of UNCTAD instructed the UNCTAD Secretariat to elaborate provisions for multimodal transport documents based on the Hague Rules and the Hague-Visby Rules and the existing ICC Uniform Combimodoc Rules.

This initiative resulted in the joint UNCTAD/ICC Rules for Multimodal Transport Documents which became effective in 1992, superseding the previous ICC Uniform Rules. In order to review the Combimodoc and to make it compatible with the UNCTAD/ICC Rules, the Multimodal Transport Bill of Lading (MTBL) or Multidoc was officially adopted in 1995.

- *Multimodal Transport Bill of Lading or "MTBL" and Combined Transport Bill of Lading or "CTBL" of the Baltic and International Maritime Council (BIMCO).*

Under BIMCO's Multidoc (1995), a **Multimodal Transport Bill of Lading (MTBL)** is issued. The MTBL is a document evidencing a multimodal transport contract, i.e. a single contract for the carriage of goods by at least two different modes, and which can be replaced by electronic data interchange messages insofar as permitted by applicable law and is issued in a negotiable form. Under BIMCO's "Combined Transport Bill of Lading (CTBL)" (1995), a **Combined Transport Bill of Lading (CTBL)** is issued. The MTBL and the CTBL can be used for both unimodal and multimodal transport contracts, for instance, to cover situations when transport which was originally intended to be performed as multimodal transport may turn out to be performed as a single transport mode only. The information in both the MTBL and in the CTBL are *prima facie* evidence of the taking in charge by the Multimodal Transport Operator of the goods as described by such information unless a contrary indication, e.g. "shipper's weight, load and count", "shipper packed container", or a similar expression, has been made in the printed text or superimposed on the MTBL/CTBL. Proof of the contrary is not admissible when the MTBL/CTBL has been transferred, or the equivalent electronic data interchange message has been transmitted to and acknowledged by the consignee who in good faith has relied and acted thereon. Apart from Multidoc's and

20 BIMCO is an independent international shipping association, with a membership composed of ship-owners, managers, brokers, agents and many other stakeholders with vested interests in the shipping industry. The association acts on behalf of its global membership to promote higher standards and greater harmony in regulatory matters. It is a catalyst for the development and promotion of fair and equitable international shipping policy. BIMCO is accredited as a Non-Governmental Organisation (NGO), holds observer status with a number of United Nations organs and is in close dialogue with maritime administrations, regulatory institutions and other stakeholders within the EU, the USA and Asia. The association provides one of the most comprehensive sources of practical shipping information and a broad range of advisory and consulting services to its members. http://www.bimco.org/Corporate%20Area/About/BIMCO_a_century_of_service.aspx

Combiconbill's negotiable versions – MTBL and CTBL -, there are also non-negotiable forms, respectively named MultiWaybill 95 and Combicon-Waybill.

- *FIATA Multimodal Transport B/L or "FBL" and FIATA Multimodal Transport Waybill or "FWB" of the International Federation of Freight Forwarders Associations (FIATA).*

The FIATA Multimodal Transport B/L or FBL is a document designed to be used as a multimodal or combined transport document with negotiable status. By issuance of this FBL, the freight forwarder (a) undertakes to perform and/or in his own name to procure the performance of the entire transport, from the place at which the goods are taken in charge (place of receipt evidenced in the FBL) to the place of delivery designated in the FBL and; (b) assumes the liability based upon FIATA Standard Conditions. These conditions are based upon the UNCTAD/ICC Model Rules for Multimodal Transport, according to which the information in the multimodal transport document is prima facie evidence of the taking in charge by the Multimodal Transport Operator of the goods as described in the Multimodal Transport Contract (unless a contrary indication, e.g. "shipper's weight, load and count", "shipper packed container", or a similar expression, has been made in the printed text or superimposed on the document). Proof of the contrary shall not be admissible when the multimodal transport document has been transferred, or the equivalent electronic data interchange message has been transmitted to and acknowledged by the consignee who in good faith has relied and acted thereon. We also quote the FIATA FBL Standard Conditions (1992): "3.2 *The information in this FBL shall be prima facie evidence of taking in charge by the freight forwarder of the goods as described by such information unless a contrary indication, such as "shipper's weight, load and count", "shipper-packed container" or similar expressions, has been made in the printed text of superimposed on this FBL. However, proof to the contrary shall not be admissible when the FBL has been transferred to the consignee for valuable consideration who in good faith has relied and acted thereon.*"

The non-negotiable version of this document is the **FIATA Multimodal Transport Waybill or FWB** - a document through the issuance of which the freight forwarder (a) undertakes to perform and/or in his own name to procure the performance of the transport, from the place at which the goods are taken in charge (place of receipt evidenced in the FWB) to the place of delivery designated in the FWB; and (b) assumes liability as a carrier as set out in FIATA's Standard Conditions. These standard Conditions (1997) lay down similar functions for FWB: "*The information in the FWB shall be prima facie evidence of the taking in charge by the freight forwarder of the goods as described by such information unless a contrary indication, e.g. "shipper's weight, load and count", "shipper packed container", or a similar expression, has been made in the printed text or superimposed on the FWB.*"

Both the FBL and the FWB can be used for unimodal and multimodal transport.

- *the CIM/UIRR Consignment Note and the CIM Consignment Note for Combined Transport*

As mentioned above, the transport documents issued under the COTIF/CIM Rules are, under some specific circumstances, multimodal transport documents. This is the case

when the COTIF/CIM rail rules apply uniformly to (i) the rail leg and the domestic road or inland waterways leg of multimodal journeys governed by a single contract; and to (ii) the rail leg and the domestic or international sea or inland waterways leg of multimodal journeys, when these supplementary legs are listed in the 1999 CIM List of Maritime and Inland Waterway Services. In these cases, the unimodal CIM consignment note is not used, but a multimodal transport document especially tailored for these purposes, either the **CIM/UIRR Consignment Note** or the **CIM Consignment Note for Combined Transport**.

Following the CIM Rules in 1999, the International Union of Combined Road/Rail Transport Companies (UIRR) in Europe adopted its own carriage conditions in a similar way as FIATA did with its Model Rules after the adoption of UNCTAD/ICC Rules for Multimodal Transport Documents. Consequently, the transport document used in Europe for combined rail/ road transport was **CIM/UIRR Consignment Note**. This multimodal transport document is still in use today.

However, in 2006, the International Rail Transport Committee created the **CIM Consignment Note for Combined Transport** to promote the combined transport and electronic trade (because the CIM Consignment Note for Combined Transport can be issued electronically). A manual with the specimen of the new transport document is available on The International Rail Transport Committee web-site²¹. The CIM Consignment note for Combined Transport provides evidence of the agency contract of carriage concluded between the combined transport undertaking and its customer and the CIM contract of carriage concluded between the carrier and the combined transport undertaking. In line with the COTIF/CIM Rules, the CIM Consignment Note for Combined Transport provides prima facie evidence of the conclusion and the conditions of the contract of carriage and the taking over of the goods by the carrier²².

Whether, in case of combined rail/road transport, a CMR consignment note or a CIM consignment note for Combined Transport is issued, depends on the type of haulage operation: in case of "mode on mode" or "piggyback" journeys – i.e. when the whole lorry accompanied by the driver is transhipped on the rail wagon - a CMR consignment note will be issued in accordance with Article 2 of the CMR Convention; in case of an unaccompanied transport operation, a CIM/UIRR Consignment Note or CIM Consignment Note for Combined Transport is issued.²³

(c) Relationship between transport documents and customs documents.

The transport procedure is normally made-up of various stages in which physical operations occur alongside paperwork:

21 <http://www.cit-rail.org/en/freight-traffic/glv-tc.html>.

22 CIOAREC Vlad, "CIM Consignment Note for Combined Transport: Rail Waybill or Combined Transport Document?" in Forwarder Law, 9 July 2007, http://www.forwarderlaw.com/library/view.php?article_id=461

23 CIOAREC Vlad, "When is CMR road consignment note acceptable as Combined Transport Document?" in Forwarder Law, 20 June 2007, http://www.forwarderlaw.com/library/view.php?article_id=454

1. Preparation of the goods labelling and packaging (seller),
2. Dispatch of goods to the carrier/forwarder (buyer or seller depending on chosen INCOTERM),
3. Checking the goods before departure (carrier/forwarder),
4. Outwards customs clearance (buyer or seller depending on chosen INCOTERM),
5. Checking the goods on arrival (buyer or forwarder), and
6. Inwards customs clearance (buyer or seller depending on chosen INCOTERM).

Transport documents are being prepared in stage 2, when the goods are dispatched to the carrier/forwarder. In stage 3, the carrier/forwarder checks the quantities, the nature and the apparent condition of the goods; these checks may lead to reservations noted on the transport document. Outwards customs clearance occurs at a later stage (stage 4) and requires the presentation of relevant customs documents. When goods are checked upon arrival in stage 5, transport documents again play a role, given that the received goods will be checked upon their conformity with the transport documents (number, weight, state, etc.) and due reservations will be noted on the transport documents in case of damage or missing items. Subsequently, at stage 6, inwards customs clearance will be carried out through the filing of relevant customs documents.

Transport documents and customs documents are two different sets of documents. Transport documents are commercial documents governing the relationship between the consignor/carrier/consignee. Customs documents, on the other hand, are documents required by the customs authorities for the purpose of customs clearance, i.e. all relevant formalities to obtain an authorisation to circulate goods within a customs territory, including the payment of all required charges, tariffs and other duties. However, national customs authorities may require that a copy of the transport documents be presented in annex to the customs documents, together with invoices and other documents to obtain customs clearance. We observe, in this context, that there is no need for customs clearance of cargo on international journeys within the EU because, with the exception of excise and goods in transit, goods travel duty-paid given that the EU is a Single Market.

Some transport documents require an indication of "custom endorsements" (CIM consignment note, CIM consignment note for combined transport, CIM/SMGS consignment note), "customs duties" (CMR consignment note) or "declared customs value" (Air Waybill); whereas others do not contain any reference at all to customs (CIM consignment note, B/L). However, the CIM consignment note, the CIM consignment note for combined transport and the CIM/SMGS consignment note are the only transport documents that are, at the same time, customs document. This signifies that, apart from their functions as commercial documents between the consignor/carrier/consignee, they also serve as customs documents vis-à-vis customs authorities for transit purposes.

We refer, in this context, to the Paper "*Interoperability and harmonization of conditions of different rail transport systems, transmitted by OTIF and the OSJD*" of 3 October 2006, in

which the Working Party on Rail Transport of the Economic Commission for Europe's Inland Transport Committee within the UN Economic and Social Council (ECE/TRANS/SC.2/2006/10) held that the CIM/SMGS consignment note model and its corresponding manual, which were approved in 2006 by the International Rail Transport Committee ("**CIT**"), the OSJD and the interested competent customs authorities, can be used both as a transport and as a customs document. The CIM/SMGS consignment note avoids the drawing-up of a new CIM or SMGS consignment note at the border between the geographic scope of the two regimes, thus allowing a saving in time and cost for customers and carriers. It also simplifies customs formalities at the external frontiers of the EU. At the Joint ECMT/UNECE Working Party/Group on Intermodal Transport and Logistics in Geneva in 2005, Mr. Evtimov, Legal Officer at CIT held a speech entitled "*Carriage of freight under the CIM & SMGS using a common CIM/SMGS consignment note*", in which he explained that the common CIM/SMGS consignment note provides evidence of the existence of both the CIM and the SMGS contract of carriage, and is recognized as a customs and bank document, which can be used without restriction in the customs territories in question.

A detailed analysis of all customs-related requirements in the respective transport documents is provided herewith:

- Under the **Budapest CMNI Convention**, there is an obligation upon the consignor to provide the carrier with instructions concerning the customs and administrative regulations applying to the goods.
- Under the **CMR Convention**, the instructions for customs purposes need to be mentioned on the consignment note, together with information on the customs duties for the carriage. In addition, the CMR Convention compels the consignor to assist the carrier for customs purposes, by attaching the necessary documents to the consignment note or placing them at the disposal of the carrier and by providing him with all relevant information. Moreover, in case of total loss and in proportion to the loss sustained in case of partial loss, the consignor needs to refund the carriage charges, customs duties and other charges incurred by the carrier in respect of the carriage of the goods (however, no further damage is payable).
- In a similar way, the **Warsaw and Montreal Conventions** require the consignor to provide all necessary information and attach all necessary documents to the air consignment note to allow the carrier to meet customs formalities. The Montreal Convention holds, in addition, that the consignor may be required to deliver a document indicating the nature of the cargo if such is needed for customs purposes.
- The **COTIF/CIM Rules** require the consignor to attach a detailed list of the documents required by customs or other administrative authorities to the CIM consignment note or to place them at the disposal of the carrier and to contain information on customs duties for carriage, in so far as they must be paid by the consignee (or any statement that the costs are payable by the consignee). Under the CIM/COTIF rules, unless otherwise agreed between the consignor and the carrier, customs duties are borne by the consignor. Importantly, the COTIF/CIM Rules contain an entire provision on the "Completion of

Administrative Formalities”, which reiterates that the consignor needs to attach the necessary documents to the consignment note or make them otherwise available to the carrier for customs purposes. It adds that the carrier is not obliged to check whether this information is correct and sufficient.

According to the COTIF/CIM Rules, the consignor may indicate in the consignment note or the consignee may give the order a) to be present himself or to be represented by an agent when the customs or other administrative formalities are carried out, for the purpose of furnishing any information or explanation required; (b) to complete the customs or other administrative formalities himself or to have them completed by an agent, in so far as the laws and prescriptions of the State in which they are to be carried out so permit; (c) to pay customs duties and other charges, when he or his agent is present at or completes the customs or other administrative formalities, in so far as the laws and prescriptions of the State in which they are carried out permit such payment. In such circumstances neither the consignor, nor the consignee who has the right of disposal, nor the agent of either may take possession of the goods.

If, for the completion of the customs or other administrative formalities, the consignor has designated a place where the prescriptions in force do not permit their completion, or if he has stipulated for the purpose any other procedure which cannot be followed, the carrier needs to act in the manner which appears to him to be the most favourable to the interests of the person entitled and needs to inform the consignor of the measures taken. If the consignor has undertaken to pay customs duties, the carrier shall have the choice of completing customs formalities either in transit or at the destination place. However, the carrier may act in the manner which appears to him to be the most favourable to the interests of the person entitled if the consignee has not taken possession of the consignment note within the period fixed by the prescriptions in force at the destination place. The consignor must comply with the prescriptions of customs or other administrative authorities with respect to the packing and sheeting of the goods. If the consignor has not packed or sheeted the goods in accordance with those prescriptions, the carrier is entitled to do so; the resulting cost shall be charged against the goods.

Finally, the COTIF/CIM Rules stipulate that, in case of loss, the carrier must refund customs duties already paid in relation to the carriage of the goods that have been lost, except excise duties for goods carried under a procedure suspending those duties.

- The **Hague/Visby Rules** and the **Hamburg Rules** do not mention customs.

(d) Relationship between transport documents and liability issues.

To connect Section 3.2 “*Transport Documents*” with Section 3.3 “*Liability for loss, damage and delay on multimodal transport journeys*”, a reference needs to be made to the **relationship between transport documents and liability issues.**

Given that the clauses governing liability are incorporated in transport documents - which contain legal proof of the transport, its contents, its origins and its destination - both documentation and liability issues are unavoidably entangled. Harmonising transport documents and creating a single document without taking account of the underlying

liability regime is a hollow exercise and will not change anything to the current situation. Proof is that, at present, single transport documents already exist in the EU (e.g. the CMR consignment note when it is used for multimodal “piggy-back” transport, see below Section 3.3. (a)). Indeed, a transport document is only the “outer shell” of the terms and conditions agreed upon by the parties, where problems of uniformity reside. In other words, if any action were to be taken, liability should be dealt with first, and the issue of a single document should be deferred to a later stage.

We observe, in this respect, that a **uniform approach goes necessarily hand-in-hand with a single document**. By contrast, if any action were to be based on a **network approach, use could be made of a single or various transport documents**.

Finally, we recommend that the issue of **dematerialisation of transport documents in an electronic form** be dealt with **simultaneously with the transport document issue**. This is because an **electronic dematerialisation may eliminate the need for any documentation altogether**.

3.3 Multimodal carrier liability.

Carrier liability is the liability that carriers, forwarders and terminal operators bear with respect to loss of and damages to the goods and, for certain modes, delays in delivery of the merchandise. The rules governing carrier liability determine the scope of their duty to deliver and possible excuses from this duty.

In the same way as the documentation itself, different legal liability regimes have emerged historically for multimodal transport in function of the transport sector concerned, international frameworks, national legislations, contractual arrangements and industry solutions.

Given that the clauses governing liability are incorporated in the transport documents, - which contain legal proof of the transport, its contents, its origins and its destination - both documentation and liability issues are unavoidably entangled.

(a) Carrier liability regimes of the international unimodal Conventions and their multimodal applications.

At international level, **each transport mode** has developed its **own unimodal liability framework** over the years. The principles of carrier liability for international freight have evolved with time and each mode is governed by a set of international conventions establishing different liability regimes. Indeed, the conventions have different rules as regards liability requirements, exclusion clauses, required evidence, limits of liability, time bars for suit, etc. For example, the limits of liability for air carriers under the Warsaw Convention are 17 SDR/kg, whereas the limits for hauliers under the CMR Convention are 8.33 SDR/kg and for maritime carriers under the Hague/Visby Rules are 2 SDR/kg (or 666.67 SDR/package). Under the Hague/Visby Rules, the time limit for suit is 1 year, whilst the Hamburg Rules grant the possibility to sue for 2 years.

The international mode-based conventions are at the basis of the national transport liability regimes in the EU Member States, which have given rise to national case-law on the matter. The interpretation of the unimodal conventions in national case-law of one Member State may differ from the interpretation given by judges of another Member State. For example, German courts are more likely to conclude that the conduct of a CMR carrier amounts to wilful misconduct than Dutch courts²⁴ (this is because international conventions are transposed into national laws, to which a body of national case-law is attached, which has historically been developed over the years). Academics also advocate different interpretations of the international unimodal conventions²⁵. The academic world is, for example, divided on the correct scope of the CMR. Some academics agree with the judgment of the English Court of Appeal in the *Quantum Case*²⁶, whereas others dissent. Moreover, the application of these unimodal liability conventions may differ from one EU Member State to another because some Member States have ratified subsequent protocols, whereas others stick to the original version of the conventions, or because some Member States have incorporated the conventions into domestic law with minor nuances, or have decided not to incorporate them at all given the high level of similarity with their domestic law (e.g. in the UK, domestic road transport is not governed by the CMR but by UK law, whilst international road transport is governed by the CMR). The main international conventions are listed in the following table. We note that, when a contracting state ratifies/accedes to these conventions, they are of a mandatory nature.

24 HAAK and HOEKS, "Arrangements of Intermodal Transport in the field of Conflicting Conventions", University of Rotterdam, JIML 10 (2004) 5.

25 To avoid dual interpretation, any EU rules should provide for a clear definition of what is meant by "multimodal freight transport".

26 CA 27 March 2002, *Quantum Corp Inc v Plane Trucking Ltd* (2002) 2 Lloyd's Rep 25.

Sea	Air	Road	Inland Waterways	Rail
HAGUE RULES (BRUSSELS, 1924), amended by the VISBY RULES (BRUSSELS, 1968), as amended by SDR PROTOCOL (BRUSSELS, 1979) (CMI)	WARSAW CONVENTION (1929) (IATA)			
HAMBURG RULES 1978 (UNCITRAL)				
LONDON LLMC 1976, replacing the BRUSSELS CONVENTION (1957) and amended by LLMC PROTOCOL (1996) (IMO)	MONTREAL CONVENTION 1999, which will replace the WARSAW CONVENTION 1929, as soon as it is ratified by all Warsaw contracting states (IATA)	GENEVA CMR CONVENTION 1956 (UN)	BUDAPEST CMNI CONVENTION 2000 (UNECE)	BERNE COTIF CONVENTION (1980), as amended by the VILNIUS PROTOCOL (1999), in particular APPENDIX B (CIM RULES) (OTIF)
COGSA (US only) Title 46 of the United States Code, Appendix- Shipping, Chapter 28 Carriage of Goods by Sea, 1300 (1936)				

In **Annex 9** to the present report, a table of the main existing legislative unimodal regimes is included, with a summary analysis of the characteristics of their liability rules.

All unimodal international conventions establish mandatory levels of carrier liability, which frequently cannot be contractually altered to the detriment of the consignor or consignee. These liability limits therefore protect cargo interests with little bargaining power against unfair contract terms. The levels emerged historically and are essentially based on a **traditional understanding of the value of the transported goods** (e.g. goods transported by road are usually understood to be of a lesser value than goods transported by air). Consequently, the **liability levels vary from one convention to the other**. We observe that the limits of liability for the transport of merchandise carried by sea or inland waterways (2 SDR/kg or 666.67 SDR/package) are lower than those for carriage by road (8.33 SDR/kg), which are, in turn, lower than those for carriage by air or rail (17 SDR/kg).

Sea

The **Hague/Visby Rules** (Brussels (CMI) International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 25 August 1924, as amended by the Visby Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading in 1968 and the SDR Protocol in 1979) apply to every B/L relating to the carriage of goods between ports in different states if (a) the B/L is issued in a contracting state, or (b) the carriage is from a port in a contracting state, or (c) the contract contained in or evidenced by the B/L provides that these rules or legislation of any state giving effect to them are to govern the contract (irrespective of the nationality of the parties involved). Its scope is therefore limited to outbound carriage (i.e. when the port of loading is located in a contracting state) “from tackle to tackle” (i.e. from when the goods are attached to the tackle during loading until their detachment during unloading) for which a B/L must be issued. **The Hague/Visby Rules apply exclusively to unimodal transport.**

Pursuant to the 1979 Protocol, the maritime carrier liability limits were set at 666.67 SDR/package or unit or 2 SDR/kg gross weight, whichever is higher.

The **Hamburg Rules** (Hamburg (UN) Convention on the carriage of goods by sea of 31 March 1978) considerably broadened, clarified and simplified the scope of the Hague/Visby Rules²⁷. Where the Hague/Visby Rules apply to outbound carriage only, the Hamburg Rules apply to both outbound and inbound (i.e. when the port of unloading is located in a contracting state) carriage. Moreover, instead of applying “from tackle to tackle”, it applies

²⁷ The provisions of this Convention are applicable to all contracts of carriage by sea between two different States, if: (a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or (b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State, or (c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or (d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or (e) the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.

“from port to port” (i.e. it includes the placing of goods in stocks in terminals and warehouses at the port). However, contrary to the Hague/Visby Rules, **the Hamburg Rules also contain rules on multimodal transport combining maritime transport with another mode of transport**²⁸: in case of combined carriage performed partly by sea and partly by another mode of transport, its provisions apply only to the sea leg. In these multimodal situations, it applies the “network system” (see below, b: each mode is regulated by its own applicable liability rules) as follows: (i) a sea leg included in a multimodal contract is always regulated by the Hamburg Rules and (ii) the Hamburg Rules only apply to the sea leg and not to the other legs²⁹.

As regards the limits, the Hamburg Rules increased the maritime carrier liability limits to 835 SDR/package or 2.5 SDR/kg gross weight. Given that the Hamburg Rules have not been ratified by main shipping countries, their role is limited.

Finally, **the LLMC (London (IMO) Convention on limitation of liability for maritime claims of 19 November 1976**, replacing the Brussels Convention 10 October of 1957 and amended by the LLMC Protocol of 1996) applies whenever a ship-owner or any other person subrogated in his rights, seeks to limit his liability before the court of a contracting state or seeks to procure the release of an arrested ship/another property or the bail/another security within the jurisdiction of any such state. It sets the following limits on the liability of the ship-owner for loss of life or personal injury: 2 million SDR for small ships (not exceeding 2,000 gross tonnage), with the following additional amounts for larger ships: (i) 800 SDR for each ton from 2,001 to 30,000 tons; (ii) 600 SDR for each ton from 30,001 to 70,000 tons; (iii) 400 SDR for each ton in excess of 70,000. For property claims, it establishes the following limits: 1 million SDR for small ships (not exceeding 2,000 gross tonnage), with the following additional amounts for larger ships: 400 SDR for each ton from 2,001 to 30,000 tons; (ii) 300 SDR for each ton from 30,001 to 70,000 tons; and 200 SDR for each ton in excess of 70,000.

“COGSA” (US Code - Carriage of Goods by Sea Act) is not an international instrument *stricto sensu* but the US enactment of the Hague Rules, i.e. an extension of the mandatory application of the Hague/Visby rules to multimodal transport contracts including partial carriage of goods by the sea to or from the US. Section 1304 (5) of COGSA provides that a carrier may limit its liability to 500 US\$ (i.e. currently approximately 300 SDR)/package or, for not-packaged goods, 500 US\$/customer freight unit, unless the nature and the value of the goods have been declared by the shipper before shipment and inserted in the B/L.

Air

The **Warsaw Convention** (Warsaw (IATA) Convention for the Unification of Certain Rules Relating to International Carriage by Air of 12 October 1929) applies to all international carriage of persons, luggage or goods performed by aircraft.³⁰ It sets the limits of liability

28 Article 1 of the Hamburg Rules.

29 Article 4 of the Hamburg Rules.

30 It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

for air freight carriage at 17 SDR/kg. We note that **the Warsaw Convention also contains rules on multimodal transport combining air transport with another mode of transport**³¹: in case of combined carriage performed partly by air and partly by another mode of transport, its provisions apply only to the air leg. In these multimodal situations, it applies the “network system” (see below, b: each mode is regulated by its own applicable liability rules) as follows: (i) an air leg included in a multimodal contract is always regulated by the Warsaw Convention and (ii) the Warsaw Convention only applies to the air leg and not to the other legs on road, sea or inland waterways performed outside an airport (i.e. the Convention applies to carriage within the airport in the performance of the air transport contract, e.g. road transport of luggage)³²; (iii) the Convention expressly stipulates that the parties are allowed to insert conditions relating to other modes of carriage in the transport document of air carriage, provided that the provisions of the Convention are observed on the air leg; and (iv) the Convention applies to unlocalised damage or loss (*“if, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air”*³³). This Convention was amended by The Hague Protocol (1955), supplemented by the Guadalajara Convention as regards rules on International Carriage by Air Performed by a Person Other than the Contracting Carrier (1961) and amended by Additional Protocol no.1 (1975), Additional Protocol no.2 (1975), Additional Protocol no. 3 (1975) and Montreal Protocol no.4 (1975).

Its successor, the **Montreal Convention** (Montreal (IATA) Convention for the Unification of Certain Rules for International Carriage by Air of 28 May 1999) has the same scope as the Warsaw Convention and sets identical liability limits for air freight carriage. In addition, **the Montreal Convention contains the same rules as regards multimodal transport combining air transport with another mode of transport**³⁴. However, it contains the additional rule³⁵ that if a carrier entirely or partly substitutes the carriage by air by another mode of transport without the consent of the consignor, the carriage is presumed to be air transport. It is therefore important that any contract intended for air transport indicates whether the parties consent or not to the substitution of air transport by other modes of transport. Otherwise, the Montreal Convention will automatically extend its application to the alternative modes of transport.

Road

The **CMR Convention** (Geneva (UN) Convention on the Contract for the International Carriage of Goods by Road of 19 May 1956) applies to contracts for the carriage of goods by road in vehicles, when the place of taking over of the goods³⁶ and the place designated

31 Article 31 of the Warsaw Convention.

32 Article 18(5) of the Warsaw Convention.

33 Article 18(5) of the Warsaw Convention.

34 Article 38 of the Montreal Convention

35 Article 18(4) of the Montreal Convention.

36 *“It has been suggested that the expression “taking over” should not be given too literal an interpretation and that in the context of the CMR as a whole a carrier can become liable as a CMR carrier without any actual physical take over of the goods at all since*

for delivery, as specified in the contract, are situated in two different countries of which at least one is a contracting country (irrespective of the nationality of the parties). We observe that, in a similar way as the COTIF/CIM rail rules (see below), it is in force in the majority of the EU Member States, turning the CMR, in practice, essentially a European rather than an international convention. It limits the haulier's liability to 8.33 SDR/kg for total/partial loss of the goods. The compensation for damage to the goods is fixed at the amount by which the goods have diminished in value.

Importantly, the scope of **the CMR Convention is not limited to unimodal transport, but also covers some scenarios of multimodal transport combining road transport with another mode of transport**³⁷. In the first place, the CMR Convention does not require that the freight carriage by road is part of a journey exclusively performed by road, it also applies to a road leg included in a multimodal contract, relying upon the network system (see below, b.). This is the prevailing view of the majority of transport law authors³⁸, whilst a minority of authors opines the contrary.³⁹ In the second place, it creates a uniform system when goods are not unloaded from the road vehicle⁴⁰ (i.e. intermodal transport) which is carried in a Ro-Ro fashion by some other means of transport ("piggyback" or "mode on mode" transport, e.g. when a truck containing the goods is loaded on a ship after or before road carriage). Indeed, if loss or damage occurs on the non-road legs of such piggy-back journey, the CMR is also applicable to these non-road legs. In other words, the CMR applies its haulier liability limits uniformly to the road and the non-road legs of a combined "piggy-back" journey. However, there is one exception to the "piggy-back uniformity": if it is proved that the loss or damage on the non-road leg was not caused by the haulier but by an event that could only occur in the course of and by reason of the non-road mode (i.e. the loss or damage is localised as non-road), the CMR turns to the network system and refers to the unimodal liability regime that is applicable to the mode in question.

Inland Waterways

The **CMNI Convention** (Budapest (UNECE) Convention on the Contract of Carriage of Goods by Inland Waterways of 3 October 2000) applies to contracts of carriage by inland

the contracting party may subcontract the whole performance of its obligation to another. It is thought, however, that for the purposes of article 1 of the CMR, reference should be made in such case to the "taking over by the sub-carrier", but for the requirements set out in article 1 to materialize it would be necessary that delivery occurs at the end of the road carriage performed by that sub-carrier. Article 2 confirms this, for the journey by another mode does not prevent the CMR to apply because it is the road carrier who has undertaken the performance of the contract from the place of taking over to the place of delivery.", BERLINGIERI, Francesco, "Door to door transport of goods, can uniformity be achieved?", in Liber amicorum R. Roland, Brussels, 2003.

37 See Articles 1 and 2 of the CMR Convention.

38 And also applied by the English Court of Appeal in the *Quantum Case*, CA 27 March 2002, *Quantum Corp Inc v Plane Trucking Ltd* (2002) 2 Lloyd's Rep 25.

39 A divergent opinion exists, according to which the CMR Convention only applies when the entire journey is performed by road, see HOEKS, Marian "Multimodal carriage with a pinch of sea salt: door to door under the UNCITRAL draft instrument", Erasmus University of Rotterdam, 13 September 2007.

40 For the purpose of the CMR Convention, "vehicles" are defined as motor vehicles, articulated vehicles, trailers and semi-trailers as defined in article 4 of the Convention on Road Traffic of 19 September 1949.

waterways according to which the port of loading/place of taking over of the goods and the port of discharge/place of delivery are located in two different states of which at least one is a contracting party (irrespective of the nationality of the parties and of the nationality, place of registration, home port or type of vessel). The carrier's liability on inland waterways is limited to 666.67 SDR/package or other loading unit, or 2 SDR/kg weight, whichever is higher.

Similarly to the CMR Convention, **the scope of the CMNI Convention is not limited to unimodal transport, but also covers multimodal transport combining transport on inland waterways with another mode of transport**⁴¹. In the first place, the CMNI Convention does not require that the freight carriage on inland waterways is part of a journey exclusively performed on inland waterways, it also applies to an inland waterway leg included in a multimodal contract, relying upon the network system (see below, b.). This is the opinion of the Dutch Government, which "*acceded to the CMNI inter alia to remove legal obstacles to the development of inland waterway transport harmonisation and to foster the growth and integration of inland waterway transport into the multimodal transport system.*"⁴² However, on this point, opinions diverge. Some transport law authors, mostly German authors, consider that the CMNI Convention does not apply to inland waterway carriage which is part of a multimodal contract⁴³. In the second place, it creates a uniform system for combined inland waterways/sea carriages when (i) the cargo remains in the same vessel during the entire journey (i.e. no transshipment), (ii) the inland waterway leg is longer than the maritime leg and (iii) no maritime B/L has been issued in accordance with applicable maritime law.

Rail

The **COTIF** (Berne (OTIF) Convention concerning international carriage by rail, 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999), and in particular its **CIM Rules** in Appendix B to it (Uniform Rules concerning the Contract for International Carriage of Goods by Rail) applies to contracts of carriage of goods by rail when the place of taking over of the goods and the designated place for delivery are situated in (i) two different contracting states or (ii) two different States, of which at least one is a contracting state and the parties to the contract agree that the contract is subject to the CIM Rules, irrespective of the place of business or nationality of the parties. As set out above in relation to the CMR, we observe that COTIF/CIM rules are in force in the majority of the EU Member States, rendering them, in practice, European rather than global rules. As a general rule, the COTIF/CIM rules limit the rail carrier's liability to 17 SDR/kg gross mass. **The scope of the COTIF/CIM rules is not limited to unimodal transport, but also covers multimodal transport combining rail transport with land, sea and inland**

41 See Articles 1.1 and 2 of the CMNI Convention.

42 HOEKS Marian, "*Multimodal carriage with a pinch of sea salt: door to door under the UNCITRAL draft instrument*", Erasmus University of Rotterdam, 13 September 2007

43 A divergent opinion exists according to which the CMNI Convention only applies when the entire journey is performed on inland waterways, see HOEKS Marian, "*Multimodal carriage with a pinch of sea salt: door to door under the UNCITRAL draft instrument*", Erasmus University of Rotterdam, 13 September 2007.

waterways transport⁴⁴. In the first place, the COTIF/CIM rail rules apply uniformly to the rail leg and the road/inland waterways leg of multimodal journeys governed by a single contract, even when the goods are unloaded from the train (i.e. not only piggy-back journeys), but only to the extent that the supplementary road or inland waterway legs take places in a single state (whilst the rail leg may be international). Indeed, we observe that the uniform application of the COTIF/CIM rail rules is limited to domestic road or inland waterway legs in order to avoid conflicts between the COTIF/CIM Rules, on the one hand, and the CMR and CMNI Conventions, on the other hand. In the second place, the COTIF/CIM rail rules apply uniformly to the rail leg and the sea/inland waterways leg of multimodal journeys governed by a single contract, even when the goods are unloaded from the train (i.e. not only piggy-back journeys) and even when the supplementary maritime or inland waterway legs are international, when these supplementary legs are listed in the 1999 CIM List of Maritime and Inland Waterway Services⁴⁵.

The limited nature of the list and the need for a consignment note minimise possible conflicts between the COTIF/CIM Rules, on the one hand, and the maritime/inland waterway Conventions, on the other hand.

Annex 10 contains a table setting out the applicability of the international unimodal conventions in the EU, listing which EU Member States signed, ratified or acceded to the conventions.

(b) Multimodal carrier liability regimes.

Currently, there is **no uniform mandatory liability regime for multimodal transport, neither at global level, nor at European level**. Instead, different liability rules based upon **various international conventions** (the **international unimodal conventions set out above**, some of which govern multimodal carrier liability to a certain extent),

44 Article 1 of the CIM Annex to the COTIF Rules.

45 Article 38, §1 provides in this scenario of rail-sea or rail-inland waterway traffic that any contracting state may, upon request of a suitable note in the 1999 CIM List of Maritime and Inland Waterway Services, "add the following grounds for exemption from liability in their entirety to those provided for in Article 23 of the CIM Rules: a) fire, if the carrier proves that it was not caused by his act or default, or that of the master, a mariner, the pilot or the carrier's servants; b) saving or attempting to save life or property at sea; c) loading of goods on the deck of the ship, if they are so loaded with the consent of the consignor given on the consignment note and are not in wagons; d) perils, dangers and accidents of the sea or other navigable waters." The subsequent paragraphs provide the following: "§ 2 The carrier may only avail himself of the grounds for exemption referred to in § 1 if he proves that the loss, damage or exceeding the transit period occurred in the course of the journey by sea between the time when the goods were loaded on board the ship and the time when they were unloaded from the ship. § 3 When the carrier relies on the grounds for exemption referred to in § 1, he shall nevertheless remain liable if the person entitled proves that the loss, damage or exceeding the transit period is due to the fault of the carrier, the master, a mariner, the pilot or the carrier's servants. § 4 Where a sea route is served by several undertakings included in the list of services in accordance with Article 24 § 1 of the Convention, the liability regime applicable to that route must be the same for all those undertakings. In addition, where those undertakings have been included in the list at the request of several Member States, the adoption of this regime must be the subject of prior agreement between those States. § 5 The measures taken in accordance with §§ 1 and 4 shall be notified to the Secretary General. They shall come into force at the earliest at the expiry of a period of thirty days from the day on which the Secretary General notifies them to the other Member States. Consignments already in transit shall not be affected by such measures".

national laws (their status at 2001 has been compiled in an UNCTAD study⁴⁶), **(sub-) regional agreements** (multimodal liability rules enacted by the Andean Community⁴⁷, MERCOSUR⁴⁸, ALADI⁴⁹ and ASEAN⁵⁰) and **contractual arrangements** apply to each modal leg of multimodal freight transport.

Overall, for multimodal consignments, a consignor can either choose to “go the unimodal way”, i.e. to deal with a series of carriers and non-carriers (e.g. terminal operators⁵¹, warehouses, etc.) operating under separate contracts for each mode of transport in order to have his goods delivered to the consignee, or to “go the multimodal way”, i.e. to mandate one single intermediary – the multimodal transport operator – under a single contract to both choose the most suitable mode of transport and deal with all carriers and non-carriers involved in the consignment. If the consignor opts for the “multimodal” solution, the multimodal transport operator will act as a principal and will bear the legal responsibility for the entire transport chain, even when the goods are not under his control. In case of a claim, the cargo owner will not need to identify the liable carrier, terminal, etc. In the unimodal scenario, by contrast, the cargo owner will need to determine at which stage the damage occurred in order to be able to identify the liable carrier, terminal, etc. If he cannot determine at which stage of the transport chain the damage occurred, the cargo owner will likely need to sue all operators involved. However, even if the cargo owner manages to determine the stage at which the damage was caused and to identify the liable operator, this operator will often be a subcontractor whom the cargo owner does not know and whom the cargo owner needs to sue under a contract of which he ignores the terms.

If the consignor chooses to “**go the multimodal way**”, when facing **liability for loss, damage and delay on multimodal journeys**, there are two main approaches that can be used: on the one hand, the “**network approach**” and, on the other hand, the “**uniform approach**”. The key difference between both approaches is that the “network approach” is modal-based, whereas the “uniform approach” does not take account of transport modes. Finally, there is a compromise or middle-way between both systems, namely the “**modified approach**”. Various modified arrangements are possible, making the system “more uniform” or “more network-like”⁵².

46 UNCTAD SDTE/TLB/2, 25 June 2001, “Implementation of Multimodal Transport Rules”, <http://www.unctad.org/en/docs/posdtetlbd2.en.pdf>

47 Its full members are Bolivia, Colombia, Ecuador and Peru. In addition, there are a number of “associated members”, namely Chile, Argentina, Brazil, Paraguay and Uruguay, and two “observers”, namely Mexico and Panama.

48 Its full members are Argentina, Brazil, Paraguay and Uruguay and Venezuela. In addition, there is a number of “associated members, namely Bolivia, Chile, Colombia, Ecuador and Peru.

49 Its full members are Argentina, Bolivia, Brasil, Chile, Colombia, Cuba, Ecuador, México, Paraguay, Peru, Uruguay and Venezuela.

50 Its members are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

51 For fullness, we mention the 1991 UN Convention on the Liability of Operators of Transports in Terminals in International Trade on the liability of terminal operator for loss of/damage to goods involved in international transport while they are in a transport terminal (limit of 8.33 SDR/kg), as well as delays in delivery. Of all EU Member States, only France and Spain signed this Convention, which has not come into force.

52 UN CONFERENCE ON TRADE AND DEVELOPMENT, “Multimodal Transport: The Feasibility of an International Legal Instrument”, Report by the UNCTAD Secretariat, UNCTAD/SDTE/TLB/2003/1, 13 January 2003.

In a "**network system**", the transport document contains referrals to applicable liability rules (international or national legislative or contractual liability regimes, as interpreted by the relevant court or arbitral tribunal) for each modal leg during which liability may occur. Consequently, in a network system, the applicable liability rules depend on the identification of the unimodal stage of transport where the loss or damage occurs, i.e. the time and place of occurrence need to be proved. A set of "fall-back" provisions apply "by default" in cases where the loss or damage cannot be localised. These "fall-back" provisions are either determined contractually or by statute (needless to say, statutory rules provide for a higher degree of equal treatment between the parties, as they do not involve any bargaining, and of certainty, given their mandatory nature).

A network system presents the following characteristics:

- One of the advantages of the network system is that a single carrier – the multimodal transport operator – can be sued on the basis of a single contract. Also, conflicts with the existing international unimodal conventions are avoided. Through the use of "references", the system provides for flexibility in that the applicable regime is automatically adapted to revisions or amendments of the international unimodal conventions.
- Even though the consignor enters into a single contract with a single multimodal transport operator, the liability of this operator depends on the ascription of the loss or damage to a modal stage. Compared to a unimodal situation, the shipper gains certainty as to the liable party that he needs to sue and the terms of the contract under which he may sue. However, in the same way as in a strictly unimodal situation, the applicable liability rules will depend on the stage at which the damage occurred. This leads to lengthy proceedings to identify where the loss, damage or delay occurred, contrary to cargo-interests, and creates uncertainty, delays and expenses for the consignor. If the multimodal transport operator subcontracts the consignment partly or fully, he is exposed to similar uncertainty, delays and expenses in his relationship with the subcontractors. This is especially so because goods are often transported in locked and sealed containers, which are not opened until delivery. Moreover, problems to locate the loss or damage frequently occur on the point of transshipment from one mode to another mode or when goods are stored before, during or after moving them from one mode to another, i.e. stages that are particularly difficult to ascribe to one or another transport mode.
- Even though he knows who he will sue and under which contractual terms he will be able to sue, it remains impossible for the shipper to predict prior to the journey to which liability risks he is exposed because the contractual terms only provide him with a framework, which will be filled out with different liability rules in function of the modal stage where the loss or damage occurred. This unpredictability makes it more difficult to conclude an appropriate insurance coverage.
- It does not solve liability for delay in delivery. In effect, delay in delivery generally stems from an accumulation of previous, shorter delays throughout the journey and cannot be attributed to one or another transport stage.

An alternative system to the “network system” for multimodal transport liability is a **“uniform system”**, i.e. a system that does not rely upon referrals to external liability regimes but expressly sets out in the transport document a single liability regime to be applied to all modal stages of the multimodal journey. When applying a uniform system, the applicable liability rules do not depend on the unimodal stage of transport where the loss or damage occurred. Instead, the same liability rules apply to all incidences of loss or damage, irrespective of the modal leg during which they took place.

In the same way as under the multimodal network system, the consignor enters into a single contract with a single multimodal transport operator. However, by contrast with the network system, the liability of this operator does not depend on the ascription of the loss or damage to a modal stage but is governed by a single set of liability rules. Compared to a unimodal situation, the shipper not only gains certainty as to the liable party that he needs to sue and the terms of the contract under which he may sue, but also as to the applicable liability rules. In other words, the consignor gains in predictability of his liability risks, rendering it easier to conclude appropriate insurance coverage and his claims are simplified (no need to localise the loss or damage).

A uniform system presents the following characteristics:

- Similarly as under a network system, one of the advantages of a uniform system is that a single carrier – the multimodal transport operator – can be sued on the basis of a single contract. Moreover, this being its main difference from a network system, the multimodal transport operator can be sued on the basis of a single set of rules, irrespective of the transport mode. This brings about the additional advantage of creating a simple and transparent regime, given that the applicable rules are predictable from the outset (they do not depend on a localisation of damage/loss) and decreases friction costs deriving from costly and lengthy judicial procedures.
- A uniform regime does not completely solve the problems of uncertainty, delays and expenses of the network system. It only solves these problems for the consignor towards the multimodal transport operator but does not solve these problems for the multimodal transport operator towards his subcontractors. In effect, under a network system, the uncertainties of the consignor and the multimodal transport operator are identical. Under a uniform system, the liability of the multimodal transport operator is governed by a single set of liability rules but the liabilities of his subcontractors depend on the modal stage at which the damage or loss occurred. The multimodal transport operator may therefore frequently be liable for more than he can reclaim from his subcontractors. The uniform system consequently creates a liability gap, expressed by Professor Clarke in the following terms: *“Cases D(ii) and D(iii) would, however, be liable to give rise to the problem that the rules applying to a multimodal transport operator (MTO) were at variance with the modal rules applying to a performing carrier, causing a mismatch between the MTO’s liability to the cargo interests and the performing carrier’s liability to the MTO for the same loss or damage”*⁵³. On the other hand, one should also consider that this characteristic of

uniform regimes avoids that carriers take advantage of potentially less onerous liability rules.

- Whereas a pure multimodal network system does not conflict with unimodal conventions, given that it views the multimodal journey as a “sum of unimodal journeys” and refers to the respective unimodal conventions, a uniform or modified multimodal system may clash with unimodal conventions. This clash only occurs if the multimodal journey is considered as a chain of unimodal journeys: the uniform regime offers a single set of rules for the entire journey, whilst the unimodal regimes offer separate rules for each its modal legs. In this case, clear provisions on conflicts need to be incorporated in the multimodal rules. By contrast, if one considers the multimodal journey as a form of transport *sui generis*, it is not viewed as a “sum of unimodal journeys” and the unimodal rules never apply. Presently, both schools of thought co-exist among the contracting states to the unimodal conventions⁵⁴. For the Member States and academics who view multimodal transport as a transport *sui generis*, any new multimodal legislation would not clash with the unimodal conventions given that multimodal transport is not viewed as a sum of different unimodal transports. However, we observe that the very wording of the international unimodal conventions, when setting out their scenarios of multimodal application - see above in 3.3 (a) -, suggests that the authors of these conventions did not consider multimodal transport as a form of transport *sui generis*. As a result, any proposal for a unified multimodal regime will need to be carefully drafted to avoid clashes with the international unimodal conventions. A more detailed analysis of both the conflicts between international conventions and the conflicts between international conventions, on the one hand, and European secondary legislation, on the other hand, is provided for at the end of this section.

Given the disadvantages of both the network system and the uniform system, some regimes attempt to resolve these gaps by the application of a “**modified system**”. A modified system essentially seeks to provide a compromise or middle-way between a uniform and a network system. In a modified liability system, some rules apply irrespective of the unimodal stage of transport during which loss, damage or delay occurs, (e.g. rules on the time bar to sue) but the application of other rules (frequently the liability limits) depends on the unimodal stage of transport during which loss, damage or delay occurs. Various arrangements are possible, making a system more “uniform” or more “network-like”.

Both the 1980 UN Multimodal Proposal (see below, Section 3.5) and the UNCTAD/ICC Model Rules (see below, contractual rules) operate a modified system. However, whilst the system of the 1980 UN Multimodal Convention displays more resemblance with a “uniform” system, the UNCTAD/ICC Model Rules are more “network-like”.

54 SCHOMMER Tim, “*International Multimodal Transport: Some thoughts with regard to the scope of application , liability of the carrier and other conventions in the UNICITRAL Draft Instrument on the Carriage of Goods [wholly or partly] [by sea]*”, 2005.

As set out by UNCTAD, modified systems have the advantage that they may effectively provide a viable compromise between all parties, taking into account conflicting views and interests. However, it is also observed that the provisions of these systems are often relatively complex and *"may fail to appeal widely, as it provides neither the full benefits of a uniform system, nor fully alleviates the concerns of those who favour a network-system"*⁵⁵. Finally, modified systems generally fail to solve the difficulties deriving from liability for delays in delivery.

For fullness, we observe that a different classification of the available regimes is applied by Professor Clarke in his recommendations to the OECD Maritime Transport Committee, in which he suggests the following classification: (i) a network regime nominating one set of modal rules as "default" regime in case of uncertainties; (ii) a network regime with a specially devised multimodal default regime; (iii) a uniform regime for multimodal transport; and (iv) a uniform regime for both multimodal and unimodal transport⁵⁶.

In practice, the network approach is commonly used to tackle multimodal transport liability issues. As indicated above in Section 3.2, multimodal operators in the EU currently issue single transport documents for multimodal journeys (e.g. CMR). However, these "single" documents (i.e. one and the same document is used throughout the various modal legs) do not, in principle, comprise a "single" content as regards liability. Based upon the network approach, these single multimodal transport documents rely upon referrals per modal leg when tackling liability (i.e. different liability rules per modal leg).

In an attempt towards unification, the cargo sector has created **private, contractual rules** (e.g. UNCTAD/ICC Model Rules and FIATA Multimodal Waybills, as set out in detail below). The use of these contractual rules – which are only worth it where the cargo operators hold sufficient bargaining power – is widespread. However, even though they appear to simplify the resolution of liability issues, they are purely contractual, i.e. apply only if they are incorporated into a contract of carriage ("opt-in"). These rules generally stipulate that they override any conflicting contractual clause (e.g. clause 1.2 of the UNCTAD/ICC Model Rules), but, due to their very contractual nature, only take effect to the extent they do not contravene the mandatory provisions of international conventions (e.g. the mandatory unimodal conventions) or of national law. Hence, they are incapable of fully eliminating the uncertainty deriving from the international patchwork of unimodal carrier liability regimes.

In addition, though they increase legal certainty to some extent (filling the legal gaps left open by the conventions), it needs to be stressed that these industry solutions make use of a **modified approach, which is close to the network approach** and relies, in effect, upon the various unimodal regimes. The question therefore arises as to whether they present advantages for the shippers compared to the use of a set of individual, unimodal contracts. As regards the key element concerned with liability – i.e. the liability limits – the shipper gains nothing compared to a set of unimodal contracts, if the loss/damage is

55 UN CONFERENCE ON TRADE AND DEVELOPMENT, "*Multimodal Transport: The Feasibility of an International Legal Instrument*", Report by the UNCTAD Secretariat, UNCTAD/SDTE/TLB/2003/1, 13 January 2003.

56 CLARKE, "*Cargo Liability Regimes*", prepared for the OECD Maritime Transport Committee, January 2001.

localised: the limits are the same. However, when loss/damage is not localised, the shipper receives a minimum compensation (e.g. the Hague-Visby limit of 2 SDR/kg for contracts including carriage by sea or inland waterways, or the CMR limit of 8.33 SDR/kg for contracts that do not include carriage by sea or inland waterways) rather than nothing at all under a set of unimodal contracts⁵⁷. This benefit for the shipper is, nonetheless, tempered by corresponding variations in his cargo insurance, which may be vital in a unimodal arrangement but minimal in a multimodal arrangement.

The main contractual industry solution is contained in the **“UNCTAD/ICC Model Rules”** (UNCTAD/ICC Rules for Multimodal Transport) of 1992⁵⁸. Shippers and forwarders make widespread use of contracts, in which they incorporate these Model rules to a greater or lesser extent, e.g. (a) **“BIMCO Multidoc”** (Multimodal Transport Bill of Lading, 1995) and **“BIMCO Combiconbill”** (Combined Transport Bill of Lading 1995) of the Baltic and International Maritime Council, (b) **BIFA STC** (Standard Trading Conditions, 2005) of the British International Freight Association and (c) **“FIATA Multimodal Transport B/L”** (1997) of the International Federation of Freight Forwarders Associations. Finally, the **UIRR** (International Union of Combined Road-Rail Transport Companies) also adopted its own General Conditions (1999).

We observe that these contractual rules are to be classified as **“modified network systems”**. Indeed, clause 6.4 of the UNCTAD/ICC Model Rules stipulates that *“when the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the MTO’s liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.”*

The contractual industry solutions for multimodal liability are summarised in the following table. We observe that these rules are of a contractual, and therefore voluntary nature.

UNCTAD ICC MT RULES (1992)	BIMCO MULTIDOC 1995 (FORMER "COMBI DOC")	BIMCO COMBICON BILL (1995)	FIATA MT B/L (1997)	UIRR RULES (1999)	BIFA STC (2005)
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In **Annex 9** to the present report, a table of the main existing contractual regimes is included, with a summary analysis of the characteristics of their liability regimes. Their main characteristics as regards liability is that (i) a single multimodal transport operator

57 IM TECHNOLOGIES LIMITED, Final Report on *“The Economic Impact of Carrier Liability on Intermodal Freight Transport”*, London, 10.1.2001, for use and information of the European Commission, p.36.

58 The original version of the UNCTAD/ICC Model Rules was drafted in 1973.

assumes liability for the whole transport operation from pick-up to delivery, irrespective of the unimodal stage of transport during which loss, damage or delay occurs; and (ii) these contractual arrangements are essentially based upon the network approach, as indicated above.

Apart from the emergence of contractual model rules and frameworks with a view to solving the uncertainty linked to the complex and fragmented international liability framework governing multimodal transport, this uncertainty has also prompted the **enactment of national legislation** on the subject in various EU Member States (e.g. in The Netherlands and Germany).

- Dutch legislation⁵⁹:

Characteristics: The Dutch Civil Code regulates carrier liability for multimodal transport by applying a network system. If loss during multimodal transport can be localised, the specific rules of each transport mode applies. However, in cases of unlocalised loss, the Dutch Civil Code states that the multimodal transport operator is liable (unless the carrier proves that he could not be held liable under any of the possibly applicable liability regimes) and the liability rules apply that are most favourable to cargo interests, i.e. the liability rules of the transport mode providing for the highest amount of compensation to cargo interests. These rules are mandatory and any contractual arrangement to the contrary is considered null and void.

Scope: Articles 8:40 - 8:43 of the Dutch Civil Code (Burgerlijk Wetboek, Boek 8) do not specify their geographic scope. As a result, they may be applied to any multimodal carriage to which Dutch law applies. From the absence of geographic restrictions in Dutch law no conclusions may be drawn in relation to an international legal instrument, including EU law. Conflicts between different national laws are dealt with by the relevant rules on conflicts of law, i.e. the provisions of the Rome I Convention of 19 June 1980 on the Law applicable to Contractual Obligations (80/934/EC, OJ L266, 9.10.1980), soon to be replaced by Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation), which will apply to contracts concluded after 17 December 2009. This Regulation contains a specific provision for contracts of carriage: "*Article 5 - Contracts of carriage: 1. To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.*" As to international law, including EU law, the international instrument itself ought to include provisions that prevent conflicts with other international instruments. In international transport law, a restriction in geographic scope of the

59 Information verified by Professor VAN DER ZIEL, University of Rotterdam (Netherlands). See also, VAN BEELEN Anneliet, "Netherlands Report on Multimodal Transport", University of Leiden, Netherlands and the Report by the UNCTAD Secretariat, "Implementation of Multimodal Transport Rules – Comparative Table", UNCTAD/SDTE/TLB/2/Add.1, 9 October 2001.

transport itself is one of the manners by which one instrument may try avoiding conflicts with another instrument.

- German legislation⁶⁰:

Characteristics: German Transport Law underwent a substantial change by the entry into force of the new "Act of 25 June 1998 to Reform the Law on Freight, Forwarding and Warehousing" (hereinafter "Transport Law Reform Act") on 1 July 1998, which amended the German Commercial Code (HandelsGesetzBuch). While until then, each mode of transport had been subject to different rules, the Transport Law Reform Act introduced uniform rules, which are applicable to (i) all transport modes in their unimodal application, except for maritime transport⁶¹; and to (ii) multimodal transport, including multimodal transport with a sea leg, except in cases of localised damage (unless parties have contractually agreed to apply the uniform rules). The uniform rules introduced by the Transport Law Reform Act are very similar to the provisions of the CMR Convention. These rules apply a liability limit of 8.33 SDR/kg gross weight, similarly to the CMR Convention.

Section 452 of the third sub-chapter of the German Commercial Code contains specific provisions dealing with multimodal transport, under the title "*Carriage Using Various Modes of Transport*". As set out above, the uniform rules of the Transport Law Reform Act apply to multimodal transport, even when it includes a sea leg, when loss or damage is not localised (Section 452 (a) of the German Commercial Code). Section 452 (a) reads as follows: "*If carriage of goods is performed by various modes of transport on the basis of a single contract of carriage, and if, had separate contracts been concluded between the parties for each part of the carriage which involved one mode of transport (leg of carriage), at least two of these contracts would have been subject to different legal rules, the provisions of the first sub-chapter shall apply to the contract, unless the following special provisions or applicable international conventions provide otherwise. This also applies if part of the carriage is performed by sea.*"

Thus, the new Act adopts the "network system" of liability, making the uniform rules of the Transport Law Reform Act applicable to cases of non-localised damage (i.e. where the place of the occurrence of the loss or damage is unknown), while in cases of localised damage the liability of the carrier is to be governed by the legal provisions applicable to the specific mode of transport during which the damage occurred. Section 452 (a) states: "*If it has been established that the loss, damage or event which caused delay in delivery occurred on a specific leg of the carriage, the liability of the carrier shall, contrary to the provisions of the first sub-chapter, be determined in accordance with the legal provisions which would apply to a contract of carriage covering this leg of carriage. The burden of proving that the loss, damage or event which caused delay in delivery occurred on a particular leg of carriage is borne by the person alleging this.*" In this respect, it is important to underline that the burden of proof for localisation of the damage is borne by "*the person alleging this*". Generally, the case will be that, if the carrier is unable to prove that the loss or damage was caused on a specific part of the

60 Information verified by Ms. Beate CZERWENKA, German Ministry of Justice. See also UNCTAD, "*Implementation of Multimodal Transport Rules – Comparative Table*", Report by the UNCTAD Secretariat, UNCTAD/SDTE/TLB/2/Add.1, 9 October 2001; and CZERWENKA, "*Short exposé outlining the German regulation on multimodal transport contracts*", November 2008.

61 Under German transport law, special rules apply to maritime transport.

journey, he will be liable according to the uniform rules of the Transport Law Reform Act.

However, even in cases where loss or damage is localised, parties are allowed, by contractual agreements, to apply the uniform rules of the Transport Law Reform (Section 452 (d)(2)), either to some specified legs of carriage or to the whole carriage. If they apply this possibility to opt-in, the parties may further make use of the so-called "corridor provision" which allows parties to either decrease the liability limit of 8.33 SDR/kg gross weight to 2 SDR/kg gross weight or to increase these limits to 40 SDR/kg gross weight. Conflicts with the international conventions are avoided because (i) Article 452 HGB provides that the uniform rules will apply, "*unless international conventions provide otherwise*" and (ii) Article 452 d(3) HGB states that agreements purporting to exclude the application of a mandatory provision of an international convention binding on the Federal Republic of Germany applicable to a leg of carriage are ineffective.

Scope: The rules in Section 452 and following of the German Commercial Code do not require that the transport fully takes place in Germany or that the transport starts or ends in Germany. The rules apply in all cases where - on the basis of conflict of law rules - German law applies to the multimodal transport contract. As set out with respect to Dutch law, we refer to the Rome I Convention as regards conflicts of law rules. However, Section 449 (3) of the German Commercial Code stipulates that the liability rules for multimodal transport contracts governed by Section 452 of the German Commercial Code apply even if foreign law is applicable to the contract of carriage provided that the contract is performed in Germany.

Conclusion: Both the Dutch and the German system apply a network regime and refer to the unimodal conventions when loss can be localised. They provide for a fall-back regime when loss cannot be localised (the most favourable compensation to cargo interests under Dutch law and rules in most aspects identical with the CMR – for all modes except maritime transport - under German law). Dutch law is more likely to create uniformity because its rules are mandatory, i.e. contracts deviating from its rules are null and void. German law allows for contractual variations both to agree on higher or lower liability limits.

Finally, it is worth mentioning that a series of **(sub-) regional agreements of the Andean Community, MERCOSUR, ALADI and ASEAN** provide for similar solutions to multimodal carrier liability. We note that the ASEAN rules are only at a draft stage. The most striking feature of these regimes is that their respective scopes are not limited to the region concerned. They apply to all international multimodal transport contracts when either the taking in charge or delivery of the goods happens in their (sub-) region (i.e. outbound and inbound carriage from/to the (sub-) region). All four agreements do not only harmonise carrier liability but also carrier establishment requirements, by introducing a system of mutual recognition of multimodal transport operators. Furthermore, these (sub-) regional agreements are modified regimes close to the uniform approach, in line with the UN Multimodal Proposal 1980, i.e. they create a uniform framework and their reliance upon the network principle (through references to mandatory international conventions) is restricted to the liability limits. A single party, namely the multimodal transport operator,

is presumed liable for loss, damages or delay throughout the multimodal transport journey (exclusions are expressly listed in cases of *force majeure*, strikes, etc.). We note that, under the rules of the Andean Community, ALADI and the draft ASEAN rules, the multimodal transport operator is allowed to reverse this presumption of liability if he proves that he took all possible measures to avoid the loss, damages or delay. The uniform liability limits of each of the four regimes are the following:

- Andean Community, ALADI and draft ASEAN rules:
 - sea/inland waterways legs: 666.67 SDR/unit or 2 SDR/kg gross weight;
 - other legs: 8.33 SDR/kg gross weight.
- MERCOSUR:
 - Argentina: 400 Arg. Pesos/unit or 10 Arg. Pesos/kg gross weight;
 - other Mercosur countries: 666.67 SDR/unit or 2 SDR/kg gross weight.

However, these uniform limits make place for a network regime in case of localised loss in all regimes, except for the ALADI rules. Both the draft ASEAN rules and the MERCOSUR rules provide that a mandatory convention will prevail on its uniform liability limits if these conventions provide for a different limit. The Andean regime, by contrast, only gives way to mandatory international conventions if these conventions provide for a higher liability limit.

A schematic overview of the different international, regional and national liability regimes is provided in the following chart:

(c) Conflicts between international conventions and conflicts between international conventions and European secondary legislation.

In principle, conflicts between international conventions are solved by the UN Vienna Convention on the Law of Treaties of 1969. Its Article 30 "*Application of successive treaties relating to the same subject matter*" contains clear rules to solve these conflicts: generally speaking, if two states are party to an earlier unimodal convention and if the two become a party to a later multimodal convention, the multimodal convention applies because it happened later and the earlier unimodal convention needs to be interpreted in the light of the later multimodal one. We quote Article 30: "(2) *When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. (3) When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.*" However, if both states are parties to an earlier unimodal one but only one of them is a party to a later multimodal one, only the unimodal convention will apply (Article 30 (4) b).

The rules of the UN Vienna Convention on the Law of Treaties does not, however, fully solve the problem of clashes between the unimodal carrier liability conventions and a multimodal liability convention because of the very fact that not all parties to the unimodal/multimodal carrier liability conventions are parties to the UN Vienna Convention on the Law of the Treaties. In the EU, all Member States are contracting parties to this convention except France, Malta and Romania.

As regards possible conflicts between the existing international conventions, on the one hand, and new European secondary legislation (e.g. Regulations or Directives), two differentiations need to be made.

First, a differentiation needs to be made as to whether the international conventions in question have been concluded **prior** to the Member States' accession to the European Community or not. If this is the case (e.g. Warsaw Convention of 1929), any Community action should avoid preventing the Member States from fulfilling their obligations assumed at international level before accession. This principle is embedded in Article 307§ 1 of the EC Treaty reads as follows: "*The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.*" In other terms, new European secondary legislation on multimodal freight transport should avoid clashing with these conventions. This would especially be the case where these conventions stretch their application to some scenarios of multimodal transport (e.g. the Warsaw Convention contains rules on multimodal transport combining air transport with another mode of transport⁶²).

Second, as regards international conventions concluded by the Member States **after their accession** (e.g. the Budapest CMNI Convention for the Member States who acceded to the

62 Article 31 of the Warsaw Convention.

European Community before 2000), a differentiation needs to be made depending on whether the European Community is a party to the international convention or not. Indeed, the obligation for new European secondary legislation to respect international conventions concluded post-accession essentially depends on whether the European Community is a party to these conventions or not. In this respect, the ECJ has developed throughout its case-law a test to determine whether it needs to review the validity of secondary Community legislation in the light of international conventions. According to this test, the ECJ only considers itself competent to proceed to such review when (1) the Community is bound by the international unimodal conventions (Joined Cases 21/72 to 24/72 *International Fruit Company and Others* (1972)); and (2) the nature and the broad logic of the international convention do not preclude its review and its provisions are unconditional and sufficiently precise (Case C-344/04 *IATA and ELFAA* (2006)).

The first part of the test is met when the European Community is a party to the international convention. Hence the need to differentiate between international conventions to which the Community is a party and international conventions to which it is not a party. Of all the existing unimodal conventions (listed in **Annex 10** to the present study), there is only one to which the European Community is a party, namely the Montreal Convention 1999. The European Community is not a party to any of the other international unimodal conventions (e.g. CMR Convention). However, on 17 November 2003, the European Commission issued a Communication containing a Proposal for a Council Decision⁶³ on the conclusion by the European Community of the Agreement on the Accession of the European Community to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999⁶⁴. The Community's accession is permitted under Article 38 of the COTIF as amended by the Vilnius Protocol, which makes provision for the accession of regional economic integration organisations. The Vilnius Protocol therefore needs to have entered into force following ratification by at least two thirds of the COTIF signatories. Consequently, it is important that the EU Member States continue and complete the ratification procedure so that the Community may accede. The Draft Agreement was endorsed by the European Parliament on 10 March 2004⁶⁵.

63 On 28 March 2003, the Council authorised the Commission to enter into negotiations with the contracting parties to COTIF in order to reach agreement on the Community's accession to that Convention under an Agreement by virtue of Article 38 of the revised COTIF. The Council Decision included negotiating directives and instructions for the Community's accession to the COTIF. The Council Decision established a special committee, which met on 17 June 2003 to examine the negotiating position presented by the Commission. Consultation with the special committee produced observations and made it possible to forward a preliminary negotiating position to the Intergovernmental Organisation for International Carriage by Rail (OTIF). On 27 June 2003 a single negotiating session held at OTIF headquarters in Bern produced a joint draft Agreement text.

64 Not published, COM(2003) 696 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0696:FIN:EN:PDF> and http://www.citrail.org/index.php?eID=tx_nawsecured&u=0&file=fileadmin/user_upload/001_Dok_DE/.1_Personenverkehr/.00_COTIF/Rechtsstudie_060406202.pdf&t=1236066398&hash=338197da75d004e89cd36de81884fdcd; see also Bulletin of the European Union 11/2003, Transport 2/9, 1.4.73.

65 Bulletin of the European Union 3/2004, Transport 6/25, 1.4.66.

(i) Montreal Convention.

Reiterating the test, the ECJ is only competent to review the validity of any secondary Community legislation in the light of the Montreal Convention if (1) the Community is bound by the Montreal Convention; and (2) the nature and the broad logic of the Montreal Convention do not preclude its review.

(1) Is the Community bound by the Montreal Convention?

Yes. The European Community signed the Montreal Convention on 9 December 1999 on the basis of Article 300(2) of the EC Treaty, approved by Council decision 2001/539/EC of 5 April 2001 and it entered into force, as concerns the Community, on 28 June 2004. It is clear from Article 300(7) of the EC Treaty that the Community institutions are bound by agreements concluded by the Community and, consequently, that those agreements have primacy over secondary Community legislation. This is confirmed by well-established case-law of the European Court of Justice (hereinafter "ECJ") (Case C-61/94 *Commission v Germany* (1996), Case C-286/02 *Bellio Fratelli* (2004), Case C-311/04 *Algemene Scheepsagentuur Dordrecht* (2006), and Case C-308/06, *Intertanko and Others v Secretary of State for Transport* (2008)). Indeed, Article 300(7) of the EC Treaty states that "*Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States.*"

In addition, the ECJ confirmed expressly in C-344/04 *IATA and ELFAA* (2006) that the provisions of the Montreal Convention have been an integral part of the Community legal order as from its entry into force in June 2004. In doing so, it referred to its settled case-law (Case 181/73 *Haegeman* (1974) and Case 12/86 *Demirel* (1987)).

(2) Do the nature and the broad logic of the Montreal Convention, as disclosed by its aim, preamble and terms, preclude a review of secondary Community legislation in the light of its provisions?

In C-344/04 *IATA and ELFAA* (2006), the ECJ had to review the compatibility of secondary Community legislation (Regulation 216/2004 of 11.2.2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights) with the Montreal Convention and therefore expressly applied its two-fold test to the Montreal Convention.

The ECJ ruled that the second limb of the test was also met, i.e. that the nature and the broad logic of the Montreal Convention do not preclude the review of secondary Community legislation in the light of its provisions and that the provisions at hand (Articles 19, 22 and 29 of the Montreal Convention) were unconditional and sufficiently precise to allow for a review. In other words, it declared itself competent to review the validity of Regulation 216/2004 in the light of the provisions of the Montreal Convention.

Conclusion: According to the ECJ's case-law, any multimodal transport Regulation or Directive would need to be consistent with the provisions of the Montreal Convention in order to be valid. In the event that secondary Community legislation were to conflict with

the Montreal Convention, the ECJ would review the validity of the Regulation or Directive in question. In doing so, it would interpret the Montreal Convention in good faith in accordance with the ordinary meaning to be given to its terms and in the light of its object and purpose (as set out, for example, in its preamble)⁶⁶. We observe that the Montreal Convention's main object and purpose is to unify certain rules for international carriage by air as regards transport documentation, the parties' duties and the carrier's liability, the extent of the compensation for damage, combined carriage and carriage by air performed by a person other than the contracting carrier.

(ii) Other international unimodal Conventions.

Again, according to the above-mentioned test, the ECJ is only competent to review the validity of any secondary Community legislation in the light of the other international unimodal conventions if (1) the European Community is bound by these conventions; and (2) the nature and the broad logic of these conventions do not preclude their review.

(1) Is the Community bound by the other international unimodal conventions?

It is to be observed at the outset that the European Community is not a party to any of the international unimodal conventions except the Montreal Convention. Furthermore, and similarly to the situation of MARPOL 73/78 in Case C-308/06, *Intertanko and Others v Secretary of State for Transport* (2008), it does not appear that the Community has assumed, under the EC Treaty, the powers previously exercised by the Member States in the field to which the international unimodal conventions apply, nor that, consequently, its provisions have the effect of binding the Community (Case C-379/92 *Peralta* (1994)). In this regard, the international unimodal conventions can therefore be distinguished from GATT 1947 within the framework of which the Community progressively assumed powers previously exercised by the Member States, with the consequence that it became bound by the obligations flowing from that agreement (*International Fruit Company and Others*).

In line with the ECJ's rulings, even in case all Member States are party to the international unimodal conventions (e.g. the CMR convention), the Community cannot be bound by the rules set out therein - which it has not itself approved - in the absence of a full transfer of the powers previously exercised by the Member States to the Community, simply because all Member States are party to the conventions.

Since the Community is not bound by the international unimodal conventions, the ECJ would not review the validity of secondary Community legislation in the light of these conventions.

However, as is clear from settled case-law, when enacting secondary Community legislation, the powers of the Community must be exercised in observance of international

66 Article 31 of the Vienna Convention of 23 May 1969 on the Law of Treaties and Article 31 of the Vienna Convention of 21 March 1986 on the Law of Treaties between States and International Organisations or between International Organisations, which stipulate in identical wording that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." See also Case C-268/99 *Jany and Others* (2001).

law, including provisions of international agreements in so far as they codify customary rules of general international law (Case C-286/90 *Poulsen and Diva Navigation* (1992), Case C-405/92 *Mondiet* (1993) and Case C-162/96 *Racke* (1998)).

Any illegality of European secondary legislation, which the Community would adopt in contravention of the international unimodal conventions, would depend on whether the ECJ would consider them to be the expression of "*customary rules of general international law*"⁶⁷.

In those circumstances, it is clear that the ECJ would declare itself incompetent to assess the validity of secondary Community legislation that would conflict with the international unimodal conventions, even when they bind the Member States. However, in view of the customary principle of good faith, which forms part of general international law, and of Article 10 of the EC Treaty ("*Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty*"), it would be incumbent upon the ECJ to interpret the provisions of secondary Community legislation taking account of whether the Member States are party to these conventions.

Conclusion: According to the ECJ's case-law, any multimodal transport Regulation or Directive would not need to be consistent with the provisions of the other international unimodal conventions (or with the UNCITRAL Proposal, in the event that it were to be adopted) in order to be valid. However, in view of the customary principle of good faith, which forms part of general international law, and of Article 10 of the EC Treaty, the ECJ would take account of these conventions when interpreting the provisions of this Regulation or Directive.

3.4 Electronic Transport Documents.

An electronic format is especially problematic when its application concerns negotiable transport documents. Indeed, the question arises whether electronic records can be traded like negotiable transport documents. Can an electronic record carry out the same title-functions as a negotiable paper document, i.e. to protect the rights of the party who has financial interests in the goods and to facilitate the transfer of such rights? An additional concern is the court recognition of electronic substitutions of the paper transport documents.

Preliminary observations.

Before dealing with the current use of electronic documents in the transport of goods, two observations need to be made on the customary and financial scene.

67 Case C-308/06, *Intertanko and Others v Secretary of State for Transport*, par. 51.

First of all, a reference should be made to the progress that has been made on electronic systems as regards **customs** in the EU. We refer to Section 3.2 (c) as regards the relationship between transport documents and customs documents, which is marginal. The development of electronic transport documents does, therefore, not interfere with the ongoing developments for paperless e-customs. However, the latter developments are mentioned in the study for fullness, because of the fact that transport operators need to make sure that they comply with both customs and transport documents. Under Commission Decision No 70/2008/EC on a paperless environment for customs and trade⁶⁸, which entered into force on 15 February 2008, the Commission and the Member States commit themselves to set up **secure, integrated, interoperable and accessible electronic customs systems** for the exchange of data contained in customs declarations, documents accompanying customs declarations and certificates and the exchange of other relevant information. The objectives of these electronic customs systems are (i) to facilitate import and export procedures; (ii) to reduce compliance and administrative costs and to improve clearance times; (iii) to coordinate a common approach to the control of goods; (iv) to help ensure the proper collection of all customs duties and other charges; (v) to ensure the rapid provision and receipt of relevant information with regard to the international supply chain; and (vi) to enable the seamless flow of data between the administrations of exporting and importing countries, as well as between customs authorities and economic operators, allowing data entered in the system to be re-used. To attain these objectives, the Decision states that there should be a harmonised exchange of information on the basis of internationally accepted data models and message formats, re-engineering of customs and customs-related processes and the offering to economic operators of a wide range of electronic customs services enabling those operators to interact in the same way with the customs authorities of any Member State. In order to allow the smooth introduction of these changes, the Decision sets various deadlines:

1. By 15 February 2011: Member States shall, in cooperation with the Commission, establish and make operational the common customs portals providing economic operators with the information needed for customs transactions in all Member States;
2. By 15 February 2013: The Commission shall, in cooperation with the Member States, establish and make operational an integrated tariff environment enabling connection to other import and export related systems in the Commission and the Member States;
3. By 15 February 2011: The Commission shall, in partnership with the Member States in the Customs Policy Group, evaluate the common functional specifications for:
 - a framework of single access points, enabling economic operators to use one single interface to lodge electronic customs declarations;
 - electronic interfaces for economic operators enabling them to conduct all customs-related business;
 - single window services providing for the seamless flow of data between economic operators and customs authorities, between customs authorities

68 Commission Decision No 70/2008/EC of the European Parliament and of the Council on a paperless environment for customs and trade, OJ L 023, 26.1.2008, p.21.

and the Commission, and between customs authorities and other administrations or agencies.

4. Within three years of a positive evaluation of the common functional specifications, the Member States shall, in cooperation with the Commission, endeavour to establish and make operational the framework of single access points and the electronic interfaces.

In addition to the time limits, the Decision establishes the strategy and coordination mechanism for electronic customs systems, defines the Community and national components of the systems, and specifies the respective responsibilities and tasks of the parties concerned and to make provision as to how costs are to be shared between the Commission and the Member States. Regular reports by Member States and the Commission should provide information on the progress of implementation of this Decision.

Secondly, on the **financial arena**, we observe that, at present, when issuing banks emit L/Cs on behalf of the buyer, they either send it to the seller's advising bank by airmail or, more commonly, by electronic means such as SWIFT. Subsequently, the advising bank establishes the authenticity of the L/C using signature books or test codes. Issuing L/Cs by electronic means has been a standard practice for many years (SWIFT MT700 messages).

In this context, reference needs to be made to the **"eUCP" (electronic Uniform Customs and Practice for Documentary Credits)**, an electronic supplement to the **"UCP" (Uniform Customs and Practice for Documentary Credits)**, a set of rules used by bankers and commercial parties on the issuance and use of L/C in trade finance, standardized by the ICC⁶⁹. The eUCP was created upon the assumption that banks, transport and insurance industries were ready to utilise electronic commerce, but its usage to date has been minimal.

Current use of electronic formats of transport documents.

Reverting to the **current use of electronic formats of transport documents**, we note that the electronic format is – at least theoretically – already a reality for a variety of transport documents. In 2001, the **UNCTAD** Expert Meeting on Electronic Commerce and International Transport Services⁷⁰ stated that, under the existing legal framework, electronic alternatives to paper transport documents are not yet recognised as documents of title, even though some legislative initiatives were underway. However, an earlier **UNCITRAL** study had shown that electronic alternatives were capable of reducing costs associated with the delayed arrival of transport documents⁷¹. The stakeholder consultation in Section 6. below illustrates the current use of electronic solutions in day-to-day business.

69 BYRNE James E. and TAYLOR Dan, "ICC Guide to the eUCP", ICC Publication No. 639, 2002 Edition.

70 UNCTAD TD/B/COM.3/EM.12/2, part II, legal and documentary aspects, 2001.

71 UNCITRAL A/CN.WG.IV/WP.69, 1996

- *Evidencing "receipt" and "contract".*

In respect of the "receipt of the goods" and "contract of carriage" functions of the transport documents (see Section 3.2 above), there seems to be significant progress on electronic alternatives. There are web-based platforms offering secure services, which enable the commercial parties to generate customised standard form transport documents electronically or allow for remote printing of "original" documents issued by a carrier and transmitted electronically to the consignee's printer. Both the 1990 and the 2000 versions of the **Incoterms** allow the use of electronic data interchange messages if both the seller and the buyer have agreed on electronic communication. The **1996 UNCITRAL Model Law on Electronic Commerce**⁷² and the **1999 European Commission Directive on Electronic Signatures**⁷³ have been implemented in various Member States to remove legal barriers, such as requirements for "writing" "original" or "signatures", recognising the evidentiary effect of data messages, and allowing the incorporation by reference of the terms and conditions of the contract of carriage.

The 1996 UNCITRAL Model Law on Electronic Commerce is intended to facilitate the use of modern means of communications and storage of information. It is based on the establishment of a functional equivalent in electronic media for paper-based concepts such as "writing", "signature" and "original". By providing standards by which the legal value of electronic messages can be assessed, the UNCITRAL Model Law should enhance the use of paperless communication. The Model Law contains rules for electronic commerce in specific areas, such as carriage of goods and transport documents:

"Article 16. Actions related to contracts of carriage of goods.

Without derogating from the provisions of part one of this Law, this chapter applies to any action in connection with, or in pursuance of, a contract of carriage of goods, including but not limited to:

- (a) (i) *furnishing the marks, number, quantity or weight of goods;*
(ii) *stating or declaring the nature or value of goods;*
(iii) *issuing a receipt for goods;*
(iv) *confirming that goods have been loaded;*
- (b) (i) *notifying a person of terms and conditions of the contract;*
(ii) *giving instructions to a carrier;*
- (c) (i) *claiming delivery of goods;*
(ii) *authorizing release of goods;*
(iii) *giving notice of loss of, or damage to, goods;*
- (d) *giving any other notice or statement in connection with the performance of the contract;*
- (e) *undertaking to deliver goods to a named person or a person authorized to claim delivery;*
- (f) *granting, acquiring, renouncing, surrendering, transferring or negotiating rights in goods;*
- (g) *acquiring or transferring rights and obligations under the contract.*

Article 17. Transport documents

(1) Subject to paragraph (3), where the law requires that any action referred to in article 16 be carried out in writing or by using a paper document, that requirement is met if the action is carried out by using one or more data messages.

(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether

72 Adopted by UNCITRAL on 12 June 1996,
http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html

73 Directive 1999/93/EC on Electronic Signatures of 13 December 1999.

the law simply provides consequences for failing either to carry out the action in writing or to use a paper document.

(3) If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, that requirement is met if the right or obligation is conveyed by using one or more data messages, provided that a reliable method is used to render such data message or messages unique.

(4) For the purposes of paragraph (3), the standard of reliability required shall be assessed in the light of the purpose for which the right or obligation was conveyed and in the light of all the circumstances, including any relevant agreement.

(5) Where one or more data messages are used to effect any action in subparagraphs (f) and (g) of article 16, no paper document used to effect any such action is valid unless the use of data messages has been terminated and replaced by the use of paper documents. A paper document issued in these circumstances shall contain a statement of such termination. The replacement of data messages by paper documents shall not affect the rights or obligations of the parties involved.

(6) If a rule of law is compulsorily applicable to a contract of carriage of goods which is in, or is evidenced by, a paper document, that rule shall not be inapplicable to such a contract of carriage of goods which is evidenced by one or more data messages by reason of the fact that the contract is evidenced by such data message or messages instead of by a paper document.

(7) The provisions of this article do not apply to the following: [...]."

The extent to which the 1996 UNCITRAL Model Law on Electronic Commerce is capable of bringing about harmonization as regards electronic commerce depends on its support. To date, legislation implementing provisions of the Model Law has only been adopted in France (2000), Ireland (2000) and Slovenia (2000). In the US, by contrast, uniform legislation influenced by the Model Law and the principles on which it is based has been drafted (Uniform Electronic Transactions Act, adopted in 1999 by the National Conference of Commissioners on Uniform State Law) and enacted by the majority of the US States.

The 1996 UNCITRAL Model Law is a model law, i.e. it has been created as a suggested pattern for law-makers when adopting domestic legislation. States enacting legislation based upon a model law have the flexibility to depart from the text. This implies that the legislation of each state should be considered in order to identify the exact nature of any possible deviation from the Model Law. Moreover, the year of enactment indicated above (2000 for France, Ireland and Slovenia) is the year when the legislation was passed by the relevant legislative body; it does not address the date of entry into force of that piece of legislation, the procedures for which may vary from State to State, and could result in its entry into force some time after its enactment.

The UNCITRAL Proposal does not refer to or is not otherwise linked to the UNCITRAL Model Law because it probably aims at securing the highest number of signatures possible. However, the UNCITRAL Proposal is not incompatible with the UNCITRAL Model Law as it allows for electronic transport documents.

The **COTIF/CIM Rules** allow that consignment notes and their duplicates may be established electronically, performing the same function of "evidence" as the paper notes. The CIM Consignment Note Manual (GLV-VM) provides for the possibility of electronic

consignment notes in its Chapter D. These rules allow for electronic data records which can be transformed into legible written symbols, when the procedures for storage and processing are functionally equivalent to the paper system, particularly in so far as the evidential value of the consignment is concerned.

The **Budapest CMNI Convention** also accepts electronic data interchange and recognises electronic signatures of the transport documents, to the extent that the law of the state where it was issued allows it.

As regards air transport, the **Warsaw Convention** does not allow for electronic records of air consignment notes. However, in 1975, Montreal Protocol no. 4 to the Warsaw Convention allowed the substitution of paper air consignment notes by electronic records of the same ("*any other means which would preserve a record of the carriage to be performed*") with the consent of the consignor. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a receipt for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means. The more recent **Montreal Convention** provides for a similar authorisation to substitute traditional paper air waybills by electronic records. However, an important difference is that the consent of the consignor is no longer required for the use of electronic records.

It is in this context that the **IATA e-freight pilot project** needs to be placed, which has been operative since 2007. The project, which is not expressly set out in any IATA Convention, has been mandated by the IATA Board. It is an industry-wide initiative - involving carriers, freight forwarders, ground handlers, shippers and customs authorities - which is facilitated by IATA. To participate in IATA e-freight, a location (country or territory) must first pass a High Level Assessment (HLA) and a Detailed Level Assessment (DLA). Once these assessments are passed, the location is certified as "ready for IATA e-freight" and moves to the implementation phase. In the implementation phase, local stakeholders including ground handlers, airlines, freight forwarders, shippers and customs officials define an e-freight operational procedure (e-FOP) for that location. Once the e-FOP is in place, the location is ready to operate e-freight.

Turning back to legal frameworks, reference should be made to the recent progress of UNCITRAL on electronic communications, namely the **2001 UNCITRAL Model Law on Electronic Signatures** and the **2005 UNCITRAL International Convention on the Use of Electronic Communications in International Contracts ("2005 UNCITRAL e-Communications Convention")**, providing for a comprehensive legal framework for contracting in an electronic environment. Indeed, the 2005 UNCITRAL e-Communications Convention establishes the legal recognition of electronic communications in its article 8: "*8.1. A communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication. 8.2. Nothing in this Convention requires a party to use or accept electronic communications, but a party's agreement to do so may be inferred from the party's conduct*". As to formal requirements, the 2005 UNCITRAL Convention accepts electronic communications as "writings" if the information contained therein is accessible so as to be usable for subsequent reference

and lays down requirements related to reliable identification methods for electronic signatures, securing integrity (Article 9).

We observe that Article 2, §2 of the 2005 UNCITRAL e-Communications Convention ~~excludes transferable documents or instruments entitling the bearer or the beneficiary to claim the delivery of the goods or the payment of a sum of money~~ from its scope (e.g. a B/L transferring title of the goods). Indeed, Article 2, §2 stipulates that "*This Convention does not apply to bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money*". This means that the 2005 UNCITRAL e-Communications Convention applies to transport documents to the extent that the documents are ~~not negotiable and do not entitle the bearer or the beneficiary to claim the delivery of the goods or the payment of a sum of money~~. This would, for example, be the case of non-negotiable sea waybills or air waybills, given that they allow delivery of goods to the consignee upon satisfactory identification without the production or surrendering of a copy of the waybill.

The rationale of the exclusion of negotiable and similar transport documents from the scope of application of the 2005 UNCITRAL e-Communications Convention is set out in Report A/CN.9/571 of the Working Group on Electronic Commerce at its 44th Session (11-22 October 2004, Vienna), § 136: "*At that time, the Working Group resumed consideration of subparagraphs (f) and (g) of article 2 (see above, para. 66). It was also noted that the potential consequences of authorized duplication of documents of title and negotiable instruments—and generally any transferable instrument that entitled the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money—made it necessary to develop mechanisms to ensure the singularity or originality. Finding a solution for that problem, it was further recalled, required a combination of legal, technological and business solutions, which had not yet been fully developed and tested. The Working Group agreed that the issues raised by negotiable instruments and similar documents, in particular the need for ensuring their uniqueness, went beyond simply ensuring the equivalence between paper and electronic form and that, therefore, draft paragraphs 4 and 5 were not sufficient to render the provisions of the draft convention appropriate for those documents. The Working Group therefore agreed that the essence of article 2, subparagraphs (f) and (g) should be retained in a provision such as the following: «This Convention does not apply to bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts and other transferable instruments that entitle the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money.»"*

In a similar sense, the Explanatory Note to the 2005 UNCITRAL e-Communications Convention explains that the Convention does not apply to negotiable instruments or documents of title, "*in view of the particular difficulty of creating an electronic equivalent of paper-based negotiability, a goal for which special rules would need to be devised*" (§9) and "*because the potential consequences of unauthorized duplication of documents of title and negotiable instruments—and generally any transferable instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money—make it necessary to develop mechanisms to ensure the singularity of those instruments.*" (§80) The Note goes on to explain that "*The issues raised by negotiable instruments and similar documents, in particular the need for*

ensuring their uniqueness, go beyond simply ensuring the equivalence between paper and electronic forms, which is the main aim of the Electronic Communications Convention and justifies the exclusion provided in paragraph 2 of the article. UNCITRAL was of the view that finding a solution for this problem required a combination of legal, technological and business solutions, which had not yet been fully developed and tested" (§81).

However, one should not overlook the fact that Article 3 of the 2005 UNCITRAL e-Communications Convention allows parties to derogate from or vary its provisions. This implies that parties in the transport sector could bilaterally agree to contractually apply electronic communications to negotiable transport documents, such as B/L. This could also be done in a multilateral manner, when several parties decide to adopt system rules for the creation of a "closed" electronic commerce system, i.e. a system where access is granted to pre-screened entities⁷⁴ (e.g. a stock exchange electronic trading system, the booking system for plane tickets). In a closed electronic commerce system, users (who are usually identified) typically agree to a set of contractual rules when asking for admission to the system. When doing so, they may overrule statutory provisions, including those of the 2005 UNCITRAL e-Communications Convention. An example is **BOLERO** - "Bills of Lading Electronic Registry Organisation", which is explained in detail below in the next section "Evidencing title".

Finally, a reference needs to be made to the **2008 Additional Protocol to the Convention on the Contract for the International Carriage of Goods by Road (CMR) concerning the Electronic Consignment Note ("e-CMR Protocol")**⁷⁵, which allows that CMR-consignment notes, as well as demands, declarations, instructions, requests, reservations and other communications falling within the scope of the CMR be issued in an electronic format, provided that it complies with the Protocol's authentication requirements (electronic signature or any other electronic authentication method permitted by the law of the country where the e-CMR consignment note was issued) and other conditions (e.g. with respect to particulars). In these cases, the consignor is entitled, upon request, to a receipt identifying the cargo and to access to the electronic record.

- *Evidencing "title".*

The main challenge, however, is the replication of the document of title function⁷⁶, unique to B/Ls, in an electronic environment⁷⁷. Under existing national and international laws,

74 As opposed to an open electronic commerce system, where access is open to all (e.g. an internet website like Amazon.com). Today, in information technology terms, this difference tends to blur as more physically separated systems adopt open platforms, while applications on open platforms require some pre-screening for access.

75 <http://www.unece.org/trans/conventn/e-CMRe.pdf>

76 UNCTAD Report on the Use of Transport Documents in International Trade, 26.11.2003, UNCTAD/SDTE/TLB/2003/3.

77 This challenge is underlined by ZEKOS, Georgios I in his paper "The e-bill of lading contract: An e-standard form contract of carriage or merely an evidential document": "There is a need for simplification of the present complex electronic systems in order to accommodate not only the contractual role of electronic bills of lading but also the function of endorsement of electronic negotiable bills of lading as documents of title. The electronic signature has to become an electronic individual signature rather than an electronic programme prepared and sold by a company as it has established at the moment. The perception of electronic possession of a document of title (bill of lading) has to be introduced and understood as equivalent to physical possession of a paper bill of lading having the same functions of the paper bill of lading as a document of title regarding the transfer of property and the finance of international carriage of goods by sea and the international commerce".

legal rights are attached to the physical possession of the paper document. The ownership of the goods is entrenched in the physical possession of the original paper transport document. The **1996 UNCITRAL Model Law on Electronic Commerce** is aimed at the legal recognition of electronic alternatives as regards the transfer of rights and title. Its Article 17.3 and 17.4 read as follows: “(3) *If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, that requirement is met if the right or obligation is conveyed by using one or more data messages, provided that a reliable method is used to render such data message or messages unique. (4) For the purposes of paragraph (3), the standard of reliability required shall be assessed in the light of the purpose for which the right or obligation was conveyed and in the light of all the circumstances, including any relevant agreement.*” However, given that their effectiveness has been questioned, these provisions have received limited support to date.

In the absence of a uniform legal framework, several contractual approaches have developed electronic alternatives to documents of title. These include central registry systems, such as **SEADOCS Registry**⁷⁸ – a project of **INTERTANKO** (International Association of Independent Tanker Owners) and Chase Manhattan Bank, which has been abandoned since – and **BOLERO** (1998)⁷⁹ – created as a neutral, trusted third party providing for the transmission of secure authentic electronic messages between a central registry and successive parties, which does not, however, play a significant role to date (partly because it is only open to BOLERO members and because of the low limits on the central registry’s liability).

The **UNCTAD/ICC Model Rules** and the **BIMCO Multidoc and Combinconbill** provide that their multimodal transport documents can be replaced by electronic data interchange messages (if the applicable law allows it) with the same function of *prima facie* evidence as paper documents. The **BIFA STC**, the **UIRR General Conditions** and the **FIATA Multimodal Transport B/L** do not provide for this possibility. However, the **FIATA Model Rules for Freight Forwarding Services** expressly recognise the use of electronic

78 The system used a bank as a central registry, or more accurately described in this case as depository. The shipper deposited the paper bill of lading with the bank. The shipper was then issued with a code, similar to that of a pin code. The sale of the goods required the shipper to notify the bank as to the buyer’s name. The shipper provided the endorsee with a portion of the code, which it then communicated to the bank who physically endorsed the bill of lading. When the goods arrived at port, SEADOCS was to have transmitted an identifying code to the ship’s master, as well as to the last endorsee. The use of this code allowed the endorsee to obtain the goods. The system was not an EDI system in the true sense of the word as communication was done by telex. There were no operational problems with SEADOCS, however it failed to attract a sufficient number of traders and financial institutions to survive.

79 BOLERO is a consortium of carriers, traders, banks and telecommunications companies. A typical transaction works as follows: The carrier receives the shipping instructions electronically, and creates a BOLERO Bill of Lading (“BBL”). This is then digitally signed by the carrier and is sent back to the carrier via the registry. The registry then authenticates the message by checking the carrier’s digital signature and by adding its own electronic signature, sets up a record of the BBL, giving it a unique reference number and passes it on to the shipper. Once the shipper confirms that he accepts the BBL via the registry, he becomes the first recorded holder. If the shipper or any current holder wishes to transfer the BBL, he sends a transfer request to the proposed new holder via the registry. If the proposed new holder accepts the BBL, he will become the new holder. The registry thus keeps a record of all transactions with respect to the BBL so it is easy to determine who the final holder is. The system has been altered so that the carrier is now involved in each subsequent endorsement of the BBL.

transport documents in some situations (e.g. consignee's notice of loss/damage at receipt).

Finally, the **Comité Maritime International ("CMI")** has been especially active in the area of electronic transport documents. In 1990, it adopted both the "CMI Uniform Rules on Sea Waybills" and the "CMI Rules for Electronic Bills of Lading". The "CMI Uniform Rules on Sea Waybills" provides for an authoritative central repository of information from where a carrier can obtain authentication of the claim of the "holder" of an electronic record. These rules were at the basis of other electronic alternatives (e.g. @GlobalTrade,⁸⁰). The "CMI Rules for Electronic Bills of Lading", on the contrary, have not received broad support from the industry. They provide a contractual framework for the substitution of B/Ls with electronic messages, by using electronic B/Ls without a central registry. The electronic B/L may be endorsed and negotiated by the use of a private key, unique to its holder. The CMI defined this private key as "*any technically appropriate form, such as a combination of numbers and/or letters, which the parties may agree for securing the authenticity and integrity of a transmission*".

3.5 Initiatives towards harmonisation of transport documents and liability for multimodal transport.

The main legislative proposals in the field of multimodal transport documentation and liability are summarised in the following table⁸¹. However, other initiatives are also included in this study. We note that the UN MT Proposal and the UNCITRAL Proposal are of a mandatory nature, whereas the ISIC Proposal is a voluntary regime.

80 For further corporate information see www.globaltradecorp.com. See also BRUNNER Raphael, in "Electronic transport documents and shipping practice not yet a married couple", ETL, 2008: "@GlobalTrade is run by Global Trade Corporation based in Toronto, Canada. It is working closely with different partners such as Adobe, Capgemini, Sitpro and Visa. [...] This system is based on electronic sea waybills and has its main focus on the letter of credit procedure. [...] Based on Sea Waybills @GlobalTrade is able to operate in an open system. Only buyers and the banks issuing letters of credit need to sign a multicontractual document with @GlobalTrade. The system is based on its own Rule Book, its User Agreement, UCP 500 (including eUCP) and Incoterms 2000. It further fully complies with the CMI Uniform Rules for Sea Waybills. The buyer who signs up with @GlobalTrade obtains a credit line or an eLC Card (electronic Letter of Credit Card) from its bank (which has to be a participating bank). Once signed up the buyer may apply for an electronic documentary credit by logging in the system of @GlobalTrade through its bank. He needs the beneficiary's agreement to the terms and conditions of the electronic documentary credit. The beneficiary will then be advised of the credit issuance by email including document instruction templates of the required documents already containing the relevant specific information. Based on these templates the beneficiary requests for the issuance of corresponding electronic documents by the respective trade service providers (carrier for electronic Sea Waybill, insurance for insurance policy etc.). The beneficiary then sends all electronic documents as an electronic message to the Documentary Clearance Centre, which is processing the documentary credit. Digital signatures including cryptographic technology secure all electronic messages. The system seems to run quite successfully in the North American trade. But it has two substantial disadvantages (i) It is only working if the trade transaction is financed by a letter of credit and (ii) it does not support any documents of title or negotiable documents."

81 Prior to these initiatives, some isolated steps had been taken as regards multimodal carrier liability: in 1911, a Draft Convention of the Comité Maritime International; in the 60ies, a Draft Convention of the International Institute for the Unification of Private Law; in 1969, the Tokyo Rules of the Comité Maritime International; and in 1982, the Draft Convention "Transport Combiné des Merchandises" of UNECE and the International Maritime Consultative Organisation.

UN MT PROPOSAL (1980)	ISIC PROPOSAL (2005)	UNCITRAL PROPOSAL (2008)
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(a) Initiatives at international level.

In 1980, a proposal for a United Nations Convention on International Multimodal Transport of Goods ("**UN Multimodal Proposal 1980**") saw the light, but has not prospered to date. Its scope is as follows: "*The provisions of this Convention shall apply to all contracts of multimodal transport between places in two States, if (a) The place for the taking in charge of the goods by the multimodal transport operator as provided for in the multimodal transport contract is located in a Contracting State, or (b) The place for delivery of the goods by the multimodal transport operator as provided for in the multimodal transport contract is located in a Contracting State*"⁸². The Proposal is intended to apply in a mandatory fashion to all multimodal freight consignments whenever the taking in charge or delivery happens in a contracting state, i.e. irrespective of the parties' nationality or domicile. This mandatory application does not impede consignors to choose not to "go the multimodal way" but instead to "go the unimodal way" to avoid its mandatory application, as the Proposal expressly recognises⁸³. Contrary to the UNCITRAL Proposal (see below), the UN Multimodal Proposal 1980 only applies to multimodal freight carriage and not to unimodal freight carriage.

The UN Multimodal Proposal 1980 is to be classified as "**modified uniform regime**"⁸⁴ (see 3.3 (b) above), which is a compromise between the uniform liability system and the network liability system. The Proposal envisages the issuance of a single multimodal transport document to serve the entire transportation period and provides for a uniform liability regime for international multimodal transport, whereby a multimodal transport operator assumes liability for the whole transport operation from pick-up to delivery, irrespective of the unimodal stage of transport during which loss, damage or delay occurs. However, one exception to the rule is foreseen, namely when, in cases of localised damage, the liability limits determined by reference to the applicable international convention or mandatory national law are higher than those of the proposal. In other words, the liability limits for non-localised damages are governed by uniform rules. Article 18 of the UN Multimodal Proposal 1980 provides the following limits: (i) if the journey involves sea/inland waterways legs: 920 SDR/package or other shipping unit or 2.75 SDR/kg gross weight, whichever is higher; (ii) if the journey does not involve sea/inland waterway legs: 8.33 SDR/kg gross weight. However, for localised damage, the Proposal applies the network principle to determine the liability limits. Article 19 of UN Multimodal Proposal 1980 refers to the liability limits of the applicable unimodal conventions or national law to the extent that these limits are higher than according to its uniform rules.

82 Article 2 of the UN Multimodal Proposal 1980.

83 Article 3 of the UN Multimodal Proposal 1980.

84 ASARIOTIS, BULL, CLARKE, KIANTOU-PAMPOUKI, MORÁN-BOVIO, RAMBERG, DE WIT and ZUNARELLI, "Intermodal transportation and Carrier Liability", June 1999, p.9, § 11.

In addition, the carrier's liability for delays is topped at 2.5 times the freight payable for the goods, to the extent that this does not exceed the total payable freight under the multimodal contract. Given its modified nature, the Proposal does not harmonise the monetary limits of liability.

Given that it is not a pure network system but a modified uniform system, there is a possibility that the UN Multimodal Proposal 1980 conflicts with unimodal conventions and therefore requires conflict provisions (see Section 3.3 (b) above). These conflict provisions are found in its Articles 30(4) and 38. Article 30(4), on the one hand, ensures that no conflict arises with multimodal transport governed by the CMR (e.g., as seen in Section 3.3 (a) above, the CMR "piggy-back" application) or by the COTIF/CIM rules (e.g., as seen in Section 3.3 (a) above, the COTIF/CIM application to both rail legs and listed sea/inland waterways leg of multimodal journeys). Article 38, on the other hand, ensures generally that no conflict arises with other international conventions: when two states are parties to an international convention and only one of them is a party to the UN Multimodal Proposal 1980, the court/arbitral tribunal may apply the former. The reason for this provision is that, as set out in Section 3.3 (b) above, there are two different schools of thought as regards the interpretation of a multimodal consignment. For the states that do not view it as a form of transport *sui generis*, but as a sum of unimodal legs, the inclusion of this *caveat* was necessary⁸⁵. This *caveat* has been held to considerably dilute the mandatory nature of the Proposal.

Even though nearly 30 years have elapsed since the adoption of the UN Multimodal Proposal 1980, it only has a small number of contracting states and has not entered into force⁸⁶. Its failure to attract broad international support has been attributed to a number of factors, e.g. the *caveat* of its Article 38 referred to above; its close ties to the Hamburg rules (the parties adopted a "wait-and-see" policy because they expected, at the time, that the Hamburg Rules would come into force); its innovative, uniform approach towards liability; its high monetary liability limits; the inclusion of customs provisions and the large number of ratifications required for its entry into force⁸⁷. It has, nonetheless, been used as a model for other multimodal transport initiatives. In the EU, the UN Multimodal Proposal 1980 has been signed by all Member States, except Cyprus, Malta, Luxembourg and Slovenia. However, it has not been ratified by any of the EU Member States.

In 2001, the United Nations Commission on International Trade Law ("**UNCITRAL**") established a Working Group on Transport Law, which has issued, since, several versions of a Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("**UNCITRAL Proposal**")⁸⁸. The UNCITRAL Proposal was adopted by the UN General Assembly on 11 December 2008. The UNCITRAL Proposal is primarily designed to cover sea carriage but applies also to multimodal contracts including a sea leg. That is the

85 SCHOMMER Tim, "International Multimodal Transport: Some thoughts with regard to the scope of application, liability of the carrier and other conventions in the UNICITRAL Draft Instrument on the Carriage of Goods [wholly or partly] [by sea]", 2005.

86 The UN Multimodal Proposal 1980 requires 30 contracting states to enter into force.

87 FAGHFOURI Mahin, "International Regulation of Liability for Multimodal Transport. In search of uniformity", WMU Journal of Maritime Affairs, 2006, Vol.5, No.1, 95-114.

88 http://www.uncitral.org/pdf/english/workinggroups/wg_3/convent_e.pdf

reason why it is often referred to as a “wet” multimodal transport liability regime. According to Article 5(1) of the UNCITRAL Proposal, it applies to “*contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State: (a) the place of receipt; (b) the port of loading; (c) the place of delivery; or (d) the port of discharge*”. The Proposal is intended to apply in a mandatory fashion to all unimodal (by contrast to the UN Multimodal Proposal 1980) and multimodal freight carriages, to the extent that there is a sea leg whenever the above requirements as regards the location of the taking in charge/delivery are met, irrespective of the nationality of the vessel or the parties. Its scope differs from the maritime regimes of The Hague/Visby (tackle-to-tackle unimodal, outbound carriage only) and Hamburg (mainly port-to-port unimodal, both inbound and outbound).

The liability regime proposed by the UNCITRAL Proposal is a “limited or minimal network regime”⁸⁹. It generally applies the network approach but fixes liability rules that apply “by default” in case of liability gaps⁹⁰. Indeed, the general liability rule is that the carrier is liable under the rules of the UNCITRAL Proposal⁹¹. This implies, with respect to the liability limits for loss or damage, a maximum value capped at the highest amount of 875 SDR/package or other shipping unit, or 3 SDR/kg gross weight, except when the value declared in the contract particulars and agreed by the parties is of a higher amount⁹². The carrier’s liability for delays in delivery is topped at 2.5 times the freight payable for the goods, to the extent that this does not exceed the limits for loss/damage⁹³. An exception to these general rules is provided for by Article 27 of the UNCITRAL Proposal, which states that, for loss or damage, localised in stages that precede or follow the sea leg, its general liability rules do not prevail over other mandatory international instruments that would have applied in the event of a separate, unimodal contract. In cases of unlocalised loss/damage or liability gaps, however, the general liability rules of the UNCITRAL Proposal apply. In other words, the UNCITRAL Proposal applies a network approach through its exception for non-sea legs prior or subsequent to its sea leg, but provides for a uniform set of liability rules for its sea leg, which serve as fall-back rules in all cases of non-localised loss/damage. The UNCITRAL Proposal is also a “limited network regime” to the extent that it provides for a uniform legal framework, except for the specific area of carrier

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HOEKS Marian, “*Multimodal carriage with a pinch of sea salt: door to door under the UNCITRAL draft instrument*”, Erasmus University of Rotterdam, 13 September 2007. p.12, STURLEY, Michael F. *The UNCITRAL carriage of goods convention : changes to the existing law*”, in CMI Yearbook 2007-2008, p. 257; KORKKA Marja, “*How cargo insurers deal with multimodal transport*”, Nordic Marine Insurance Days 2007; and ALCANTARA GONZALEZ José María, “*La Convención de NN.UU. sobre Transporte de Mercancías Total o Parcialmente por Mar: un instrument ·neoncon· sobre responsabilidad del portador*”, XIII Congreso de Derecho Marítimo Instituto Iberoamericano de Derecho Marítimo, Montevideo, 10-12 November 2008.

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According to DELEBECQUE of the University of Paris-I (Panthéon-Sorbonne) in “*The New convention on international contract of carriage of goods wholly or partly by sea: a civil law perspective*”, CMI Yearbook 2007-2008, p. 264: “[...] the carrier liability is still, in our opinion, a strict liability, given that the carrier could not withdraw his liability if the cause of damage is unknown. But, probably, the divergences of interpretation about such and such excepted case will remain (e.g. on the perils of the sea; on the “*fait du prince*”) or still on the “*in concreto*” or “*in abstracto*” appreciation of the personal and qualified fault within article 63.2.”

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Article 17 of the UNCITRAL Proposal.

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Article 59 of the UNCITRAL Proposal.

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Article 60 of the UNCITRAL Proposal.

liability (limits, time for suit, etc.). Indeed, its network approach for the non-sea legs preceding or following the sea leg as set out above is limited to the specific area of the carrier's liability, liability limits, or time for suit and does not apply to other areas of law.

A peculiarity of the UNCITRAL Proposal is that it not only governs the liability of the carrier, i.e. the operator who concludes the contract of carriage with the consignor, but also of his maritime subcontractors, called "maritime performing parties" in the Proposal (either carriers or non-carriers, e.g. terminals). The "performing party" is defined in Article 1.6 as a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control. However, it is important to note that "non-maritime performing parties" are expressly excluded from the application of the regime (Article 1.7 and 19). In other words, it does not apply to inland performing parties (e.g. rail, truck and barge carriers). Claims made directly against these inland carriers would continue to be covered by whatever national law applies to them⁹⁴. The argument was raised that it would be unfair to base the liability of inland performing parties on the UNCITRAL Proposal because these parties are often not aware that they perform part of a multimodal "wet" carriage⁹⁵. Given that the UNCITRAL Proposal does not expressly address the possibility of extending the contracting carrier's limitations of liability to inland subcontractors by agreement in the contract of carriage (the so-called "Himalaya clause-legal construction", i.e. a clause in a transportation contract purporting to extend liability limitations which benefit the carrier, to others who act as agents for the carrier such as stevedores or longshoremen), this practice would, according to Richard Gluck, presumably be permitted to continue to the extent that it is allowed by the law of the country in which the claim is brought against the inland carrier⁹⁶.

Similarly to the UN Multimodal Proposal 1980, the UNCITRAL Proposal requires conflict provisions because it is not a pure network system and because some states do not consider multimodal transport as a form *sui generis* but view it as a chain of unimodal legs (see 3.3 (b) above). We quote Ms. Czerwenka of the German Ministry of Justice in this sense: *"Even though a "network system" such as the one established in the UNCITRAL draft may reduce the risk of a conflict with other conventions that regulate contracts of carriage, the problem of conflicts of conventions will remain. Thus there may be a conflict with the 1956 Convention on the Contract of the International Carriage of Goods by Road (CMR) if the carrier undertakes to carry goods by a truck and by a sea-going vessel whereby the goods remain on the truck during the carriage by sea, since both the CMR, according to its Article 2, as well as the UNCITRAL instrument require their application. Furthermore there may be a conflict with the Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on 28 May 1999, the so-called Montreal Convention 1999, if the carrier performs a carriage by sea and by air, since the Montreal*

94 VAN DER ZIEL G.J., "Survey on History and Concept", in *Transportrecht*, vol. 27, July/August 2004.

95 CZERWENKA Beate, "Scope of the Application and Rules on Multimodal Transport Contracts", in *Transportrecht*, vol. 27, July/August 2004.

96 GLUCK Richard, "Report on UNCITRAL: Part 2: Specific Provision", 23 October 2008, http://www.forwarderlaw.com/library/view.php?article_id=528

*Convention, according to its Article 18 paragraph 4, as well as the UNCITRAL instrument require their application. In all these cases the question arises, which convention shall have priority.*⁹⁷

The conflict provisions of the UNCITRAL Proposal are quite complex. First of all, the limited nature of the UNCITRAL Proposal is already an attempt to avoid potential conflicts with existing mandatory international unimodal regimes as regards the non-sea legs of the multimodal journey (Article 26). As regards the sea legs of the multimodal journey, the UNCITRAL Proposal is unlikely to clash with the existing international unimodal maritime regimes because it requires the contracting states to denounce both the Hague/Visby Rules and the Hamburg Rules in its Article 89. Furthermore, likely conflicts with the LLMC Convention are avoided by Article 83, which expressly states that the UNCITRAL Proposal does not affect the application of "any international convention or national law regulating the global limitation of liability of vessel owners". Clashes between the UNCITRAL Proposal and the international unimodal conventions could, nonetheless, still occur insofar as the unimodal conventions provide for multimodal rules (see above, e.g. the CMR multimodal rules for piggyback carriage)⁹⁸. That is why Article 82 of the UNCITRAL Proposal provides for the following general conflict rule: "Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods: (a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage; (b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship; (c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or (d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea." This provision represents, therefore, a considerable caveat, which dilutes the effect of the UNCITRAL Proposal in a similar way as the caveat of Article 38 of the UN Multimodal Proposal 1980.

97 CZERWENKA Beate, "Scope of Application and Rules on Multimodal Transport Contracts" , in "The UNCITRAL 's Attempt towards Global Unification of Transport Law: The CMI Draft Convention on the Carriage of Goods by Sea and its Impact on Multimodal Transport", Transportrecht, July-August 2004, p.297.

98 In this sense, the article "UNCITRAL's Attempt towards Global Unification of Transport Law: The CMI Draft Convention on the Carriage of Goods by Sea and its Impact on Multimodal Transport" (Transportrecht, July-August 2004) states that "even though a "network system" such as the one established in the UNCITRAL draft may reduce the risk of a conflict with other conventions that regulate contracts of carriage, the problem of conflicts of conventions will remain. Thus there may be a conflict with the 1956 Convention on the Contract of the International Carriage of Goods by Road (CMR) if the carrier undertakes to carry goods by a truck and by a sea-going vessel whereby the goods remain on the truck during the carriage by sea, since both the CMR, according to its Article 2, as well as the UNCITRAL instrument require their application. Furthermore there may be a conflict with the Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on 28 May 1999, the so-called Montreal Convention 1999, if the carrier performs a carriage by sea and by air, since the Montreal Convention, according to its Article 18 paragraph 4, as well as the UNCITRAL instrument require their application. In all these cases the question arises, which convention shall have priority?"

The proposal has been subject to a lot of controversy on the European scene because of its complexity⁹⁹ – making it difficult to assess liability in advance - and because it establishes a “**limited network approach**”, does not channel liability to a single operator responsible throughout the multimodal transport chain (implying a need to identify the “liable” party), excludes non-maritime performing parties (in order to avoid conflicts of law with the non-maritime unimodal conventions) and applies maritime liability rules “by default” in cases of non-localised damage/loss or if no mandatory international regime applies¹⁰⁰. On the last point, the peculiarity of the proposed regime is that in these cases, maritime liability rules apply to the entire multimodal transport, even if the sea leg is negligible and the transport is foremost carried out by land/air. Due to this controversy, its entry into force is doubtful. We quote Professor Delebecque about the UNCITRAL Proposal in this context: “*Cette Convention n’est pas parfaite, mais l’on comprendrait mal que les européens veuillent une nouvelle fois se singulariser en rejetant d’un revers de main un texte longuement discuté et élaboré patiemment au fil de nombreuses sessions, sous prétexte que les camions vont aller dans les bateaux et que la CMR doit les accompagner*”¹⁰¹. It has to be noted, for fullness, that the European Commission was an observer at the UNCITRAL deliberations.

Finally, we observe that, since the 50’ies, both UNECE and UNCTAD have been actively involved in multimodal transport issues tackling liability and documentation. Within UNECE, a Working Party on Intermodal Transport and Logistics (WP.24) was created in 1951, aimed at being a pan-European forum for the exchange of technical, legal and policy information as well as best practices on combined and intermodal transport for the preparation of policy advice and for the negotiation and administration of multilateral legal instruments. Its objective is to promote combined and intermodal transport in the 56 UNECE member countries and to ensure a “*maximum utilization of equipment, infrastructure and terminals used for such transport*”. This Working Party has assisted industries and transport policy makers in some legal areas such as liability provisions for intermodal transport (in this area, the Working Party has developed several reports, e.g. “*Note by the Secretariat about the Reconciliation and harmonization of civil liability regimes in intermodal transport Excerpts of considerations by the Working Party*”, 9 January 2009, <http://www.unece.org/trans/wp24/wp24-official-docs/documents/ECE-TRANS-WP24-2009-03e.pdf>). UNCTAD is generally active on the multimodal front (see <http://r0.unctad.org/en/subsites/multimod/mt1home.htm>) and has drafted several reports, e.g. “*Multimodal Transport: The Feasibility of an International Legal Instrument*”, UNCTAD/SDTE/TLB/2003/1, 13 January 2003, reviewing the existing multimodal transport legislative framework and analysing the feasibility of a new international instrument, taking account of the views of all interested parties.

99 ASARIOTIS Regina, “*Main Obligations and Liabilities of the Shipper*”, in *Transportrecht*, vol. 27, July/August 2004: “*Unfortunately, many of the relevant provisions are rather complex and contain wording which leaves much scope for interpretation by contracting parties and courts alike*”.

100 E.g. CLARKE, HERBER, LORENZON and RAMBERG, ECORYS, “*Integrated Services in the Intermodal Chain Study*”, Final Report Task B, 28 October 2005, p.10.

101 DELEBECQUE Philippe, “*Les “autoroutes de la mer”: pour un régime entièrement (ou partiellement) maritime.*”, DMF 692, Mai 2008, 403.

(http://www.unctad.org/en/docs/sdtetlb20031_en.pdf); and "Implementation of Multimodal Transport Rules".

(b) *Initiatives at European level.*

The 1999 Study considers that, **in the long run**, an international convention would be the ideal solution to ensure uniformity of carrier liability. However, given the failure of the UN 1980 Multimodal Proposal, it considers that an international convention is probably not viable and recommends, consequently, a regional convention, conscious that such regional (e.g. European) convention would be subject to a similar *caveat* (however, to a lesser extent, given that there would be less parties involved at a mere EU-level and, therefore, potentially, more common interests). The Study also mentions the possibility of an interregional convention (e.g. EU-US convention) and holds that this would be politically difficult to reach, especially in view of the US COGSA legislation, which was being drafted at the time of the 1999 Study. At an EU-wide level, the Study also considers, apart from the possibility of a European convention, the possibility of European legislation (both directives and regulations are mentioned as possible legislative measures, but a preference is expressed for regulations, because of their direct applicability securing a higher likelihood of uniformity/harmonization).

Pending a long-term measure, the Study proposes **an interim solution**, namely to **temporarily** create a voluntary, contractual regime based on the CMR Convention. Quoting the Study: "A possible temporary solution may be to promote voluntary contractual adoption of the CMR, i.e. to ensure (by way of EC legislation) that contractual agreements providing for the application of the CMR to intermodal contracts (regardless of the stage of transport where a loss occurs) are legally binding in all member states and replace otherwise applicable national rules of law"¹⁰². In the opinion of the authors of the Study, this solution would be an ideal temporary solution because it can quickly be put in place given that the European transport industry is already well-acquainted with the CMR-rules ("the CMR is well-established and provides for liability (..) which (although low) is higher than in the maritime transport Conventions"¹⁰³. Moreover, the long-term solution of an international/interregional or European Convention "would take considerable time to develop and may eventually fail to become accepted by national parliaments", whereas the enactment of European legislation follows a quicker procedure and has the advantage of direct applicability (Regulations) or transposition into domestic law within a fixed deadline (Directives). "If sufficient political impetus exists, the development of an intermodal liability system by way of EC legislation may provide a more immediately viable regulatory option"¹⁰⁴.

This temporary solution of enacting EU secondary legislation would either have direct effect and prevail over national law in case of a Regulation, or oblige Member States to repeal, amend or otherwise align their domestic laws in case of a Directive. "This would eliminate some of the present uncertainty, although it would not affect the applicability of

102 ASARIOTIS, BULL, CLARKE, KIANTOU-PAMPOUKI, MORAN-BOVIO, RAMBERG, DE WIT and ZUNARELLI, "Intermodal transportation and Carrier Liability", June 1999, p.28.

103 Ibidem.

104 Ibidem, p.34.

mandatory Convention law¹⁰⁵". The Study states, in this respect, that "in order to avoid substantive conflict with existing mandatory liability regimes, a new non-mandatory regime should provide for liability in excess or established minimum levels¹⁰⁶". Finally, the 1999 Study is likely to be at the origin of the **BP2S Proposal** of 2008 (see below).

In 2005, the Integrated Services in the Intermodal Chain ("ISIC") Study¹⁰⁷, mandated by the European Commission, dedicated a chapter of its Final Report to "Intermodal liability and documentation" and stressed the need for an integrated legal regime. It therefore proposed a uniform liability regime to remedy the current situation ("**ISIC Proposal**"). The ISIC Proposal suggests a simple, streamlined and uniform non-mandatory regime, intended for being the basis for further discussion with the industry. The scope of the ISIC Proposal is not restricted to the territory of the EU, but includes transports to and from EU (Article 2 of the Proposal). This regime would be an "opt-out"-regime, i.e. it would apply by default unless the transport operators opt-out of it (however, if they do not opt-out, they are bound by it in its entirety and unable to amend it, except as regards its liability limits). The proposed regime channels all liability for loss, damage or delay to a "transport integrator", whose liability would be capped but would, as a *quid pro quo*, be strict or objective (i.e. no need to prove fault or negligence) except in cases of force majeure. Indeed, the limit on the transport integrator's liability for loss or damage would amount to the highest unimodal liability limit, i.e. 17 SDR/kg gross weight (a higher limit can contractually be agreed upon) and only exceptionally be unlimited in the case that he committed a "personal act or omission with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result" (Article 10 of the Proposal). However, the monetary limits for the transport integrator in relation to the transport operators that he subcontracts are not harmonised, which could lead to the unwanted effect that the transport integrator chooses to use modes where the level of compensation is high (e.g. rail or road) rather than using other modes (e.g. sea or inland waterways). The transport integrator's strict or objective liability signifies that, even if it is proved that the loss, damage or delay was caused in a particular unimodal leg that he did not operate, the transport integrator will equally be held liable for this loss or damage. Finally, we observe that the ISIC Proposal caps the transport integrator's liability for delays to twice the charge payable under the transport contract.

On possible clashes with the international unimodal conventions, the ISIC Proposal maintains that its regime would not likely be thwarted by the prevalence of mandatory unimodal rules, essentially because the unimodal rules (CMR, Hague/Visby and Montreal Convention) only apply to exclusively unimodal transport as opposed to the unimodal legs of a multimodal contract¹⁰⁸. It is in this sense that the comment under Article 1 of the ISIC Proposal should be interpreted: "*The Regime applies to contracts to perform or procure the transport of goods involving at least two different modes of transport. The Regime does not apply to*

105 Ibidem.

106 Ibidem, p.11, § 21.





107 CLARKE, HERBER, LORENZON and RAMBERG, ECORYS, "Integrated Services in the Intermodal Chain Study", Final Report Task B, 28 October 2005, http://ec.europa.eu/transport/logistics/consultations/doc/2006_03_31_logistics_consultation_task_b_en.pdf

108 Ibidem, p. 12 and 13.

the extent that a contract of transport is within the scope of unimodal regimes such as CMR, CMI, the Hague/Visby Rules or the Montreal Convention" page 16 of the ISIC proposal). From this reasoning, it can be inferred that the authors of the ISIC Proposal follow the school of thought according to which multimodal transport is not a sum of unimodal legs but rather a form of transport *sui generis*. The ISIC Proposal acknowledges, however, that its regime could collide with the COTIF/CIM Rules. Indeed, to the extent that the COTIF/CIM rail rules apply uniformly to rail legs and supplementary domestic road/inland waterways legs of multimodal journeys governed by a single contract, as well as to rail legs and supplementary domestic or international sea/inland waterways legs of multimodal journeys governed by a single contract and listed in the 1999 CIM List of Maritime and Inland Waterway Services, a conflict could arise. However, according to the authors of the ISIC Proposal, "this has been dealt with by assimilation of the main liability rules of the Regime to those of CIM, notably the monetary limit. (...) In any event it is believed by some that a clash is unlikely in practice because the Central Office for International Carriage by Rail (OCTI), which is responsible for listing services under CIM, is unlikely in future to list services if a listing would give rise to a clash with a multimodal regime that had been adopted by the EU"¹⁰⁹.

In February-March 2006, DG TREN organised a broad consultation of stakeholders on intermodal logistics, "Logistics for Promoting Freight Intermodality" and received over 100 contributions from the Member States and other stakeholders. In April 2006, the Commission organised a consultation workshop with approximately 70 participants, which showed divergent views on the matter¹¹⁰ and highlighted a need for further study. The consulted suppliers, for example, recognised that intermodal liability can be problematic, but that the market has a solution in offering multimodal bills of lading and multimodal waybills, whereas the consulted governments, public bodies and international organisations recognised the problem and the need for an international regime, but advocated to "wait-and-see" until the outcome of the UNCITRAL Proposal. Overall, the vast majority of stakeholders held that no action was needed on multimodal liability.

When presenting the results of the "Impact Assessment Study on the Proposal for a Communication on Logistics for Freight Intermodality"¹¹¹ on 25 April 2006, ECORYS qualified the impacts of intermodal liability as a neutral considering its economic, social, safety/security and environmental aspects, pictured in the following table:

	Economic	Social	Safety/security	Environmental
Intermodal liability				

109 Ibidem.

110 http://ec.europa.eu/transport/logistics/documentation/highlights/doc/2006_04_25_logistics_consultation_results.pdf, 25 April 2006.

111 http://ec.europa.eu/transport/logistics/documentation/highlights/doc/2006_04_25_logistics_ecorys.pdf

ECORYS added that, in theory, an impact on friction cost reduction was possible and that several lobby organisations representing many stakeholders did not think that an active role of the European Commission was needed.

In its June 2006 Communication "*Freight Transport Logistics in Europe – the key to sustainable mobility*"¹¹² to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, the European Commission expressed its determination to explore the possibility of a single multimodal transport document for the EU with a uniform approach towards liability:

*"Furthermore, the fragmented nature of liability regimes could be relieved by the use of a comprehensive transport document that would cover and simplify the entire carriage door-to-door (e.g. multimodal waybills or bills of lading). Further to a comprehensive liability solution for Europe, the Commission could also look into the added value of standardising a transport document for multimodal transport operations."*¹¹³,

The Commission made the following statements both on a one-stop-shop for multimodal transport documents and on multimodal liability issues:

"4.2.7. Promotion and simplification of multimodal chains

4.2.7.1. One-stop administrative shopping and "Common European Maritime Space" Logistics flows, in particular multimodal flows, can be assisted by one-stop administrative shopping or single windows where all customs (and other related) formalities are carried out in a coordinated way while the customer only has a single contact point with the administrations and submits the necessary documents only once. Also physical checks would be coordinated and happen at the same time in the same place. The Commission's proposal on a paperless environment for customs and trade¹² provides a framework that can achieve these results and simplify formalities. It now needs to be adopted and implemented as soon as possible. This is particularly important for shortsea shipping where a ship sailing between two Member States leaves the EU Customs territory each time it leaves a port to re-enter that territory in the destination port. In the recent Green Paper on a Future Maritime Policy for the Union, the Commission launched a wider debate on a "Common European Maritime Space" where both the ship's journey and goods could be reliably and securely tracked all the way along, thereby decreasing the need for individual controls in purely intra-Community trade. Promotion Centres and their activities. The Commission has considered this approach and started to explore ways to develop the existing network of 21 Shortsea Promotion Centres to also encompass the promotion of multimodal logistics solutions in inland transport chains.

112 Communication "*Freight Transport Logistics in Europe – the key to sustainable mobility*" to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM (2006) 336 final, Brussels, 28 June 2006 [http://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com\(2006\)0336_/com_com\(2006\)0336_en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com(2006)0336_/com_com(2006)0336_en.pdf)

113 Ibidem.

4.2.7.3. Multimodal liability

Responsibility and liability in international transport arise from international conventions. Often they provide different rules for different modes. This creates a complex multitude of regimes with subsequent friction costs in multimodal chains. Shippers do not consider liability to be a major problem, in particular, when they use outsourced logistics providers that manage liability. Insurance coverage can normally be obtained to cover a transport operation using more than one mode. The EU should participate in creating a multimodal regulatory structure at global level. Nevertheless, parallel to this work, the added value of an EU-wide liability solution that would best suit European needs should be studied. Furthermore, the fragmented nature of liability regimes could be relieved by the use of a comprehensive transport document that would cover and simplify the entire carriage door-to-door (e.g. multimodal waybills or bills of lading). Further to a comprehensive liability solution for Europe, the Commission could also look into the added value of standardising a transport document for multimodal transport operations.”

In June 2008, the **BP2S Proposal** (« *BP2S, Serving a European Ambition, Multimodal Transport Service* »)¹¹⁴ of the Shortsea Promotion Centre France saw the light. This proposal contains a blueprint for a single transport document, which would help overcome the current administrative hurdles to shortsea shipping and encourage a switch from road to sea.

The BP2S Proposal aims at attaining legal certainty as follows:

- (i) it governs door-to-door transport, irrespective of the transport mode and loading unit;
- (ii) it attempts to stay **as closely as possible to the CMR regime**, because transport operators are already familiar with this regime;
- (iii) it creates a **voluntary, contractual** regime (as opposed to the CMR);
- (iv) its **liability rules are based on the CMR convention**, supplemented by specific clauses for stowage, delivery, etc. (i.e. allowing for flexibility);
- (v) it proposes a **non-negotiable transport document, which would be a compulsory fall-back document applying when parties have not made different contractual arrangements, and would contain customer-friendly (“tick-the-box”) model insurance clauses**;
- (vi) it holds a **single operator liable** for the entire multimodal journey; and
- (vii) it allows for an **electronic version** of the transport document, referring to the existing Shortsea XML, a Marco Polo experiment supported by the European Commission.

However, no legislative action has been undertaken at EU level. As a result, the **current liability framework governing multimodal transport in the EU is highly fragmented and complex, creating uncertainty as to applicable liability rules to a given multimodal transport chain**. When planning a multimodal move of goods, shippers and freight forwarders have the choice to either opt for the unimodal or the multimodal way.

114 “BP2S – Serving a European Ambition – Multimodal Transport Service Simplification – Legal Certainty, a single transport document.”, Shortsea Promotion Centre France, June 2008.

We observe, as an aside, that any initiative of the European Commission in relation to multimodal transport documents and liability will necessarily need to go hand-in-hand with its initiative on the creation of a "European Maritime Transport Space without Barriers". Indeed, shipments of goods by the sea between the ports of the EU do not enjoy the benefits of an internal market. Instead, they are treated in the same way as shipments to third countries, i.e. involving many documentary checks and physical inspections by customs, health, veterinary, plant health and immigration control officials. In concrete terms, this has led to the paradoxical situation that a ship sailing from Antwerp to Amsterdam is considered leaving the EU customs territory in Antwerp to re-enter that territory in Amsterdam. The EU Maritime Transport Space without Barriers aims to rectify this situation. As announced in its Integrated Maritime Policy for the Union and Mid-term Review of the White Paper on Transport Policy, the Commission should present a legislative proposal on the matter in the forthcoming months¹¹⁵, taking account of the outcome of its stakeholder consultation (2007)¹¹⁶. Moreover, the Commission intends to publish a policy document in 2009 on the deployment of an "e-maritime approach" with a single window. Given that these initiatives will deeply alter and shape the maritime legs of multimodal transport chains, account will need to be taken of it in any legislative proposal on multimodal transport documents and legislation. Indeed, the Commission should ensure a streamlined and consistent approach between any legislative initiative on the multimodal and the maritime scene.

Similarly, any initiative of the European Commission on multimodal transport documents will need to take account of recent customs developments, namely the fact that Regulation (EC) no 648/2005 of 13 April 2005, amending Council Regulation (EEC) No 2913/92 establishing the Community Customs Code will require, as of July 2009, an electronic summary declaration for the import of goods to the EU and a customs declaration for the export of goods outside of the EU (also preferably in electronic format). The Regulation introduces 3 major changes to the EU Customs Code:

- It requires traders to provide customs authorities with information on goods prior to the import to or export from the EU (except for goods passing through by air or ship without a stop within the EU territory): a summary declaration for imports and a customs declaration for exports;
- It provides trade facilitation measures to reliable traders to whom the status of "authorised economic operator" is granted (based on compliance records, financial solvency, etc.); and
- It introduces a mechanism for setting uniform Community risk-selection criteria for controls, supported by computerised systems.

These changes to the Customs Code are further implemented in Regulation 1875/2006 of 18 December 2006, through the following measures:

- The introduction of a new risk management framework (i.e. the common EU risk management framework created in 2007 will be fully computerized by 2009).

115 Communication on a European Ports Policy COM (2007) 616 final.

116

http://ec.europa.eu/transport/logistics/freight_logistics_action_plan/doc/maritime/2008_consultation_results_maritime_space_withoutbarriers_en.pdf

- Criteria to grant the status of “authorised economic operator” (these criteria entered into force in 2008).
- The introduction of the requirement to provide pre-arrival and pre-departure information 2 hours in advance to the customs authorities on all goods imported to or exported from the EU, applicable as of 1 July 2009; and
- Facilitation of electronic information exchange between customs authorities (“e-customs project”).

Finally, we observe that any initiative by the European Commission on multimodal liability will clearly need to delineate, especially in case of a mandatory liability system, how it relates to the INCOTERMS. The INCOTERMS - a set of international commercial terms commonly used in the transport sector - do not only determine where the merchandise should be delivered (Ex Works, Free Carrier, Free Alongside Ship, Free On Board, Delivered Ex Ship) or who should pay the customs duties (Delivered Ex Quay, Delivered Duty Unpaid, Delivered Duty Paid) and costs (Cost and Freight, Cost Insurance and Freight, Carriage and Insurance Paid to, Delivered at Frontier). Some Incoterms also determine when the consignor’s liability for the carriage of goods ends and when the consignee’s liability for the carriage of the goods starts, and determine who should stand in for the insurance (Cost and Freight, Cost Insurance and Freight, Carriage and Insurance Paid to, Delivered at Frontier). Importantly, these terms only define the relationship between the seller/consignor and the buyer/consignee. However, its liability provisions may have an indirect impact on the carrier’s liability, who concludes a contract of carriage with the consignor. When a shipper delivers under E- or F-conditions (e.g. Ex Works), the goods cease to be under his responsibility when they leave his premises. In other words, the shipper only commits himself to deliver the goods to the buyer without bearing risks. In these cases, if the cargo is lost or damaged, the shipper does, in principle, not need to compensate the buyer. Cargo insurance should therefore be taken by the buyer and not by the seller. By contrast, when C- or D-conditions are used, the shipper bears the risk for the goods until delivery and will take cargo insurance.

We observe that an important contribution in this respect was received from Mr. Roos (see **Annex 5**), lecturer at Fenedex and at the University of ‘s_Hertogenbosch (The Netherlands) and author of “Incoterminology”. He explained that there are 2 situations where the use of certain transport documents, in combination with certain INCOTERMS, leads to paradoxical legal situations and interfere with payment conditions:

1) Where a B/L is used (essentially maritime carriage) in combination with an E- or an F-condition, the CAD (cash against documents) payment condition leads to a legal paradox. This is best explained by way of an example. If a Dutch seller sells his goods FCA (Free Carrier) to a UK buyer, the Dutch seller will have met his obligation to supply after the delivery of the container to the carrier and the UK buyer bears the risks for the rest of the freight transport until receipt. Upon arrival of the goods at the port, the Dutch bank will instruct the UK bank to pay the price for the goods. If parties had agreed that the CAD payment condition would be used, the UK bank should only agree to pay when it receives the transport document, i.e. the B/L. However, given that goods were sold FCA, the carrier handed the B/L over to the UK buyer (not to the Dutch seller). The UK bank does not need

to pay the cash to the Dutch bank given that the Dutch bank will never be able to show the B/L, which is already in the possession of the UK buyer. The UK buyer could, in theory, pick-up the goods at the port without having paid for them.

2) Where a B/L is used (essentially maritime carriage) in combination with an E- or an F-condition, the use of an L/C (letter of credit) leads to a legal paradox. This is also best explained by way of an example. Again, if a Dutch seller sells his goods FCA (Free Carrier) to a UK buyer, the Dutch seller will have met his obligation to supply after the delivery of the container to the carrier and the UK buyer bears the risks for the rest of the freight transport until receipt. Upon arrival of the goods at the port, the Dutch bank will instruct the UK bank to pay the price for the goods. If parties had agreed upon an L/C, the UK bank should only agree to pay if the Dutch bank can present a B/L whose terms are matching the terms of the L/C. However, given that goods were sold FCA, the carrier handed the B/L over to the UK buyer (not to the Dutch seller) and the Dutch bank will, as a result, never be able to present the B/L with matching terms, as it is already in the possession of the UK buyer. Again, the UK buyer can receive the goods without having paid for them.

It is therefore advisable that any action on carrier liability takes due account of the INCOTERMS and payment conditions. Any proposal for a single transport document should, with respect to its negotiable version, ensure that the seller obtains a "certified copy of the original" or other document to which sufficient validity is granted for payment purposes.

3.6 Initiatives towards e-transport documents.

Steps towards the creation of electronic, on-line transport documents have been taken at a fairly early stage in the initiatives to harmonise multimodal transport documents and liability.

(a) Initiatives at international level.

In the 80ies, the **UN Multimodal Proposal 1980** already allowed for the electronic signature of multimodal transport documents: "*the signature on the multimodal transport document may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if no inconsistent with the law of the country where the multimodal transport document is issued*".

Presently, the **Additional Protocol to the CMR concerning the electronic consignment note is open for signature** at the United Nations Headquarters in New York. This Additional Protocol provides that an electronic consignment note (defined as a consignment note issued by electronic communication by the carrier, the sender or any other party interested in the performance of a contract of carriage to which the Convention applies, including particulars logically associated with the electronic communication by attachments or otherwise linked to the electronic communication contemporaneously with or subsequent to its issue, so as to become part of the electronic consignment note) is an

equivalent of the consignment note referred to in the CMR. These electronic consignment notes are authenticated by the parties to the contract of carriage by means of reliable electronic signatures. *"Once the additional protocol has come into force, a period of transition in which the electronic consignment note and other electronic communications will gain importance to the detriment of the use of the traditional paper consignment note and written paper communications, until the use of paper communication and the paper consignment note will become rare"*¹¹⁷.

The adopted text of the **UNCITRAL Proposal** (11 December 2008) envisages the acceptance and use of electronic communications, provided that both the persons by and to whom the communication is made consent to it. It equally accepts the use of electronic transport records by way of valid transport documents, provided that both the carrier and the shipper consent with the issuance and subsequent use of these records. These e-transport records are to be signed electronically. It defines "*electronic communication*" as information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference. An "*electronic transport record*" is defined as information in one or more messages issued by electronic communication under a contract of carriage by a carrier (including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record) that (a) evidences the carrier's or a performing party's receipt of goods under a contract of carriage; and (b) evidences or contains a contract of carriage. However, on the main hurdles to e-transport documents – i.e. security and transparency - the UNCITRAL Proposal requires, in general terms, the use of procedures to ensure the integrity of the record, the identification of the holder, etc.¹¹⁸ We observe that the status and acceptability of the UNCITRAL Proposal depends upon its ratification and incorporation by Member States in their domestic legal systems.

117 MARTIUS, Henri P.A., *"The use of electronic means of communication under the Convention on the contract for the International Carriage of goods by Road."* ETL 2007.

118 See the opinion of ZEKOS on electronic documentation in the UNCITRAL Proposal: *"The draft convention introduces different characteristics and contractual role for the transport document not bringing standardization and harmonization needed especially for the use of electronic documents [...]. This author considers that all types of paper and electronic negotiable bills of lading should be attributed with the same characteristics and function namely as contracts of carriage, receipts and negotiable instruments in order to achieve uniformity and certainty in international maritime transport. Moreover, the non-negotiable form of paper or electronic bills of lading should be circulated as well. Paper and electronic bills of lading in a negotiable or a non negotiable form should be the transport documents issued for the purpose of the application of the draft convention in order to achieve standardization. Otherwise multi-documentation will emerge in the market not suitable tactic for electronic circulation causing problems in international transportation. Oral contracts are not suitable for the global market of maritime transportation. The path of freedom of contract allows the stronger part to prevail. The use of contacts of adhesion /standard form contract allows the shipper at least to know the contractual terms in advance and not to come across claims of new contractual terms in a later stage of the carriage of goods"*, in *"Documentation on the 2007 Draft Convention on the Carriage of Goods Wholly or Partly by the Sea"*, Revue Electronique Neptunus, Centre de droit maritime et oceanique de Nantes, Vol.14, 2008/1.

(b) *Initiatives at European level.*

In 1997, the Commission Communication on intermodality and the intermodal carriage of goods within the EU¹¹⁹ encouraged the creation of an electronic clearing house as a measure to improve operation or interconnectability, as well as appropriate standardisation criteria for the paperless transport procedures and documents, and more particular customs procedures. The study "*The Economic Impact of Carrier Liability on Intermodal Freight Transport*" mandated by the European Commission to IM Technologies Limited in 2001 also recommended the creation of a common e-commerce business-to-business platform including (i) the freight contract, (ii) insurances and (iii) a system of monitoring the status of deliveries from door-to-door (to ease the identification of the liable party), which would, in its opinion, save costs and benefit both unimodal and multimodal transport¹²⁰.

The **ISIC Proposal** also acknowledges the validity of electronic communication (e-mail or EDI) for transport documents, provided that the information is retrievable in perceivable form. However, the Explanatory Notes to the Proposal recognise that it may be premature to provide for electronic equivalents to paper transport documents, and in particular the bill of lading. They consider, however, that there is no reason to discourage the parties from electronic communication in their day-to-day affairs and to treat electronic records differently as long as they fulfil the same functions, i.e. whenever the electronic record is accessible and can be read, hence the additional wording "*retrievable from the electronic system in perceivable form*". Part 2, Article 3 expressly foresees the possibility of an electronic signature for transport documents. Its Explanatory Notes acknowledge that progress on the replacement of paper bills of lading with electronic procedures has been slow and that the resistance to e-transport documents is probably due to the difficulty to obtain a workable system on a multilateral basis whereby all operators are "on line", and not only the carrier, consignor and consignee. Indeed, the replacement of paper documents in the tripartite relation between a carrier, consignor and consignee would seem to be more difficult than in a bilateral relation. On a multilateral basis, this replacement would prove even more difficult. The Notes refer to the recent progress booked by the **2005 UNCITRAL International Convention on the Use of Electronic Communications in International Contracts** (see Section 3.4 above), affirming that its success largely depends on the international acceptance of electronic transport document variants: "*14. Hopefully, the envisaged UNCITRAL international convention on the use of electronic communications in international contracts (A/CN.9/WG.IV/WP.110) will improve matters. However, it is prudent to await the international acceptance of general rules before particular rules for electronic variants of transport documents are adopted.*"

Finally, **some private transport integrators**, such as the Dutch transport integrator TNT Express, have taken the initiative of implementing their own electronic transport document system. On 19 December 2008, an interview (telephonic conversation) was held with TNT

119 Commission Communication of 29 May 1997 on intermodality and the intermodal carriage of goods within the EU, (COM (97)243 final), not published in the OJ.

120 IM TECHNOLOGIES LIMITED, Executive Summary and Final Report, p.43 of "*The Economic Impact of Carrier Liability on Intermodal Freight Transport*", London 10.1.2001, for use and information of the European Commission.

Express (Mr. Reinout Wijbenga, Public Affairs manager at TNT Express and Mr. Hans de Bruyne, Director Insurance and Risk management at TNT Express, responsible for handling claims against TNT Express based on the application of the international unimodal conventions).

4. What is the problem?

It clearly appears from the above outline of the current situation that there is a **patent lack of uniform transport documents and liability rules throughout the different freight transport modes in the EU**. Currently, the transport documents and the liability for multimodal transport are characterised by a patchwork of different legal regimes deriving from international conventions (applying different mandatory rules as regards liability requirements, exclusion clauses, limits of liability, time bars for suit, etc.), national legislation, contractual arrangements and professional practices within the transport sector. Liability rules for multimodal freight transport are fragmented and complex, rendering it almost unpredictable for transport operators to estimate the liability risks that they incur when relying upon multimodal transport. Moreover, some commentators affirm that the current carrier liability situation for multimodal transport creates friction costs for multimodal transport due to the time and costs of preliminary risk assessments and judicial proceedings, which reduces the competitiveness of multimodal transport.

5. What is the objective of the study?

The present study aims at **assessing to which extent** the identified lack of uniformity as regards multimodal transport documents and liability proves to be a **barrier to a seamless, streamlined, flexible and sustainable multimodal transport within the EU**.

In doing so, it attempts to identify **which regime** - either the current regime or any alternative regime - would be **best-suited to provide a simple, transparent and predictable legal framework to govern multimodal transport documents and liability**.

An important note should be made with respect to the scope of the study. Indeed, as was indicated in the consultation questionnaire to the stakeholders, at this stage, it is still left open whether a uniform regime would only cover multimodal journeys fully taking place within the EU (i.e. all legs are intra-EU) or whether it should also be envisaged for the intra-EU leg(s) of multimodal journeys partly taking place within the EU (i.e. one or more legs are intra-EU) and partly taking place outside of the EU (i.e. one or more legs are in third countries). The question does not arise in the liability regimes discussed above in Section 3 because all regimes are international or meant to be international regimes. The ISIC Proposal (see in 3.3.b) above), however, which is the only European-wide proposal and was mandated by the European Commission, holds, in this respect, that its scope is restricted to the territory of the EU, but includes transports to and from the EU. It justifies its scope as follows: *"It seems necessary that the EU not only regulates internal transactions but takes some influence on its exports and imports as well. In view of the failure of all relevant attempts at international unification of law on multimodal transport, permanently undertaken since 1970, in view of the need of the industry to make use of General Conditions like the FIATA Bill of Lading (doubtful as to their validity in many countries) and finally in view of the fact that some Member States for these reasons have started to promote national legislation, it seems advisable that the EU offers to its industry a reasonable, workable and legally reliable legal framework."*

In addition, it analyses to which extent the introduction of **electronic transport documents** is suitable.

6. Methodology of the study.

The Tasks Specifications to the Specific Contract provided by the European Commission (attached in **Annex 1**) required a stakeholder consultation in order to duly assess all impacts and angles of the subject-matter of the present study.

The stakeholder consultation consisted of **(i) a written consultation through the sending of questionnaires** and **(ii) a series of interviews with selected stakeholders**. The objective of the consultation was to collect the views of the 27 EU Member States, the Secretariats of the existing and draft international conventions, freight forwarders, carriers (maritime/inland waterways/air/rail/road/combined), providers of logistics services and terminal operators, insurance companies (cargo insurers and liability

insurers), banks, shippers (consignors and consignees) and academic experts as regards the need for a uniform EU regime on multimodal transport documents and liability and the means that would be best-suited to serve their interests.

6.1 Stakeholders for the consultation.

Annex 3 to this Final Report contains the stakeholder list that was used for the consultation questionnaire. The stakeholder list was aimed at reaching the widest possible views on the issue of multimodal transport documents and liability regimes in Europe. It includes all stakeholders which would be significantly affected by or involved in any policy implementation on the issue.

A total of **183** stakeholders were identified and classified into **20 different categories**:

1. Member States
2. Banks
3. Insurance companies
4. Port authorities
5. Airports
6. Ship-owners
7. Consignees
8. Carriers (road, rail, air, combined, maritime and inland waterways)
9. Custom agents
10. Intermodal Centres
11. Logistic Services Operators
12. Freight forwarders
13. Terminal operators
14. Infrastructure managers
15. Consignors
16. Customs authorities
17. Transport workers
18. Academics
19. Secretariats of present contractual arrangements
20. Secretariats of the draft and existing conventions

As regards the Member States, a list of dedicated officials was provided by the European Commission.

6.2 Consultation process.

A stakeholder consultation was carried out, consisting of (i) a written consultation and (ii) a series of interviews with selected stakeholders.

(a) The first stage / Written consultation.

(a.1) Pre-consultation on the draft Questionnaire.

In accordance with the Tasks Specifications to the Specific Contract provided by the Commission (attached in **Annex 1**), the **information to be collected** by means of the stakeholder consultation reads as follows:

- "(i) The current state of play and existing practices and customs,
(ii) Legal or other issues under the current state of play,
(iii) The effects of a universal multimodal transport document and liability regime on:
(a) Facilitation and fostering of multimodal transport,
(b) Legal certainty and conflicts of legislation,
(c) Technical and organizational issues,
(d) Insurance coverage, insurance costs, prices and freight rates,
(e) Friction costs related to court claims and litigation,
(f) Business and administrative costs for adapting the internal processes to the new standard of a multimodal transport document,
(g) Economic, social and environmental impacts, and
(h) Acceptability to the Member States; and
(i) The preference of the stakeholders for any of the 3 policy options identified by the European Commission."*

On the basis of these indications, a draft questionnaire was elaborated. However, in order to improve the contents of this draft with useful comments and observations of experts in the field and test the appropriateness/accuracy of the questions, a **preliminary consultation** was conducted on the draft questionnaire. Five stakeholders, including representatives of carriers, shippers, freight forwarders, providers of logistics services and terminal operators as well as an academic expert, provided input at separate interviews. The preliminary consultation was held with the following stakeholders:

- U.I.R.R. (International Union of Combined Road-Rail Transport Companies): Mr. Rudy Colle, General Manager at U.I.R.R. was interviewed on 16 September 2008;
- ESC (European Shippers' Council): Ms. Nicolette Van der Jagt, Secretary General of the ESC was interviewed on 12 September 2008;
- CER (Community of European Railway and Infrastructure Companies): Mr. Jacques Dirand, Freight Adviser at CER, Ms. Delphine Brinckman-Salzedo, Senior Policy Adviser-Legal Affairs at CER and Ms. Isabelle Oberson, Legal Adviser of CER's Comité International des transport ferroviaires were interviewed on 15 September 2008; and
- CLECAT (European Association for Forwarding Transport Logistics and Customs Services): Mr. Marco Leonardo Sorgetti, Director General of CLECAT, was interviewed on 18 September 2008.

- Professor van der Ziel, multimodal transport expert and retired professor at the University of Rotterdam, was interviewed on 22 September 2008.

Other stakeholders were also contacted to be consulted in the pre-consultation process on the draft questionnaire (ABN Amro bank, the European Intermodal Association EIA, the International Road Transport Union IRU, the European Community Ship-owners Associations ECSA and the Comité Européen des assurances CEA). However, they were not able to participate to the preliminary consultation.

An overview of all responses and reactions of these stakeholders within the preliminary consultation is attached in **Annex 2** to the present report. Pursuant to the pre-consultation, the most important inputs of the interviewed stakeholders were incorporated in the final version of the questionnaire.

In drafting the questionnaire, account was taken of previous consultations held on the topic (UNCTAD questionnaire on transport documents in international trade (2003)¹²¹ and IMMTA questionnaire on multimodal transport (2007)¹²²).

(a.2) Consultation on the basis of a final Questionnaire.

The final version of the questionnaire (**Annex 4** to the present report) contains four sets of questions, in line with the Task Specifications provided by the Commission (**Annex 1**):

- "1) *FIRST SET OF QUESTIONS - The current situation;*
 2) *SECOND SET OF QUESTIONS - Difficulties under the current state of play;*
 3) *THIRD SET OF QUESTIONS - A uniform EU Multimodal e-Transport Document? A uniform EU liability regime?*
 4) *FOURTH SET OF QUESTIONS - Preferred Policy options.*"

The **first set of questions** was aimed at assessing whether the stakeholders were satisfied with the current state of play, both as regards the Transport Documents and as regards the liability regime governing multimodal transport. In the **second series of questions**, the stakeholders were asked to identify the potential difficulties, if any, that the current state of play triggers from a legal, economic, administrative and technological perspective. The **third series of questions** was designed to examine the viability of harmonisation within the EU of Transport Documents for multimodal transport, on the one hand, and a liability governing multimodal journeys, on the other hand, and to assess how far-reaching such harmonisation should be. In addition, it tested the suitability of introducing electronic documents in the ambit of multimodal transport. Finally, the **fourth set of questions** tabled 5 different policy options proposals – one being a *status quo* and the 4 others involving EU harmonisation to a lesser or greater extent – and asked the stakeholders to indicate which of these options would, in their opinion, be best-suited to

121 UNCTAD/SDTE/TLB/2003/3, 26 November 2003.

122 IMMTA e-Newsletter, Second Issue 2007.

serve their interests. Finally, the stakeholders were left with the possibility to provide additional feedback and observation at the end of the questionnaire.

On 30 September 2008, the questionnaire was sent by e-mail to the **183 identified stakeholders**, accompanied by a standard letter from the European Commission demonstrating Gómez-Acebo & Pombo's due mandate. The e-mail indicated that responses would be taken into account if they were received **by 24 October 2008**.

Given that the electronic mailing failed to reach 24 stakeholders, the contacts details of these stakeholders were double-checked and telephone calls were held in order to obtain the correct contact details. Subsequently, on 7 October 2008, the questionnaire was resent to the new contacts of the stakeholders who had previously failed to receive it.

On 24 October 2008, a total of **38** responses out of the 183 stakeholders had been received.

Due to the numerous requests for an extension, an e-mail was sent to all stakeholders on the deadline of 24 October 2008 granting additional time for a response until **5 November 2008**.

On 5 November 2008, a total of **40** responses out of the 183 stakeholders had been received.

On the basis of the outcome of the written consultation, **(i) the current situation of the available transport documents for multimodal transport and the applicable liability regime to multimodal transport in the EU** was analysed (with an understanding of, *inter alia*, the cost of transferring between modes, the scope of insurance coverage for multimodal journeys, the use of letters of credit, the use of negotiable/non-negotiable transport documents, the issue of electronic transport documents and the applicable international and national laws and trading conditions); **(ii) possible problems arising from the current state of play** were examined, in relation to the administrative burden, legal certainty, technological security and other aspects of the available transport documents, but also in relation to the currently applicable liability regime (questions as to whether this regime potentially favours one transport mode rather than another or whether difficulties are experienced as to the localisation of damage/loss in a particular unimodal leg, etc.); **(iii) the suitability of harmonisation at EU level was checked**, by an analysis of the responses relating to (a) the appropriateness of a uniform (electronic) multimodal transport document in the EU that would fit all modes and fulfil all functions of the current transport documents, considered from various angles (conflicts of legislation, costs, stakeholder acceptability, insurance coverage, etc.) and (b) the appropriateness of a uniform liability regime in the EU examined from various angles (i.e. geographic scope, costs, legal characteristics and conflicts, etc.); and **(iv) the preferred policy option** of the stakeholders was identified (multiple documents or single document; choice between a *status quo* on liability, an opt-in network regime, a modified network system, an opt-out modified uniform system or a pure uniform system).

On 6 November 2008, a meeting was held with DGTREN of the European Commission to comment upon the Inception Report. At this meeting, the need for a balanced representation of shippers and carriers was highlighted (which led Gómez-Acebo & Pombo Abogados to make additional contact with shippers).

On 10 November 2008, an email was sent to all Member States who had not responded as yet and various officials of their permanent representations were included. In this email, Gómez-Acebo & Pombo conceded, on an individual basis, an exceptional extension to these Member States to provide input in any format (letter, email or request for a telephonic conversation) **until 26 November 2008**.

On 27 November 2008, a total of **58** responses out of the 183 stakeholders was received. For a full list of the responses, see below in Section 7.1.

The **main absents** in their responses are the **secretariats of the present unimodal conventions**. Also, **few representatives of consignees** responded. In order to meet the European Commission's request at the Inception meeting of 6 November 2008, where it asked Gómez-Acebo & Pombo Abogados to try to reach a balanced representation of shippers and carriers, 2 more shippers and 1 shipping association were contacted – the Belgian Shippers Council "Organisation Traffic Managers" OTM (Ghent), the Confederation of European Paper Industries CEPI (Brussels) and the Cyprus Shipping Association – to invite them to provide additional input.

Responses and reactions from the **Member States**, whose interest in this matter is vital if the European Commission is to take any further action, is summarized below. We observe, as a general comment, that **most of the EU Member States held that it is not for ministries or administrations to provide answers to the questionnaire, given its nature, but for the industry**. That is the reason why **most of the Member States circulated the questionnaire with their domestic industry**. **Some Member States** only referred to the responses of their industry and **did not respond to the questionnaire (e.g. UK, Portugal, Cyprus, Belgium)**. **Others** referred to the responses of their industry, but also **responded to the questionnaire (e.g. Lithuania, the Slovak Republic and Romania)**.

- **Austria, Denmark, France, Lithuania** (the latter marked a special interest in the study), **the Netherlands** (which responded in close consultation with Professor van der Ziel), **the Slovak Republic and Sweden responded to the questionnaire**;

- on 14 November 2008, a **meeting** was held with **Romania**;

- on 18 November 2008, a **telephone conversation** was held with the **UK**; previously, the UK had indicated by email that (i) it was not aware of any difficulties with multimodal transport, which is frequently relied upon in the UK given its geography; (ii) if the UK industry were to promote a multimodal transport document, any EU action should be preceded by a short feasibility study and a robust impact assessment; and (iii) the UK was opposed to any proposals for changes to insurance arrangements for the vessels, as this would conflict with the negotiations currently underway on the Civil Liability Directive, to which the UK is opposed. On 12 December 2008, the UK confirmed its official supportive

position of the UNCITRAL Proposal by e-mail: "*The UK is in favour of the UNCITRAL Proposal and feels that an additional European regime parallel to the UNCITRAL Proposal would not benefit the freight transport industry.*";

- on 24 November 2008, a **telephone conversation** was held with **Germany**, which also provided a Short Exposé by Ms. Czerwenka outlining German law (attached in **Annex 5** to the present Final Report);

- on 25 November 2008, a **meeting** was held with **Denmark**;

- a tentative was made to schedule a meeting or a telephonic conversation with **France**, but due to an incompatibility of agendas, a **written input** was received on 27 November 2008; the written input related to the use of electronic documents: France held that electronic transport documents require appropriate infrastructure and controls, i.e. all competent authorities should be able to control these documents, which will likely be a difficult task. The problem of electronic transport documents is, in its view, more related to technological and logistics issues (resulting in litigation and delays) than legal uncertainty *per se*;

- **Belgium** provided, on 27 November 2008 (i.e. AFTER the deadline, but Gómez-Acebo & Pombo Abogados still took account of it), a **response to the questionnaire** as filled out by the Port and Water Policy Division of the Mobility and Works Department of the Flemish Government, indicating that this opinion does not represent the opinion of Flanders nor of the Belgian State. On 19 December 2008, the Belgian Government sent an e-mail in which it held that "*there is a need for a single European space, including all the modes, so also including the maritime sector*" and mentioned the existence of the UNCITRAL Proposal.

- **Cyprus** called on 12 November 2008 explaining that the Cyprus Port Authority, in contact with the Cyprus Ministry, did not consider it appropriate to respond and provided the details of the Cypriot Shipping Association, to which the questionnaire was sent on 13 November 2008;

- **the Czech Republic** sent an email on 24 October, which stated that a partly completed questionnaire was attached, but no annex was attached to the email. Several follow-up emails were sent to the Czech Republic but no further reaction was received;

- **Poland** limited its answer to a referral to the responses of its industry on 24 October 2008;

- **Portugal** replied on 12 November 2008 explaining that Portugal did not consider it appropriate to respond and provided the details of Portuguese industry stakeholders;

- **Slovenia** called on 25 November 2008, indicating that it would need one week to respond to the questionnaire because it had just been attributed to the relevant department following an internal redistribution within the Ministry. Given the deadline for the Final Report, it was proposed to arrange for a **telephone conversation**. Calls were made to Slovenia on 25 and 26 November but it proved impossible to contact the responsible official.

- **Latvia** reported on 27 November 2008 that the Latvian experts experienced problems in submitting a response to the questionnaire because different departments (per transport mode) were involved and it had been difficult to reach a joint response. However, the Latvian State noted that all departments and ministries involved agreed that a development towards multimodal transport documents would be more than welcome as it would potentially decrease bureaucracy and promote the development of multimodal transport.

- **Bulgaria, Estonia, Finland, Greece, Hungary, Ireland, Italy, Luxembourg, Malta and Spain did not respond to the questionnaire and did not request any meeting/telephone conversation.**

Several stakeholders did not respond to the questionnaire but provided Gómez-Acebo & Pombo Abogados, instead, with **separate papers and written contributions**, attached in **Annex 5** to the present Final Report. Also, some stakeholders who responded to the questionnaire provided for additional information, which has also been included in **Annex 5**. These contributions can be summarized as follows:

- the **UK Chamber of Shipping** provided the article "New Convention on Carriage of Goods by Sea", Rotterdam Rules, BIMCO Bulletin, Volume 103, nr.4, 2008, by Donald Chard;

- the **European Community Ship owners' Associations ECSA; the International Chamber of Shipping ICS; the Baltic and Maritime Council BIMCO; the International Group of P&I Clubs and the World Shipping Council WSC** sent a Covering Letter to the Consultation Questionnaire, in which they clearly set out their view and recommended the EU to **adopt a Council Decision advising Member States to quickly ratify the UNCITRAL Proposal, in accordance with the draft UN Assembly Resolution that was going to be adopted in December 2008;**

- the **European Community Association of Ship Brokers and Agents ECASBA and its parent organization FONASBA** sent a letter to Gómez-Acebo & Pombo Abogados, **urging the European Commission to consider very carefully the actual benefits of any European action.** It considers that the **European Commission should put its full weight behind securing full EU-backing for the UNCITRAL Proposal;**

- the **German Seaport Operators Association** sent a letter commenting upon the consultation questionnaire, in which it insisted that **discussions on liability rules** of any mode of transboundary transport within the supply chain and its involved parties **should be held at an international level, under recognition of the currently discussed draft UNCITRAL Proposal and urged the European Commission to abstain from any single European approach on the liability regime governing multimodal transport;**

- the **European Shippers Council** provided a copy of the article "International Regulation of Liability for Multimodal Transport – In Search of Uniformity" by Mahin Faghfour, International Multimodal Transport Association, WMU Journal of Maritime Affairs, 2006, Volume 5, No. 1, 95-114. This article provides for a historic description of the current applicable unimodal conventions and the UNCITRAL Proposal.

- the **International Road Transport Union IRU** sent (i) a copy of the *Additional Protocol to the CMR Convention regarding e-CMR*, (ii) a position paper on the Draft Convention on Exclusive Choice of Court Agreements and (iii) a position paper on a proposed Regulation of the European Parliament and Council on the law applicable to contractual obligations

including those concerning road transport, November 2007.

(i) Presently, the *Additional Protocol to the CMR* concerning the electronic consignment note is open for signature at the UN Headquarters in New York. This Additional Protocol provides that an electronic consignment note (defined as a consignment note issued by electronic communication by the carrier, the sender or any other party interested in the performance of a contract of carriage to which the Convention applies, including particulars logically associated with the electronic communication by attachments or otherwise linked to the electronic communication contemporaneously with or subsequent to its issue, so as to become part of the electronic consignment note) is a valid equivalent of the consignment note referred to in the CMR. These electronic consignment notes are authenticated by the parties to the contract of carriage by means of reliable electronic signatures.

(ii) The *IRU Paper commenting on the Preliminary Draft Convention on Exclusive Choice of Court Agreements*: the Preliminary Draft Convention on Exclusive Choice of Court Agreements, drafted by a Special Commission of the Hague Conference on Private International Law, infringes, in IRU's opinion, the CMR Convention, the CVR Convention¹²³ and the Vienna Convention on the Law of Treaties of 1969¹²⁴. IRU alleges that the Preliminary Draft Convention (i) provides for rules concerning jurisdiction and recognition/enforcement of judgments which do not match those of the CMR and the CVR Convention; (ii) contains provisions which clash with (a) the limits of the CMR and CVR Convention and (b) the terms under which multilateral conventions may be amended, provided for by the Vienna Convention on the Law of Treaties; and (iii) infringes the competence provisions of the CMR and CVR Conventions as well as the exclusive powers of the Secretary-General of the United Nations. In IRU's opinion, international road transport operations should therefore be excluded from the scope of the Preliminary Draft Convention.

(iii) The *IRU Position on the Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)*, including those concerning Road Transport: the Proposal for a Rome I Regulation contradicts, in IRU's opinion, the provisions of the CMR and CVR Conventions, the Vienna Convention on the Law of Treaties of 1969, Regulations on cabotage of goods and passengers, and national legislation in certain EU Member States which incorporated the CMR in their national legislation.

- **Mr. Roos**, lecturer at Fenedex and at the University of 's Hertogenbosch (The Netherlands) and author of Incoterminology provided Gómez-Acebo & Pombo Abogados with a paper containing his personal contribution on the issue.

- the **Groupement Européen de Transport Combiné** sent an email with the following attachments :

123 Geneva Convention on the Contract for the International Carriage of Passengers and Luggage by Road, 1 March 1973.

124 Vienna Convention on the Law of Treaties, 23 May 1969.

- "2001: Le Livre Blanc – Le Chainon Manquant, La 61^{ème} Mesure, Une Convention pour le Transport Combiné. » 326/2003 (*"2001: White Paper – the Missing Link : A 61st Measure – a Specific Convention for Combined Transport"*), in which the **legal gap for some situations of combined road/rail transport** is set out, namely **unaccompanied road/rail Ro-Ro transport of containers or swap bodies**, placing freight integrators in an uncertain legal position when facing this type of transport. Indeed, the White Paper highlights that there is a legal gap for certain scenarios of intra-European combined rail-road transport. To illustrate this, it describes the concrete example of transport between Katowice (Poland) and Milton Keynes (UK):

- road leg and accompanied Ro-Ro via Calais-Dover: covered by the CMR;
- rail leg and crossing by ferry Dunkerque-Harwich: covered by COTIF/CIM Rules;

and

- air leg, including the road feeder service: covered by the Warsaw convention;

However, as regards transport of swap-bodies or containers combining non-accompanied road-rail, there is legal uncertainty.

According to the White Paper and another Paper by the Groupement Européen de Transport Combiné, entitled *"Etude sur l'Harmonisation des Regimes de Responsabilité Civile en Transport Combiné intra-Européen"* («*Study on the Harmonisation of Liability Regimes in intra-European Combined Transport*»), the problem stems from the fact that Article 1.2 of the CMR Convention defines "vehicles" as *"motor vehicles, articulated vehicles, trailers and semi-trailers as defined in article 4 of the Convention on Road Traffic dated 19 September 1949"*. It therefore excludes containers and swap bodies from the scope of the CMR Convention. This means that, in applying Article 2 of the CMR Convention, *"Where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air, and, except where the provisions of article 14 are applicable, the goods are not unloaded from the vehicle, this Convention shall nevertheless apply to the whole of the carriage"*, when a swap body or a container is loaded separately - i.e. without the vehicle - on a train, the CMR Convention does not apply. Moreover, if the supplementary road or inland waterway legs do not take place in a single state, the COTIF/CIM Rules do not apply. Therefore, the **Groupement Européen de Transport Combiné advocates the creation of a specific European instrument – a "Combined Transport Regime"** - tailored alongside the CMR and the COTIF/CIM Rules, which would provide for rules on combined rail-road transport between two Member States.

- *"Etude sur l'harmonisation des Regimes de Responsabilité Civile en Transport Combiné Intra-Européen"* by Yves LAUFER, 26/2003, in which the **legal gap for some situations of combined road/rail transport** is set out, namely **unaccompanied road/rail Ro-Ro transport of containers or swap bodies**, placing freight integrators in a uncertain legal position when facing this type of transport. It therefore **advocates for the creation of a Combined Transport regime, tailored alongside the CMR and the COTIF/CIM Rules.**

- two pages of the study "Intermodal transportation and Carrier Liability" by Professors Asariotis, Bull, Clarke, Kiantou-Pampouki, Morán-Bovio, Ramberg, de Wit and Zunarelli, June 1999, co-funded by the European Commission.

- the **French BP2S Shortsea & Intermodal Promotion Centre** sent the following documents:

- "Le Document Unique de Transport multimodal/intermodal en Europe", NTG Nouvelles et Informations, p.940, novembre 2008, DMF 697, by Françoise Odier, head of Working Group BP2S.

- the presentation "European Freight Logistics and Single Transport Document" by Jean-Marie Millour, Chairman of ESN, Balkans Co-modality, 10/11 November 2008.

- « BP2S, Serving a European Ambition, Multimodal Transport Service », June 2008, Shortsea Promotion Centre France, which proposes a blueprint for a single transport document that would help overcome the current administrative hurdles to shortsea shipping and encourage a switch from road to sea. The **BP2S Proposal** aims at attaining legal certainty as follows: **(i)** it governs **door-to-door transport**, irrespective of the transport mode and loading unit¹²⁵; **(ii)** it attempts to stay **as closely as possible to the CMR regime**, because transport operators are already familiar with this regime; **(iii)** it creates a **voluntary, contractual** regime (as opposed to the CMR); **(iv)** its **liability rules are based on the CMR convention**, supplemented by specific clauses for stowage, delivery, etc. (i.e. allowing for flexibility); **(v)** it proposes a **non-negotiable transport document**, which would be a compulsory **fall-back** document applying when parties have not made other contractual arrangements, and would contain customer-friendly ("tick-the-box") model insurance clauses, **(vi)** it holds a **single operator liable** for the entire multimodal journey, and **(vii)** it allows for an **electronic version** of the transport document, referring to the existing Shortsea XML, a Marco Polo experiment supported by the European Commission.

- **The European Association for Forwarding, Transport, Logistic and Customs Services (CLECAT)** sent us a position paper concerning transport documents and liability in Multimodal Transport. "The European Voice of Freight Logistics and Customs Representatives. Position Paper", 10 November 2008.

-**The Union International des Sociétés de Transport Combiné Rail-Route (UIRR)** sent the following documents at a pre-consultation stage:

- *General Conditions of the International Union of Combined Road-Rail Transport Companies*, 1 July 1999;

125 Even though the BP2S Proposal started off as a project aimed at supporting intra-EU transport comprising a sea leg, in particular door-to-door shortsea shipping and Motorways of the Sea, the Proposal is intended to cover all intra-EU multimodal transport, even when there is no sea leg (e.g. rail-road transport) and irrespective of the loading units (trucks, trailers, semi-trailers, swap bodies, containers, etc.).

- *Report 2007. International Union of Combined Road-Rail Transport companies*, June 2008;
- *UIRR Recommendations on improving Security in Combined Transport*, July 2007;
- A brochure entitled "*Mega trucks versus Rail freight?-What the admission of Mega-trucks would really mean for Europe*", July 2008. The authors of the present Study do not consider this contribution to be relevant to the present topic; it has therefore **not been included in Annex 5**.
- Power Point presentation "*Combined Transport in Europe*", September 2008.

-The **German Ministry of Justice** sent the following documents:

- *Short exposé outlining the German regulation on multimodal transport contracts*, by Ms. Czerwenka, November 2008; and
- *Position Paper of the Belgian Maritime Law Association on the UNCITRAL Convention*, October 2008.

A non-confidential version of the results of Study will be **published on a consultation website set up for the exercise**, accessible to the general public. Indeed, this was expressly set out in Point 4.2 of the Introductory Statements to the Consultation Questionnaire. Point 4.2 added that, by submitting a contribution, stakeholders were deemed to have given their consent to the European Commission to publish it on-line on its website and that any objection to the publication of their contributions had to be made explicitly, recommending stakeholders that they mark their contribution as confidential in case of an objection.

(b) The second stage / Interviews with selected stakeholders.

Pursuant to an analysis of the responses to the written consultation, stakeholders were selected for meetings to be held in November 2008. Stakeholders from all previously identified categories were interviewed. The appropriate stakeholders were chosen by Gómez-Acebo & Pombo following the reception of the reply to the written questionnaire.

The following table contains a schedule of all meetings and telephonic conversations that were held in November 2008:

STAKEHOLDER	PLACE	DAY	TIME
1. European freight forwarders association CLECAT	BRUSSELS Rue du Commerce 77	06-nov	16:30

2. Association of European Airlines AEA	BRUSSELS Avenue Louise 350	12-nov	10:00
3. European Community of Ship-owners Association ECSA + International Chamber of Shipping ICS	BRUSSELS Rue Ducale 67/B2	12-nov	13:00
4. International Road Transport Union IRU	CONFERENCE CALL	13-nov	10:00
5. Fédération Française des Sociétés d'Assurance FFSA	PARIS 26 Bd Haussmann	14-nov	9:00
6. French Intermodal & Shortsea Promotion Centre BP2S	PARIS 47, rue Monceau	14-nov	12:00
7. Union des Ports de France	PARIS 47, rue Monceau	14-nov	12:00
8. French Port de Nantes	PARIS 47, rue Monceau	14-nov	12:00
9. French Shippers Council AUTF	PARIS 91, rue du Faubourg St Honoré	14-nov	15:00
10. Romanian Ministry of Transport	BUCAREST 38 Dinicu Golescu Blvd., Sector 1	14-nov	13:00
11. Romanian inland waterways carrier AAOPFR-GALATI	BUCAREST 38 Dinicu Golescu Blvd., Sector 1	14-nov	13:00
12. Romanian railway freight carrier CFR MARFA	BUCAREST 38 Dinicu Golescu Blvd., Sector 1	14-nov	13:00
13. CEA Insurers of Europe	BRUSSELS Square de Meeûs 29	17-nov	11:30
14. Dutch railway freight carrier ERS Railways	ROTTERDAM Albert Plesmanweg 61 K-L	17-nov	10:00
15. Dutch bank ABN AMRO	ROTTERDAM Coolsingel 119	17-nov	14:00

16. Spanish Shortsea Promotion Centre	MADRID Jorge Juan 19, 6º	18-nov	10:00
17. UK MINISTRY (DTI)	CONFERENCE CALL	18-nov	11:30
18. French maritime carrier CMA CGM	CONFERENCE CALL	19-nov	10:00
19. Belgian insurance company Navigators	ANTWERP Heilig Hartstraat 14/1 2600 Berchem	20-nov	16:00
20. European Shippers Council	BRUSSELS	21-nov	9:30
21. Finnish Freight Forwarders Association	HELSINKI. Eteläranta 10	24-nov	9:00
22. Federation of Finnish Financial Services, Insurance Legislation, Loss Prevention & Security	HELSINKI Bulevardi 28, FI-00120	24-nov	12:00
23. Finnish road haulage and logistic services provider Suomen Kuljetus ja Logistiikka SKAL ry	Nuijamiestentie 7 00400 Helsinki	24-nov	15:00
24. German Federal Ministry of Justice	CONFERENCE CALL	24-nov	10:00
25. Danish Ministry	COPENHAGUEN, Vermundsgade 38 C DK-2100 København Ø	25-nov	13:00
26. Mr. Piet Roos	CONFERENCE CALL	25-nov	10:00
27. UK Chamber of Shipping	LONDON Carthusian Court 12, Carthusian Street	26-nov	11:00
28. UK Freight Transport Association	LONDON Five Kings House, 1 Queen Street Place	26-nov	13:00

29. UK Road Haulage Association	LONDON Five Kings House, 1 Queen Street Place	26-nov	14:30

In **Annex 6**, the Minutes of all interviews and telephonic conversations are attached.

7. Analysis of the data collected.

Responses have been provided by category of stakeholders whenever the responses were clearly influenced by the category they belong too. However, where responses very much diverge in each of the categories and where there is no tendency per category, it is materially not possible to group opinions per category. In such cases, forcing a tendency per category would provide for a wrong picture. Therefore, in these cases, the answers have been grouped per opinion instead of per category. In any event, the necessary information is always given on the stakeholder category when information is provided. For example, the report does not refer to "CMA CGM", but refers in all places to the "French maritime carrier CMA CGM".

7.1 1st Set of Questions –The Current Situation

7.1 General

1. The stakeholders who answered the questionnaire (58) can be identified and classified as follows:

- Road Carriers
 1. IRU International Road Transport Union
 2. UK Road Haulage Association
 3. French RCS (road, inland waterways carrier and freight forwarder)
 4. Finnish Road Haulage and Logistic Services Provider SKAL
- Air Carriers
 5. Association of European Airlines (AEA)
- Consignees
 6. ECG - The Association of European Vehicle Logistics
- Railway Carriers
 7. CIT Comité International des transports ferroviaires (jointly with CER)
 8. CER Community of European Railway and Infrastructure Companies (jointly with CIT)
 9. Polish Chamber of Land Transport Commerce representing railway carriers
 10. French railway freight carrier Rail Link Europe
 11. Romanian railway freight company CFR Marfa
 12. Lithuanian railway freight carrier Lithuanian Railways
 13. Dutch railway freight carrier ERS Railways

- Inland waterways Carriers
 - 14. Romanian inland waterways carrier AAOPFR-Galati
- Combined Carriers
 - 15. International Union of combined Road-Rail transport companies (UIRR)
 - 16. Groupement Européen de Transport Combiné
- Maritime Carriers
 - 17. French maritime carrier CMA CGM SA
 - 18. French ferry operator Brittany Ferries
- Insurances
 - 19. German Insurance Association
 - 20. The International Group of P&I Clubs (the "IG of P&I Clubs", jointly with ECSA, ICS, BIMCO, WSC and UK Chamber of Shipping)
 - 21. Nordic insurance company IF P&C
 - 22. German insurance group SCHUNCK
 - 23. Swedish Insurance Federation
 - 24. Fédération française des sociétés d'assurances (FFSA)
 - 25. Belgian insurance company Navigators
- Banks
 - 26. Dutch bank ABN AMRO
 - 27. Federation of Finnish Financial Services
- Freight forwarders
 - 28. Finnish Freight Forwarders Association
 - 29. Lithuanian freight forwarder JURTRANSA
 - 30. Polish Chamber of Land Transport Commerce representing freight forwarders
 - 31. Italian freight forwarders association FEDESPEDI
 - 32. European freight forwarders association CLECAT
 - 33. Belgian freight forwarders association CEB
 - 34. French freight forwarder CMA CGM LOGISTICS
- Shippers
 - 35. French shippers council AUTF
 - 36. European shippers council ESC
 - 37. UK Freight Transport Association FTA
- Member States
 - 38. Austria
 - 39. Denmark
 - 40. France
 - 41. Slovak Republic
 - 42. Sweden
 - 43. Netherlands
 - 44. Lithuania
- Intermodal/multimodal associations
 - 45. French Intermodal and Shortsea Promotion Centre BP2S
 - 46. Shortsea Promotion Centre Spain
- Port authorities
 - 47. French port authority of Nantes
 - 48. Union des Ports de France

49. Port and Water Policy Division of the Mobility and Public Works Department of the Flemish government of Belgium
- Transport Integrators
 - 50. Dutch transport integrator TNT Express
 - Ship-owners
 - 51. The European Community Ship owners' Associations (ECSA) (jointly with ICS, BIMCO, IG P&I, WSC and UK Chamber of Shipping)
 - 52. The International Chamber of Shipping ("ICS", jointly with ECSA, BIMCO, IG P&I, WSC and UK Chamber of Shipping)
 - 53. The Baltic and Maritime Council ("BIMCO", jointly with ECSA, ICS, IG P&I, WSC and UK Chamber of Shipping)
 - 54. The World Shipping Council ("WSC", jointly with ECSA, ICS, BIMCO, IG P&I and UK Chamber of Shipping)
 - 55. UK Chamber of Shipping (jointly with ECSA, BIMCO, ICS, IG P&I and WSC)
 - 56. Spanish ship-owners association ANAVE
 - Academics and Institutions
 - 57. Professor Berlingieri, Comité Maritime Internationale.

2. When asked whether they are satisfied with the currently available Transport Documents and liability regime governing multimodal transport in the EU; 34 stakeholders responded negatively, 19 stakeholders responded positively and 5 stakeholders did not respond.

Among the negative responses, the ship-owners (European Community Ship-owners Associations (ECSA), the International Chamber of Shipping (ICS), the Baltic and Maritime Council (BIMCO), the World Shipping Council (WSC), the UK Chamber of Shipping and the Spanish Ship-owners Association ANAVE), the Shortsea Promotion Centre Spain, the International Group of P&I Clubs (IG of P&I Clubs) and the Danish Ministry pointed out that the liability regime governing multimodal transport is regulated by **inadequate unimodal conventions for today's door-to-door transport**. For maritime transport, there is a clear need to revise the existing international conventions. A review should cover both port-to-port traffic and door-to-door or multimodal transport with a maritime leg. They consider that the UNCITRAL Proposal is being negotiated and will be adopted for this very purpose.

Professor Francesco Berlingieri considered that in international carriage by sea and road, which is the most common form of combined transport, there is a frequent use of B/Ls and sea waybills. He held that it is **difficult to establish from these documents if one carrier has assumed the global transportation and that it is difficult to identify this carrier**.

All shippers who answered the questionnaire (French shippers' council (AUTF), European shippers' council (ESC) and the UK Freight transport association) and the Union des Ports de France, the Port Authority of Nantes and the Intermodal and Shortsea Promotion Centre BP2S (France) underlined that there is **no legal instrument for multimodal transport and that land/sea transport is hindered**, especially when maritime

international law applies. They added that the Hague Visby Rules are obsolete and discourage shippers and intermodal operators to use sea transport.

The Association of European Airlines (AEA) underlined that users and shippers are **confused by the multiple rules** governing the successive legs in the intermodal logistics chains.

The Polish Land Transport Chamber of Commerce considered that transport documents should cover all journeys. An **intermodal operator is needed** and his role would be to gather all elements and to offer a **one-stop-shop service to customers**. Similarly, the Slovak Republic considered that the so-called "break the carriage", i.e. finishing one mode and beginning another mode with new transport documents is a concern.

4 stakeholders (France, the International Union of combined Road-Rail transport companies (UIRR), the French railway carrier Rail link Europe and the Finnish Freight Forwarders Association) considered that the **transport market needs an updating/simplification** of its procedures and rules.

The Romanian railway freight company CFR Marfa stressed the following concerns regarding the current state of play in international combined transport with rail components:

- There is **no single transport document**, e.g. for intermodal rail-air transport, not only a CIM consignment note, but also an air consignment note is required.
- There are **specific regulations for each mode of transport** regarding the right to modify the contract of carriage, the right to dispose of the goods, circumstances precluding carriage and/or delivery, liability, claims and conditions under which claims can be made, compensation limits, actions against the carrier, competent court to judge these actions against the carrier, prescription, recourse between carriers, the obligations and the rights of multimodal/intermodal transport operators, the relationships between multimodal and single mode transport operators.

Among the positive answers, the Association of European Vehicle Logistics ECG, the Italian freight forwarders association FEDESPEDI, the European freight forwarders association CLECAT, the Belgian freight forwarders association CEB and the Nordic insurance company IF P&C held that the **currently available documents**, as for example FIATA Multimodal Transport Bill of Lading, are **reasonable ways of settling disputes in multimodal transport** and that a simplification of the system would only be welcomed at international level. Establishing a European multimodal transport or liability regime would, according to them, not add any value, given that logistics are of an international dimension. Yet, they do not believe that the UNCITRAL Proposal is a correct answer.

The Comité International des transports ferroviaires (CIT) and the Community of European Railway and Infrastructure Companies (CER) considered that currently, the **CIM Uniform Rules offer a satisfactory protection** to consumers in the rail sector. CIT and CER would not support any less advantageous protection. They recalled that railway transport is not only national or European, but that it is of an international nature. Therefore, should

a new system be put into place, it should have a wider scope of application than only Europe. CIT and CER therefore question whether an EU initiative would not have the effect to restrict the existing legal framework and jeopardise the single liability regime for freight traffic in Annex B of COTIF (CIM Rules).

The Netherlands considered that **transport documents as such are not a problem**. Furthermore, it is their understanding that the **current variety of liability regimes works well in practice**.

The Swedish Insurance Federation held that, in Europe, the **unimodal regimes are adequately regulated through unimodal conventions**. It added that multimodal transport is governed by voluntary standard documents, such as the General Conditions of the Nordic Association of Freight Forwarders.

3. When asked whether they consider that the costs (i.e. freight rates, business costs, administrative costs, friction costs – i.e. additional costs due to the change of mode in a multimodal journey - and other costs) of transferring between modes are presently reasonable and encouraging multimodal transport, 32 stakeholders responded negatively, 10 stakeholders responded positively and 16 stakeholders did not respond.

Among the negative responses, the ship-owners (European Community Ship-owners Associations (ECSA), the International Chamber of Shipping (ICS), the Baltic and Maritime Council (BIMCO), the World Shipping Council (WSC), the UK Chamber of Shipping and the Spanish Ship-owners Association 8ANAVE), the Shortsea Promotion Centre Spain, the International Group of P&I Clubs (IG of P&I Clubs) and the Danish Ministry pointed out that there is currently a **lack of legal certainty**, which translates into **extra costs**. This lack of certainty arises from the existence of different unimodal international conventions as well as legal gaps which exist between these unimodal conventions. They added that the UNCITRAL Proposal is being negotiated and will be adopted to solve these problems.

France, the French shippers' council (AUTF), the European shippers' council (ESC), the UK Freight Transport Association, the Union des Ports de France, the Port Authority of Nantes and the French Intermodal and Shortsea Promotion Centre BP2S considered that the present situation clearly does not encourage multimodal transport: **current complexity leads to extra costs**, and these costs are discouraging when compared to present modal transport in EU. Only simplification could effectively reduce costs and make multimodal transport more attractive. In the same sense, the Association of European Airlines (AEA) considered that there is a **lack of flexibility between sea and air** (different formats, not interchangeable, etc.), which discourages multimodal transport.

The Romanian inland waterways carrier AAOPFR-Galati underlined that **administrative costs in terminals** should be reduced.

The Polish Land Transport Chamber of Commerce indicated that it is difficult for road-railway combined transport to compete with pure road transport because of the high costs

of infrastructure and railway rolling stock. The **costs of transshipment added to the costs of transport** make the offer of combined transport even less competitive.

The Dutch railway carrier ERS Railways held that **margins for railway companies are very low** in intermodal transportation. Current truck driver legislation is different to train driver legislation, which makes competition unfair.

The Romanian railway freight company CFR Marfa indicated that in Romania: (i) **rail infrastructure charges** are too high compared to the charges for the use of infrastructure in other modes of transport (for example, compared to the cost of the Rovignette); (ii) in **the price of diesel oil used in Diesel traction the road tax is included**, which is equivalent to a subvention to the road transport system; (iii) Romanian legislation foresees **too many formalities** (for example, transport documents specific to each mode of transport instead of a single document); (iv) **external costs are not included** in transport costs or in the costs of connected activities, which encourages the road transport system (v) the **State does not financially stimulate** multimodal/intermodal/combined transport. The facility provided in Government Ordinance no. 88/1999 cannot be easily applied.

The Port and Water Policy Division (which forms an integral part of the Mobility and Public Works Department of the Flemish government in Belgium) held that the **lack of legal certainty** translates directly into **extra costs**. This lack of certainty arises from the existence of different unimodal international conventions as well as legal gaps which exist between and within these unimodal conventions. An international convention providing for uniform rules and simplified documents for door-to-door traffic, regardless of the chosen transport mode, would provide the predictability and legal certainty, which would enhance the use of multimodal transport.

According to the Groupement Européen de Transport Combiné, operating **door-to-door intermodal transport generates specific or additional administrative costs** compared to road, as it requires more attention and control to ensure that the chain works smoothly. These **costs and related friction costs** plus the insufficient level of service discourage multimodal transport.

Among the positive answers, the Finnish Freight Forwarders Association, the Association of European Vehicle Logistics (ECG), the Italian freight forwarders association FEDESPEDI, the European freight forwarders association CLECAT and the Belgian freight forwarders association CEB considered that **multimodal services are provided according to market conditions** and that it is, therefore, impossible to say that cost are unreasonable, but they could be improved.

4. When questioned as to whether is presently easy to obtain an insurance coverage to cover cargo and liability comprehensively throughout all modes of a multimodal journey 34 stakeholders responded positively, 9 stakeholders responded negatively and 15 stakeholders did not respond.

Among the positive answers, the French Intermodal and Shortsea Promotion Centre BP2S and the Union des Ports de France indicated, as regards cargo insurance, that the existing "**Warehouse to Warehouse**" policy covers door-to-door multimodal cargo transport comprehensively throughout all modes of transport, all combinations of modes, irrespective of the loading units. However, they held that many inland transports within Europe are "**self-covered**". As regards liability insurance, they held that the insurances available to freight forwarders can also be used by carriers.

The opinion of the ship-owners of the European Community Ship-owners Associations (ECSA), the International Chamber of Shipping (ICS), the Baltic and Maritime Council (BIMCO), the World Shipping Council (WSC), the UK Chamber of Shipping and the Spanish Ship-owners Association ANAVE, as well as the Shortsea Promotion Centre Spain, the International Group of P&I Clubs (IG of P&I Clubs) and the Danish Ministry demonstrates that both **facultative cover and open cover are made available by the market and ship-owners' mutual**. These covers have been tailored over time to meet current risks throughout all parts of multimodal transport. Insurers tend to favour insuring liabilities according to a **global rather than a regional regime**, because there is greater certainty as to the scope of risk. Equally, insurers are likely to offer less attractive terms where liability regimes do not truly reflect the risks of the particular type of transport involved.

The Italian freight forwarders association FEDESPEDI, the European freight forwarders association CLECAT and the Belgian freight forwarders association CEB stated that there are **several types of insurance coverage**: some are on a case-by-case basis, whereas others are comprehensive coverages. Policy excess can be negotiated and re-assured, very often down to zero. There are several providers and the offer is fairly diversified. They affirmed that insurance cover and transport liability are two concepts that differ in both nature and scope.

The Swedish Insurance Federation stated that the **conditions of cargo insurances are quite similar worldwide and are normally based on risks**. The most commonly used conditions are the "**Institute Cargo Clauses**" issued by the London market. These cargo insurances are normally based on annual contracts, which include all transits ordered by the cargo-owner during the period of insurance. Private persons or shippers with few transport movements can also insure the goods by single voyages. **Liability insurers normally cover the liability connected to the transport laws applicable**. However, in Sweden, special insurance conditions are connected to the **General Conditions NSAB 2000, which** cover the entire multimodal journey. The liability regime is based on the network principle, which means that, if damage is localised, the respective unimodal liability conventions will govern liability. If it is not possible to determine where the damage occurred, liability is governed by NSAB 2000 with a maximum compensation similar to CMR (SDR 8.33 /kg gross weight).

The French maritime carrier CMA CGM mentioned two types of insurances to cover the multimodal journey, (i) **protection and indemnity (P&I) insurance**, under Through and Transshipment Bills of lading and (ii) freight **forwarders' liability insurance**.

The German insurance group Schunck indicated that the freight forwarders are required to insure all their activities, including multimodal transport, by **liability insurance for freight forwarding (Verkehrshaftungsversicherung)**. The Schunck group sells this product as "freight forwarding, logistics and warehousing policy-plus (SLVS-Plus)".

The Fédération française des sociétés d'assurances (FFSA) held that the French market offers **coverage for each specific mode of transport**, which can be adapted to multimodal transport. There are also insurance policies to cover **civil liability of multimodal transport operators**.

The UK Road Haulage Association indicated that **different rights are attached to each mode** and that this complicates the **risk assessment of multimodal transport**. In its view, road transport risks are always easier to assess and mitigate than risks of rival modes because of the protections to the parties granted by the CMR Convention/Conditions of Carriage.

Among the negative answers the Polish Chamber of Land Transport Commerce representing railway carriers held that, generally speaking, cargo has a **separate insurance for each modal part of journey**, because of the different rules in road and rail transport.

5. When asked whether banks (the consignee's "issuing bank") easily issue letters of credit to secure the consignee's creditworthiness vis-à-vis the shipper's "advising bank" in multimodal journeys; 20 stakeholders responded positively, 11 stakeholders responded negatively and 27 stakeholders did not respond.

The European shippers' council (ESC), the UK Freight Transport Association, the Union des Ports de France and the French Intermodal and Shortsea Promotion Centre BP2S considered that there is **no need for L/C in intra EU trade**. As far as intra EU-transport and exchanges are concerned, the question is practically irrelevant.

Among the positive answers, the ship-owners of the European Community Ship-owners Associations (ECSA), the International Chamber of Shipping (ICS), the Baltic and Maritime Council (BIMCO), the World Shipping Council (WSC), the UK Chamber of Shipping and the Spanish Ship-owners Association (ANAVE), together with the Shortsea Promotion Centre Spain, the International Group of P&I Clubs (IG of P&I Clubs) and the Danish Ministry referred to the **Uniform Customs and Practice for Documentary Credits 2007**, article 19 (Transport document covering at least two different modes of transport). Article 19 of the Uniform Customs and Practice for Documentary Credits 2007 (ICC Publication Nr. 600, 2007), entitled "*Transport Document Covering at Least Two Different Modes of Transport*",

contains the requirements that banks demand regarding transport documents when they provide documentary credit for multimodal transport contracts:

"(a) A transport document covering at least two different modes of transport (multimodal or combined transport document), however named, must appear to:

(i) indicate the name of the carrier and be signed by:

- the carrier or a named agent for or on behalf of the carrier, or*
- the master or a named agent for or on behalf of the master.*

Any signature by the carrier, master or agent must be identified as that of the carrier, master or agent. Any signature by an agent must indicate whether the agent has signed for or on behalf of the carrier or for or on behalf of the master.

(ii) indicate that the goods have been dispatched, taken in charge or shipped on board at the place stated in the credit, by:

- pre-printed wording; or*
- a stamp or notation indicating the date on which the goods have been dispatched, taken in charge or shipped on board.*

The date of issuance of the transport document will be deemed to be the date of dispatch, taking in charge or shipped on board, and the date of shipment. However, if the transport document indicates, by stamp or notation, a date of dispatch, taking in charge or shipped on board, this will be deemed to be the date of shipment.

(iii) indicate the place of dispatch, taking in charge or shipment, and the place of final destination stated in the credit, even if:

- a) the transport document states, in addition, a different place of dispatch, taking in charge or shipment or place of final destination, or*
- b) the transport document contains the indication "intended" or similar qualification in relation to the vessel, port of loading or port of discharge.*

(iv) be the sole original transport document or, if issued in more than one original, be the full set as indicated on the transport document.

(v) Contain terms and conditions of carriage or make reference to another source containing the terms and conditions of carriage (short form or blank back transport document). Contents of terms and conditions of carriage will not be examined.

(vi) Contain no indication that it is subject to a charter party.

(b) For the purpose of this article, transshipment means unloading from one means of conveyance and reloading to another means of conveyance (whether or not in different modes of transport) during the carriage from the place of dispatch, taking in charge or shipment to the place of final destination stated in the credit.

(c) (i) A transport document may indicate that the goods will or may be transhipped provided that the entire carriage is covered by one and the same transport document.

(ii) A transport document indicating that transshipment will or may take place is acceptable, even if the credit prohibits transshipment. "

The Swedish Government mentioned the **UCP 600 letter of credit**.

The Italian freight forwarders association FEDESPEDI, the European freight forwarders association CLECAT and the Belgian freight forwarders association CEB held that **letters of credit are the current practice** and they therefore consider that it is no difficult to obtain one. The FIATA multimodal bill of lading is often used in documentary credit.

The German Insurance Association clarified that international business is mostly being carried out on the basis of Sea B/Ls or FIATA B/Ls in accordance with the ICC Rules No 400/600.

6. When asked whether [they presently use/issue/require letters of credit for multimodal transport](#), 20 stakeholders responded negatively, 8 stakeholders responded positively and 30 stakeholders did not respond.

Among the positive answers, ABN AMRO requires letters of credit on presentation of bills of lading.

The Italian freight forwarders association FEDESPEDI, the European freight forwarders association CLECAT, Belgian freight forwarders association CEB and the German insurance group Schunck held that they are frequently used with the **FIATA Multimodal B/L**.

The Romanian railway freight company CFR Marfa observed that it requires **guarantees from consignees with which it concludes long-term contracts with periodic payments**.

7. When asked whether [the letter of credit are legally required as import control](#), 45 stakeholders did not respond, 13 stakeholders responded negatively and any stakeholders responded positively.

1.2 The current use of transport documents.

8. Concerning the question [of which transport document they mainly use/issue/require](#):

- **23 stakeholders use bills of lading**
- **22 stakeholders use CMR consignment notes**
- **19 stakeholders use sea waybills**
- **15 stakeholders use FIATA bills of lading**
- **12 stakeholders use CIM consignment notes**
- **9 Air waybills**

Moreover, the ship-owners of the European Community Ship-owners Associations (ECSA), the International Chamber of Shipping (ICS), the Baltic and Maritime Council (BIMCO), the World Shipping Council (WSC), the UK Chamber of Shipping and the Spanish Ship-owners Association (ANAVE), as well as the Shortsea Promotion Centre Spain and the International Group of P&I Clubs (IG of P&I Clubs) use the **Combined transport bill of lading**.

The Lithuanian Freight Forwarder Jurtransa mentioned the use of **local road bills** and **CIS rail bills**.

The Slovak Republic and the Lithuanian railway carrier JSC mentioned the use of **SMGS Consignment Notes**.

The French ferry operator Brittany Ferries held that it issues its **own ferry reservation document**.

The Comité International des transports ferroviaires (CIT) and The Community of European Railway and Infrastructure Companies (CER) indicated the use of **CIM consignment notes for combined transport** and **CIM SMGS consignment notes**.

The French RSC CMA, which is at the same time an inland waterways carrier, road carrier and freight forwarder, indicated that a **suitable waterway transport document will be created soon**.

The Dutch transport integrator TNT Express uses its **own consignment notes**, which takes multimodal transport into account.

The Romanian railway freight company CFR Marfa¹²⁶ made a distinction of the document used for international and domestic traffic:

-For international combined traffic:

- Rail (CFR Marfa): **CIM consignment note or CIM consignment note for combined transport**, which can be also used on road, inland waterways or sea, within the scope of CIM (appendix B of COTIF)
- CFR Transauto and other road transport operators, for the road component: **receipt account + CMR consignment note**
- Waterborne transport operators: **bill of lading**

-For domestic combined traffic:

- CFR Marfa: **local consignment note**
- CFR Transauto and other road transport operators, for the road component: **receipt account + CMR consignment note**
- Waterborne transport operators: **bill of lading**

9. When asked whether [they mainly use negotiable or not negotiable transport documents for multimodal transport](#); 22 stakeholders answered non negotiable, 6 stakeholders answered negotiable, 12 stakeholders both of them and 18 stakeholders did not answer.

126 In conformity with the methodological norms for the implementation of Government Ordinance no. 88/ 1999, road transport operators use a receipt account and the CMR consignment note, even when these are not necessary, as the CIM consignment notes or the CIM consignment notes for combined transport may represent, according to COTIF / CIM, single documents for combined transport. The Romanian legislation must be adapted to the provisions of COTIF/CIM.

Among the stakeholders who answered non-negotiable, the French shippers council (AUTF), the European shippers council (ESC), the UK Freight Transport Association, the Union des Ports de France and the French Intermodal and Shortsea Promotion Centre BP2S indicated that, as there is **hardly any letter of credit used in intra-EU trade**, there is consequently **no need for negotiable transport documents** for multimodal transport in the EU.

The European Airlines Association AEA answered that the **air waybill is designed as a non-negotiable document**. In respect of the short period air transport takes, there is no need for a negotiable document.

The Swedish Government commented that **goods are mostly distributed on short distances** and that often arrive before the bill of lading.

The Polish Chamber of Land Transport Commerce representing the rail carriers held that, in railway transport, there are common types of documents. Given that **negotiations are capable of changing the construction of the documents**, this could lead to misunderstandings during carriage.

The Comité International des transports ferroviaires (CIT) and the Community of European Railway and Infrastructure Companies (CER) held that the **non-negotiable document** is explicitly foreseen in the COTIF/CIM Rules (articles 6 & 5 CIM).

The Dutch railway carrier ERS Railways answered that, in rail transport, **non-negotiable transport documents** are the norm.

Among the stakeholders who answered negotiable documents, ABN Amro indicated that **banks always require negotiable documents to issue letters of credit/documentary collections** because, if the goods are refused by the buyer, then it is possible to sell them.

The Lithuanian Freight Forwarder Jurtransa and the French freight forwarder CMA CGM logistics held that they issue **negotiable documents only for bank and customs requirements**.

10. When asked whether (1) international law, (2) domestic law or (3) trading conditions and uses require the use of certain Transport Documents for multimodal transport; 30 stakeholders answered negatively, 20 stakeholders answer positively and 8 stakeholder did not answer.

Among the positive answers, the following international laws were mentioned as instruments governing transport documents in multimodal transport:

- **Hague Visby Convention**, mentioned by **12** different stakeholders.
- **CMR Convention**, referred to by **10** stakeholders.

- **COTIF/CIM rules**, signalled by **8** stakeholders: the Comité International des transports ferroviaires (CIT) and the Community of European Railway and Infrastructure Companies (CER), the Polish Chamber of Land Transport Commerce representing the rail carriers, the Slovak Republic, the International Union of combined Road-Rail transport companies (UIRR), the Romanian railway freight company CFR Marfa and the Finnish road haulage and logistic services provider SKAL.
- **SMGS agreement**, mentioned by 3 stakeholders: the Slovak Republic, the Lithuanian railway carrier JSC and the Polish Chamber of Land Transport Commerce representing the rail carriers.
- **UIRR General Conditions**, mentioned by the International Union of combined Road-Rail transport companies UIRR.
- **Warsaw and Montreal Conventions**, indicated by 3 stakeholders: the Dutch transport integrator TNT Express, the Association of European Airlines AEA and one other stakeholder.
- **Budapest CMNI agreement**, mentioned by 2 stakeholders: the Romanian inland waterways carrier AAOPFR-Galati and the French RSC CMA, which is at the same time an inland waterways carrier, road carrier and freight forwarder RSC.
- **Customs and international trade law**, referred to by the French freight forwarder CMA Logistics and the Dutch railway carrier Rail link Europe.
- **TIR** was mentioned by the Slovak Republic.
- **B/L and Sea Waybill**, referred to by the Finnish road haulage and logistic services provider SKAL.
- **Council Directive 92/106/EEC of 7 December 1992 on the establishment of common rules for certain types of combined transport of goods between Member States**, mentioned by the Romanian railway freight company CFR Marfa.

The following domestic law, regulating transport documents, was mentioned:

- **LR Civilinis Kodeksas** (the Lithuanian Freight Forwarder JURTRANSA)
- **Civil aviation code and LOTI** in France and **Vrachtbrief** in Netherlands (Association of European Airlines AEA)
- **Formal letter of carriage** accompanying the goods in road transport (Dutch transport integrator TNT Express)
- **National Freight waybill** (Finnish road haulage and logistic services provider SKAL)
- **German commercial Code** one stakeholder
- **The Civil code of the republic of Lithuania** (Lithuania)
- **Transport Regulation for Romanian railway network, Uniform norms for rail transport in Romania, Government Ordinance no. 88 of 30 August 1999 on the establishment of rules for combined transport, approved with amendments through Law no. 401 of 20 June 2000 and Government Decision no. 193 / 2002 on the approval of methodological norms for the implementation of Government Ordinance no. 88 / 1999** (The Romanian railway freight company CFR Marfa)

The stakeholders enumerated the following trading conditions regulating documents in multimodal transport:

- **IATA RESOLUTIONS** (Association of European Airlines AEA)
- **Lineka regulations** (Lithuanian Freight Forwarder JURTRANS)
- **FIATA HBL** (French freight forwarder CMA LOGISTICS)
- **CIT MANUALS** (the Comité International des transports ferroviaires (CIT) and the Community of European Railway and Infrastructure Companies (CER))
- **National Freight waybill** (Finnish road haulage and logistic services provider SKAL)
- **Own consignment note with general conditions of carriage** (Dutch transport integrator TNT Express)

1.3 The current use of electronic transport documents

11. When asked whether they presently use/issue/require electronic Transport Documents; 25 stakeholders responded positively, 22 stakeholders responded negatively and 11 stakeholders did not respond.

Among the stakeholder who responded positively, the ship-owners of the European Community Ship-owners Associations (ECSA), the International Chamber of Shipping (ICS), the Baltic and Maritime Council (BIMCO), the World Shipping Council (WSC), the UK Chamber of Shipping and the Spanish Ship-owners Association (ANAVE), together with the Shortsea Promotion Centre Spain, the International Group of P&I Clubs (IG of P&I Clubs) and the Danish Ministry held that the **UNCITRAL Proposal allows for electronic documents** and is therefore a decisive step forward in order to create legal certainty for electronic documents and to allow for the use of electronic documents as an equivalent to paper documents.

The Finnish road haulage and logistic services provider SKAL answered that the Finnish companies use in some cases **electronic waybills on a contractual basis**.

The International Union of combined Road-Rail transport companies UIRR indicated that the road transport industry starts to use the **electronic Consignment notes on an experimental basis**.

The Comité International des transports ferroviaires (CIT) and the Community of European Railway and Infrastructure Companies (CER) indicated that a **combined project of the CIT and the International Union of Railways (UIC)** is currently developing **standards for the electronic CIM consignment note ("e-Rail Freight" project)**, based on article 6 § 9 of the COTIF/CIM Rules. This e-document will be recognised by the customs and by the banks for documentary credit operations. More than twenty railway undertakings in Europe have committed themselves to implement the e-Rail Freight system by 1 July 2009. They will also be able to satisfy the requirements of the **Technical Specifications for Interoperability for Telematic Applications for Freight TAF-TSI of the UIC**. That is because the messages, which the TAF-TSI plans for its consignment note application,

can be regarded as a subset of the e-Rail Freight messages for the electronic consignment note. Nevertheless, it will be essential to check that the data specifications are properly harmonised. In addition, data from the electronic consignment note will largely allow railway undertakings to satisfy customs' new requirements for "secured" messages, requirements which will come into effect on 1 July 2009. In addition, a reference was made to the functional and legal specifications for the **electronic CIM/SMGS consignment notes of the CIT/OSJD project "Transport interoperability CIM/SMGS"**. The data catalogue and message catalogue for the electronic CIM/SMGS consignment note can be considered as an extension of the catalogues for the electronic CIM consignment note. They will be prepared by RAILDATA and the Working Group of OSJD working closely together.

The Association for European Airlines mentioned the introduction of the **IATA e-Freight project**. The IATA e-freight pilot project is operative since 2007. It is an industry-wide initiative - involving carriers, freight forwarders, ground handlers, shippers and customs authorities - which is facilitated by IATA. The project has been mandated by the IATA Board. It is not expressly set out in any IATA Convention. However, since Montreal Protocol No. 4 amending the 1929 Warsaw Convention of 25 September 1975, an air waybill is allowed to be substituted by "*any other means which would preserve a record of the carriage to be performed, with the consent of the consignor*" (Article 5). To participate in IATA e-freight, a location (country or territory) must first pass a High Level Assessment (HLA) and a Detailed Level Assessment (DLA). Once these assessments are passed, the location is certified as ready for IATA e-freight and moves to the implementation phase. In the implementation phase, local stakeholders including ground handlers, airlines, freight forwarders, shippers and customs officials define an e-freight operational procedure (e-FOP) for that location. Once the e-FOP is in place, the location is ready to go live.

Among the stakeholders who responded negatively, the French Intermodal and Shortsea Promotion centre BP2S, the Union des Ports de France and the Port Authority of Nantes clarified that the **lack of knowledge, the lack of awareness and the lack of effective support** are the main reasons for not issuing electronic documents.

The Romanian railway freight carrier CFR Marfa considered that the **inexistence of electronic systems for forwarding management** impedes the use of e-docs.

The European Shippers Council, the French Shippers Council and the UK Freight Trade Association considered that e-docs are **not a common practice, except for the sea way bill in Shortsea Shipping**.

France held that there is **no legal system supporting the e-docs** and the elaboration of a new system requires the **agreement and cooperation among the administrations and the transport industry**.

The German Insurance Group Schunck held that its main concerns are **technical insecurity, costs and the absence of a European/worldwide system of exchange of such documents**.

The Polish Land Transport Chamber of Commerce, representing the freight forwarders and Lithuania held that the **legal and customs uncertainty** hinder the use of e-docs.

The French freight forwarder CMA CGM Logistics and the Romanian inland waterways carrier AAOPFR-Galati maintained that **banking, insurance and customers require paper documents**.

The Dutch bank ABN AMRO sustained that it is **very difficult to authenticate and verify the genuineness of such electronic documents**.

12. When asked whether (1) international law, (2) domestic law or (3) trading conditions and uses somehow hinder the use of electronic documents, 25 stakeholders answered positively, 19 negatively, 3 stakeholders answered in both senses and 11 stakeholders did not answer the question.

Among the positive answers, the following international conventions and domestic laws were considered to hinder the use of electronic documents:

- International Law: **Hague Visby Rules** were cited by 14 stakeholders, and **CMR** by 3 stakeholders (European Shippers Council, UK Freight Transport Association, and French Shippers Council), because they do not mention e-docs.

-Domestic Law: the **maritime national law** was mentioned by 3 stakeholders (European Shippers Council, UK Freight Transport Association and French Shippers Council)

The ship-owners of the European Community Ship-owners Associations (ECSA), the International Chamber of Shipping (ICS), the Baltic and Maritime Council (BIMCO), the World Shipping Council (WSC), the UK Chamber of Shipping and the Spanish Ship-owners Association (ANAVE), together with the Spanish Shortsea Promotion Centre, the International Group of P&I Clubs (IG of P&I Clubs) and the Danish Ministry, indicated that the **Hague Visby and Hamburg Rules create legal uncertainty** because it is **unclear whether electronic transport documents can be used with the same legal effect as paper transportation documents**.

The Comité International des transports ferroviaires (CIT) and the Community of European Railway and Infrastructure Companies (CER) considered that the **lack of mandatory international law on the recognition and validity of electronic contracts and on the use of e-signatures** is the main hurdle. Moreover, there are **differences in national laws regarding the legal validity of electronic contracts** (linked to the level of electronic signature required). For example, in German civil law, electronic contracts may only be used as proof in court if they are signed with "qualified" electronic signatures. This renders international e-contracts invalid when they are signed with signatures of a different nature.

The French maritime carrier CMA CGM held that it is still **necessary to issue paper versions of the bill of lading**.

Among the negative answers, the UK Road Haulage Association considered that electronic documents invariably **need complementary paper documents to protect various parties**. Its experience is that e-docs, e.g. BOLERO for Bills of Lading, have had a limited take-up because of the lack of legal certainty of their procedures.

13. The question was also posed to the stakeholders: "do you presently also use/issue/require electronic letters of credit to secure the goods (with or without transfer of title) multimodal journeys (e.g. via SWIFT MT700)?" 23 stakeholders answered negatively, 6 stakeholders answered positively, and 29 did not answer the question.

Among the positive answers, the French freight forwarder CMA CGM Logistic clarified that it issues electronic letters of credit for certain destinations.

The Dutch bank ABN AMRO explained that it issues different types of letters of credit in electronic format, e.g. SWIFT MT700, MT710, MT720 and MT799.

1.4 Liability under the current situation.

14. Regarding the question "does the current use of fall-back clauses as regards the liability for multimodal transport, presently favour one transport mode?"; 30 stakeholders answered negatively, 16 stakeholders answered positively and 12 did not answer the question.

Among the negative answers, the ship-owners of the European Community Ship-owners Associations (ECSA), the International Chamber of Shipping (ICS), the Baltic and Maritime Council (BIMCO), the World Shipping Council (WSC), the UK Chamber of Shipping and the Spanish Ship-owners Association (ANAVE), together with the Shortsea Promotion Centre Spain, the International Group of P&I Clubs (IG of P&I Clubs) and the Danish Ministry pointed out that the Hague/Visby rules are not advantageous for the maritime mode. Furthermore, they added that **the importance of fall-back clauses should not be overstated**, because the network liability system leads, in most cases, to the application of mode-specific liability rules.

Among the positive answers, the Shortsea Intermodal Promotion Centre BP2S, the European Shippers Council, the French Shipper Council, the UK Freight Transport Association and the Union des Ports de France indicated that **road transport is clearly favoured**, thanks to the provisions of CMR. This is not the case for maritime transport, where Hague Visby rules apply, that are detrimental to shippers and do not favour the use of a maritime segment.

AAOPFR Galati Romania (Romanian Inland Waterways Operator) clarified that **road and railways are favoured** due to the infrastructure funding.

The German Insurance Group Schunck clarified that **sea transport is favoured**, since the seaway is mostly the longest distance in multimodal transport and Bill of lading conditions

are worldwide accepted in the banking and transport community. The UK Road Haulage Association also mentioned that the lower compensation regime **favours the sea mode**.

JURTRANSA (Lithuanian Freight Forwarder) stated that **rail is a dominant transport mode**, which is favoured by the present use of fall back clauses.

The Finnish road haulage and logistics provider SKAL held that, **due the differences in liabilities of separate transport modes, the overall management of the total chain becomes (too) complex**.

15. Does (1) international law, (2) your domestic law or (3) your trading conditions and uses govern liability for multimodal transport?: 37 stakeholders answered positively, 16 negatively and 5 did not answer the question.

Among the positive answers, the following instruments regulating liability in multimodal transport were mentioned:

- international law:

- The **COTIF/CIM rules** were signalled by **7** stakeholders: European Shippers Council, the UK Freight Transport Association, the Romanian National Railway Freight Company "CFR Marfa", the European Airlines Association AEA, the French Shippers Council, the Comité International des transports ferroviaires (CIT) and the Community of European Railway and Infrastructure Companies (CER)
- **CMR Convention** was referred to by **5** stakeholders (European Shippers Council, the UK Freight Transport Association, the French Shippers Council, JURTRANSA (Lithuanian freight forwarder), and the European Airlines Association AEA.
- The **Hague Visby Rules** were mentioned by **4** different stakeholders: European Shippers Council, French Shipper Council, Freight Transport Association and Brittany Ferries (ferry operator)
- The **SMGS agreement** was mentioned by the Lithuanian Railway carrier JSC.
- The **Montreal Convention** was indicated by the European Airlines Association AEA
- The **CMNI Budapest Convention** was mentioned by AAOPFR Galati Romania (Romanian Inland Waterway Operator).

- Regarding the domestic law, the Netherlands and the Dutch railway carrier ERS Railways mentioned **Dutch law**. The German Insurance Association and the German Insurance Group Schunck indicated that the **German Commercial Code**.

- Regarding trading conditions:

- The ship-owners of the European Community Ship-owners Associations (ECSA), the International Chamber of Shipping (ICS), the Baltic and Maritime Council (BIMCO), the World Shipping Council (WSC), the UK Chamber of Shipping and the Spanish Ship-owners Association (ANAVE), together with the Shortsea Promotion Centre Spain, the International Group of P&I Clubs (IG of P&I Clubs) and the Danish Ministry, pointed out

that **multimodal transport documents** invariably regulate the liability under multimodal transport.

- The Freight Forwarders FEDESPEDI, CEB and CLECAT indicated that **trading conditions with limitations of liability** are often used in common law countries. The **FIATA Multimodal bill of lading** also was mentioned.
- The Swedish Insurance Federation, Sweden, the Nordic If P&C Insurance company, the Federation of Finnish Financial Services and the Finnish Freight Forwarders Association use the **General Conditions of the Nordic Association of Freight Forwarders (NSAB 2000)**.
- The Comité International des transports ferroviaires (CIT) and the Community of European Railway and Infrastructure Companies (CER) mentioned the CIT manuals for the **CIM Consignment note**, the **CIM consignment note for combined transport** and the **CIM/SMGS Consignment Note**.

16. When asked if [the applicable liability influence the banks' and insurer's willingness to secure/pledge and insure multimodal transport of goods](#), 27 stakeholders answered positively, 15 negatively and 16 did not answer the question.

Among the positive answers, the UK Road Haulage Association stated that, at present, **risks are mode-specific and therefore depend on the insured**. Insurers are willing insure different risks but not for the same premium. If there is a higher risk exists on one mode, the other modes are not willing to support the risks of that mode.

The Finnish road haulage and logistics provider SKAL clarified that, depending on the product value, time, area (countries of operations) involved, the risks and related costs vary a lot. There is a clear need for a **simplification of the legal framework and practical procedures to guarantee faster, safer and more flexible logistics operations**. This would benefit the entire EU, as mentioned in the strategy of Lisbon and in the original objectives set by the ECSC.

The Nordic company IF P&C indicated that **well-known and widely used liability clauses make it easier to calculate risks**.

The French maritime carrier CMA CGM clarified that, if the European Union creates a new regime with a **higher level of limit of liability, this will have negative consequences on the transport insurance**. The insurers would not be willing to reimburse the costs and expenses of the carriers incurred under the new European regime, if those exceed the costs and expenses under the Hague Visby Rules (P&I cover) or other national or international legislation or conventions (FIATA Freight Forwarders' Liability insurance).

The ship-owners of the European Community Ship-owners Associations (ECSA), the International Chamber of Shipping (ICS), the Baltic and Maritime Council (BIMCO), the World Shipping Council (WSC), the UK Chamber of Shipping and the Spanish Ship-owners Association (ANAVE), together with the Shortsea Promotion Centre Spain, the International Group of P&I Clubs (IG of P&I Clubs) and the Danish Ministry, held that the

content of the **applicable liability regimes is of high importance to insurers** as it determines the insurance coverage. The greater the liability imposed on the insured, the higher the cost of liability insurance will be.

Among the negative answers, the Netherlands argued that it has **never been reported that liability issues have an impact on the willingness of banks** to accept goods in transit as security or on the willingness of insurers to insure goods in transit.

The German insurance group Schunck and the French Federation of Insurers FFSA explained that the **liability situation is satisfactory**, and that it is possible to cover insurance security for multimodal transport.

7.2 2nd Set of Questions – Difficulties under the Current State of Play.

2.1 Difficulties with transport documents under the current situation.

17. When asked whether the **current situation as regards transport documents places a more cumbersome administrative burden on one transport mode rather than another** (e.g. more paperwork required for one mode than for another mode), **15 stakeholders did not respond, 24 stakeholders responded positively and 19 stakeholders responded negatively.**

18. **Among the positive responses**, 7 stakeholders – mainly ship-owners - held that the current situation as regards transport documents **hinders maritime transport** (ECSA, BIMCO, ICS, WCS, IG P&I, the UK Chamber of Shipping, the Spanish Ship-owners Association ANAVE and the Spanish Shortsea Promotion Centre). Most of these stakeholders noted that in maritime transport, including multimodal transport with a maritime leg, a negotiable transport document is often issued, which is more cumbersome than the issuance of a waybill. The Spanish Shortsea Promotion Centre stressed that the administrative burden on maritime transport is heavier than on other modes. These stakeholders – as well as Denmark – see a solution in the UNCITRAL Proposal. The Finnish Road Haulage and Logistic Services Providers Association SKAL held that in multimodal sea/road transport, the sea leg is more complicated for hauliers.

2 stakeholders held that the current situation as regards transport documents **hinders rail transport** (the Dutch railway freight carrier ERS Railways and the Polish Land Transport Chamber of Commerce in its representation of the railway freight carriers). ERS Railways observed that, generally, more paperwork is required for rail transport than for road transport and sea/inland waterways transport. The Polish Land Transport Chamber of Commerce stated that the combined road/railway consignment note is rarely used and that, as a result, various consignment notes are required, creating additional paperwork for combined transport including a rail leg.

3 stakeholders held that the current situation as regards transport documents **hinders shortsea shipping** (Union des Ports de France, the French BP2S Shortsea & Intermodal

Promotion Centre, the Port and Water Policy Division of the Flemish Government in Belgium). They allege that the current situation places a more cumbersome administrative burden on shortsea shipping than on any other mode of transport in the EU (more paperwork and related administrative burdens, e.g. documents for veterinary controls, for sanitary & phytosanitary controls, for dangerous goods and hazardous cargo). This, in turn, implies that there is a more cumbersome administrative burden on multimodal transport involving a sea leg in the EU in the absence of a single multimodal transport document. They added that, given the lack of a "European Maritime Transport Space", shortsea shipping between two EU member States is still treated as international transport. Moreover, even though the existing status of "Authorized Regular Shipping Service" somehow reduces the said burden customs-wise, this status is still too restrictive. Finally, harmonisation at EU level has been introduced for the transport of dangerous goods by rail, road and inland navigation, but maritime transport has, to date, not been included in this EU-wide harmonisation. The Port and Water Policy Division of the Flemish Government in Belgium added that the currently used multimodal transport documents have been designed for unimodal transport and are, therefore, inadequately transformed into multimodal documents, which means that the same data needs to be entered for every transshipment.

1 stakeholder, the Romanian inland waterway operator AAOPFR-Galati held that the current situation as regards transport documents **hinders inland waterways and favours the other modes of transport**. AAOPFR-Galati states that more paperwork is required for inland waterway transport than for the other means of transport. It held, in this respect, that the CIM consignment note, the CIM/SMGS consignment note and the Combined Transport CIM consignment note provide for uniform multimodal transport documents recognised by both the customs authorities and the banks for their documentary credit operations.

In addition, 1 stakeholder, the Romanian railway freight company CFR Marfa held that the present situation **favours road transport**. This is because Rumanian law requires road transport operators to use a CMR consignment note, whereas this is, in its opinion, not necessary because the COTIF/CIM consignment note may be used as a single document for international combined transport, including transborder rail routes. In the view of CFR Marfa, Romanian law should, therefore, need to be harmonised with COTIF 1999 as regards combined transport. The UK Road Haulage Association, by contrast, alleged that road transport presently requires a lot of paperwork and may require more in the future.

The French RSC CMA, which is at the same time an inland waterways carrier, road carrier and freight forwarder, noted that there is not one single transport document for multimodal transport but that **different documents need to be used per mode**. This was confirmed by Professor Berlingieri, who stressed that the variety of documents currently in use creates confusion and increases litigation. The Lithuanian freight forwarder Jurtransa advocated, in this respect, that there should be a unique and universal transport document for multimodal transport. The French port authority of Nantes held that the easiest way to solve this gap when a road journey includes a ferry leg is to use the CMR and not to emit a B/L. According to the French ferry operator Brittany Ferries,

administrative burdens could largely be overcome by electronic documents based on EDI-standards.

Finally, we note that the European freight forwarders association CLECAT and 2 of its members (the Italian FEDESPEDI and the Belgian CEB), as well as the Finnish freight forwarders association FFFA, pointed out that the **FIATA Multimodal Transport B/L is a sufficient and convenient transport document** to address the issue of liability in multimodal transport.

2.2 Difficulties with electronic transport documents under the current situation.

19. When asked whether the [use of electronic transport documents is welcomed by the banks](#), which need to match the terms and conditions of the credit against the documents presented, **a considerable number of stakeholders (33) did not respond**, some of them alleging that, to their knowledge, electronic transport documents are not currently in use.

Among the stakeholders that responded to the question, opinions diverge. The Union des Ports de France, the Groupement Européen de Transport Combiné, the Swedish State and the French BP2S Shortsea & Intermodal Promotion Centre indicated that the use of electronic transport documents is **generally welcomed by the banks, but that it is irrelevant in intra-EU trade and consequently for intra-EU transport**. Similarly, the French railway freight carrier Rail Link Europe, the French port authority of Nantes, the French ferry operator Brittany Ferries, the Spanish Shortsea Promotion Centre, the freight forwarders association CLECAT and 2 of its members (the Italian FEDESPEDI and Belgian CEB), the Association of European Vehicle Logistics (consignee and operator of various modes), the Lithuanian freight forwarder Jurtransa and the ABN-AMRO bank confirmed that the use of electronic transport documents is **generally welcomed by the banks**. However, their opinion is contradicted by the French, European and UK Shippers, the Dutch transport integrator TNT Express, the maritime carrier CMA CGM, the freight forwarder CMA CGM Logistics, the German Insurance Association, the German insurance group Schunck, the Netherlands and the Romanian inland waterways operator AAOPFR-Galati, which held that the use of electronic transport documents is **not currently welcomed by the banks**.

20. When questioned as to whether [electronic transport documents are facing problems stemming from an unwillingness of private trading partners or public authorities \(e.g. port authorities\) to accept e-docs, legal uncertainty, technological insecurity, confidentiality concerns or costs](#), **many stakeholders, again, did not express their opinion**. The opinion of the stakeholders that responded demonstrates that, **overall, there is no unwillingness of private trading partners or public authorities to accept e-docs and costs do not constitute a major issue**. The **main problems** associated with e-docs are issues of **legal uncertainty and technological insecurity, and, to a lesser extent, confidentiality concerns**. Yet only approximately half of the respondents viewed these posts as being problematic.

<u>Difficulties faced by electronic transport documents</u>	<u>Yes</u>	<u>No</u>
Unwillingness of private trading partners or public authorities (e.g. port authorities) to accept e-docs	7	27
Legal uncertainty	19	15
Technological insecurity	15	18
Confidentiality concerns	13	21
Costs	8	27

Some stakeholders provided useful comments on the current use of e-transport documents.

The European freight forwarders association CLECAT and its Italian member FEDESPEDI stated that electronic transport documents often fail because of the **technical/administrative burdens and costs** that it implies. In the same sense, the German insurance group Schunck stated that the **requirements of the European Directive on electronic signatures are not accepted by the industry** because of their additional costs and technical/bureaucratic requirements. The AEA held that there is a lack of global standards on electronic documents.

The French Shippers Council indicated that transport operators are still **not very familiar** with electronic documents and that, presently, paper documents remain the rule. The UK Road Haulage Association added that it is rare that road carriers are allowed to use electronic documents without having to rely on **paper backup**. The Finnish Road Haulage and Logistic Services Providers Association SKAL held that the **readiness for e-documents varies from one EU Member State to the other**. In its opinion, Finland would be ready for it.

However, the Romanian railway freight company CFR Marfa held that, presently, both the COTIF/CIM Rules and Romanian rail transport regulations **allow the use of electronic consignment notes, if the necessary technical conditions are met** (electronic systems for the management of transport contracts, applications for the realisation of electronic exchange of data and necessary interfaces between the IT systems of the transport operators). In turn, the French port authority of Nantes stated that **all conditions are present to "dematerialise" transport documents**. The Lithuanian freight forwarder Jurtransa called for a **universal transport document**, whilst the French freight forwarder CMA CGM Logistics suggests that the **possibility of an electronic archive should be explored**.

2.3 Difficulties with liability under the current situation.

21. When asked whether **the current liability regime favours/hinders one transport mode rather than another, or whether it has no effect upon it**, the majority of the stakeholders answered that the liability regime does not have the effect of

favouring or hindering any transport mode. Some stakeholders did not respond to the question. Others claimed that the current liability regime:

- hinders road transport (the UK Road Haulage Association, TNT Express);
- hinders non-road transport (France); hinders rail, the "last mile", inland waterways transport (Slovak Republic);
- hinders maritime transport (Union des Ports de France, the French port authority of Nantes, the French BP2S Shortsea & Intermodal Promotion Centre, the Spanish Shortsea Promotion Centre, the French Shippers Council, the European Shippers Council and the UK shippers of the Freight Transport Association);
- hinders air transport (AEA);
- hinders intermodal transport (Groupement Européen de Transport Combiné);
- favours air transport (TNT Express);
- favours rail transport (the UK Road Haulage Association, Lithuanian Railways);
- favours maritime transport (the UK Road Haulage Association, AEA);
- favours road transport (France, Groupement Européen de Transport Combiné, Union des Ports de France, the French port authority of Nantes, the French BP2S Shortsea & Intermodal Promotion Centre, the Spanish Shortsea Promotion Centre, the French Shippers Council, the European Shippers Council, the UK shippers of the Freight Transport Association, the Slovak Republic); or
- favours inland waterway transport (the French RSC CMA, which is at the same time an inland waterways carrier, road carrier and freight forwarder).

France clarified that the present liability regime favours road transport due to its higher compensation levels and hinders combination of road with alternative modes, e.g. shortsea shipping, rail transport or inland waterways. The Union des Ports de France, the French port authority of Nantes and the French BP2S Shortsea & Intermodal Promotion Centre held, similarly, that the current liability regime favours road transport because the CMR Convention is drafted in clear terms, whereas the other transport modes lack comprehensible rules (e.g. the maritime liability regime and relationship between the shipping companies and P&I clubs are unclear). In their view, shortsea shipping, rail transport and the "last mile" are hindered by the present situation. The Spanish Shortsea Promotion Centre, European Shippers Council, the UK shippers of the Freight Transport Association and the French Shippers Council equally held that shortsea shipping is stalled by the current situation. A completely opposite view is expressed by the UK Road Haulage Association, which believes that, currently, combined rail/sea transport is favoured, because it benefits from the Hague/Visby Rules, whereas road transport is governed by the CMR Convention. The UK Road Haulage Association added that the current situation has no effect on short-sea shipping, but that it favours rail transport and hinders the last mile. One stakeholder equally held that sea transport is favoured because of the low liability limits of the Hague Rules and its strict liability regime, whereas road transport is hindered because it is governed by the strict CMR Convention, any deviation of which is void. TNT Express stressed that the current situation hinders last mile transport, including city logistics. A stakeholder added that it also considered air transport to be favoured by the liability regime of the Montreal Convention. The AEA's comments are in line with the UK Road Haulage Association on the opinion that sea transport is favoured due to the low

limits of 2 SDR/kg gross weight. However, it disagrees on air transport, which it considers to be hindered by its higher liability limits of 17 SDR/kg gross weight. According to the AEA, the difference in liability limits appears to be particularly unjustified on combined sea/air journeys, where the liability largely differ between air and maritime transport for one and the same consignment.

The European freight forwarders association CLECAT, its Italian member FEDESPEDI and the Association of European Vehicle Logistics ECG held that each transport mode is suited for specific requirements in terms of speed, costs, distance, geographic constraints, efficiency or type of cargo (e.g. commodities). In its opinion, liability is seldom a decisive criterion in selecting a transport mode. Even though one would assume, at first sight, that a higher liability regime (e.g. for rail transport) would attract more customers, reality shows that the opposite is true. In other words, according to CLECAT, there is no statistically relevant correlation between liability limitations, on the one hand, and the choice of the transport mode, on the other hand.

Finally, the International Road Transport Union expressed the view that the question is irrelevant and that, instead, the question should be posed to which extent the modal liability regimes favour/hinder the customers.

23. The question was also posed to the stakeholders ["What happens presently liability-wise when it is difficult to associate the damage/loss or delay with a particular unimodal leg?"](#)

Most of the stakeholders answered this question extensively.

The ship-owners and the Spanish Shortsea Promotion Centre indicated that, under most standard multimodal transport documents, the **Hague/Visby Rules** are applied. They, however, also referred to the **UNCTAD/ICC Rules** for multimodal transport documents and, in particular, to the special defences that it provides for carriage by sea/inland waterways (article 5.4¹²⁷).

Turning to the shippers, the French Shippers Council only mentioned that difficulties in localising loss/damage or delays **generally complicate litigation** unless a uniform liability regime applies.

Answering for its railway freight carriers, the Polish Chamber of Land Transport stated that, in case of difficulties in localising loss, damage or delay, the **"dominant" transport operator takes the responsibility**. It did, however, not specify what needs to be understood by the "dominant transport operator". The Romanian railway freight company

127 "Notwithstanding the provisions of Rule 5.1. the MTO shall not be responsible for loss, damage or delay in delivery with respect to goods carried by sea or inland waterways when such loss, damage or delay during such carriage has been caused by: (i) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship, (ii) fire, unless caused by the actual fault or privity of the carrier, however, always provided that whenever loss or damage has resulted from unseaworthiness of the ship, the MTO can prove that due diligence has been exercised to make the ship seaworthy at the commencement of the voyage."

CFR Marfa Romanian Rail explained that **Article 50 of the COTIF/CIM Rules** may be relied upon¹²⁸ (proportionate apportionment between all carriers) when the combined transport includes a rail leg and falls within the scope of the COTIF CIM Rules. Both the International Rail transport Committee (CIT) and the Community of European Railway and Infrastructure Companies (CER) also referred to the **COTIF/CIM Rules**, indicating that it provides for uniform liability from the place of taking over of the goods until the place of delivery and that, as a consequence, difficulties in localising loss, damage or delay would not constitute a problem for the customers. The French railway freight carrier Rail Link Europe did not mention the COTIF/CIM Rules but held that difficulties in localising loss, damage or delay is dealt with by **litigation**.

Responding from a road carrier's perspective, the French RSC CMA, which is at the same time an inland waterways carrier, road carrier and freight forwarder, indicated that the **road carrier is presumed liable and bears the burden of proof** to demonstrate force majeure and a fault of the shipper. The UK Road Haulage Association limited its response to a reference to the **applicable law**. The International Road Transport Union answered that, **according to a constant jurisprudence, the organiser of multimodal transport is considered liable under applicable law**. The Finnish Road Haulage and Logistic Services Providers Association SKAL held that this situation usually leads to **arguments, extra time and costs**. The International Union of Combined Road/Rail Transport UIRR held that unlocalised damages usually lead to **disputes and appeals in court**.

The French maritime carrier CMA CGM held that **contractual arrangements** apply. The French ferry operator Brittany Ferries alleged that **associating damage, loss or delay to a particular unimodal leg does not pose difficulties**.

The air carriers represented by the AEA explained that, where air transport includes a road leg, the **air carrier is responsible for the entire transport and bears full liability for loss or damage regardless of the mode** where it occurred.

The Dutch transport integrator TNT Express held that, in case of localisation difficulties, its **catch-all contractual liability** provisions apply. On 19 December 2008, an interview (telephonic conversation) was held with TNT Express (Mr. Reinout Wijbenga, Public Affairs manager at TNT Express and Mr. Hans de Bruyne, Director Insurance and Risk management at TNT Express, responsible for handling claims against TNT Express based on the application of the international unimodal conventions). TNT Express confirmed that a substantial part of its business is multimodal. The liability rules applied by TNT Express are included in its General Conditions¹²⁹. These General Conditions are incorporated in TNT Express' consignment note (a non-negotiable transport document, hereinafter referred to as "TNT Express' Consignment Note"). TNT Express' Consignment Note is the transport

128 "If it cannot be proved which of the carriers has caused the loss or damage, the compensation shall be apportioned between all carriers who have part in the carriage, except those who prove that the loss or damage was not caused by them; such apportionment shall be in proportion to their respective shares of the carriage charge. In the case of insolvency of any one of these carriers, the unpaid share due from him shall be apportioned among all the other carriers who have taken part in the carriage, in proportion to their respective shares of the carriage charge."

129 http://www.tnt.com/express/finfi/site/terms_and_conditions/terms_and_conditions_long_form.html

document used between TNT Express and its clients. Other transport documents are used between TNT Express and the transport operators to which TNT Express subsequently orders the transport, e.g. air waybills or bills of lading in the relation with a freight forwarder (who, in turn, may subcontract transport to another operator). Reference was made to the General Conditions, more precisely its Clause 12 "Extent of Our Liability", which reads as follows:

"Subject to condition 13 below we limit our liability for any loss, damage or delay of your shipment or any part of it as follows:

a) Carriage by air

If the carriage of your shipment is solely or partly by air and involves an ultimate destination or a stop in a country other than the country of departure the Warsaw Convention (1929), or the Warsaw Convention as amended by the Hague Protocol (1955) and/or Montreal Protocol No. 4 (1975), or the Montreal Convention (1999), whichever is compulsorily applicable will apply. These international treaties govern and limit our liability for loss, damage or delay to your shipment to 17 special drawing rights per kilo (approximately 20 Euros per kilo although the rate of exchange is variable).

b) Carriage by road

If we carry your shipment by road within, to or from a country that is a party to the convention on the contract for the international carriage of goods by road 1956 (CMR) our liability for loss or damage to your shipment shall be governed by the CMR and thus limited to 8.33 special drawing rights per kilo (approximately 10 Euros per kilo although the rate of exchange is variable). In the case of delay where you can show to us you have suffered loss our liability is limited to refunding to you the charge you paid us for carriage in respect of that shipment or the part which was delayed.

c) If we have a liability to you for whatever reason including without limitation breach of contract, negligence, wilful act or default, and

a) none of the conventions referred to above under 12 a) or b) apply compulsorily, or;

b) such liability is not governed by any of the above mentioned conventions pursuant to 12 a) or

b) above nor any other law or convention which applies compulsorily, or;

c) it relates to any services not being carriage by road or air, our liability to you is at all times limited to the actual cost incurred by you to acquire or repair the shipment or the part affected with in every case an upper limit that does not exceed 17 Euros per kilo with a maximum of 10,000 Euros per shipment. In the case of delay where you can show to us you have suffered loss our liability is limited to refunding to you the charge you paid us for carriage in respect of that shipment or the part which was delayed.

In other words, when loss or damage is localized by road, liability is governed by the CMR and thus limited to 8.33 SDR/kg. When loss or damage is localized by air, liability is governed by the Warsaw and Montreal Conventions and limited to 17 SDR/kg. In all other cases, TNT Express applies a "catch-all" provision, i.e. in all cases where liability is not localized or not governed by any of these conventions nor does any other law/convention apply compulsorily, TNT Express limits its liability to the highest available level of 17

SDR/kg. This implies that TNT Express takes the commercial risk of having to compensate its clients for more money than it can recuperate from its subcontractors. Indeed, it is possible that under TNT Express' General Conditions, TNT Express is obliged to pay more to its clients than it is able to recover from its subcontractors. E.g. if damage occurs during a sea-leg for which TNT Express had subcontracted transport to a subcontractor, TNT Express will pay a compensation of 17 SDR/kg to its client under its General Conditions, even though it will only be able to recover 2 SDR/kg from its subcontractor under The Hague-Visby Rules. TNT Express observes that 5% of its clients are "major accounts", which prefer a higher liability limit, mainly because they carry goods of high value. In these cases, and to the extent that the CMR and Warsaw/Montreal Conventions allow it, derogation is made from the General Conditions and higher liability limits are agreed upon between TNT Express and these clients.

TNT Express indicated that its regime does not conflict with the Dutch multimodal regime. However, it is conscious that it may clash with German national law. It therefore provides for separate conditions for Germany.

The Association of European Vehicle Logistics, a consignee and operator of various modes, held that in case of difficulties to localise loss/damage, **full liability** applies unless there are clearly specified limitations.

Similarly, the port authority Union des Ports de France, in line with the French BP2S shortsea & intermodal Promotion Centre held that **contractual arrangements are sought in order to avoid lengthy litigation**. The Port of Nantes answered that it **lacked experience** on this issue.

Among the Member States, France stated that the contractual regime determines liability, but that some clauses are subject to mandatory international conventions. It refers, in this respect, to **Article 2 CMR Convention** as regards the piggyback multimodal rules. Denmark gave an identical answer to the ship-owners' associations (see above), i.e. that the **Hague/Visby Rules** usually apply and that the **UNCTAD/ICC Rules** provide for special sea/inland waterways defences in its article 5.4. Sweden held that the clauses on non-localised damages of the **existing multimodal transport documents** are applied. The Netherlands held that, under **Dutch law**, the carrier is liable unless he proves that he cannot be held liable on any of the transport legs.

The French freight forwarder CMA CGM Logistics merely stated that difficulties in localising damage, loss or delay cause **delays in litigation**. The European freight forwarders association CLECAT and two of its members (FEDESPEDI and CEB) indicated that, unless there are clearly specified limitations of liability (e.g. in common law systems), the freight forwarder is **fully liable** when such difficulties occur. The Finnish freight forwarders association, however, held that the freight forwarder falls back on the **NSAB 2000 General Conditions** of the Nordic Association of Freight Forwarders ("NSAB"), limiting liability to 8.33 SDR/kg gross weight. Answering on behalf of its freight forwarders, the Polish Land Transport Chamber of Commerce limited its contribution to the plain statement that **each unimodal operator is liable for "his leg" of the multimodal journey**, unless a freight forwarder acts as the representative of all legs towards the consignor and

consignee. Finally, the Lithuanian freight forwarder Jurtransa claimed that **insurers would attempt avoiding payment** in these cases.

The Finnish Federation of financial services indicated that difficulties in determining the leg where loss, damage or delay took place have to be solved according to the **conditions of the transport document used**.

Among the insurers, the Swedish Insurance Federation held that either the NSAB 2000 **General Conditions of the NASB** applies or the unimodal conventions, which solve the difficulties of localisation loss, damage or delay by joint liability of all carriers or by holding the last carrier automatically responsible (with a right to reclaim from the liable carrier). The Nordic insurance company IF P&C similarly referred to **NSAB 2000**. The German insurance company Schunck stated that the **German Commercial Code** (§§ 452 HGB) stipulates that in the event of an “unknown place of damage”, general freight law applies and limits the carrier’s liability respectively to 8.33 SDR/kg gross weight for loss or damage, and to 3 times the freight charge for delays. The Belgian insurance company Navigators held that liability is governed and determined by the **liability terms of the last carrier**.

24 Many stakeholders expressed [additional remarks on the current situation of carrier liability for multimodal transport](#).

Some stakeholders urged for a harmonisation of carrier liability. Professor Berlingieri stressed the urgent need for an international multimodal liability regime. France insisted on a harmonisation of the compensation levels and of the rules on burden of proof throughout the different modes. The French Shippers Council, the port authority Union des Ports de France, the Port and Water Policy Division of the Flemish Government of Belgium, the French BP2S shortsea & intermodal Promotion Centre lamented the absence of a specific multimodal liability regime in the EU, especially when involving a sea leg, i.e. when intra-EU shortsea shipping is concerned. They added that the liability regime for multimodal freight consignment does, at present, not only depend upon the transport mode but also upon the loading unit: the different multimodal loading units (lorries, (semi-)trailers, swap bodies, containers, etc.) on a same ship operating in an intra-EU sea leg are subject to different liability regimes.

By contrast, one stakeholder – the Swedish Insurance Federation – expressly stated that shippers or receivers are satisfactorily covered by cargo insurance.

One stakeholder – the German insurance group Schunck – highlighted the problem posed by warehousing and value-added logistics during multimodal transport, “*given that insurers bear a strict, limited liability for transport, but a fault-based, unlimited liability for storage and value-added logistics*”. This is legally not correct because insurers do not bear any liability. It probably reflects the fact that German insurers provide coverage to carriers, which benefit from a limited liability for multimodal transport under German law, but do not benefit from the same limits when other activities than transport are involved (e.g. storage).

Some stakeholders suggested that the UNCITRAL Proposal provides for a modern and comprehensive set of rules for multimodal transport with a sea leg and that, consequently, regulation at EU level is not required (ship-owners, Spanish Shortsea Promotion Centre, Denmark). Others – the International Rail transport Committee (CIT) and the Community of European Railway and Infrastructure Companies (CER) – advocated the COTIF/CIM Rules as a solution for a uniform EU liability regime (except for Estonia, Malta and Cyprus), given that it not only provides for unimodal railways rules, but also for multimodal rules and that it protects the customer to a higher extent than the international conventions for other modes, especially maritime transport. One stakeholder – the AEA – considered that a solution should be found in contractual arrangements between carriers.

Some stakeholders – the European freight forwarders association CLECAT and two of its members (FEDESPEDI and CEB) - stressed that there is no statistically relevant correlation between mode selection and liability limits. Indeed, if there were to be a correlation, transport modes characterised by a higher liability regime, such as railways, would attract more users, which, in practice, is not the case.

One stakeholder – the Polish Land Transport Chamber of Commerce – held that all modes of transport should be complementary and not competitive, which would ease liability issues between modes.

7.3 3rd Set of Questions: A uniform EU multimodal e-transport document? A uniform EU liability regime?

3.1 The possibility of a uniform transport document in the EU.

25. When given the choice between a network and a uniform regime, **the majority of stakeholders (29) opted for a uniform approach**, with a single document applying a single liability regime irrespective of the mode suitable for all functions of transport documents. A few stakeholders **(8) abstained**. The **remaining stakeholders (20) chose a network approach**, where a single document or various documents refer to and apply different liability regimes for each mode. Finally, **1 stakeholder advocated a combination of both the uniform and the network approach**.

The stakeholders were asked to motivate their choice.

Amongst the advocates of the uniform approach, the following reasons were given:

The German insurance group Schunck explained that **“a single face to the customer”** should be translated into “a single document for the customer” to ease liability calculations.

According to the French Port of Nantes and the Union of French Ports, a uniform approach, irrespective of mode, allows logistics providers to offer **competitive, reliable and sustainable “door to door” solutions** to shippers. The Slovak Republic highlighted **the synergic effects** of uniformity.

The French Intermodal and Shortsea Promotion Centre BP2S and the Port and Water Policy Division of the Flemish Government of Belgium highlighted the **simplicity, certainty, facility and predictability** of a uniform approach. France underlined that a uniform approach is capable of **reducing costs, complexity and reluctance towards multimodal transport, offering a simple and legally certain solution**. Similarly, the French Shippers Council and the European Shippers Council stressed its **simplicity and predictability**. The Lithuanian freight forwarder and port agent Jurtransa held that a uniform approach would reduce paperwork. One stakeholder held that it would **simplify liability issues**, but that this would very much depend upon the contents of the uniform regime. In this respect, it recommended that any regime be based upon the Montreal Convention. The International Union of Combined Road/Rail Transport Operators UIRR also highlighted the **clarity and simplicity** inherent to a uniform approach. Lithuania held that a uniform approach **reduces the administrative burden** and is easy to use for both the transport operators and the authorities. The French railway freight carrier Rail Link Europe indicated that a uniform approach allows **switching modes without additional documents**. The Federation of Finnish Financial Services held that the **efficiency of claims** requires a **simplified approach**. In its view, the NSAB2000, based on that idea, prove to work well. The Finnish Road Haulage and Logistics Providers Association SKAL also underlined the **efficiency of the logistical and administrative processes**. The Romanian railway carrier CFR Marfa indicated that a uniform regime can **reduce bureaucracy and administrative formalities, enhance solutions to claims and disputes and provide a better definition of the relationships between the transport operators of the different modes**. The French ferry operator **Brittany Ferries** held that a single document in electronic format would **ease administration and terminal facilities**.

The European freight forwarders association CLECAT and two of its members (FEDESPEDI and CEB) held that a mode-neutral solution is preferred as it **avoids discrimination**. However, it highlighted that **regional uniformity is unsuitable** as it would add another regime and increase the complexity of the legal framework. Similarly, the Association of European Vehicle Logistics ECS held that **uniformity only makes sense at a global level**.

The Dutch bank ABN AMRO held that a uniform approach **avoids discussions on liability** between the various transport operators. Similarly, the Finnish Freight Forwarders Association held that a uniform approach **reduces the number of conflicts and legal interpretation**. According to the German Insurance Association, a uniform approach **alleviates the burden of proof**.

The Dutch transport integrator TNT Express held that it is already applying a uniform approach in the **“catch-all” provision of its general terms and conditions**.

Amongst the supporters of the network approach, the following reasons were given:

The Polish Land Transport Chamber of Commerce, representing the Polish freight forwarders held that a network approach was necessary due to the **variety of divergent regulations** for each transport mode. The Lithuanian rail carriers equally held that it is **impossible to combine a single document suitable for all modes**. Professor Berlingieri added that a network approach is **necessary to allow for a simultaneous application of the CMR and the UNCITRAL Proposal**.

In its quality of representative of the Polish railway freight carriers, the Polish Land Transport Chamber of Commerce held that the network approach is **more customer-friendly** to users of intermodal transport.

The Netherlands held that the current **Dutch law includes a network system** and that there are **no reports that the industry (carriers and consignors/consignees) is not satisfied with it**.

The Belgian insurer Navigators expressed its **fears** that, under a uniform regime, his liability would be fixed on the basis of the **most favourable liability regime for the shipper**, whilst the **subcontractors would continue to trade under more restrictive terms**. This leads, in its view, to an increased exposure to liability insurers for which they will unlikely be able to charge higher premiums.

The French RSC CMA - which is at the same time an inland waterways carrier, road carrier and freight forwarder underlined that **risks are mode-specific**.

The International Road Transport Union IRU held that a uniform solution would **violate the unimodal conventions**.

The ship-owners of ECSA, BIMCO, ICS, WCS and the British Chamber of shipping, together with the International Group of P&I Clubs, the Spanish Shortsea Promotion Centre, the Spanish ship-owners of ANAVE and Denmark, held that the rules of the **UNCITRAL Proposal**, based upon a **network approach**, should be ratified. The Proposal should, in their view, be preferred as the way forward because it was extensively considered during negotiations and agreed by a majority of contracting state, including EU Member States. They allege that it ensures **respect for the unimodal conventions and reduces costs**

considerably, in particular by making **recourse claims between the contracting carrier and performing carrier subject to the same rules as the ones applicable to disputes between the shipper and the contracting carrier**. The Nordic insurance company IF P&C held that the existing **NSAB rules are working well**.

The Association of European Airlines (AEA) suggested a **combination of both approaches**. It explained that the uniform system is preferable to the extent that the place of loss or damage is unknown. However, **when this place is known, the network system is, in its opinion, preferable** because the multimodal transport operator can take recourse towards a subcontractor to the extent of his own liability towards the shipper. The AEA added that a uniform document covering the entire multimodal transport track would be a positive, with different legal contents for each unimodal leg of the multimodal chain. The AEA suggested **Article 8:46 of the Dutch Civil Code**, relating to multimodal transport documents, as a model.

Amongst the abstentions was Sweden, which held that it prefers an **industry-based approach** where the conditions of the main leg govern ancillary legs, as foreseen by the UNCITRAL Proposal and the COTIF/CIM Rules. The Road Haulage Association also abstained, indicating that it is in favour of a **uniform approach to the extent that liability and freight rates for road transport would not increase**. The International Rail transport Committee CIT and the Community of European Railway and Infrastructure Companies CER held that a **uniform approach would be ideal but only if its scope were not limited to the EU**. They indicated that, at present, rail transport between Germany and Russia is governed by a single CIM/SMGS Consignment Note and that reintroducing the need for two documents would not be considered progress.

Comments:

The advocates of a uniform approach are correct to hold that a uniform system simplifies customer relationships because it provides for a single document for all customers applying the same rules to all customers. It is also true that this would make multimodal liability simpler and more predictable and would reduce legal and administrative costs. Even though some stakeholders hold that it would enhance competition between modes, this is doubtful because, throughout the Study, a majority of stakeholders have expressed the opinion that liability considerations do not play an important role in the choice of a transport mode where other factors (cost, speed, etc.) are decisive. However, the simplification of a uniform system may reduce overall reluctance towards multimodal transport.

However, the support of a uniform regime needs to be qualified as to its geographic reach. Indeed, it needs to be read in conjunction with the response to Question 37: the majority of the stakeholders favouring uniformity call for global as opposed to regional uniformity. Surprisingly, even the Scandinavian stakeholders who hold that their regional (network-based) solution – the NSAB rules – provides for a workable solution also oppose a regional EU solution.

It is true, as highlighted by the supporters of a network approach, that the use of a uniform regime brings about complications in terms of its compatibility with the existing unimodal conventions, some of which already contain provisions regulating specific multimodal scenarios. This is an obstacle that could only be overcome by (i) the negotiation of amendments to ensure reservations and/or modifications by the EU Member States party to each of these conventions, to the extent that these conventions allow for it; or (ii) the negotiation of a new, European Convention between all EU Member States, which would take precedence over earlier conventions. This obstacle is probably one of the reasons why the UNCITRAL Proposal relies upon the network approach.

Furthermore, it is correct that a uniform regime that would only apply to the consignor-multimodal carrier relationship and not to the carrier-subcontractor relationships would create a situation of imbalance, which may be to the detriment of the multimodal carrier. A network regime, on the contrary, avoids this inequity.

The historically influential argument that a network regime is needed because risks are mode-specific needs to be taken with a pinch of salt in modern times. Indeed, since containerisation has seen the light, it seems hard to justify that a container on a maritime vessel is exposed to much lesser risks than a container on a train justifying important differences in terms of carrier liability.

If considering action, the European Commission should carefully outweigh the pros and cons of a uniform regime against the pros and cons of a network regime.

26. When asked whether they considered [a single transport document applicable to all modes and suitable for all functions of transport documents](#) to be [feasible in the EU](#), **32 stakeholders responded that they consider it feasible, whereas 18 stakeholders responded that they do not consider it feasible.**

Of the positive responses, the Groupement Européen de Transport Combiné qualified its response by adding that a single document is **only feasible if a special convention on road/rail combined transport** is created. The Finnish Road Haulage and Logistics Providers Association SKAL held that it would be feasible **provided that the liability regime is also changed**. The Port of Nantes and the Union des Ports de France referred to the **BP2S single document proposal** of the French Intermodal and Shortsea Promotion Centre BP2S. They added that they consider a single document also feasible (customs-wise). ABN AMRO Bank held that a single document would **simplify procedures and increase the speed** of processing. The Association of European Airlines added that the **existing legal and political structures render EU-wide harmonisation easier**. France held that the international framework presently works per transport mode but that a **contractual document** should be preferred that parties could use at their own discretion. Lithuania indicated that the introduction of a single document would **require significant administrative changes in each mode, which may be difficult to harmonise given their specificities**. One stakeholder stressed that any solution should be found at a **global level**.

Of the negative responses, Sweden held that transport documents should be **adapted to the needs of specific transport modes** and therefore left to the discretion of the industry. The International Road Transport Union IRU referred to the **failure of the UN Multimodal Proposal of 1980**. Similarly, the Dutch railway carrier ERS Railways indicated that the **alignment of the various liability regimes would take too long**. The Netherlands stated that the main function of a transport document is to evidence the contract of carriage, which includes **other, mode-specific provisions** than liability provisions. Because of these conditions, harmonisation may not be frequently used. Moreover, in its opinion, a harmonisation of contractual conditions may be anti-competitive. The UK Road Haulage Association explained that **interests are too varied and mutually exclusive**. Furthermore, even if a single document were feasible it would have to be agreed at a higher level than that of the EU, otherwise this would merely add another document and legal regime without removing any of the others. In the opinion of a Lithuanian railway carrier, **different traditions and regimes** cannot be combined to satisfy all players/transport modes. The Federation of Finnish Financial Services and the Nordic insurance company IF P&C held that **regionalism should be avoided**. Denmark, the ship-owners of ECSA, BIMCO, ICS, WCS and the British Chamber of shipping, together with the International Group of P&I Clubs, the Spanish ship-owners association ANAVE and the Spanish Shortsea Promotion Centre, strongly oppose a uniform transport document in the EU. In their opinion, **each transport mode requires its own liability and documentary rules**, because each mode has its own characteristics. Liability and documentary rules applicable to the various modes have to meet the specific requirements of these modes. They held that, at multimodal level, a single document can be used in the relationship between the shipper and the contracting carrier, but this multimodal document could not possibly replace documents issued under each separate leg of the multimodal transport.

3 stakeholders - the European freight forwarders association CLECAT and two of its members (FEDESPEDI and CEB) - **answered "yes and no"**. A single document would, in their view, not be suitable to all modes and all functions in the EU. It doubts about the success of a European regime, which, even if it were to simplify transport within the EU, would have negative effects on the EU's external trade. Many operators would erroneously believe that they are protected by the EU-regime but would be exposed to foreign actions. Even though answered "no", the Association of European Vehicle Logistics ECS gave exactly the same reasons as these freight forwarders.

5 stakeholders did not respond. Amongst them, the International Rail transport Committee (CIT) and the Community of European Railway and Infrastructure Companies (CER) held that, in practice, it is **hardly feasible** to develop a uniform transport document without a uniform liability regime (i.e. a uniform law on the contract of multimodal carriage) because the document should sum up all existing unimodal conventions, which is practically unfeasible. In this respect, a reference is made to the Analysis of the Outcome of the Stakeholder Consultation in 7.5.1.

Comment: Most stakeholders seem to favour the concept of a single transport document *per se*. Discrepancies only emerge when attaching a liability system to this single transport

document. However, the design of a single transport document suitable for all transport modes and document functions without harmonising underlying liability issues would not only be a tedious exercise but probably also a pointless exercise, given that the underlying specificities of each regime would call for multiple exceptions and *caveats*.

27. Responding to the question whether they [already use a single transport document applicable to all modes and suitable for all functions of transport documents](#), **17 stakeholders confirmed that they already use a single document, whereas 31 stakeholders responded that they do not use a single document. 10 stakeholders did not respond.**

The Belgian insurance company Navigators held that many of its insured have a **multimodal transport document governing their liability door-to-door**.

Sweden indicated the **NSAB 2000 General Conditions** of the Nordic Freight Forwarders Association.

The Slovak Republic mentioned the so-called **Ubergabeschein, as a substitution of COTIF/CIM or CMR**, which is **only valid for the company Intercontainer Basel**. The Romanian railway carrier CFR Marfa answered that it uses the **CIM consignment note for Combined Transport**. In its quality of representative of the Polish railway carriers, the Polish Land Transport Chamber of Commerce answered that it uses the **CIM-UIRR consignment note** for road/rail transport.

The UK Road Haulage Association answered that a **CMR** can be used if parties agree to it.

The German insurance group Schunck answered that its clients use a **FIATA Multimodal Transport B/L (FIATA B/L)** for all transport modes, both multimodal and unimodal (e.g. maritime transport). The German Insurance Association, the Association of European Vehicle Logistics ECS, the Nordic insurance company IF P&C, the European Freight Forwarders Association CLECAT and its Italian member FEDESPEDI and Belgian member CEB answered that they use a **FIATA Multimodal Transport B/L (FIATA B/L)**. The Finnish Freight Forwarders Association held that its members use the negotiable **FIATA Multimodal Transport B/L (FIATA B/L)** and the non-negotiable **FIATA Multimodal Transport Way Bill (FWB)** and that the NSAB 2000 trading conditions of the Nordic Association of Freight Forwarders are suitable for all functions.

The French maritime carrier CMA CGM mentioned the **FIATA House B/L document**, as per its **Non Vessel Owning Ocean Carrier quality**.

The Association of European Airlines AEA answered that its members use an **Air Waybill** because their transport is limited to airlift and (road) substitution as feeder service.

The Dutch transport integrator TNT Express held that it is **already applying a uniform approach in the "catch-all" provision of its general terms and conditions**.

Comment: Most stakeholders still use multiple transport documents for multimodal transport. However, some single transport documents for multimodal transport are currently in existence and are being used by some stakeholders, e.g. the CIM consignment note for Combined Transport of the FIATA Multimodal Transport B/L.

28. On the **overall impacts of a single transport document:**

- a **vast majority of stakeholders (30) held that a single transport document would generally foster/facilitate multimodal transport** (16 held that it would hinder/complicate multimodal transport, 4 said that they have no effect and 8 did not respond);
 - a **majority of stakeholders (28) held that a single transport document would increase legal certainty of multimodal transport**, 15 held that it would hinder/complicate multimodal transport, 8 said that it has no effect and 7 did not respond;
 - somehow in contradiction with the previous answers, a **majority of stakeholders (25) held that a single transport document would increase conflicts of legislation as regards multimodal transport**, 16 held that it would decrease conflicts of legislation as regards multimodal transport, 6 said that it has no effect and 11 did not respond;
 - a **majority of stakeholders (23) held that a single transport document would decrease friction costs related to court claims and litigation for multimodal transport**, 18 held that it would increase friction costs, 7 said that it has no effect and 10 did not respond;
 - **most stakeholders (28) agreed that a single document would have no bearing on the security of multimodal transport** (according to 13 stakeholders, a single document would increase the security of multimodal transport, and 17 did not respond to this question). The Dutch railway carrier ERS Railways held that security and safety are two different concepts and that, with e-docs, it may be more difficult to know the cargo.
- opinions were pretty much divided on the other aspects:**
- o as to whether a single transport document would make it easier (18) or more difficult (14) to obtain **insurance coverage for multimodal transport**, or whether a single transport document bears no effect on the ease with which insurances are obtained (17) (9 did not respond);
 - o as to whether a single transport document would make it easier (15) or more difficult (14) to obtain **financial services from banks for multimodal transport**, or whether a single transport document bears no effect on the ease with which financing is obtained (12) (16 did not respond);

- as to whether a single transport document would increase (15) or decrease (10) **freight rates and/or prices for multimodal transport services**; or whether a single transport document bears no effect on freight rates and prices obtained (21) (11 did not respond);
- as to whether a single transport document would increase (22) or decrease (19) **business and administrative costs for adapting the internal processes to the new single standard document for multimodal transport**; or whether a single transport document bears no effect on business and administrative costs (6) (11 did not respond). The Finnish Road Haulage and Logistics Providers Association SKAL indicated that business and administrative costs would increase in the short run but decrease in the long run.

- when asked whether electronic transport documents have any **other economic, social and/or environmental impacts on multimodal transport**, the UK Road Haulage Association stated that a single EU transport document would create **different circumstances between single and multimodal transport and probably benefit neither**. In its view, it would create a new legal framework that would only benefit lawyers. The ship-owners of ECSA, BIMCO, ICS, WCS and the British Chamber of shipping, together with the International Group of P&I Clubs, the Spanish Shortsea Promotion Centre, the Spanish ship-owners of ANAVE and Denmark held that a **reduction of administrative costs and legal uncertainty requires the use of a same document for EU and non-EU transport**, otherwise too many extra costs are created. The International Rail transport Committee CIT and the Community of European Railway and Infrastructure Companies CER reiterated that transport is global and that only a uniform liability system at global level would be capable of providing for benefits, whereas a **EU-wide regime would have no added value but, instead, add a new layer of red tape and unnecessary administrative and legal costs**.

The Association of European Vehicle Logistics ECS, the European freight forwarders association CLECAT and two of its members (FEDESPEDI and CEB) held that a focus on multimodal documents and liability will **deduct attention from more important issues, such as innovation, cost reduction and enhanced efficiency in the multimodal chain**.

The French Port of Nantes reaffirmed that the development of multimodality, when suitable, and comodality, especially for short legs is very important for a sustainable European economy, as it fosters an **optimal use of its transport networks**. The French Intermodal and Shortsea Promotion Centre BP2S, the Union of French Ports and the Port and Water Policy Division of the Flemish Government of Belgium held that a single European multimodal/intermodal transport document would **enhance flexibility, encourage modal shifts, co-modality and combined transport and consequently reduce environmentally less friendly road-only journeys**. It added that a single document is a necessary tool to promote intermodal journeys with a shortsea leg between 2 EU Member States and would support the Motorways of the Sea initiative and a seamless door-to-door traffic in the EU. Similarly, the French Shippers Council held that a single document would help to promote multimodal transport, especially when it involves a

maritime leg and to develop the Motorways of the Sea initiative. France stated that if a single transport document encourages multimodal transport, and therefore **benefits a switch from road to other modes, this would fit with the EU's agenda**. According to the Lithuanian freight forwarder and port agent Jurtransa, a single transport document would **accelerate cargo movement**. The French railway carrier Rail Link Europe and the French maritime carrier CMA CGM highlighted the **positive environmental impacts of using less paper**.

Comment: A single transport document would foster multimodal transport, increase legal certainty and decrease friction costs relating to court claims and litigation. However, the contradictory statement of many stakeholders that it would also increase conflicts of legislation is due to their awareness of the existing unimodal conventions, with which a uniform regime could clash if not carefully drafted. Again, many stakeholders insisted that an EU-wide regime would have no added value but, instead, add a new layer of red tape and unnecessary administrative and legal costs.

29. When asked whether they consider that a **single transport document applicable to all modes and suitable for all functions of transport documents** is **acceptable for**:

- the **shippers**, **34 responded "YES"** and 2 responded "NO" (21 abstained);
- the **road, rail, air, combined, maritime and inland waterways operators in their Member State**, **35 responded "YES"** and 4 responded "NO" (18 abstained).

The UK Road Haulage Association stated that a single transport document would add another document for a small proportion of the carriers' businesses.

30. **23 stakeholders** were of the opinion that a **single transport document** could enable a **secure and reliable tracking procedure and decrease the need for controls in EU trade**. However **22 stakeholders opined the opposite**. 12 stakeholders abstained.

The French Port of Nantes affirmed that there is a link between customs and freight transport. A **higher degree of transparency enhances trade flows**. The Association of European Airlines AEA held that a single document would **reduce complexity and therefore improve transparency and traceability**. France noted that some freight forwarders already provide tracking tools. Lithuania mentioned a single tracking system. The Romanian railway carrier CFR Marfa indicated that a single document would **avoid the need for comparisons of documents of different modes, as well as the loss of documents**. The French maritime carrier CMA CGM held that a single transport document would present the advantage of being **consultable by the authorities at any moment**.

The ship-owners of ECSA, BIMCO, ICS, WCS and the British Chamber of shipping, together with the International Group of P&I Clubs, the Spanish Shortsea Promotion Centre, the Spanish ship-owners of ANAVE and Denmark held that it is important that the relevant data for tracking purposes are available and accessible. It is **unrealistic to believe that**

a single transport document could contain all these data. In any event, many carriers already offer customer tracking arrangements.

According to the German Insurance Association, the **transport document bears no effect** on security and tracking arrangements. Sweden held that **tracking costs will remain the same**, irrespective of the creation of a single transport document.

According to the UK Road Haulage Association, it is hard to see how a single document would be useful, given that the **vehicle and freight manifests, and not the transport documents, are tracked**. This is because transport documents often refer to several consignments. The single transport document does not seem to take account of groupage.

The Port and Water Policy Division of the Flemish Government of Belgium held that current tracking procedures are **currently not based upon transport documents** but other means. However, if all necessary information were to be grouped into a single document, the authorities **might reduce controls and save out on the costs** of obtaining information by other means.

According to the German insurance group Schunck, a **transport document** traditionally has the function of evidencing the contract of carriage, its parties and its contents. This renders it **complicated to use it for tracking purposes**, even though transport customers would enjoy the benefit of tracking.

Comment: Opinions diverge as to whether a single transport document could improve cargo tracking. Currently, tracking is not done on the basis of transport document and tracking services are provided by many carriers and freight forwarders on a stand-alone basis. A possibly new, single transport document would need to be specifically adapted to provide for an additional tracking function.

31. On the influence of a **single transport document** on the **willingness of insurers and banks to issue insurances and bank guarantees for multimodal freight transport**, **30 stakeholders** responded that a single document has **no effect** on insurances and guarantees, whereas **16 stakeholders** held that it has a **positive effect** on the willingness of insurers and banks to issue insurances and bank guarantees for multimodal freight transport, 1 stakeholder viewed that it has negative effects and 10 stakeholders did not respond. As no stakeholder category is mentioned in the report, this opinion was provided by a mixture of different categories:

1. French Intermodal and Shortsea Promotion Centre BP2S;
2. French Port Authority of Nantes;
3. German insurance group SCHUNCK;
4. French freight forwarder CMA CGM LOGISTICS;
5. French railway freight carrier Rail Link Europe;
6. Romanian inland waterways carrier AAOPFR-Galati;
7. International Union of Combined Road-Rail transport companies (UIRR);
8. Lithuania;
9. Slovak Republic;

10. Romanian railway freight company CFR Marfa;
11. Professor Berlingieri;
12. French Union des Ports de France;
13. Association of European Airlines (AEA)
14. Finnish Freight Forwarders Association
15. Dutch bank ABN AMRO.

We note, for fullness that, apart from the German insurance broker SCHUNCK, all insurers (the German Insurance Association, the International Group of P&I Clubs, the Nordic Insurance Company IF P&C, the Swedish Insurance Federation, the Fédération Française des Sociétés d'Assurances FFSA and the Belgian insurance company Navigators) held that a single transport document would not have any effect on the willingness of insurers and banks to issue insurances and bank guarantees. The responses by the banks were divided: ABN AMRO held that a single transport document would have a positive effect, whereas the Federation of Finnish Financial Services held that a single document would have no effect at all on the willingness of insurers and banks to issue insurances and bank guarantees for multimodal freight transport.

Comment: Apart from the German insurance broker SCHUNCK, all insurers (the German Insurance Association, the International Group of P&I Clubs, the Nordic Insurance Company IF P&C, the Swedish Insurance Federation, the Fédération Française des Sociétés d'Assurances FFSA and the Belgian insurance company Navigators) held that a single transport document would not have any effect on the willingness of insurers and banks to issue insurances and bank guarantees. The responses by the banks were divided: ABN AMRO held that a single transport document would have a positive effect, whereas the Federation of Finnish Financial Services held that a single document would have no effect at all on the willingness of insurers and banks to issue insurances and bank guarantees for multimodal freight transport.

3.2 The possibility of a uniform electronic transport document in the EU.

32. When asked whether they are [in favour of electronic transport documents](#), a **vast majority of stakeholders (48) responded positively** and **only (2) stakeholders – Sweden and the Groupement Européen de Transport Combiné GETC - responded negatively**, whereas 8 abstained from giving an opinion.

The Road Haulage Association held that, currently, the use of electronic transport documents is often still backed-up by paper documents as a guarantee for the uncertainty surrounding their legal validity or as a guarantee for electronic system failure.

According to the French Intermodal and Shortsea Promotion Centre BP2S and the Union of French Ports, a move towards electronic transport documents should happen in two successive stages: at a first stage, a single European transport document for multimodal transport should be created; and at a later stage, an electronic single European transport document for multimodal transport should see the light. In other words, dematerialisation should only occur following effective simplification.

When expanding on the reasons why they favour electronic transport documents, the majority of stakeholders held that electronic transport documents will **(i) simplify** administrative procedures (they are easier to produce than paper documents and also facilitate cargo tracking and tracing)¹³⁰; **(ii) speed-up** information exchange (critical in the transport business) and **(iii) reduce administrative costs**. With respect to simplification, the French State noted that simplification would not automatically ensue from dematerialisation, but that necessary measures need to be taken to guarantee simplification. Importantly, the AEA pointed out that dematerialising transport documents alone without the accompanying documents would not be satisfactory. Many stakeholders (the ship-owners of ECSA, BIMCO, ICS, WCS, the Spanish Ship-owners Association ANAVE and the British Chamber of shipping, the International Group of P&I Clubs, the Nordic insurance company IF P&C, the Finnish Freight Forwarders' Association, Denmark, the Spanish Shortsea Promotion Centre, the International Rail transport Committee (CIT) and the Community of European Railway and Infrastructure Companies (CER)) also held that the introduction of a uniform electronic document should not happen at EU-level but rather at global level (otherwise EU-USA transport would require printouts at the border). According to the International Rail transport Committee (CIT) and the Community of European Railway and Infrastructure Companies (CER), an electronic document at EU level would not generate any benefits, as opposed to a genuinely global uniform electronic transport document. Finally, an additional advantage of electronic transport documents spotted by the Romanian railway freight carrier CFR Marfa, is that electronic documents **eliminate all problems generated by the loss of documents**.

The ship-owners of ECSA, BIMCO, ICS, WCS and the British Chamber of shipping, as well as the International Group of P&I Clubs, referred to the UNCITRAL Proposal allowing for electronic transport documents as a decisive step forward to creating legal certainty as regards the use of electronic transport documents. One stakeholder referred to IATA's e-freight programme, which proves to be working successfully. The International Road Transport Union, which advocated electronic documents per transport mode, referred to the CMR consignment note for both paper and electronic use, but admitted that parties still preferred paper documents,

The main hurdles invoked for e-transport documents were **(i) their legal validity**, especially when transfer of title is concerned, **(ii) their security** and **(iii) their general acceptance by the transport market**. The Lithuanian State also held that the **costs of the necessary technology** represented a hurdle. One stakeholder, the German insurance association, expressed fears of increased criminality if electronic transport documents were introduced.

According to **Sweden**, the one of the two stakeholders which did not claim to be in favour of electronic transport documents, the use of electronic transport documents is a **commercial issue to be determined on a contractual basis by the parties to the commercial transaction**. The other stakeholder against the introduction of electronic transport documents, the **Groupement Européen de Transport Combiné GETC** held

130 Especially for dangerous goods, according to the French ferry operator Brittany Ferries.

that an e-document will **not improve the level of service in operations, i.e. punctuality, reliability and quality**, which are the main parameters to render modal switches competitive.

Comment: A vast majority of stakeholders is in favour of electronic transport documents because they simplify and reduce the costs of administrative procedures, whilst being capable of speeding these up. Importantly, an electronic system eliminates the problems due to the loss of documentation in the course of the transport. The only stakeholders that expressly oppose electronic transport documents are Sweden and the Groupement Européen de Transport Combiné. The argument of the French Intermodal and Shortsea Promotion Centre BP2S and the Union of French Ports, according to which dematerialisation should only occur following effective simplification, does, in our opinion, not stand. Indeed, an electronic transport document system would render any documents irrelevant. It would therefore be more efficient that the creation of a single transport document throughout modes and its dematerialisation go hand-in-hand in order to avoid double work. Again, many stakeholders held that dematerialisation initiatives should not be undertaken at a regional, EU level, but rather at global level. The main hurdles invoked for e-transport documents were (i) their legal validity, especially when transfer of title is concerned, (ii) their security and (iii) their general acceptance by the transport market.

33. On the **overall impacts of electronic transport documents**:

- a **vast majority of stakeholders (32) held that electronic transport documents would generally foster/facilitate multimodal transport** (11 held that they would hinder/complicate multimodal transport, 3 said that they have no effect and 12 did not respond);

- **opinions were pretty much divided on all the other aspects:**

- as to whether electronic transport documents would make it easier (13) or more difficult (11) to obtain **insurance coverage for multimodal transport**, or whether electronic documents bear no effect on the ease with which insurances are obtained (23) (11 did not respond);
- as to whether electronic transport documents would make it easier (10) or more difficult (10) to obtain **financial services from banks for multimodal transport**, or whether electronic documents bear no effect on the ease with which financing is obtained (21) (17 did not respond);
- as to whether electronic transport documents would increase (16) or decrease (11) **legal certainty of multimodal transport**; or whether electronic documents bear no effect on legal certainty (15) (15 did not respond);
- as to whether electronic transport documents would increase (12) or decrease (16) **conflicts of legislations as regards multimodal transport**; or whether electronic documents bear no effect on conflicts of legislation (15) (14 did not respond);
- as to whether electronic transport documents would increase (10) or decrease (14) **freight rates and/or prices for multimodal transport services**; or whether

- electronic documents bear no effect on freight rates and prices obtained (21) (13 did not respond);
- as to whether electronic transport documents would increase (12) or decrease (16) **friction costs related to court claims and litigation for multimodal transport**; or whether electronic documents bear no effect on friction costs (15) (15 did not respond);
- as to whether electronic transport documents would increase (16) or decrease (16) **business and administrative costs for adapting the internal processes to the new single standard document for multimodal transport**; or whether electronic documents bear no effect on business and administrative costs (12) (13 did not respond); 1 stakeholder – the Port and Water Division of the Flemish Government of Belgium observed that electronic documents will increase business and administrative costs on the short run, but decrease these costs on the long run;

- however, **most stakeholders (22)** agreed that electronic transport documents have **no bearing on the security of multimodal transport** (according to 13 stakeholders, electronic transport documents would increase the security of multimodal transport, 1 stakeholder affirmed that it would decrease security and 22 did not respond to this question).

- when asked whether electronic transport documents have any **other economic, social and/or environmental impacts on multimodal transport**, the French railway freight carrier Rail Link Europe, the Italian freight forwarder FEDESPEDI and the Belgian freight forwarder CEB stressed that less paper is obviously environmentally friendly. The French Shippers Council, the Union of French Ports and French BP2S shortsea & intermodal Promotion Centre stressed the positive role of electronic transport documents for the expected developments as regards multimodal transport with a maritime leg, shortsea shipping and the Motorways of the Sea initiative. The Port and Water Division of the Flemish Government of Belgium observed that benefits of electronic documents would only be achieved if the move towards e-documentation was made on a global scale. Therefore, a world-wide acceptance of electronic transport documents should be fostered.

34. The **stakeholders who responded unanimously (35)** considered that e-transport documents would be **acceptable for the shippers in their Member States** (23 did not express their opinion on this issue). Similarly, **nearly all stakeholders who responded (34) unanimously** held that e-transport documents would be **acceptable for the carriers in their Member States**. One stakeholder – the French railway freight carrier Rail Link Europe – dissented (23 did not express their opinion on this issue).

35. On the **characteristics of electronic transport documents**, the following contributions were received:

- the **majority of the responding stakeholders (33)** held that **electronic transport documents should be visualised by using standard internet connection**. The UK Road Haulage Association commented, however, that the need for a paper back-up would unlikely be removed. The Romanian railway freight carrier

CFR Marfa observed that visualisation using a standard internet connection is desirable, but not mandatory. Some stakeholders (12) disapproved the use of standard internet connection for e-transport documents. The Dutch bank ABN AMRO advocated, instead, the use of a **secured website**. The ship-owners of ECSA, BIMCO, ICS, WCS, the Spanish Ship-owners Association ANAVE and the British Chamber of shipping, as well as the International Group of P&I Clubs, the Danish State and the Nordic insurance company IF P&C stressed the need to leave visualisation issues open in order to **allow for changes** according to the needs of the commercial parties and future technological developments. The Port and Water Division of the Flemish Government of Belgium observed that the chosen IT package is premature at the present stage. Finally, there were abstentions (13), such as Professor Berlingieri, the International Rail transport Committee (CIT) and the Community of European Railway and Infrastructure Companies (CER) - who stressed the need for **flexibility** on this type of issues - or the French State, who judged that these considerations were **premature** at this early stage of reflection.

- the **majority of the responding stakeholders (27) held that electronic transport documents should be undersigned by using electronic signatures**. The Polish Land Transport Chamber of Commerce – in representation of the Polish freight forwarders – stressed that it is essential to **protect transport players at all times against unauthorised changes**. The Romanian railway freight carrier CFR Marfa held that electronic signatures should be **mandatory**, because they certify both the takeover of goods, marking the beginning of the carrier’s liability, and the delivery of goods, marking the end of the carrier’s liability. The International Rail transport Committee (CIT) and the Community of European Railway and Infrastructure Companies (CER) only favour the idea of electronic signatures to the extent that there would be a **reasonable and mutually recognised standard of proof throughout the Member States** and referred to **Directive 1999/93/EC on a Community Framework for Electronic Signatures**. Some stakeholders (10) disapproved the use of electronic signatures for e-transport documents. The majority of the opponents (the European Shippers Council, the French Shippers Council, the French Intermodal and Shortsea Promotion Centre BP2S, the Union of French Ports and the UK Freight Transport Association) held that there is **no need for electronic signatures in intra-EU transport because there are no L/Cs in intra-EU trade**. Furthermore, the UK Road Haulage Association observed that electronic signatures are **not compatible with all computer systems**, the German insurance group Schunck stated that electronic signatures are **too complex and make no economic sense for private companies**, whereas the European freight forwarders association CLECAT and its Italian member FEDESPEDI held that the requirements of **Directive 1999/93/EC on a Community Framework for Electronic Signatures** are **not economically feasible**. According to the Port and Water Division of the Flemish Government of Belgium, **electronic signatures should be an option, not a requirement**. Finally, there were **MANY abstentions** (21). Again, the ship-owners of ECSA, BIMCO, ICS, WCS, the Spanish Ship-owners Association ANAVE and the British Chamber of shipping, as well as the International Group of P&I Clubs, the Danish State and the Nordic insurance company IF P&C stressed the need to leave electronic signature

issues **optional to the discretion of the commercial parties**. The French State considered this type of practicalities **premature** at this early stage of reflection.

- **almost all respondents (35) held that electronic transport documents should be released in printable formats, rather than screen-only formats. Only 1 stakeholder – the Belgian insurer Navigators – held that it preferred screen-only transport records.** The French Shippers Council, the French Intermodal and Shortsea Promotion Centre BP2S and the Union of French Ports suggested that a single European e-transport document be **modelled upon the “shortsea XML” document**. The Dutch railway freight carrier ERS Railways recommended that **pdf-formats** be used. The International Rail transport Committee (CIT), the Community of European Railway and Infrastructure Companies (CER) and the Finnish Road Haulage and Logistic Services Providers Association SKAL stressed that **flexibility** as regards this issue is essential. An important contribution was given by the Romanian railway freight carrier CFR Marfa, who held that electronic transport documents should be printable at any moment and that these **print-outs should be certified and should have legal power**. CFR Marfa added that, currently, electronic transport documents are being used in combined transport with a rail leg and regulated by the COTIF/CIM Rules. However, given that not all parties have electronic systems allowing for electronic data exchange, transporters using electronic transport documents are, **at present, often required to print them off**. CFR Marfa illustrated this with the example of the Austrian railway carrier Rail Cargo Austria, who prints its electronic consignment notes off at the **Austrian-Hungarian border**, before sending them onto the Hungarian railway carrier MAV Cargo. Many stakeholders (22) did not respond to this question. Again, the ship-owners of ECSA, BIMCO, ICS, WCS, the Spanish Ship-owners Association ANAVE and the British Chamber of shipping, as well as the International Group of P&I Clubs, the Danish State and the Nordic insurance company IF P&C, observed that the choice of the format should be **left open to the commercial parties**. The French State reiterated that this type of details were **premature** at this early stage of reflection.

Comment: The chosen IT-package is probably premature at this stage. To provide sufficient security, electronic transport documents should bear an electronic signature in cases of negotiable transport documents, which have “title”-functions and are often backed-up by L/Cs. However, in order not to impose needless technological investments upon transport players and to allow for flexibility as regards non-negotiable electronic transport documents, it would be recommended not to require electronic signatures for non-negotiable electronic transport documents. Finally, stakeholders do not appear to be ready to fully leave paper and switch over to electronic documents. Therefore, at least during a phasing-in period, electronic transport documents should be released in read-only printable format (e.g. pdf). This also avoids any discrimination between technologically advanced and less advanced players.

36. The **majority of stakeholders (28) did not opine on the need for guarantees to secure transfer of title on the basis of electronic transport documents**. The Finnish Road Haulage and Logistic Services Providers Association SKAL highlighted that this was a

complex issue requiring a separate, in-depth study. The ship-owners of ECSA, BIMCO, ICS, WCS, the Spanish Ship-owners Association ANAVE and the British Chamber of shipping, as well as the International Group of P&I Clubs and the Danish State referred to Article 9 of the UNCITRAL Proposal and held that the system should provide for clear rules on the method of issuance and transfer of electronic records, especially to guarantee their integrity. Of the **stakeholders who opined (30), the majority (24) voted in favour of a guarantee to secure the transfer of title, whilst the rest (6) voted against**. The UK Road Haulage Association, who voted against a guarantee, explained that third party involvement would **raise costs and reduce savings**. Out of the 23 supporters of a guarantee, **some (12) were in favour of a private guarantee (assurances from a trusted third party). Others (8) supported a public guarantee (EU regulator)**. Finally, **4 stakeholders** did not specify whether the guarantee should be private or public. Among the latter, the Belgian insurance company Navigators⁷ held that both a private or public guarantee would be OK as long as they would offer the necessary guarantees.

Comment: Apart from the use of electronic signatures to secure transport on the basis of negotiable electronic transport documents, it would be advisable to create a system of private assurances from a trusted third party. We would recommend a system whereby banks and credit institutions provide third-party assurances, given that they are already involved in the process for the issuance of letters of credit and documentary credit. Guarantees by a public regulator would not be fit in the transport sector, which is essentially driven by private economy forces.

3.3 The possibility of a uniform liability regime in the EU.

37. When questioned as to whether liability should be harmonised for multimodal transport, a **remarkably vast majority (50) of stakeholders answered "yes"**. Only 4 stakeholders answered "no": the UK Rail Haulage Association, the Swedish State, the French RSC CMA - which is at the same time an inland waterways carrier, road carrier and freight forwarder - and the International Road Transport Union IRU. The UK Rail Haulage Association held that it opposes any initiative that excludes third country traffic - which is essentially multimodal (sea/air to land) - because this would increase costs and create complications. It held, furthermore, that it opposes any rules that would inhibit the use of the CMR in international trade because the use of the CMR is working well. The IRU held that the European Union is not entitled to violate mandatory unimodal conventions. 4 stakeholders did not respond to the question.

Of the 50 stakeholders who support uniformity:

- **33 stakeholders** consider that uniformity should be reached **at a global level:**
 - railway freight carriers:
 - French railway freight carrier Rail Link Europe
 - International Rail transport Committee CIT, which held that an EU regime will only bring about an unnecessary, additional layer of regulation.
 - Community of European Railway and Infrastructure Companies CER, whose comments are identical to those of the CIT.

- Romanian railway freight carrier CFR Marfa, which underlined that a regulation at EU level rather than global level would create similar problems as those Romania presently encounters when carrying out transport to or from countries of the Organisation for Cooperation Railway Lines (“**OSJD**”) applying the Agreement on International Goods Transport by Rail of 1951, as modified in 1998 (“**SMGS Agreement**”). The OSJD comprises 27 Member States in Europe and Asia, **and includes some EU Member States** (Albania, Azerbaijan, Belarus, **Bulgaria**, China, Cuba, **the Czech Republic, Estonia**, Georgia, **Hungary**, Iran, Kazakhstan, Kyrgyzstan, **Latvia, Lithuania**, Moldavia, Mongolia, North Korea, **Poland, Rumania, Slovakia**, Tajikistan, Turkmenistan, Ukraine, Uzbekistan and Vietnam). In addition, many railway companies from EU Member States (e.g. French SNCF, German Deutsche Bahn) are observers at the OSJD. Claims for loss/damages against countries that are only parties to the SMGS and not to the COTIF/CIM Rules are complicated due to the differences between both sets of rules.
- Lithuanian railway carrier
- insurers:
 - German insurance group Schunck
 - Belgian insurance company Navigators
 - International Group of P&I Clubs, which underlined that global harmonisation is vital for a smooth development of international trade and commerce and recommended the UNCITRAL Proposal. However, this global harmonisation should create uniform rules per transport mode (i.e. no uniform rules for all modes).
 - Swedish Insurance Association, highlighting that, if the UNCITRAL Proposal is ratified by the US, it will probably obtain acceptance on a global basis and will likely come into force. Any action at European level should be upheld until the outcome of the UNCITRAL Proposal is firm.
 - Nordic insurance company IF P&C, stressing that uniformity at global level is about to be reached with the UNCITRAL Proposal, that logistics are global by nature and that a regional, European regime will only cause friction and interpretation problems.
- banks:
 - Dutch bank ABN AMRO
 - Federation of Finnish Financial Services, stressing that uniformity at global level is about to be reached with the UNCITRAL Proposal, that logistics are global by nature and that a regional, European regime will only cause friction and interpretation problems.
- ship-owners, who all stressed that global harmonisation is vital for a smooth development of international trade and commerce and recommended the UNCITRAL Proposal. However, this global harmonisation should create uniform rules per transport mode (i.e. no uniform rules for all modes):
 - ship-owners European Community Ship-owners Association ECSA
 - ship-owners World Shipping Council WSC
 - ship-owners International Chamber of Shipping ICS
 - British Chamber of Shipping
 - Baltic and International Maritime Council BIMCO
 - Spanish ship-owners association ANAVE

- Member States:
 - Denmark which underlined that global harmonisation is vital for a smooth development of international trade and commerce and recommended the UNCITRAL Proposal. However, this global harmonisation should create uniform rules per transport mode (i.e. no uniform rules for all modes).
 - air carriers:
 - Association of European Airlines AEA, which held that a European harmonisation would be a positive stepping stone towards a preferred global harmonisation, providing for legal certainty in Europe
 - logistics providers and transport integrators:
 - Dutch transport integrator TNT Express
 - freight forwarders:
 - Federation of Finnish freight forwarders
 - European freight forwarder association CLECAT
 - Italian freight forwarder FEDESPEDI
 - Belgian freight forwarder CEB
 - French freight forwarder CMA CGM Logistics, which stressed that global uniformity should be the goal.
 - Polish Transport Chamber of Commerce representing freight forwarders, which stressed that transport, is a global business.
 - consignees:
 - Association of European Vehicle Logistics ECG, which stressed that transport activities are of a global nature and that a separate European regime would add rather than remove burdens.
 - shortsea promotion centres:
 - Spanish Shortsea Promotion Centre
 - inland waterways carriers:
 - Romanian inland waterway carrier AAOPFR-Galati
 - port authorities:
 - Union of French Ports
 - academics:
 - Professor Berlingieri
- **13 stakeholders** consider that uniformity should be reached **at EU level and apply to fully intra-EU multimodal journeys as well as to the EU-legs of mixed (EU-third country) multimodal journeys**:
- shippers:
 - French Shippers Council
 - European Shippers Council
 - UK Freight Transport Association
 - combined carrier:
 - International Union of Combined Road-Rail Transport Operators UIRR
 - port authorities:
 - French Port of Nantes
 - Port and Water Division of the Flemish Government of Belgium, which observed that it favours **global harmonisation in the long run** but a European

harmonisation in the short run, including transport with a transit leg in non-EU countries.

- intermodal centres and organisations:

- French BP2S shortsea & intermodal Promotion Centre
- Groupement Européen de Transport Combiné, which held that a harmonised European regime should, either from its creation or at a later stage, also include neighbouring countries such as Switzerland, Norway, Turkey, Ukraine and Russia, in a similar fashion as the CMR and the COTIF/CIM Rules.

- freight forwarders:

- Finnish freight forwarders association

- Member States:

- France
- Slovak Republic
- Lithuania, which held that intra-EU level is a condition sine qua non for effective multimodal regulation but that co-operation with third countries is vital to ensure a seamless flow of goods on a global scale (which is very important for the EU economy).

- insurers:

- French Insurance Federation FFSA, which considers an intra-EU regime only too restrictive

- **4 stakeholders** consider that uniformity should be reached **at EU level but be restricted to fully intra-EU multimodal journeys:**

- logistics providers:

- Finnish Road Haulage and Logistic Services Providers Association SKAL, which held that a global regime would be ideal but obviously too complex to attain in the near future and that, therefore, an EU approach would be a positive first step towards harmonisation.

- railway freight carrier:

- Polish Transport Chamber of Commerce representing railway carriers

- maritime carriers:

- CMA CGM,

- freight forwarders:

- Lithuanian freight forwarder Jurtransa

Comment: The vast majority of stakeholders are in favour of global uniformity. Their longing for harmonisation at a global level is often the very reason why they oppose any harmonisation at a European or otherwise regional level. In addition, the supporters of European harmonisation also view European harmonisation as a stepping stone towards ideal, global uniformity. This statement is justified given the global nature of trade.

38. When asked **whether an additional EU multimodal liability regime would be beneficial or, on the contrary, add costs**, the **stakeholders were divided**. **22 stakeholders** held that a European regime would **add costs**, whilst **20 stakeholders** held that a European regime would be **beneficial**. 15 stakeholders did not opine on the issue. 1 stakeholder, the Port and Water Division of the Flemish Government of Belgium,

held that it is difficult to predict whether a European regime would add or reduce costs. In its opinion, much depends on how the rest of the world views the regime and on the extent to which it can be exported.

The Association of European Vehicle Logistics ECG, the European freight forwarders association CLECAT, the Italian freight forwarder FEDESPEDI and the Belgian freight forwarder CEB stressed that a European regime would add an **additional burden**, complicate liability with an additional regime, create **uncertainty** (there is no clear understanding of how the European regime should be shaped) and **extra costs** (**administrative costs**: new forums and protocols and **personnel**: staff to be trained to cope with the new forms and protocols). The Polish Land Transport Chamber of Commerce, representing the freight forwarders, also stressed that it would lead to **unacceptable additional costs**. The Federation of Finnish Financial Services and the Nordic insurance company IF P&C underlined that an additional European regime would create **unnecessary court cases and legal expenses**. One stakeholder held that transport is global by nature and that multimodal transport should be regulated at a global level, as is already the case for air transport and maritime transport. A European multimodal regime will **only be beneficial for European carriers if this European regime is accepted globally, otherwise it will place them in a less favourable competitive position**. The French freight forwarder CMA CGM Logistics stated that if an additional European regime of an **optional nature** is created, it will be **invoiced by carriers**. The ship-owners of ECSA, BIMCO, ICS, WCS, the Spanish Ship-owners Association ANAVE, the British Chamber of shipping, the International Group of P&I Clubs, Denmark and the Spanish Shortsea Promotion Centre held that a European regime would **seriously damage EU trade by creating legal uncertainty** (e.g. because it encroaches upon the UNCITRAL Proposal), **considerable extra administrative costs** (need to operate with different documents, liability rules, etc.), **jurisdictional conflicts, races to courts, etc.** In their opinion, it would also result in **other major trading nations adopting regional or national rules, which would further hamper international trade**. The UK Road Haulage Association held that an additional European regime would **add legal costs associated with the application of two systems, one for the EU and one for the rest of the world**. The International Rail transport Committee (CIT) and the Community of European Railway and Infrastructure Companies (CER) stressed that a European regime would make the legal situation **even more complex without any added value for European carriers**, which would remain subject to the unimodal conventions for transport with non-EU players. The Swedish Insurance Association considers that an **additional European regime in parallel with the UNCITRAL Proposal** would not produce any benefits.

The Romanian railway company CFR Marfa held that an additional European regime would help **reduce ambiguities and disputes** in multimodal transport and create a **uniform and standardised procedure to govern relationships between transport players**. The Dutch transport integrator TNT Express similarly held that a European regime would **increase legal certainty**. The International Union of Combined Road-Rail Transport Operators UIRR held that a uniform regime would **enhance clarity, whilst decreasing legal disputes and costs**. The Dutch bank ABN AMRO observed that a European regime

would create **benefits to some transport players, but not to others**. By contrast, according to the French BP2S shortsea & intermodal Promotion Centre and the Union of French Ports, a European regime would be **beneficial to all transport players**, support the development of multimodal transport in Europe and promote European shortsea shipping. According to the European Shippers Council, a single multimodal liability regime could **improve the operation of the supply chain**. The French Shippers Council indicated that a modern and equitable European multimodal regime would **favour the development and promotion of multimodal transport**. The French maritime carrier CMA CGM held that, in its opinion, a European regime would **lead to savings and reduce costs**. According to the Groupement Européen de Transport Combiné, a European regime would be capable of **filling the existing legal emptiness, creating a uniform framework, replacing the existing UIRR-regime, enhancing relationships between transport operators and insurers and decreasing friction costs**.

Comment: The stakeholders are divided: would an EU-regime imply additional red-tape and hurdles or would it, instead, be a stepping stone towards a desired global uniformity? An answer to this question fully depends upon both the contents and formal shape of a proposed EU-regime.

39. When asked [whether a European multimodal liability regime should be modelled upon an existing regime or whether it should be entirely new](#), the following answers were received:

- **15 stakeholders** held that EU liability should be based on the **UNCITRAL Proposal**:

- European Community Ship-owners Association ECSA
- World Shipping Council WSC
- International Chamber of Shipping ICS
- British Chamber of Shipping
- Baltic and International Maritime Council BIMCO
- Spanish ship-owners association ANAVE
- Nordic insurance company IF P&C
- International Group of P&I Clubs
- Denmark
- Sweden
- Professor Berlingieri
- Finnish Federation of Financial Services
- Spanish Shortsea Promotion Centre
- German Insurance Association, which, alternatively, recommended **FIATA rules** as a model.

- **12 stakeholders** held that it should be based upon **alternative rules/laws** or **industry solutions**:

- Union of French Ports (did not specify which alternative solution)
- French Port of Nantes (did not specify which alternative solution)
- French BP2S shortsea & intermodal Promotion Centre, suggesting to integrate a uniform application of the CMR (except for Art.2) in contractual solutions and

stressed that this solution has the benefit of being immediately applicable, as it is well-known and appreciated by all EU transport players.

- Romanian railway freight carrier CFR Marfa, suggesting the COTIF/CIM Rules
 - France, suggesting a contractual regime based upon the existing international conventions and preferably modelled upon the CMR, as it is the convention with which multimodal transport operators are most familiar.
 - Slovak Republic, suggesting a combination of the UNCITRAL Proposal and the UN Multimodal Proposal 1980.
 - One stakeholder suggesting the Montreal Convention
 - Dutch transport integrator TNT Express, suggesting the CMR or the Montreal Convention.
 - Swedish Insurance Association, suggesting the NSAB 2000 and leaving sufficient leeway to commercial parties to solve problems.
 - French maritime carrier CMA CGM, suggesting the ICC Rules of 1975 (which apply a network regime).
 - International Rail transport Committee CIT, recommending that a new global convention for multimodal transport should (i) be uniform (similar to COTIF/CIM Rules) and (ii) provide for strict liability with fixed limits (e.g. 17 SDR/kg gross weight), as well as joint and several liability of all carriers involved (similar to COTIF/CIM Rules), leaving leeway for flexibility in the relationships between carriers.
 - Community of European Railway and Infrastructure Companies CER, same comments as the CIT.
- 10 stakeholders** held that it should be based upon the **UNCTAD/ICC Rules**:
- Association of European Airlines AEA which, alternatively, recommended **the Montreal Convention**.
 - the European Freight Forwarders Association CLECAT, which clarified that it should be based on the **FIATA multimodal transport B/L**.
 - Italian freight forwarder FEDESPEDI, which clarified that it should be based on the **FIATA multimodal transport B/L**.
 - Belgian freight forwarder CEB, which clarified that it should be based on the **FIATA multimodal transport B/L**.
 - French Shippers Council which, alternatively, recommended **drafting an entirely new EU liability regime**.
 - European Shippers Council
 - UK Freight Transport Association
 - French railway freight carrier Rail Link Europe
 - Polish Transport Chamber of Commerce representing railway carriers
 - Romanian inland waterway carrier AAOPFR-Galati
- 5 stakeholders** held that it should be based upon the **UN Multimodal Proposal 1980**:
- International Road Transport Union IRU which, alternatively, recommended **UNCTAD/ICC Rules** as a model
 - Lithuanian freight forwarder Jurtransa which, alternatively, recommended **to draft an entirely new EU liability regime**

- French RSC CMA, which is at the same time an inland waterways carrier, road carrier and freight forwarder
 - German insurance group Schunck
 - Lithuanian State
- 4 stakeholders recommended drafting an entirely new EU liability regime:**
- French freight forwarder CMA CGM Logistics
 - Finnish freight forwarder association, which suggested that, as a first step, a panel of legal and commercial experts be created to carry out an in-depth study of the existing legislative (UNCITRAL) and contractual (FIATA FBL, FWB, NSAB) possibilities and to create a regional European solution as a stepping stone towards a preferred, global regime, extending beyond EU-specific interests.
 - Dutch Bank ABN AMRO
 - Groupement Européen de Transport Combiné, referring to the 1999 Study *"Intermodal Transportation and Carrier Liability"* by the University of Southampton (co-funded by the European Commission), which recommended the adoption of a Directive or Regulation based on the CMR (plus on COTIF/CIM Rules for certain aspects). The GETC added that road-rail combined transport is, in its opinion, the best solution to cover the European territory by rail through a corridor-system based on an EU TEN-T strategy together with a rail network dedicated to freight.
- 12 stakeholders** did not answer the question.

40. The stakeholders in favour of harmonising liability in the EU were requested to provide [details on the characteristics of an ideal multimodal liability regime](#).

We observe that **many stakeholders responded to this question, even though they are not in favour of a uniform European liability regime, but rather in favour of a global liability regime.**

- Opinions on the binding nature of the regime were extremely mixed:**
- **13 stakeholders** suggested a **fall-back regime** (i.e. an EU regime that would only apply by default if nothing else is agreed);
 - **11 stakeholders** favoured a **mandatory regime** (i.e. an EU regime that would apply obligatory to all modes, guaranteeing uniformity but likely triggering industry opposition);
 - **9 stakeholders** favoured a **modified regime** (i.e. an EU regime containing some mandatory clauses and some voluntary, merely recommended clauses);
 - **4 stakeholders** suggested a **voluntary regime**; and
 - **21 stakeholders** did not express their opinion. The UK Road Haulage Association highlighted that there is no need for another regime. The Finnish Road Haulage and Logistic Services Providers Association SKAL held that it would only opt for a mandatory regime if the system were to be flexible, efficient and transparent enough. Otherwise, it would be in favour of an optional fall-back regime.
- On the limited/unlimited nature of the regime, all stakeholders who responded (36) unanimously favoured limited liability, except for one stakeholder (the**

International Union of Combined Road-Rail Transport Operators UIRR). 21 abstained. From the 36 stakeholders in favour of limited liability, the vast majority (27) held that the maximum limits for maritime/inland waterways should not be different from those for road and rail transport, 5 opined the opposite and 4 abstained. According to the French BP2S shortsea & intermodal Promotion Centre and the French Shippers Council, waterborne specificities should be cancelled in order to attain uniformity of both modes and loading units. The Swedish Insurance Association also held that harmonizing the limits would be beneficial. The Slovak Republic, the Association of European Airlines, the Dutch railway freight carrier ERS Railways, the Polish Land Transport Chamber of Commerce representing Polish freight forwarders and the UK Road Haulage Association also stressed that, in a multimodal transport chain, the modality changes, but not the goods, and that differences in liability for these goods are consequently not justified. The European Shippers Council and the French State added that unequal conditions would, again, introduce complexities in the supply chain. The Groupement Européen de Transport Combiné referred to the 1999 Study "*Intermodal Transportation and Carrier Liability*" by the University of Southampton (co-funded by the European Commission) and held that liability limits have the positive effect of reducing cargo insurance costs.

By contrast, Professor Berlingieri held that the average value and quantity of goods carried by sea, road, rail and air is very different and therefore suggested that differences be maintained.

- **A majority of responding stakeholders (20) is in favour of ordinary fault- or negligence-based liability rules**, whilst 11 are in favour of strict liability¹³¹ (i.e. no need to prove fault or negligence) and 27 abstained.

- **A majority of responding stakeholders (26) is in favour of a uniform overall liability coverage**, whilst 6 are in favour of a network system (applying different liability regimes "per mode"), 4 are in favour of a modified coverage (i.e. modified, some provisions are uniform and others are not) and 22 abstained.

- **A vast majority of responding stakeholders (23) holds that one party should be responsible throughout the multimodal transport journey**, whilst 11 advocate solidarity of all transport operators and subcontractors (e.g. stevedores, terminal operators, truckers, warehouse keepers), 23 abstained and 1 stakeholder – the Port and Water Division of the Flemish Government of Belgium – held that solidarity is appropriate in the short run, but that a single liable party would be appropriate on the long run. For those who voted for a single liable party, opinions diverged as to whom should be solely liable: some held that it should be the **shipper** or the **owner of the goods** (or his agent), others that it should be the **party issuing the transport document** (or the issuer and e-signer of an e-document), others said that it should be the **contracting carrier** or the **first operator to whom transport has been confirmed by the customer**, some held that it should be the **party whose fault or negligence has been evidenced**, others that it should be the **multimodal of combined transport operator** and, finally, some

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One stakeholder stressed that he is only in favour of strict liability as a trade-off for limited liability.

expressed the opinion – limited to transport involving shortsea shipping - that it should be the **managing body of the motorways of the sea**.

- **14 responding stakeholders** held that there **should not be an obligation on multimodal transport operators to hold a comprehensive financial insurance or guarantee for the entire journey**, whilst **14 stakeholders** said to be **in favour of a compulsory financial insurance or guarantee**¹³². 30 abstained.

Comment: Even though the answers to these questions are not representative due to the numerous abstentions to respond to these legal issues, a preferred regime, based on all responses, would be a fall-back default regime, with a possibility to opt-out, where a single party would be held liable throughout the journey on the basis of ordinary fault- or negligence-based liability rules, with uniform liability limits for maritime and non-maritime transport. These criteria would be in line with the proposed regime under Section 8. below.

41. On the **overall impacts of a uniform multimodal liability regime in the EU**:

- a vast majority of stakeholders (30) held that a uniform liability regime in the EU would generally **foster/facilitate multimodal transport**, 12 held that it would hinder/complicate multimodal transport, 4 said that it has no effect and 12 did not respond;
- a vast majority of stakeholders (31) held that a uniform liability regime in the EU would **increase legal certainty of multimodal transport**, 12 held that it would hinder/complicate multimodal transport, 2 said that it has no effect and 13 did not respond;
- a majority of stakeholders (26) held that a uniform liability regime in the EU would **decrease conflicts of legislation as regards multimodal transport**, 15 held that it would increase conflicts of legislation as regards multimodal transport, 2 said that it has no effect and 15 did not respond;
- a majority of stakeholders (25) held that a uniform liability regime in the EU would **decrease friction costs related to court claims and litigation for multimodal transport**, 14 held that it would increase friction costs, 4 said that it has no effect and 15 did not respond;
- **opinions were pretty much divided on all the other aspects:**
 - o as to whether a uniform liability regime would make it easier (20) or more difficult (12) to obtain **insurance coverage for multimodal transport**, or whether a uniform liability regime bears no effect (9) on the ease with which insurances are obtained (17 did not respond);
 - o as to whether a uniform liability regime would make it easier (18) or more difficult (12) to obtain **financial services from banks for multimodal transport**, or

132 The French BP2S shortsea & intermodal Promotion Centre and Union of French Ports stated that it should not be an obligation but a strong advice to hold a financial insurance or guarantee.

whether a uniform liability regime bears no effect (6) on the ease with which financing is obtained (22 did not respond);

- o as to whether a uniform liability regime would increase (10) or decrease (7) **freight rates and/or prices for multimodal transport services**; or whether a uniform liability regime bears no effect (16) on freight rates and prices obtained (25 did not respond);
- o as to whether a uniform liability regime would increase (17) or decrease (17) **business and administrative costs for adapting the internal processes to the new single standard document for multimodal transport**; or whether a uniform liability regime bears no effect (4) on business and administrative costs (18 did not respond); we observe that one stakeholder, the Port and Water Division of the Flemish Government of Belgium, held that business and administrative would be increased in the short run but decreased in the long run; and
- o as to whether a uniform liability regime would increase (16) or decrease (none) **security of multimodal transport**, or whether a uniform liability regime bears no effect (19) on the ease with which insurances are obtained (22 did not respond).

- when asked whether a uniform multimodal liability regime has any **other economic, social and/or environmental impacts on multimodal transport**, the French BP2S shortsea & intermodal Promotion Centre and the Union of French Ports stated that a uniform European multimodal regime would promote shortsea shipping, which is favourable to the environment. The UK Road Haulage Association observed that quality standards between modes are very different at the moment and that, therefore, some modes do not dare to increase their compensation levels. The Polish Land Transport Chamber of Commerce representing the Polish railway carriers held that a uniform regime would render transport more transparent and solid. According to the French States, a uniform multimodal liability regime would foster sustainable mobility and development. Finally, the Port and Water Division of the Flemish Government of Belgium held that a uniform multimodal transport liability regime favours the most environmentally friendly modes.

42. The **responding stakeholders (33) nearly unanimously (31)** considered that a uniform multimodal liability regime would be **acceptable for the shippers in their Member States**. Sweden dissented and 25 stakeholders did not express their opinion on this issue. The Groupement Européen de Transport Combiné referred to a 2002 UNECE industry consultation, which showed massive support to a European project on the matter. Similarly, **a vast majority of stakeholders (30)** responded that a uniform multimodal liability regime would be **acceptable for the carriers in their Member States**, whereas 5 stakeholders – the UK Road haulage Association, the French maritime carrier CMA CGM, the Spanish Shortsea Promotion Centre, the French railway freight carrier Rail Link Europe and Sweden – dissented (23 did not express their opinion on this issue). The International Road Transport Union stressed that any mandatory EU regime would violate the existing unimodal international conventions.

Comment: As to the remark of IRU, namely that any mandatory EU Regime would violate the existing unimodal international conventions, this will depend on what is understood by "EU Regime". We refer to 3.3.(c) above.

43. On the [ideal legal regime for multimodal transport](#), the following comments were received:

The Association of European Vehicle Logistics ECG, the European freight Forwarders Association CLECAT, the Italian freight forwarder FEDESPEDI and the Belgian freight forwarder CEB recommended a **global approach, based on the FIATA multimodal transport B/L**.

The German Insurance Association held that the most appropriate regime would be the **Montreal Convention**.

The Federation of Finnish Financial Services and the Nordic insurance company IF P&C consider the **UNCITRAL Proposal** to be ideal.

The Netherlands held that its preferred regime would be based on an **extension of the applicability of all unimodal conventions to carriage with other transport modes performed prior to or after the convention's mode**. In other words, in the same way as the UNCITRAL Proposal is a "maritime plus" convention, the other unimodal conventions should become "road plus", "rail plus", etc. Appropriate conflict of convention provisions should be included to avoid conflicting overlaps.

The Romanian railway carrier CFR Marfa considers the **COTIF/CIM Rules** to be ideal. Sweden stated that it tends to prefer **industry-based solutions such as the UNCITRAL Proposal or COTIF/CIM Rules**. The International Rail transport Committee (CIT) and the Community of European Railway and Infrastructure Companies (CER) recommend a new global convention for multimodal transport, which should (i) be uniform (similar to COTIF/CIM Rules) and (ii) provide for strict liability with fixed limits (e.g. 17 SDR/kg gross weight), as well as joint and several liability of all carriers involved (similar to COTIF/CIM Rules), leaving leeway for flexibility in the relationships between carriers.

The UK Freight Transport Association, the European Shippers Council and the Finnish freight forwarders association consider the **CMR** to be the ideal regime. The UK Road Haulage Association held that the **CMR** could be used as a model and that its high liability level corresponds with the quality standards of road transport and the ensuing risks associated with road transport. According to the French BP2S shortsea & intermodal Promotion Centre and the Union of French Ports, the most appropriate regime is a **regime on a contractual basis, as close as possible to the CMR liability rules (CMR except Art.2)**. The French Shippers Council also recommended a **similar regime to the CMR**. France suggested, in the same line of thinking, a **contractual regime based upon the existing international conventions and preferably modelled upon the CMR**, as it is the convention with which multimodal transport operators are most familiar. The International Union of Combined Rail/Road Transport Operators (UIRR) also supported an

adapted CMR regime. The Groupement Européen de Transport Combiné suggested a regime based on a **combination of the CMR and the COTIF/CIM Rules**, which would also cover terminal operators. In doing so it referred to the 1999 Study "*Intermodal Transportation and Carrier Liability*" by the University of Southampton (co-funded by the European Commission). The Groupement Européen de Transport Combiné held that this regime should go hand-in-hand with an active promotion of the Motorways of the Sea and of transport infrastructure (bridges and tunnels, e.g. the Channel Tunnel, the Øresund Tunnel, the Øresund Bridge, the Messina Bridge, the Gibraltar Tunnel).

AAOPFR-Galati suggests a **global regime**. Similarly, one stakeholder suggests a **globally harmonised strict liability regime with unbreakable limits (i.e. only per kg gross weight)**. According to the ship-owners of ECSA, BIMCO, ICS, WCS, the Spanish Ship-owners Association ANAVE and the British Chamber of shipping, the International Group of P&I Clubs, Denmark and the Spanish Shortsea Promotion Centre, a **global regime, leaving no room for conflicting regional solutions and based on the network principle**, would be ideal. The Dutch transport integrator TNT Express held that, in its opinion, an ideal regime should provide for **15EUR/kg gross weight** in case of damage or loss due to the fault or negligence of the shipper, unless the value is proven to be less. The Port and Water Division of the Flemish Government of Belgium held that an ideal regime would be **global** and use electronic, single transport documents covering all combinations of modes and units.

The Lithuanian freight forwarder Jurtransa indicated that a **uniform regime** would be ideal. The French freight forwarder CMA CGM Logistics and Dutch bank ABN AMRO suggested a **uniform regime, governed by clear EU law**. The French maritime carrier CMA CGM, by contrast, recommended a **network-based regime**. The International Road Transport Union also recommended a **network-based regime** and suggested that any rules on multimodal transport (**UN Multimodal Proposal 1980**) should be voluntary.

According to the Polish Land Transport Chamber of Commerce representing the railway freight carriers held that **the best solutions from the existing legal regimes should be grouped in either a single multimodal regime or a small number of multimodal regimes**.

Finally, the Finnish Road Haulage and Logistic Services Providers Association SKAL held that there is **no need for a new regime**.

44. **A more or less equal number of stakeholders held that a uniform liability regime would have positive effects (23) or no effect at all (21) on the insurers' and banks' willingness to issue insurances and bank guarantee for multimodal transport of goods.** Only one stakeholder – the Polish Road Transport Chamber of Commerce, representing the railway freight carriers, claimed that it would have negative effects. 13 stakeholders did not respond.

The ship-owners of ECSA, BIMCO, ICS, WCS, the Spanish Ship-owners Association ANAVE, the British Chamber of shipping, the International Group of P&I Clubs, Denmark and the

Spanish Shortsea Promotion Centre explained that a uniform liability regime per mode has a positive effect on insurance availability and premiums, whilst a uniform liability regime throughout all modes has a negative effect because it decreases the likelihood of correlation between the liability risk and the operational risk and renders insurers more cautious.

According to the UK Road Haulage Association, insurance premiums may increase if a uniform liability limit below the CMR-threshold were to be introduced. This is because the limits would not reflect the risks anymore that are specific to each mode.

7.4 4th Set of Questions – Preferred Policy Options.

For the sake of clarity, we present the **5 different available options**:

- Option A: (status quo/no action)** Keep the current state of play, i.e. **no EU legislative measures and no changes** are made to the current transport documents and liability regime.
- Option B (opt-in network system):** 1) Creation of a European single (electronic) transport document that fits for all unimodal and multimodal transport. 2) Liability is determined by the unimodal stage of transport during which the loss, damage or delay occurs according to the existing international and national liability regimes for each mode. The EU provides for a standard fall-back liability clause, which market players could choose to incorporate in their contracts at their own discretion.
- Option C (modified network system):** 1) Creation of a **European single (electronic) transport document** that fits for all unimodal and multimodal transport. 2) **Some liability aspects** are governed by **the unimodal stage of transport** during which the loss, damage or delay occurs according to the existing international and national liability regimes for each mode. **Other liability aspects** are governed by a **uniform liability regime irrespective of the unimodal stage of transport** during which the loss, damage or delay occurs, which prevails over the existing international and national liability regimes and over any alternative contractual arrangements between the parties.
- Option D (opt-out modified uniform system):**1) Creation of a **European single (electronic) transport document** that fits for all unimodal and multimodal transport. 2) **Liability** is governed by a **uniform liability regime** irrespective of the unimodal stage of transport during which the loss, damage or delay occurs, which prevails over the existing international and national liability regimes, and which is only applicable as a **fall-back** system in the absence of any alternative contractual arrangements between the parties.
- Option E (pure uniform system):** Creation of a **European single (electronic) transport document** that fits for all unimodal and multimodal transport. 2) **Liability** is governed by a **uniform liability regime irrespective of the unimodal stage of transport** during which the loss, damage or delay occurs, which prevails over the existing international and national liability regimes and over any alternative contractual arrangements between the parties.

The following table displays **the choices of the different stakeholders**:

ANALYSIS OF THE POLICY OPTIONS - MULTIMODAL CONSULTATION QUESTIONNAIRE

	OPTION A	OPTION B	OPTION C	OPTION D	OPTION E	ALTERNATIVE SOLUTIONS	NO ANSWER
STAKEHOLDERS	Road Haulage Association (road carrier)	ERS Railways (rail carrier)	Land Transport Chamber of Commerce Warsaw (rail carrier)	European Shippers Council (shippers)	National Railway Freight Company "CFR Marfa" (rail carrier)	The European Community Ship-owners Associations "ECSA" (ship-owner)	Finnish Transport and Logistic SKAL (road carrier)
	CIT (railway carrier)	CMA-CGM (maritime carrier)		Freight Transport Association (shippers)	CMA CMG Logistics (freight forwarder)	International Chamber of Shipping "ICS" (ship-owner)	Rail Link Europe (rail operator)
	CER (railway carrier)	RSC (Inland waterway, road carriage and freight forwarder)		French Shippers Council (shippers)	ABN Amro (financial services)	The Baltic and Maritime Council "BIMCO" (ship-owner)	
	CEB (freight forwarder)	JURTRANSA (freight forwarder)		AAOPFR-Galati Romania (inland waterway operator)	German Insurance Association (insurance)	International Group of P&I Clubs- the "IG of P&I Clubs" (insurance)	
	FEDESPEDI (freight forwarder)	Swedish Insurance Federation (insurance)		Finnish Freight Forwarders' Association (freight forwarder)	Union des Ports de France (port/terminal)	The World Shipping Council (ship-owners)	
	CLECAT (freight forwarder)	France (Member State)		Oskar Schunk (insurance)	Port Authority of Nantes Saint-Nazaire (port/terminal)	The UK Chambers of Shipping (ship-owner)	
	Federation of Finnish Financial Services (financial services)	Land Transport Chamber of Commerce Warsaw (freight forwarder)		TNT Express (transport integrator)	Shortsea & Intermodal Promotion Centre (multimodal association)	International Road Transport Union (road carrier)	
	P&C Insurance Company LTD (insurance)	Brittany Ferries (ferry operator)		Slovak Republic (Member State)	UIRR (road+rail carrier)	FFSA (insurance)	
	Denmark (Member State)	Lithuania (Member State)		Port and Water Policy Division of the Mobility and Public Works Department of the Flemish government	Association of European Airlines (AEA) Unimodal Operator (Air Carrier) Air & Truck under through air waybill	Prof. Berlingieri (academic)	
	Austria (Member State)				One stakeholder	ANAVE (ship-owner)	
	ECG - The Association of European Vehicle Logistics					Shortsea Promotion Centre Spain (maritime carrier)	
	Sweden (Member State)					GETC (combined carriers association)	
	Netherland (Member State)						
	Navigators (insurance) JSC "Lithuanian Railways" (unimodal operator)						
	TOTAL	15	9	1	9	10	12

The overall conclusion is that **opinions are highly divided on the way forward. A majority of stakeholders (15) wishes to maintain a status quo (Option A).** However, **many stakeholders (12) came up with alternative policy proposals. 10 stakeholders** favoured a single document with a **mandatory uniform liability regime (Option E).** **9 stakeholders** were in favour of a single document and a **voluntary standard EU fall-back liability clause along the lines of an opt-in network system (Option B).** **9 stakeholders** were in favour of a single document and a **standard EU fall-back liability regime applicable in the absence of contractual arrangements in a modified uniform system (Option D).** Only 1 single stakeholder voted for a **modified network system, i.e. some aspects applying the network principle and other aspects applying uniform rules (Option C).**

Among the stakeholders who opted for **OPTION A (status quo)**, the UK Road Haulage Association observed that the priority is that **several issues be addressed within the existing liability regimes** (e.g. jurisdiction, spread of liability between the parties, compensation regime – i.e. rate per unit weight, per package, etc. -, liability limits and exclusions) and that a single document would only be welcomed to the extent that it solves some of these issues. The Road Haulage Association held that identical quality standards and risks would need to be identified in all transport modes before a European “one size fits all”-regime with a single document and liability regime would have a chance of being accepted. In its opinion, **a preferably IT-based single document is not capable of improving multi-modal transport because of the different underlying legal regimes.** Moreover, a single document and liability regime would **unlikely avoid current bias**, well-known in some legal regimes, towards carrier or cargo interests depending on the perception of national interests. The Road Haulage Association also underlined that **competence questions** would arise on the issue and that this would lead to a **bureaucratic debate**, which would probably hinder the transport. In its view, the proposal to create a single European document and liability regime **only reflects the demand of a few specific interest groups and possibly the European Commission’s desire for a “tidying up exercise”** that will not remove bureaucracy, but merely introduce another element of it. The Road Haulage Association is also concerned as to whether a European initiative would take priority over other the well-established international conventions (e.g. CMR) and their body of case-law.

The Netherlands indicated a status quo is the only feasible option. It referred to its written submissions to the UNECE and to the UNCITRAL Proposals (see A/CN.9/WG.III/WP.33 at www.uncitral.org), where it proposes a **system based on an extension of the applicability of all unimodal conventions to other transport modes performed prior to or after the convention’s mode.** In other words, just as the 2008 UNCITRAL Proposal is a **“maritime-plus” convention**, the other conventions should be made **“road-plus”, “rail-plus”, etc.** In doing so, each unimodal carrier may satisfy his customers by being able to offer a multimodal product on a single set of terms to which both are accustomed and for which both are insured for. This system would elaborate on an already existing tendency in the modern unimodal transport conventions, e.g. COTIF-CIM and the Montreal Convention. In line with the Netherlands’ view, the European

Commission could take a political initiative aimed at achieving amendments to the existing unimodal conventions.

In case this option were not to find sufficient support and in case a clear majority were to favour the creation of an EU-instrument, the Netherlands holds that any European instrument should be (i) restricted to inland multimodal transport only; (ii) limited to carrier liability issues (i.e. not related to other contractual terms and conditions, including the scope of the contract itself) and (iii) not mandatory (i.e. tailor-made contractual conditions, including on liability issues, should always remain possible).

The International Rail transport Committee CIT and the Community of European Railway and Infrastructure Companies CER consider that a single transport document together with a single liability regime for the different modes of transport can only be envisaged in the framework of an **international convention for multimodal freight carriage contracts**. According to them, a new multimodal convention should not be limited to the EU because it would bring no added value to the railway undertakings on the worldwide market for transport services. Within the EU, the Uniform CIM Rules already provide for a single liability regime together with a single transport document for multimodal movements on rail/road/inland waterways/sea (art. 1 §§ 3 and 4 CIM Rules). The CIT and the CER also observe that the Uniform CIM Rules are the most favourable rules for the customers, in comparison to the Montreal Convention, the CMR and the maritime conventions. Rail stakeholders (both carriers and consignors) will not accept that a new multimodal convention deprives them of these high standards of legal security. In their view, a new multimodal convention should be negotiated at a global level, under the auspices of the UN or one of its special commissions. They noted that the most recent attempt, the **UNCITRAL Proposal focuses too much on maritime transport** and can therefore **not be considered as a multimodal convention**. Professional organisations should take an active role in drafting such an international multimodal convention and that it should be left to the professional organisations to design and create the standards and the shapes of the multimodal transport document, as they are the ones holding the know-how and the practitioners' expertise.

The CIT and the CER highlight, in this context, that rail transport, by contrast to road and air transport, does not have a single standardised legal framework. **Rail carriers have to face 2 legal regimes on the external borders of the EU: the CIM Uniform Rules for OTIF member states and the SMGS Rules for OSJD member states**. The interface between the CIM and SMGS requires transport to be interrupted and new consignment notes to be made out (re-consignment). This gives rise to a significant loss of time, administrative overheads and added costs without added value. The biggest priority for European railway undertakings nowadays is to solve this problem and to overcome the two legal regimes. A **Common CIM/SMGS consignment note** was developed on 1 September 2006 as an integral part of the project to make CIM Rules and SMGS Rules interoperable. This Common CIM/SMGS consignment note has been recognised as a customs transit document by the EU, EFTA, Russia, Belarus and Ukraine and is currently working successfully and enhancing the speed of rail transport (discussions are also being

held with Kazakhstan). This Common CIM/SMGS consignment note is also recognised for documentary credit purposes.

The Association of European Vehicle Logistics ECG, the European freight forwarders association CLECAT and two of its members (the Italian freight forwarders of FEDESPEDI and the Belgian freight forwarders of CEB) consider that the issue of **multimodal transport documents and liability regimes should be addressed at an international level**. In their opinion, a European transport document does not satisfy the needs of a global economy, where goods are frequently delivered across borders. They therefore urge the Commission to consider a global approach to address liability. A European transport document and European liability regime will **not add any value** but, instead, create **additional burdens**. If it is not possible to address the issue at an international level, the **status quo** should be maintained. They recommend that the EU concentrates its efforts, time and resources on **actions where a coordinated EU policy can make a difference**, i.e. efficiency in rail, enhanced infrastructure, promotion of innovation and training. CLECAT and its members added that, if a European approach were nevertheless to be adopted, it should (i) involve major trading partners in America, Asia, Africa and Oceania, (ii) enable electronic messaging; (iii) not discriminate between modes; (iv) render liability mandatory for all parties in the supply-chain and (v) not exceed normal legal principles (e.g. in questions of burden of proof). They added that the implementation of any new regime would trigger adaptation costs for the companies involved.

The Federation of Finnish Financial Services, the Swedish Insurance Federation, the Danish State and the Nordic insurance company IF P&C oppose a regional solution and are in favour of a **global regime**, suggesting that the **UNCITRAL Proposal** provides for an appropriate solution. Denmark added that the UNCTITRAL Proposal is based on 6 years of negotiation. If any EU initiative were to be taken, it should respect the UNCITRAL Proposal. The Swedish Insurance Federation underlined that the industry will need to buy cargo insurance, irrespective of the liability regime that Europe may or may not create, and that this insurance should be cost-effective. In its view, cargo insurances presently work well in a world with different liability regimes based on international conventions, national laws or private contracts.

The Austrian Ministry considers that the **existing national and international rules** regarding transport documents and liability regimes for multimodal transport are **satisfactory** and also suggests the EU to **closely monitor further developments of the UNCITRAL Proposal**, given that a **global uniform liability regime is preferable** to regional regimes.

Regarding the stakeholders who chose **OPTION B (opt-in network system with a standard EU fall-back liability clause that parties are free to incorporate)**, the French RSC CMA, which is at the same time an inland waterways carrier, road carrier and freight forwarder would be in favour of a standard EU fall-back liability clause, even though it would not want a single electronic transport document in Europe.

The French State underlines that a single **contractual** European document would provide for a simple, practical and legally certain solution, given that non-compulsory document find more acceptance with stakeholders. It suggests a contractual liability regime based upon the **CMR**, which is well-known by the industry.

The French ferry operator Brittany Ferries chose Option B, even though it indicates the risk that big market players would impose a fall-back clause.

Only one single stakeholder, the Polish Land Transport Chamber of Commerce in its representation of the railway freight carriers, chose **OPTION C (some liability aspects are governed by the unimodal stage of transport during which the loss, damage or delay occurs whilst other aspects are governed by a uniform liability regime)**. This is because the Polish railway freight carriers consider that this option enables due reflection of the **differences between transport modes, in particular as regards their risks**. They favour a single document for multimodal journeys as well as a single multimodal operator offering a comprehensive service to customers, but consider that each carrier should be responsible for the part of the journey that he performs (and that terminal operators should be liable for transshipments) in view of the divergent risks.

Among the stakeholders who opted for **OPTION D (standard EU fall-back liability regime applicable in the absence of contractual arrangements)**, the French Shippers Council does **not consider the UNCITRAL Proposal to be the adequate legal system** for short-sea shipping and Motorways of the Sea (neither the archaic Hague-Visby Rules).

The German insurance broker Schunck considers that not a European, but a **global** single document for multimodal transport is necessary. In the EU, account should be taken of the role of warehousing and value-added logistics services.

The Port and Water Policy Division of the Mobility and Public Works Department of the Flemish government believes that Option B sufficiently allows market players to freely negotiate their preferred contract clauses, whilst providing for legal certainty via the fall-back regime.

Among the stakeholders who have opted by **OPTION E (mandatory uniform liability regime in the EU)**, ABN AMRO considers that a mandatory uniform EU regime would ease international trade.

The Union des Ports de France and the Shortsea & Intermodal Promotion Centre holds that the **UNCITRAL Proposal** does not provide for a suitable solution and suggests that the **CMR liability regime** be applied as a reference in intra-EU transport **on a contractual basis** (CMR except art 2.), covering the different European modes of transport and their various combinations, but also the various loading units (trailer/semi-trailer, swap body, container, etc.). They do not consider that a European multimodal transport document in negotiable form would be necessary and would favour the use of electronic transport documents.

The Association of European Airlines AEA thinks that a **European solution could increase the certainty of law in Europe**. Indeed, a regional European solution could be a **stepping stone towards a preferred, global regime**.

One stakeholder underlines that a **global, limited and mandatory liability regime** should be the objective. Option E would help to achieve this objective.

Among the stakeholders who presented **ALTERNATIVES**, the European Community Ship-owners Associations ECSA; the International Chamber of Shipping ICS; the Baltic and Maritime Council BIMCO; the International Group of P&I Clubs, the World Shipping Council WSC, the UK Chambers of Shipping, the Spanish Shortsea Promotion Centre and the Asociación de Navieros Españoles ANAVE indicate that a **global liability system** is vital for international trade and commerce and that the **UNCITRAL Proposal contains an ideal - practical and balanced solution for multimodal transport**. They advise the EU to avoid taking any steps that would encroach upon the scope of application of the UNCITRAL Proposal. Moreover, according to them, in order to facilitate and improve the transportation liability system, the European Community should adopt a **Council decision encouraging Member States should ratify the UNCITRAL Proposal** in accordance with the draft UN General Assembly Resolution to be adopted in December 2008. This draft Resolution encouraging all UN Member States to ratify the Convention was endorsed by the influential 6th Committee of the UN General Assembly on 20 October 2008 with very positive and widespread support from a majority of Member States from all continents. A ratification of the UNCITRAL Proposal by all EU Member States would ensure the entry into force of this convention and encourage other major trading nations to ratify, which is vital for a global industry.

The International Road Transport Union IRU holds that all proposed policy options **violate international unimodal conventions, especially the CMR convention** because all CMR-members (including all 27 EU Members States) committed themselves not to modify the CMR (Article 1.5). In its opinion, any multimodal transport liability rules must be **optional** and based on the **UN Multimodal Proposal of 1980 or the UNCTAD/ICC rules**, but using the liability limits of the CMR Convention (8.33 SDR/kg gross weight). Finally, the unimodal conventions must continue to be applied to the unimodal legs within multimodal transport.

The French Insurance Federation FFSA considers that a **global uniform liability regime** for multimodal transport is desirable but, if this is not possible, a **European liability including inbound and outbound EU journeys** would be suitable. It acknowledges that this could raise difficulties given the binding and exclusive nature of the various international unimodal conventions. FFSA thinks that fall-back clauses have the advantage to give priority to freedom of contract while ensuring legal security to parties when they are not formally bound by a contract.

Professor Berlingieri indicates that all policy options would be in conflict with the creation of a **worldwide uniform regime, which is preferable**.

Comment: For a review of the policy options, please see Section 8 of the present Final Report.

7.5 Analysis of the Outcome of the Stakeholder Consultation.

In deciding whether to take further action or not, the European Commission will need to take account of the [following general conclusions drawn from the present legal study](#):

(a) Which issue should be tackled first?

Transport documents are only the “outer shell” of the terms and conditions agreed upon by the parties where the problems of uniformity reside. Consequently, if any action were to be taken, **liability should be dealt with first**, and the issue of a **single document should be deferred to a later stage**.

We observe, in this respect, that a uniform approach goes necessarily hand-in-hand with a single document. By contrast, if any action were to be based on a network approach, use could be made of a single document or various transport documents.

Finally, we recommend that the issue of **dematerialisation of transport documents in an electronic form** be dealt with **simultaneously with the transport document issue**. This is because electronic dematerialisation **may eliminate the need for any documentation altogether**.

(b) Which is the adequate forum for the debate?

The involvement of and approval by the EU Member States in this matter is undoubtedly vital if the European Commission is to take any further action. We observe, however, that most of the EU Member States held that it is **not for ministries or administrations** to provide answers to the questionnaire, given its nature, but **for the industry**. That is the reason why most of the Member States circulated the questionnaire with their domestic industry. Some Member States only referred to the responses of their industry and did not respond to the questionnaire (e.g. UK, Portugal, Cyprus, Belgium). Others referred to the responses of their industry, but also responded to the questionnaire (e.g. Lithuania, the Slovak Republic and Romania).

An involvement of the industry would therefore be essential in any further impact assessment. If the industry were to voice its approval to an envisaged action, Member States would follow.

Finally, given that the issue affects several international conventions, an **open discussion with the Secretariats of these conventions should be maintained**.

(c) A single transport document.

- **Single transport documents for multimodal transport are already operating in the EU.** The most frequently used are the FIATA Multimodal Transport B/L, the COTIF CIM Consignment note, the CMR Consignment note and the CIM-UIRR note. Retaining a unique

document – in both a negotiable fashion and a non-negotiable fashion - for all transport modes would unlikely bring about uniformity and foster multimodal transport. Less paperwork is, without doubt, welcome. However, it is not capable of providing for uniformity (the objective of the present study), given that the underlying regimes, and not the documents *per se*, seem to be at the heart of the debate.

- Even though carriers in the EU do not presently seem to give any consideration to the INCOTERMS, which they consider as exclusively governing the seller/buyer relationship without any bearing on their business or legal status, some stakeholders demonstrated that **account should be taken of the INCOTERMS** because of their interrelationship with transport documents and payment conditions. In order to avoid legal gaps in situations in which certain transport documents are used in combination with certain INCOTERMS, any proposal for a single transport document should, with respect to its negotiable version, ensure that the seller obtains a “certified copy of the original” or other document to which sufficient validity is granted for payment purposes.
- **Economic, social and environmental impacts of a single document throughout all transport modes.** A single document would generate overall positive economic effects for all parties involved in multimodal transport, as it may simplify and reduce the costs and delays of administrative procedures and bureaucracy, decreasing – to a certain extent - friction costs deriving from the modal switch. However, these positive economic effects are only capable of promoting the overall use of multimodal transport to a relatively limited extent. This is because it appears, from the stakeholder consultation, that neither documentation nor liability issues are determinant in the decision-making process of whether to use unimodal or multimodal transport. Other factors, such as the typical speed and costs of a particular transport mode, are decisive. In addition, the stakeholder consultation shows that a single document would be unlikely to have an impact on the freight rates for multimodal transport services. For fullness, it has to be observed that, in the short term, a switch towards a single document may generate some investment costs to allow market players to adapt their paperwork to the new standard documents. From a financial perspective, the stakeholders indicate that a single transport document is likely to have no bearing on the willingness of insurers and banks to issue insurances and bank guarantees for multimodal freight transport.

To the relatively limited extent that it were to encourage modal shifts, a single transport document would indirectly encourage that some of the currently unimodal road transport be replaced by environmentally more friendly multimodal journeys, e.g. Motorways of the Seas initiative. However, as mentioned above, this effect is estimated to be negligible, given that more or less bureaucracy does not seem to be critical in deciding whether to opt for unimodal or multimodal transport. A switch towards electronic transport documents would, however, be capable of reducing paperwork, thus generating positive environmental impacts.

(d) Electronic transport documents.

- **Almost all stakeholders are in favour of electronic transport documents.** Acceptability by the private and the public sector does not seem to be an issue for the

launch of electronic transport documents. Nor does there seem to be a cost-issue. The main hurdles are of a legal and technological nature, i.e. there is still uncertainty as to the status of electronic transport documents from a legal perspective and many companies are not geared-up to use electronic transport documents from a technological perspective.

- Most stakeholders held that e-docs should be **visualized using a standard internet connection** and that they should be **released in a printable format**. Opinions are divided about the suitability of **electronic signatures**, often considered too complex and burdensome.
- Two interesting examples to follow when fostering electronic transport documentation are, on the one hand, the **IATA e-freight pilot project** (operative since 2007) and, on the other hand, the **electronic COTIF/CIM Consignment note**. Two lessons are to be learned from these initiatives. On the one hand, the IATA e-freight pilot project shows that dematerialisation of transport documents is pointless if the accompanying documents are not simultaneously dematerialised. On the other hand, account should be taken of the differences in technological achievements reported by several EU Member States, e.g. electronic COTIF/CIM consignment notes are frequently being printed out when crossing the border between Austria and Hungary.

(e) A single liability regime.

- There is a **general dissatisfaction** with the available transport documents and liability regime expressed at the start of the questionnaire. In addition, most stakeholders consider that their **own transport mode is being hindered** by the current liability regimes (e.g. road hauliers consider that road transport is hindered and sea transport is favoured, whereas maritime carriers consider that sea transport is hindered and road transport is favoured). However, when the stakeholders were questioned about the ideal solution to tackle the lack of uniformity, **nearly all stakeholders referred to their own regime**. It was also observed that stakeholders are, generally speaking, mainly knowledgeable of the regime governing their own transport mode. Put differently, there is a **lack of dialogue between the different modes**.
- **Option A – a status quo/no action** – was the option chosen by most stakeholders. Given that this somehow contradicts their general dissatisfaction expressed at the start of the questionnaire, it probably translates the fact that, even though they are unsatisfied with the present situation, stakeholders do not wish to see any EU action but rather global action. Hence the signal of “no action” towards the EU.
- A vast majority (50/58) of stakeholders are **in favour of a uniform carrier liability regime**.

However, a majority of stakeholders are in favour of harmonisation **at a global level**. Most of the stakeholders supporting a global regime consider that a **European regime** would add a **new layer of complexity to the already complex cargo liability regimes**.

Among the far lesser number of stakeholders in favour of **European harmonisation**, the majority considers **global harmonisation as an ultimate goal** and view **European harmonisation as a stepping stone towards global convergence**.

In other words, there is a **general consensus amongst all stakeholders** that an ideal world should provide for **global harmonisation**, irrespective of whether this needs to be preceded by a regional, European regime or not.

Before any impact assessment, a **fundamental policy choice** should be made as to whether the European Commission wishes to harmonise at a **horizontal or vertical level**. The European Commission's starting point in this legal study is that harmonisation of multimodal carrier liability implies a "horizontal" harmonisation of carrier liability throughout the different modes of transport at a European level. However, harmonisation could also be conceived as a "vertical harmonisation" of carrier liability per transport mode at a global level. In addition, account should be taken of the fact that transport documents and liability are not always the main hurdles to multimodal transport. Feedback was received from one Member State that its transport players do not operate multimodal transport because of an entrenched lack of mutual confidence. The shortcomings and bottlenecks of the absence of a European Maritime Space were also frequently highlighted. The absence of a European Maritime Space implies that maritime trade between France and the Netherlands is essentially treated in the same way as trade between France and China.

- The lack of uniformity of liability regimes is **not only a problem at a carrier level, but also at a subcontractor level**. This has historically been ignored by the international conventions. However, the identified lack of uniformity is a problem within the **consignor-carrier relationship** and the **consignor-subcontractor relationship**. Therefore, any action should take account of both levels in order to ensure a balanced approach. Reference should be taken from the UNCITRAL Proposal and the NSAB 2000 General Conditions, which duly take account of both the consignor-carrier relationship and the consignor-subcontractor relationship.
- **Liability and insurances are conceptually two very distinct matters**. At present, the situation is such that large maritime liners make use of comprehensive insurances (global P&I and open cover insurances), whereas insurances are less common for rail or inland waterways carriers. Some stakeholders hint towards a compulsory cargo insurance. In this respect, two remarks need to be made. First of all, it needs to be underlined that, irrespective of the cargo insurance coverage that may or may not be concluded by the shippers, the underlying legal liability of the carriers would remain unaffected. In other words, an insurance coverage is not capable of solving liability issues, it can only soften its perception. Cargo insurance compensations are not based upon legal liability but upon the declared loss of or damage to the cargo (hence, its unsuitability to cover delays in delivery). The wrong impression is often created with shippers that cargo insurances absolve them from their liability. Secondly, the European insurance sector would strongly oppose any mandatory cargo insurance, as this would deprive them from all discretion when deciding upon the risks that they are willing to insure, essential to their business.

There seems to be **two big blocks of thought** in the EU. One block, dominated by the maritime carriers, ship-owners, liners and well-known maritime countries such as Denmark and the UK, urges for a signature and ratification of the **UNCITRAL Proposal at a global level**. Another block, mainly dominated by shippers and shortsea shipping operators, opposes the UNCITRAL Proposal (considered to be biased in favour of carriers) and urges for the **creation, in the short term, of a contractual regime, based on the CMR, at a European level** to foster **global uniformity in the long term**. Amongst those stakeholders, many hold that the UNCITRAL Proposal does not promote the Motorways of the Sea initiative because it essentially addresses transoceanic trade on the basis of negotiable documents. We observe that, by its very nature, maritime transport is prone to a global regulation, whereas inland transport is more suitable for regional agreements. Proof is the essentially "European" COTIF/CIM Rules and CMR.

An **alternative way** is provided by **the Netherlands**, which proposes a system based on an extension of the applicability of all unimodal conventions to other transport modes performed prior to or after the convention's mode. In other words, in a similar way as the UNCITRAL Proposal, which is a **"maritime-plus" convention**, the other conventions should be made **"road-plus", "rail-plus"**, etc. In doing so, each unimodal carrier may satisfy his customers by being able to offer a multimodal product on a single set of terms to which both are accustomed and for which both are insured. This system would elaborate on an already existing tendency in the modern unimodal transport conventions, e.g. COTIF-CIM Rules and the Montreal Convention. In the Netherlands' view, the European Commission should take political initiatives aimed at achieving amendments to the existing unimodal conventions.

Others (e.g. the European freight forwarders association) voice that there is **no need for EU-action**, given their satisfaction with the current situation, whilst at the same time **opposing the UNCITRAL Proposal**.

In making its policy choice, the European Commission should obtain **reliable statistics** in order to get a clear understanding of the percentage of multimodal transport in the EU that would remain uncovered by the UNCITRAL Proposal. This would allow the European Commission to **understand to which extent the UNCITRAL Proposal might be a "harmonising tool" for the EU**.

- As to the **scope of any European action**, the present legal study suggests that **any action limited to intra-EU transport would only be accepted as a temporary solution, i.e. a trampoline towards global harmonisation**. A vast majority of stakeholders favoured a global regime and almost all stakeholders that favoured a European regime considered that the most suitable regime would not be restricted to intra-EU transport but should also cover inbound and outbound EU transport. One should not forget that, because of Europe's geography, transport from one Member State to another frequently involves transit through non-EU countries (e.g. transport from Bulgaria to Germany involves transit through Serbia and Montenegro). In this respect, the European Commission needs to take account of two well-established transboundary

arrangements affecting some EU Member States: (i) the railway freight SMGS-regime of the OSJD (Organisation for Co-operation of Railways between 25 contracting countries, including Azerbaijan, Belarus, Iran, Kazakhstan, Russia, China, Korea, Vietnam and some European Member States (e.g. Bulgaria, Lithuania); and (ii) the NSAB 2000 General Conditions of the Nordic Association of Freight Forwarders, representing the national freight forwarders' associations of Denmark, Finland, Norway and Sweden. However, purely legal considerations may require EU action to be confined to intra-EU transport in the short term to allow for a wider application in the long run.

- **The timing of the present study coincides with the adoption of the UNCITRAL Proposal by the UN General Assembly on 11 December 2008**, authorising the opening for signature of the Convention at a signing ceremony to be held on 23 September 2009 in Rotterdam (the Netherlands) and recommending that the UNCITRAL Proposal be given the formal name of "Rotterdam Rules". Stakeholders from both sides – i.e. the supporters of and the opponents to the UNCITRAL Proposal – are quite confident that the US will likely sign and ratify the Proposal. The European Commission should therefore make a policy choice as to whether it will (i) adopt a wait-and-see approach or (ii) continue its plans for action irrespective of the outcome of the UNCITRAL Proposal. Some stakeholders advocate that a *status quo* is not an option because of the fact that either the UNCITRAL Proposal is backed-up by the US and comes into force, or the US will revise its domestic COGSA unilaterally, in which case the EU would need, in their opinion, its own regime to protect the interests of its industry. With respect to this observation, we note that it is true that the US is aware that its COGSA needs and urgent revision. However, the scenario that the US, who has been one of the main drivers behind the launching of the UNCITRAL Proposal, would prefer to incorporate it in US law instead of signing and ratifying the UNCITRAL Proposal, is unlikely. In 1992, the Maritime Law Association of the United States began to review its COGSA. Soon thereafter, the Comité Maritime International formed an International Subcommittee on Transport Law which began drafting a new international instrument on cargo liability with the intention of delivering that draft to UNCITRAL for governmental action. These two efforts tracked each other closely in form and content up until 1996, when the Maritime Law Association of the US decided to support legislation in the US to unilaterally address the issues by amending COGSA. However, according to a press release of the World Shipping Council¹³³, this legislation failed to gain sufficient support and was abandoned in favour of the international effort at UNCITRAL level to draft a new Convention. "*An already completed draft for such adjustment is for time being put in the drawers of Congress because this body prefers to fall in line with an international instrument*"¹³⁴. The opinion that the US is likely to sign and ratify the UNCITRAL Proposal is also backed-up by the fact that the UNCITRAL Proposal is much broader than the Proposed Amendments if the COGSA in the pipeline ("Senate Redraft"¹³⁵), e.g. covering transport from door-to-door instead of tackle-

133 http://www.worldshipping.org/iss_3.html

134 See also VAN DER ZIEL G.J., "Survey on History and Concept", in *Transportrecht*, vol. 27, July/August 2004.

135 HOOPER Chester D. and DEORCHIS Vincent M., "Comparison between Senate Staff Working Draft of the MLA Proposed Amendments to COGSA dated 24 September 1999 and the Final Draft of the UNCITRAL Convention as reported at page 60 in A/CN.9/645 of UNCITRAL's Working Group III", 2008.

to-tackle, We note, in this respect, that the US is not a party to the Hague/Visby Rules (which it has incorporated in its COGSA), nor to any of the CMR Convention, COTIF/CIM Rules or CMNI Convention. It has signed the Hamburg Rules in 1979 but has not ratified them. It has signed and ratified the Warsaw Convention and Montreal Protocol no.4 amending the Warsaw Convention, and has signed (but not ratified) Additional Protocol no.3 to the Warsaw Convention. It has also signed and ratified the Montreal Convention. We expect that, if the US signs and ratifies the UNCITRAL Proposal, many countries will follow, e.g. the UK, to which the USA is a « key » maritime trading partner (moreover, the UK has communicated its official position in favour of the UNCITRAL Proposal). This would probably trigger the entry into force of the UNCITRAL Convention. In the unlikely event that the US were not to sign and ratify the UNCITRAL Proposal, this could possibly stop the international momentum of the UNCITRAL Proposal at once. Many contracting parties, for whom the US is a key trading partner, would be less motivated to sign the Proposal. *"It may be expected that ratifications by any of these countries, in particular US and China, may induce others, for instance in Eastern Europe and Asia, to follow suit."*¹³⁶ Moreover, in the unlikely event that the US were to incorporate the UNCITRAL Proposal in its COGSA without signing the Convention in UNCITRAL, differences between both texts – to adapt the Proposal to the US reality – would likely undermine uniformity.

- **If the European Commission does not adopt a wait-and-see approach** and does not hold off until the outcome of the UNCITRAL Proposal becomes sufficiently clear, it will likely face the **opposition by several EU Member States** that are in favour of the UNCITRAL Proposal (e.g. Denmark and the UK). We observe that the UNCITRAL Proposal does not allow for any reservations.

Unless all EU Member States were made to sign a new Convention on multimodal transport, any EU-action would trigger the need for wide-ranging negotiations of (i) reservations to the multimodal application of the existing unimodal conventions, e.g. CMR, CMNI, COTIF/CIM Rules, to the extent that these conventions allow for reservations and following the applicable procedure under these conventions, in accordance with Section II of the 1969 Vienna Convention on the Law of Treaties; or (ii) modifications of these conventions in line with Article 41 of the 1969 Vienna Convention on the Law of Treaties. In this context, account needs to be taken of the fact that the CMR Convention bans any modification in the following terms: *"The Contracting Parties agree not to vary any of the provisions of this Convention by special agreements between two or more of them, except to make it inapplicable to their frontier traffic or to authorize the use in transport operations entirely confined to their territory of consignment notes representing a title to the goods"*¹³⁷. However, if all EU Member States were to sign a new Convention on multimodal transport, it would take precedence over previous international conventions entered into by the EU Member States in accordance with Article 30 of the 1969 Vienna Convention on the Law of Treaties, e.g. the UNCITRAL Convention (assuming it enters into force).

- Irrespective of whether the EU takes action or not as regards multimodal transport

136 VAN DER ZIEL G.J., "Survey on History and Concept", in *Transportrecht*, vol. 27, July/August 2004.

137 Article 1.5 of the CMR Convention.

documents and liability, **some stakeholders identified the need to take action as regards two ancillary issues** that are held to lack a suitable legal regime: (i) combined road/rail transport falling outside of the scope of the CMR and the COTIF/CIM Rules (e.g. when a container is loaded separately - i.e. without the vehicle – on a train in a different state than the state where it was transported by road, neither the CMR Convention (because the container is unloaded from the vehicle) nor the COTIF/CIM rules apply (because the supplementary road leg took place in a different state); and (ii) combined road/ferry transport falling outside of the scope of the CMR.

- **The creation of a Working Group on Multimodal Liability would be a useful tool to ensure further progress and dialogue.** This Working Group should include national experts from each of the 27 Member States – who would act as an intermediary with their industry - as well as representatives from each of the Secretariats of the Unimodal Conventions and the head of Working Group III on the UNCITRAL Proposal.

8. **Analysis of the Policy Options – Proposed Policy Option.**

8.1 **Option D as Proposed Policy Option.**

- **Option A – status quo/no action:** Even though this is the most popular option among stakeholders, it is not capable of attaining the objective of the present study, i.e. to provide for a simple, transparent and predictable legal framework to govern multimodal transport in the EU. This is because, at present, there is no seamless, streamlined, flexible and sustainable multimodal transport in the EU.
- **Option B – opt-in network system:** This option would probably not provide any added value to the presently existing contractual arrangements such as the FIATA Rules or BIMCO conditions. Given its contractual “opt-in” nature, it is not capable of increasing legal certainty and uniformity within the EU. Indeed, there is no harmonised regime on which parties can rely in the absence of an express agreement. Besides, problems stemming from the mandatory nature of international conventions covering multimodal transport to a lesser or greater extent remain unsolved.
- **Option C – modified network system:** Even though this option seems at first sight legally viable to attain the objectives of the study, it does not provide any guidance in case of legal gaps or clashes related to the interpretation of the international unimodal conventions for the clauses to which the network regime applies. It is therefore not capable of providing legal certainty and predictability.
- **Option D – modified uniform system whereby uniform, mandatory rules apply except as regards liability limits, which can be contractually opted-out,** i.e. liability limits are based on a default system, the application of which is triggered unless the parties agree otherwise. Such a system will be voluntary as regards liability limits because parties will be able to contract-out, nevertheless if parties do not opt-out, it is applicable in its entirety and parties are unable to amend it. The “opt-out” nature of the liability limits, i.e. the fact that a harmonised regime applies automatically when parties have not reached or concluded an agreement on liability limits, avoids legal gaps and increases the levels of both legal certainty and uniformity. This legal construction is, in our view, suitable for the attainment of the objectives of the present study. We refer to Section 8.2., Proposed Liability Regime.
- **Option E – pure uniform system:** This option would legally be possible through the adoption of a European Convention between all EU Member States but would be politically unviable, given that it would trigger fierce opposition from most stakeholders and would not enjoy sufficient support from the Member States. It would certainly end in a similar way as the UN Multimodal Proposal of 1980.

8.2 **Proposed Liability Regime.**

- Is an endorsement of the UNCITRAL Proposal at EU level sufficient or is there a need for alternative/supplementary EU action?

In the light of the recent adoption of the UNCITRAL Proposal by the UN General Assembly on 11 December 2008, it is necessary to analyse, first of all, whether the endorsement of the UNCITRAL Proposal would constitute a sufficient solution to ensure a high level of uniformity for multimodal carrier liability in the EU. In other words, would it be sufficient that the EU encourages Member States by soft law (recommendation, communication) or hard law (directive, regulation, decision) to sign and ratify the UNCITRAL Proposal as of September 2009?

Given that the UNCITRAL Proposal is a “maritime plus” convention, it is not capable of harmonising multimodal transport rules **which do not include a sea leg**. Legally, the EU’s desire for a single regime applicable to all multimodal combinations of modes can, therefore, practically not be attained by the mere endorsement of the UNCITRAL Proposal. Multimodal rail/road/air transport or inland waterways/rail transport would, for example, fall outside of the scope of the system and not benefit from any approximation. Politically, various Member States are in favour of the UNCITRAL Proposal (Denmark, the UK, Sweden), whereas others did, *a priori*, not express their opposition to it (Austria, The Netherlands and the Slovak Republic). These Member States do not represent a majority of the 27 Member States.

The question arises, therefore, whether it would be advisable that the European Community encourages all 27 Member States to sign the UNCITRAL Proposal for all multimodal transport chains containing a sea leg and that it, simultaneously, launches a parallel initiative to approximate all multimodal transport chains excluding a sea leg. In other words, multimodal transport would be split into two different categories: (i) multimodal transport including a sea leg and (ii) multimodal transport not including a sea leg. The present study does not opine that this option would be viable. Legally, a solution could be that the EU drives all 27 EU Member States towards the signature of a non-sea leg European Convention, which, if all EU Member States can be convinced to sign it, would have precedence at EU level over the CMR Convention, the Warsaw and Montreal Conventions, the COTIF/CIM Rules and the Budapest CMNI Convention on the basis of the Vienna Convention on the Law of the Treaties of 1969 as regards possible overlaps. We note that this would not be the case at international level, because of article 30.4 (b) of the 1969 Vienna Convention on the Law of Treaties. Politically, the Member States *pro* UNCITRAL would probably not have a problem with the EU non-sea leg Proposal, given that they are essentially maritime states whose international freight transport usually involves a sea leg. However, the rest of the Member States, and more particularly those who support the CMR Convention – e.g. Germany via its national law or France who advocates the BP2S-proposal (a contractual application of the CMR at EU level to all transport modes) would probably fiercely oppose this dual system given that, in case of doubt, the relatively lower liability limits of the UNCITRAL Proposal (if one does not take account of the “package” thresholds) would apply to multimodal transport chains with a negligible sea leg. We note, in this respect, that the text of the UNCITRAL Proposal, as adopted in December 2008, stipulates that the Convention does not permit any reservation. This means that the EU is unable to negotiate a reservation in order to reach a compromise, which would be capable of taking account of the views

of its pro-CMR continental transporters.

Conclusion: An endorsement of the UNCITRAL Proposal and a parallel European Convention for non-sea plus multimodal transport would legally be feasible but politically unviable.

- Workable Proposal for action at EU level from a Legal Perspective.

In line with the conclusions of the stakeholder consultation, any attempt of harmonisation at EU-level should **focus on carrier liability** before dealing with transport document issues and electronic transport document issues.

In order to ensure an approximation of carrier liability regimes for multimodal freight transport, lifting barriers to a seamless, streamlined, flexible and sustainable multimodal transport within the EU, a workable proposal for action at EU level would be to launch a political debate at EU-level (involving the Member States and their respective industries) in order to **persuade all EU Member States to sign a new Convention**. This political debate could be opened by a formal Communication, in which the European Commission would set out its intentions and invite interested parties to comment upon them.

The proposed new Convention would promote a **modified uniform regime, providing for uniform, mandatory rules except as regards liability limits, where parties would be able to contractually opt-out**. The emphasis on contractual freedom is consistent with the current practice of the industry to adopt contractual arrangements operating a modified network regime based on "opting-in" under the UNCTAD/ICC Model Rules, BIMCO Multidoc, BIMCO Combiconbill, BIFA STC, FIATA Multimodal Transport B/L or UIRR General Conditions.

Indeed, the new Convention would recommend that the consignor and the multimodal carrier in intra-EU multimodal freight transport contracts, irrespective of whether they include a maritime leg or not, expressly **assign the liability limits of their multimodal transport contract to "one main transport mode"**. This express assignment of multimodal transport contracts to a single mode would allow the parties to effectively "hang" their multimodal contract to a single mode **as regards liability limits**. By qualifying their contract as "mainly rail", for example, parties would refer to the applicable international unimodal rail convention – COTIF/CIM Rules - as regards liability limits.

In the absence of such express assignment, the liability limits of the international unimodal convention corresponding to the **"main mode" of the multimodal transport journey would apply by default**. The "main mode" of multimodal transport journey would be determined **by the longest trajectory, expressed in km**. A multimodal transport journey accounting for 70% of road transport, 20% of air transport and 10% of rail transport, would, consequently, trigger the application of the applicable international unimodal road convention (CMR Convention). In cases of

disagreements as to which is the “longest mode”, the presently highest carrier liability limit of **17 SDR/kg** would apply.

To summarise, the regime would be as follows:

- **Nature of the regime**: The Convention between EU Member States would provide, on the one hand, for **mandatory uniform rules for all matters other than liability limits** and, on the other hand, for **liability limits of which parties would be able to opt-out**. In other words: uniform provisions for all clauses except liability limits;
- **Type of regime**: The proposed regime would be a **modified uniform system**.
- **Basis of liability**: Our recommendation would be that the proposed regime be a **fault-based regime**. This is, in the first instance, because the majority of stakeholders who responded to Question 40 is in favour of ordinary fault- or negligence-based liability rules. Secondly, strict liability is, to date, only used for extra-contractual claims based on hazardous activities where fault or negligence can be extremely hard to prove, obliging the operator to assume the high risks of his activity (e.g. nuclear third party liability, liability for maritime oil pollution, etc.). Strict liability would therefore not be suitable in a contractual relationship relating to commercial transport activities.
- **Liability limits**: Contractual freedom to expressly “assign” the multimodal contract for liability limits: rules of the assigned mode apply;
 - ⇒ Default system in the absence of an express contractual assignment:
 - in the absence of an express assignment, the rules of the “longest mode” apply;
 - in cases of disagreements as to which is the “longest mode”: 17 SDR/kg.

A **detailed explanation of the envisaged regime** is provided for in the following paragraphs:

- *Uniform rules for all contractual provisions except liability limits.*

Given that carrier liability limits appear to be the essential conflicting issue hindering convergence towards a single multimodal freight transport regime, the creation of uniform rules on all other contractual provisions would not pose insurmountable challenges and a compromise between the EU Member States should be reached to the extent that it is reasonably in line with the established practice of the unimodal conventions and currently widespread contractual arrangements (e.g. a single party - namely the multimodal transport operator - would be presumed liable for loss, damages or delay throughout the multimodal transport journey and exclusions would be expressly listed in cases of *force majeure*, strikes, etc., the possibility for the multimodal transport operator to reverse this presumption if he proves that he took all possible measures to avoid the loss, damages or delay; time bar for suit of 1 or 2 years, etc.).

In this respect, the proposed regime replicates the existing regimes of the Andean Community, MERCOSUR and ALADI and the draft ASEAN regime. All these (sub-) regional agreements are “modified uniform” regimes, which create a uniform

framework, and their reliance upon the network principle (through references to mandatory international conventions) is restricted to the liability limits. We observe that the failed UN Multimodal Proposal of 1980 was characterised by a similar structure. However, the authors of this Study do not believe that its failure was due to the uniform rules that it had introduced on matters unrelated to liability limits.

➤ *Basis of the liability limits: contractual freedom.*

The envisaged regime would guarantee the parties' contractual freedom to determine which liability limits will apply to their multimodal transport journey, leaving the ultimate solution up to the natural economic interplay of negotiation and bargaining between parties.

This approach would, therefore, be in line with the Member States' desire – repeatedly expressed throughout the consultation process – to mould the liability limits of any regime according to the needs and interests of their industry. Indeed, Member States recurrently observed that it was not for ministries or administrations to provide answers to the questionnaire and, instead, circulated the questionnaire with their domestic industry to trigger its contribution.

This approach would also be in line with the general principle of Freedom of contract provided for in article 1.102 of the Principles of European Contract Law 1998¹³⁸. It would, moreover, please common lawyers, whilst providing for a systematic and predictable system by default, likely to please continental civil law practitioners.

Given that it would give precedence to contractual freedom as regards liability limits, this regime would be an ideal compromise to combine the stakeholders' desire for uniformity with their reluctance towards EU-approximation, which is feared to hinder global uniformity and, instead, add an unnecessary layer of EU/non-EU differentiation. The primacy of contractual freedom would ensure the parties' ability to autonomously apply a single liability regime of their choice to the liability limits of their European multimodal transport journey. However, in the absence of an express determination, the European default-system would ensure legal certainty and minimise timely and costly judicial proceedings for intra-EU multimodal transport journeys.

The primacy of contractual freedom would somehow consecrate the existing widespread global practice of contractual arrangements (UNCTAD/ICC Model Rules, BIMCO Multidoc, BIMCO Combiconbill, BIFA STC, FIATA Multimodal Transport B/L, the UIRR General Conditions, or the NSAB General Conditions of the Nordic Freight Forwarders).

It may be adduced that the carrier will often not know in advance which transport mode will be applied for a particular multimodal journey. It may well be that a freight forwarder or transport integrator ignores which transport modes he will apply at the time of the conclusion of the contract. However, for the sake of predictability, the

138 Hardbound ISBN 90-411-1305-3 published in November 1999 by Kluwer Law International P.O Box 85889, 2508 CN Hague, The Netherlands.

system encourages parties to reach a workable compromise on liability limits in case of loss/damage by effectively “hanging” their contract to a single convention.

- *Default system: the “longest mode” (or 17 SDR/kg in case of disagreement on the “longest mode”).*

If parties have not expressly agreed upon the applicable liability limits, a default system should attempt to be as close as possible to the real economic risks that the parties to multimodal transport journey are taking. An economically correct calculation of the “risks” that are undertaken by the multimodal carrier would be to take account of both the length of the trajectory of each employed transport mode within the multimodal journey and the typical risks of damage/loss characterising a certain mode. However, given that this would be too complex a calculation to be made at a contractual level, the proposed system only retains the length of the trajectory as an objective parameter, even though this does not represent a truthful reflection of the risks incurred by the carrier.

In case of contractual disagreements over the “longest” mode, the highest level of liability limits provided by the international conventions – i.e. 17 SDR/kg – would apply by default. The liability limit of 17 SDR/kg would apply, irrespective of the transport modes involved in the multimodal journey, i.e. it would also apply to a journey involving only road and inland waterways transport. This is because of the fact that, if no “common” denominator is set, the regime would split again into too many variants and deviations that would undermine all benefits of a single and transparent regime.

To some extent, the system mimics the applicable regime under Dutch national law. Its fall-back clause is aimed at avoiding any “free-rider” approach by the carrier, whose interests will be best served by a clear and express assignment of the multimodal contract to an applicable mode upfront. The high limit by default also drives towards competition between the carriers, who will try to provide for an “attractive” liability arrangement to their clients. It may be alleged that this will allow more sophisticated carriers to get the upper hand. However, the system would be fully compatible with European competition law principles.

- *Geographic scope of the regime.*

Given the prominence of contractual freedom, the proposed regime would not hinder parties to apply a uniform regime throughout international multimodal transport journeys. In order to take account of the trends towards global trade, the aim of the regime would be that it becomes, in the long run, applicable both to intra-European multimodal transport journeys and journeys starting or ending in the EU (outbound/inbound EU transport).

However, due to legal technicalities, it is not practically possible to ensure the applicability of the new regime to European inbound and outbound multimodal transport in the short term, but only to intra-EU multimodal transport. This is because the regime will formally be shaped as a Convention between the EU Member States (see below),

which would take precedence over previous international conventions entered into by the EU Member States in accordance with Article 30 of the 1969 Vienna Convention on the Law of Treaties, e.g. the UNCITRAL Convention (assuming it enters into force). This Convention could, however, not ensure that the regime applies to multimodal transport originating or ending outside of the EU. Indeed, in a hypothetical scenario that the UNCITRAL Proposal were to enter into force in Germany and Turkey, the new Convention would not take precedence over the UNCITRAL Convention and would, consequently, not apply to EU-inbound multimodal journeys from Turkey to Germany, in accordance with Article 30.4 (b) of the 1969 Vienna Convention on the Law of Treaties.

It would, nonetheless, be advisable for the EU to engage in diplomatic efforts to promote its new regime world-wide and allow non-EU Member States to join the new regime. That is why it is of utmost importance that the regime comes over as “attractive” to non-EU Member States due to its simplicity and transparency.

Indeed, as will be demonstrated in the following paragraphs, to be viable, an intra-EU regime would necessarily have to be a trampoline towards a broader geographic applicability of the regime in the long run.

- A vast majority of stakeholders favoured a global regime and almost all stakeholders that favoured a European regime considered that the most suitable regime should not be restricted to intra-EU transport but should also cover inbound and outbound EU transport. They essentially allege that freight transport has evolved throughout the years into an essentially global activity. Given that global uniformity is favoured by a vast majority of stakeholders, an intra-European Regime in the long term would therefore obtain so much opposition that it would be doomed to fail. It would only be accepted as a temporary trampoline towards global harmonisation. Moreover, practically speaking, an intra-EU regime would add obstacles and hinder uninterrupted cargo transport in cases where, because of Europe’s geography, transport from one Member State to another involves transit through non-EU countries (e.g. transport from Bulgaria to Germany involves transiting through Serbia and Montenegro). Proof of the international nature of cargo transport is also given by the fact that many EU Member States are party to well-established transboundary arrangements: (i) the railway freight SMGS-regime of the OSJD (Organisation for Co-operation of Railways between 25 contracting countries, including Azerbaijan, Belarus, Iran, Kazakhstan, Russia, China, Korea, Vietnam and some European Member States (e.g. Bulgaria, Lithuania); and (ii) the NSAB 2000 General Conditions of the Nordic Association of Freight Forwarders, representing the national freight forwarders’ associations of Denmark, Finland, Norway and Sweden). The new EU regime should therefore allow these commercial trading partners to “opt in” the new EU system and pave the way for gradual convergence.
- Furthermore, from a strictly legal perspective, the scope of the existing international unimodal cargo transport conventions is not limited to the territory of their contracting states. For example, the Hague Visby Rules apply if the port of loading is

located in a contracting state, the Hamburg Rules apply when the port of loading or the port of unloading are located in a contracting state and the CMR Convention applies when the place of taking over of the goods and the place designated for delivery are situated in two different countries of which at least one is a contracting country. Neither are the existing regional NSAB 2000 General Conditions of the Nordic Association of Freight Forwarders restrictive either as regards their application. According to its Introductory Conditions on Applicability, they apply to members of the Nordic Association of Freight Forwarders but other parties can also agree to apply them. Finally, none of the draft multimodal transport Proposals delimits its scope in a restrictive fashion. The UN Multimodal Proposal 1980 is intended to apply to multimodal freight consignments whenever the taking in charge or delivery happens in a contracting state. The UNCITRAL Proposal applies to *"contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State: (a) the place of receipt; (b) the port of loading; (c) the place of delivery; or (d) the port of discharge"*. Finally, the ISIC Proposal does not restrict its application to cargo transport starting and ending in the territory of its contracting states, but also includes transport to and from the EU. In the light of the above, it would be legally and practically speaking not advisable to limit the scope of a new multimodal European regime to transport both starting and ending in the EU. However, from a legal/technical perspective, a temporary intra-EU regime would be unavoidable.

- We refer, in this context, to Professor Ramberg's statement: *"an easily understandable, transparent, uniform, cost-effective and all-embracing system on a global rather than national, sub-regional or regional level is otherwise unattainable, since any mandatory convention with extended carrier liability, if at all possible to achieve, would share the unfortunate fate of the 1978 Hamburg Rules and the 1980 Multimodal Transport Convention. The solution to establish an overriding regime with opting-in or opting-out possibilities is for this reason recommended in the EU study Asariotis, Bull, Clarke, Kiantou-Pampouki, Morán-Bovio, Ramberg, de Wit and Zunarelli, "Intermodal transportation and Carrier Liability", June 1999."*¹³⁹

➤ *Does the proposed regime attain the objective of the Study?*

Yes. The proposed regime would be capable of providing a simple, transparent and predictable legal framework to govern multimodal transport liability in the EU.

➤ *Interplay with existing liability regimes.*

If all EU Member States were to sign and ratify the new Convention, a conflict of laws with the existing international unimodal conventions – to the extent that these conventions apply to the unimodal legs of multimodal transport journeys or otherwise provide or multimodal provisions, i.e. to the extent that they deal with *"the same subject*

139 RAMBERG Jan, "The future of international unification of transport law", in Dir. mar., 2001, 643.

matter” as foreseen by Article 30 of the Vienna Convention of 1969 on the Law of Treaties (this article does not require that both conventions cover an identical subject-matter but that both conventions overlap to a lesser or greater extent; otherwise, its application would be almost non-existing, given that the scope of different conventions rarely coincides in all aspects) – would be avoided. Indeed, under the Vienna Convention of 1969 on the Law of Treaties, the later European Convention would prevail as regards multimodal transport rules. As already mentioned above, it is acknowledged that the CMR Convention bans modifications¹⁴⁰. However, this provision stems from the fundamental objective of the CMR Convention of “*standardizing the conditions governing the contract for the international carriage of goods by road*”, as set out in its Preamble. A new EU Convention on multimodal transport would, in our view, not be able to undermine this fundamental objective to standardize international unimodal road carriage, nor would it qualify as a “special agreement” in the sense of Article 1.5 of the CMR Convention. Moreover, a literal interpretation of this provision would infringe, in our opinion, the *lex generalis* of the 1969 Vienna Convention on the Law of Treaties, which allows modifications by parties to multilateral treaties (Article 41 of the 1969 Vienna Convention).

In the event that the UNCITRAL Proposal was to enter into force, the same principles would apply and the later European Convention would equally prevail as regards its multimodal transport rules between EU Member States and, hence, for intra-EU transport. The UNCITRAL Convention would, however, validly apply to unimodal maritime journeys, effectively replacing the Hague and Hamburg Rules (and in the event that the US was to sign and ratify, the COGSA). In other words, the UNCITRAL Convention would apply in Europe as a “maritime” instead of a “maritime plus” convention. Yet, given the prominence of contractual freedom, nothing would hinder the parties to a multimodal transport journey including a sea leg (even a minimal sea leg) to qualify their multimodal transport contract as a “maritime” contract and, consequently, refer to the application of liability limits of the UNCITRAL Convention. It is crucial for the prevalence of the new proposed EU Convention over the UNCITRAL Convention that the EU adopts a wait-and-see approach and that the regime be adopted after the entry into force of the UNCITRAL Convention. Indeed, if it were to precede its entry into force, the EU Convention would be incapable of prevailing over the UNCITRAL Convention and, hence, unable to bring about its desirable harmonisation.

We reiterate, in this respect, that the applicability of the new regime to intra-EU multimodal transport would be ensured, but that its applicability to inbound and outbound European transport could only be ensured by allowing that non-EU Member States accede to the Convention on the long run.

On the interplay with the existing national multimodal transport laws, in particular the Dutch Civil Code and the German Commercial Code, the new Convention would not conceptually clash with the contents of these national laws, which – we recall – provide for a network regime with a default system respectively based on the highest liability

limit and on the CMR-threshold. We observe, in this respect, that a new Convention between EU Member States of a legislative nature as described above would enjoy supremacy over national law, even though the methods of national implementation of international conventions vary from country to country. In some countries, international conventions are self-executing, having force of law as a consequence of their ratification; in other countries, some sort of implementing legislation is required, which may vary from the promulgation/publication to the enactment of a Convention to the translation of substantive provisions of the Convention into terms of national law. In the Netherlands, the recognition of the supremacy of international conventions is embedded in direct and clear constitutional provisions (the Dutch Constitution of 1956 as amended in 1983, Articles 66 and 95) and in Germany, recognition derives from the appropriate interpretation of constitutional provisions. *"The consequence of the recognition of the supremacy of international conventions, especially if it arises from a constitutional provision, is that, in case of conflict between a national rule and an international convention provision, the national rule will not be applied and also the ex officio examination of the opposition of the national rule to the international convention by courts"*¹⁴¹.

➤ *Formal shape of the regime: a Convention.*

This proposal would formally need to take the shape of a Convention between the EU Member States because a Convention would be the only formal way to enable it to prevail, as regards EU Member States, over earlier international conventions providing for multimodal freight carriage arrangements.

Binding EU legislation (a Regulation, Directive or Decision), by contrast, would need to respect prior international conventions providing for multimodal freight carriage arrangements. Indeed, as set out above, the European Community is bound by the Montreal Convention, to which it is a contracting party. Moreover, in the light of its recent proposal to accede to COTIF, the European Community may also find itself bound by COTIF in the near future.

The European Court would, therefore, be competent to annul any secondary EU legislation conflicting with the Montreal Convention. As regards the other international unimodal conventions and the UNCITRAL Convention (if it were to enter into force), EU secondary legislation would, strictly speaking, not need to be consistent with these conventions in order to be valid according to the ECJ's established case-law. This is because the European Community is not a contracting party to these conventions. However, in view of the customary principle of good faith, which forms part of general international law, and of Article 10 of the EC Treaty, the ECJ would take account of these conventions when interpreting the provisions of EU secondary legislation.

Non-binding EU legislation (recommendations, opinions and communications) is not considered to be a suitable solution given that, because of their very non-binding nature, they would be unlikely to promote any approximation of laws.

141 BERLINGIERI Francesco and ANTAPASSIS Anthony, *"Implementation and Interpretation of International Conventions"*, CMI Yearbook 2007-2008, p.308.

However, we consider that, once a modified uniform approach is attained for international multimodal freight transport, the European Community could enact secondary legislation (a Regulation with direct effect or a Directive to be transposed into national law) in order to ensure that the rules of the new Convention would also be applicable in purely domestic multimodal transport journeys within each Member State.

➤ *Political viability of the regime.*

As indicated above, the parties that are already applying contractual arrangements (UNCTAD/ICC Model Rules, BIMCO Multidoc, BIMCO Combiconbill, BIFA STC, FIATA Multimodal Transport B/L, the UIRR General Conditions, or the NSAB General Conditions of the Nordic Freight Forwarders) will welcome the safeguarding of their contractual freedom to determine carrier liability limits.

Stakeholders within the “two big blocks of thought” identified above – i.e. maritime supporters of the UNCITRAL Proposal, on the one hand, and the continental supporters of the CMR, on the other hand – would not be likely to oppose the regime, because the system safeguards their possibility to contractually control the applicable liability limits. Neither could they allege that the proposed regime would add EU-particularities hindering global transport.

Some multimodal carriers – freight forwarders and transport integrators – may initially oppose the upfront assignment of the multimodal contract to a specific mode, adducing that they often ignore the transport modes that they will employ at the time of the conclusion of the carriage contract. However, the regime is aimed at providing for legal certainty both to the carrier and the consignor and fall-back system applicable by default in the absence of a contractual agreement on the transport mode is based on the objective parameter of “length” of the trajectory.

➤ *Relationship between the consignor and the multimodal carrier’s subcontractors.*

The regime would only apply to the multimodal contract between the consignor and the multimodal carrier, and not to the relationship between the consignor and subcontractors of the multimodal carrier. It is our opinion that the disadvantages that could arise from a situation of imbalance between the multimodal carrier and the subcontractor are outweighed by the fact that, in this situation, multimodal carriers will not take advantage of potentially less onerous liability rules and consignors will be encouraged to sue the multimodal carrier. The unimodal contracts between the multimodal carrier and its subcontractors will be governed by unimodal rules.

8.3 Proposed action on (electronic) Transport Documentation.

As mentioned above in Section 7.5 (a), **liability should be dealt with first**, and the issue of a **single document should be deferred to a later stage and dealt with simultaneously with the issue of dematerialisation.**

Our general recommendations are that, once the liability issues are dealt with, **a single transport document be created as a “voluntary” model applicable to intra-EU journeys, but equally capable of being applied (in the long run) to inbound and outbound EU journeys.** This single transport document should be drafted in two different versions: a negotiable and a non-negotiable version because the different functions of these respective documents would not allow for one standard model. The requirements upon such a single transport document should be aligned as much as possible with the UNCITRAL Proposal in order to guarantee uniformity and avoid additional red-tape at EU level. If the voluntary use of this single transport document would be capable of reducing bureaucracy and administrative paperwork, time and costs, the industry would automatically start using it and its success, even overseas, would be guaranteed.

As regards dematerialisation, **the newly proposed Convention should allow that paper documents be replaced by electronic records.** Again, this should, at this stage, be a **voluntary choice of the transport operators.** The Convention should, however, not provide for a detailed guidance on the electronic format of these records, in order to allow the Convention to adapt to technological developments (similarly to the Montreal Convention, which allows a replacement by electronic records but does not provide any details on its implementation, such as the e-freight project). As a general rule, the electronic records should be authenticated by electronic signatures in accordance with the **1999/93/EC Directive on Electronic Signatures**, which has been transposed in the legislation of all Member States. We also refer to **“The Economic Impact of Carrier Liability on Intermodal Freight Transport” mandated by the European Commission to IM Technologies Limited in 2001**, which recommended the creation of a common e-commerce business-to-business platform including (i) the freight contract, (ii) insurances and (iii) a system of monitoring the status of deliveries from door-to-door (to ease the identification of the liable party), which would, in the opinion of the authors of the study, save costs and benefit both unimodal and multimodal transport¹⁴².

9. **Annexes.**

Annex 1 - Task Specifications by the European Commission.

Annex 2 - Pre-consultation on the draft questionnaire.

Annex 3 - Stakeholder list.

Annex 4 - Consultation questionnaire.

Annex 5 - Separate papers and other contributions by stakeholders.

Annex 6 - Minutes of the stakeholder interviews.

Annex 7 - Minutes of the Meetings with the European Commission.

Annex 8 - Non-exhaustive list of transport documents and accompanying documents.

Annex 9 - Table of the main draft and existing legislative and contractual unimodal/multimodal regimes.

142 IM TECHNOLOGIES, Executive Summary and Final Report, of “The Economic Impact of Carrier Liability on Intermodal Freight Transport” by IM Technologies Limited, London 10.1.2001, for use and information of the European Commission.

- 9.1- Major features of the mandatory international Unimodal Carrier Liability Regimes.**
- 9.2- Major features of the voluntary international Multimodal contractual arrangements.**
- 9.3- Major features of draft voluntary or mandatory international Multimodal legislative initiatives.**
- Annex 10- Table on the applicability of the mandatory international Unimodal conventions in the EU.**
- Annex 11- Bibliography.**