

# Integrated Services in the Intermodal Chain (ISIC)

## Final Report Task B: Intermodal liability and documentation

Client: European Commission – DG TREN  
Contract Number: TREN/04/MD/S07.38573

Author(s): Prof. M.A. Clarke (S. John's College – Cambridge)  
Prof. R. Herber (University of Hamburg)  
Dr. F. Lorenzon (Institute of Maritime Law – Southampton)  
Prof. J. Ramberg (University of Stockholm)

Southampton, 28 October 2005

ECORYS Nederland BV  
P.O. Box 4175  
3006 AD Rotterdam  
Watermanweg 44  
3067 GG Rotterdam  
The Netherlands

T +31 (0)10 453 88 00  
F +31 (0)10 453 07 68  
E [netherlands@ecorys.com](mailto:netherlands@ecorys.com)  
W [www.ecorys.com](http://www.ecorys.com)  
Registration no. 24316726

ECORYS Transport  
T +31 (0)10 453 87 59  
F +31 (0)10 452 36 80

## INTRODUCTION TO THE ISIC PROJECT

To support the organising of intermodal freight transport, the European Commission defined a number of actions to:

- foster the emergence of actors (“freight integrators”) that offer integrated services;
- improve the inter-operability of equipment and infrastructures;
- improve the knowledge and experience in the management of intermodal transport chains.

The overall aim of these actions, which have been described in the “Freight Integrator Action Plan”, is to improve the quality, efficiency and transparency of intermodal transport chains. The directorate General of Energy and Transport (DG TREN) of the European Commission has launched an Invitation to Tender for a study on the implementation of these actions. This project, that is named Integrated Services in the Intermodal Chain (ISIC), provides all necessary information for the Commission to successfully prepare and implement these actions. The project presents a roadmap for implementation of the actions, and policy recommendations are given with respect to the effectiveness and impacts of the actions.

The actions included in the project have been clustered within a number of specific tasks:

- Task A: Management and co-ordination;
- Task B: Improving intermodal liability and documentation;
- Task C: Harmonising technical requirements for intermodal transport equipment;
- Task D: Improving the quality of intermodal terminals;
- Task E: Certification and training for intermodal transport;
- Task F: Promotion of intermodal transport;
- Task G: Socio-economic cost-benefit analyses.

The project has been organised around these tasks, which can be seen as different sub-projects. A team of experts of different research institutes, co-ordinated by the Task leader, have worked on the different tasks.

The results of each Task (except for Task A) are described in a separate deliverable (Final Task Reports). A summary of the overall results is separately described in the Overall Final Report.

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## Summary

The following work has been carried out by an independent panel of legal experts, and is aimed at drafting a set of uniform intermodal liability rules which “concentrate the transit risk on one party and which provide for strict and full liability of the contracting carrier (the intermodal operator) for all types of losses (damage, loss, delay) irrespective of the modal stage where a loss occurs and of the causes of such a loss” (TREN/G3/25/2004, p. 7).

In carrying out its task, the Panel has opted for providing the Commission with what is intended as a first draft of a non-mandatory European alternative for the regulation of multimodal transport. Such draft and the comments accompanying it are only intended to – and indeed recommended for – being the basis for further discussion with all industries concerned to find a satisfactory solution to the problems identified in the current practice of multimodal transport.

The key provisions of the Draft Regime may be summarized as follows:

- ‘Transport Integrator’ is defined as any person 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 (Art.1);
- The Regime applies to all such international carriage contracts, if the goods are taken in charge in a State member of the EU, or delivery of the goods is to be made in a member State (Art. 2);
- The parties to the contract may agree to opt out of the Regime. Agreement that the contract shall not be governed by the Regime may be in any form (Art.2);
- Under the Regime transport documents may be, at the option of the consignor, in either negotiable or non-negotiable form (Art. 3);
- As far as the transport document is concerned, this has to contain, in addition to the usual particulars, a statement that the contract is subject to the Regime (art.4(a));
- The regime provides for the Transport Integrator’s strict and full liability for total or partial loss of the goods or damage to the goods occurring between the time in which it takes over the goods to the time of delivery, as well as for any delay in delivery (Art. 8);
- However, the Transport Integrator shall not be liable for any total or partial loss of the goods, or damage to the goods, or delay in delivery of the goods to the extent that such loss, damage or delay was caused by circumstances beyond its control (art. 8);
- When the Transport Integrator is liable for loss resulting from loss of or damage to the goods, his liability shall be limited to an amount not exceeding 17 units of account per kilogram of gross weight of the goods lost or damaged. The liability for

loss resulting from delay in delivery does not exceed twice the amount of the charge payable under the contract of transport (Art. 9);

- The Transport Integrator and the consignor may agree on limits of liability exceeding those provided (Art. 9.4);
- For the sake of certainty and predictability, the limits provided for in this Regime are virtually unbreakable. To break the limits, it has to be proved that the loss, damage or delay in delivery resulted from a personal act or omission of the Transport Integrator done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result (art. 10);
- Any action relating to a contract of transport subject to this Regime will be time-barred if judicial or arbitral proceedings have not been instituted within nine months from the day after the day of delivery was made or should have been made (Art. 14).

The final recommendations to the Commission may be summarized as follows:

The Commission should:

- (a) Start extensive consultation with all interested parties, using the proposed Regime as a basis for discussion. Carriers, insurers, freight forwarders, port authorities and cargo interests should be involved in the consultation, together with international organizations and multimodal and unimodal carriers' associations. Given the broad applicability of this regime and the consequences it may carry to trade worldwide, consultation should not be limited to interested parties based in the EU. Consultation should be carried out by way of conferences and round table discussions, followed by position papers;
- (b) If the need for further investigation or research emerges from the consultation process, a panel of independent experts should be appointed to deal with the issues raised;
- (c) Draft Multimodal Transport Regulation based on this proposed Regime, as amended on the basis of the consultations referred to in sub (a) above and (where necessary) the further investigation referred to in sub (b) above. This form of legislation is the most suitable in order to ensure uniformity and consistency of enactment and interpretation;
- (d) Alternatively, draft a Multimodal Transport Directive based on this proposed Regime, as amended on the basis of the consultations and investigations referred to in sub (c) above.

## Foreword

The following work has been carried out by an independent panel of legal experts, as part of a more ambitious project financed by the European Commission – DG-TREN: “Integrated services in the Intermodal Chain”. This part of the project was aimed at drafting a set of uniform intermodal liability rules which “concentrate the transit risk on one party and which provide for strict and full liability of the contracting carrier (the intermodal operator) for all types of losses (damage, loss, delay) irrespective of the modal stage where a loss occurs and of the causes of such a loss” (TREN/G3/25/2004, p. 7).

In carrying out its task, the Panel has opted for providing the Commission with what is intended as a first draft of a non-mandatory European alternative for the regulation of multimodal transport. Such draft and the comments accompanying it are only intended to – and indeed recommended for – being the basis for further discussion with all industries concerned with the common aim to find a satisfactory solution to the problems identified in the current practice of multimodal transport.

This report describes the draft regime including explanatory notes, as well as the consequences on the documentation in intermodal transport. In the Annex, the comments on the draft regime, made by a review panel of renown legal experts<sup>1</sup>, are presented.

# 1 A draft set of uniform liability rules for intermodal transport.

## 1.1 The Need for an Integrated Legal Regime

1. The United Nations Convention on International Multimodal Transport of Goods 1980 (UNC), as well as earlier draft conventions on the subject, General Conditions in current use (such as the FIATA-B/L and UNCTAD/ICC-Rules for Multimodal Transport Documents 1992) and national laws (e.g. in Germany and in Netherlands) are based on the so-called “network-system”. This means that the Multimodal Transport Operator (MTO) is responsible for loss, damage and (where appropriate) delay to the goods in accordance with the rules of law governing the particular unimodal stage (or “leg”) of transport, during which the loss, damage or delay occurred, provided that the time and place of occurrence can be proved.

2. Although most of these regimes provide for uniform liability rules to apply in cases in which the time and place of occurrence cannot be proved, in many cases the network-system preserves rights and duties for the parties, which were designed for unimodal transport and are not necessarily appropriate for multimodal transport. Moreover, the system exposes the parties to uncertainty and, therefore, delay and expense, not least in often lengthy proceedings to ascertain where the loss, damage or delay occurred. A particular problem arises when the time and place of occurrence is the point in time and space where one unimodal regime ends and another begins: usually the operations of loading and unloading. To draw a line and then ascertain on which side of the line loss, damage or delay occurred can be problematic.

3. The technical and economical advantages of containerization and unit loading depend on the simplicity of direct integrated transport from door to door. Sender and consignee do not have to concern themselves about providing transportation by different modes of transport. That is the concern of the MTO, who is referred to in the proposed regime (hereinafter “the Regime”) as the ‘Transport Integrator’ and who may undertake transportation himself or by means of sub-contractors. A liability regime for damage or delay caused during integrated transport should be in line and harmony with the concept of transport integration. Cargo-interests do not want to be faced with legal complications of the kind described in paragraph 2. They should be offered a simple and foreseeable method of indemnification irrespective of such issues and also of the Transport Integrator’s rights of recourse, if any, against sub-contractors. Moreover, this should be available to them whether or not the identity of the actual carrier and the mode of carriage are known in advance. Rights of the cargo-interests, as well as duties, should be known to them at the time that they conclude a contract of transport.

4. A new draft international instrument is currently under discussion within UNCITRAL. The Draft Instrument on Carriage of Goods [wholly or partly] [by sea] is primarily designed to cover sea carriage but would also apply to multimodal contracts including a sea-leg. The liability provisions envisaged in this respect do not, however, provide for responsibility of one contracting party throughout the multimodal transport, nor do they provide for uniform liability irrespective of the unimodal stage of transport where loss, damage or delay occur. Instead, in relation to multimodal contracts, the Draft Instrument introduces a “network” liability system (i.e. dependent on mode), with substantively maritime liability provisions applying in cases where loss damage or delay are not attributable to a particular unimodal leg of the transport. Moreover, a carrier, even if charging freight for a multimodal contract, would be able to act as agent only for certain parts of the contract (e.g. for land or air carriage ancillary to maritime carriage). Thus, the solution proposed by the Draft Instrument does not effectively address the challenges posed by modern multimodal transport as mentioned above. Nor, being a regime of considerable complexity, does it address the need express in Europe for a streamlined and relatively straight forward regime.

5. Contractual regimes of strict uniform liability for MTOs, which do not permit them to invoke particular rules of limitation and exemption normally applicable for particular modes of transport, can already be seen in practice where cargo-interests have the necessary negotiating power. Such practice is sufficiently widespread to show, better than any theoretical studies of the situation, that there is a considerable interest in simpler liability rules than are currently available to the commercial community at large.

## 1.2 A Simple and Strict Regime

6. In response to the needs and apparent wishes of the commercial community just described, the proposed Regime offers a simple, streamlined and uniform regime of legal liability of a kind which is new in the international legal domain. Such a regime should not be mandatory. The parties to a contract of transport should be free to decide whether or not to take advantage of a regime proposed by the EU to enable them to enjoy a cost-effective liability system of the kind already enjoyed by many powerful and experienced enterprises on the basis of individual contracts.

7. Under the Regime the Transport Integrator is strictly liable for loss of or damage to the goods occurring between the time he takes over the goods and the time of delivery, as well as for any delay in delivery (Article 8.1), unless and to the extent that the Transport Integrator proves that it was caused by circumstances beyond his control (Article 8.4). Certain provisions are similar to corresponding provisions in UNC, for example Article 1.1(d) containing an inclusive definition of ‘goods’ and Article 12 concerning dangerous goods. In most respects, however, the Regime constitutes a break with the past.

8. To this end the highest monetary limit found in unimodal regimes, 17 Special Drawing Rights, has been selected for the Regime (Article 9.1). On the one hand, this choice avoids an inadequate monetary limit whenever integrated transport includes carriage by

air or rail, for which that limit is usually applicable. On the other hand, for goods carried by sea, which generally have a lower value than 2 Special Drawing Right per kilo, the increase from 2 Special Drawing Rights to 17 Special Drawing Rights is unlikely to be problematic. Without the unit limitation of 666.67 Special Drawing Rights found in the Hague/Visby Rules for carriage of goods by sea, the 17 Special Drawing Rights per kilo limitation will sometimes provide the Transport Integrator with a lower limit than the combined unit/per kilo limitation under the Hague/Visby Rules. For road carriers the 17 Special Drawing Right limit is more than double the 8.33 limit under CMR (see paragraph 10). The expectation is that under the Regime cargo interests are not very likely to go to court to try to establish the wilful misconduct or gross negligence of the carrier in order to obtain an award of unlimited liability – a right for extreme situations, which is limited by the Regime to the very exceptional case of personal fault of the Transport Integrator himself (Article 10).

9. The strict liability established by the Regime (see paragraph 6) is expected to facilitate claims settlements, especially when compared with liability for presumed fault which often encourages fruitless efforts to rebut the presumption. As a quid pro quo for the strict liability and the monetary limit of 17 Special Drawing Rights, the Regime makes the monetary limit of 17 Special Drawing Rights for all practical purposes unbreakable. If nonetheless Transport Integrators find that the Regime works to their disadvantage, they have the opportunity of opting out of the Regime (Article 2).

### 1.3 The “opt out” approach

10. As the 1999 Study “Intermodal Transportation and Carrier Liability” (ISBN 92-828-7824-4) suggested, the main advantage of a mandatory international or regional regime is that it creates uniformity. On the other hand, such a regime may be strongly opposed by some important players in the industry and therefore generate commercial and political tension.

11. At the opposite end of the regulatory spectrum lie “model rules”, by definition only applicable if the parties to a contract so agree. The main advantage of such “models” consists in that they should not encounter any significant resistance. Indeed some of these “soft law” solutions have achieved more international uniformity than “hard law” alternatives; and this is particularly true in the world of international banking practice. However, model rules (other than those contained in legislative instruments) lack legal status comparable to that of mandatory national or international legislation and therefore have to give precedence to these in the event of overlap or conflict.

12. The 1999 study identified one way of avoiding the drawbacks of both alternatives: a default system, the application of which is triggered unless the parties agree otherwise. Even if a system devised in such a way would allow the parties to “opt out” of it, it would be more likely to achieve widespread application as it should avoid the strong opposition the adoption of mandatory measures would inevitably attract, while it would be triggered by mere inaction of the parties involved. Nonetheless, transparency and predictability of the liability framework will be preserved: if the parties do not “opt out” (a) they will be

bound by the Regime in its entirety, and (b) any contractual provisions in conflict with the Regime will be overridden.

13. This is the alternative which is here suggested. The proposed Regime does in fact allow the parties to the contract of transport a choice: either they “opt out” of it or they are bound by it in its entirety (Art. 2 and comments thereto). However, to preserve the balance between freedom of contract and third party protection, the Regime allows the parties to agree on higher monetary limits to the Transport Integrator’s liability than those provided for in the Regime itself. The alternative suggested does present its own drawbacks, since whether or not the Regime is adopted may depend on the commercial ‘muscle’ of the parties to the contract of transport. Nonetheless, this solution is the best way forward representing the first true alternative to the network-system while preserving the parties’ freedom of contract.

## 1.4 Collision of Conventions

14. To provide the possibility of uniform integrated liability on the part of the Transport Integrator, the Regime does not permit either party to invoke liability rules which are contained in special rules applicable to unimodal transportation which is a stage in a multimodal movement, even if it is proved that the loss, damage or delay occurred on that stage. This is essential to achieve technical and economic advantages of integrated transport (paragraphs 2 and 3). There could, however, be legal problems arising out of a potential ‘collision of conventions’: arguments that existing international Conventions governing unimodal transport must be respected and applied, if the loss, damage or delay has been proved to have occurred during a specific stage subject to such a Convention. Generally speaking, such arguments will not be sustainable.

15. If the stage of multimodal transport, during which loss, damage or delay has occurred, is performed by international road transport, mandatory application of the CMR may be argued. On this point there is some doctrinal disagreement. One view, held for example in Germany, is that the CMR only applies to carriage, which under the contract is to be performed exclusively by road. The view, held for example in England, is different: that a clash with the Regime is possible. The intention behind the Regime, however, is that in all such cases it is the Regime and not CMR that should apply.

16. If the stage, during which loss, damage or delay has occurred, is performed by international sea transport, mandatory application of the Hague/Visby-Rules is not a serious issue: the Rules apply only “to carriage of goods by sea”, which is required, moreover, to be covered by a (maritime) “bill of lading or any similar document of title” (Art. 1(b)).

17. If the stage of multimodal transport, during which loss, damage or delay has occurred, is performed by international rail transport, any clash with the Regime will be slight. CIM 1999 (Art. 1.3), which is expected to replace CIM 1980 in the near future, provides that, when international carriage is “the subject of a single contract” and “includes carriage by road or inland waterway in *internal* traffic of a Member State as a *supplement* to

transfrontier carriage by rail”, CIM shall apply (italics supplied). CIM 1999 (Art. 1.4) provides that when international carriage is “the subject of a single contract” and “includes carriage by sea or transfrontier carriage by inland waterway as a supplement to carriage by rail” CIM shall apply “if the carriage by sea or inland waterway is performed on services included in the list of services provided for” in CIM (Art.24.1). In theory therefore a clash with CIM 1999 could arise. This has been dealt with by assimilation of the main liability rules of the Regime to those of CIM, notably the monetary limit; see Article 9 and the introductory remarks on limits (paragraph 7). 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.

18. If the stage of multimodal transport, during which loss, damage or delay has occurred, is performed by international air transport, a clash with the Regime is unlikely. First, the Montreal Convention 1999, like previous air regimes, provides (Art. 38.1) that, in the case of “combined carriage performed partly by air and partly by any other mode of carriage”, the Convention shall apply “to the carriage by air, provided that the carriage by air falls within the terms of Article 1”. Article 1 of the air conventions limits their scope to agreements to carry cargo by aircraft. Prima facie such agreements are different from contracts of transport subject to the Regime, which are intended to be *sui generis*: Article 1.1(a). Second, the Montreal Convention provides (Art. 18.4) that, although the period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport, if “such carriage takes place in the performance of a contract for carriage by air, for the purposes 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”. As regards both provisions of the Montreal Convention (Art. 18.4 and Art. 38.1), there is in any event no significant clash in view of the assimilation of the main liability rules of this Regime to those of unimodal conventions, notably the monetary limit; see Article 9 and the introductory remarks on monetary limits (paragraph 7). Moreover, in certain respects the Regime is more favourable to cargo interests than the Montreal Convention; cargo interests will have every reason to seek to displace the presumption stated by Art. 18.4 of the Convention.



## 2 Draft Regime

### **Part 1. GENERAL**

#### **Article 1 Definitions**

1. For the purposes of this Regime:

- (a) ‘Contract of transport’ means a contract whereby a Transport Integrator undertakes to perform or procure the transport of goods from a place in one country to a place in another country, whether or not through a third country, involving at least two different modes of transport, and to deliver the goods to the consignee.
- (b) ‘Consignor’ means any person by whom a contract of transport has been concluded with a Transport Integrator.
- (c) ‘Consignee’ means the person entitled to take delivery of the goods.
- (d) ‘Goods’ includes any container, pallet or similar article of transport or packaging, if supplied by the consignor.
- (e) ‘Transport document’ means a document in writing, which evidences a contract of transport and the taking in charge of the goods by the Transport Integrator.
- (f) ‘Transport Integrator’ means any person who concludes a contract of transport and who acts as principal, not as agent or on behalf of the consignor and assumes responsibility for the performance of the contract of transport.
- (g) ‘Charge’ means the amount to which the Transport Integrator is entitled under the contract of transport.
- (h) ‘Writing’, unless otherwise agreed by the parties to the contract of transport, includes the transmission of information by electronic mail

or electronic, optical or similar means of communication, including, but not limited to, telegram, facsimile, telex, electronic mail or electronic data exchange (EDI), provided that the information is retrievable in perceivable form.

2. Unless the context otherwise requires, any reference in this instrument to the consignor, the consignee or the Transport Integrator shall include their servants or agents, and any other person engaged for the performance of the obligations under the contract of transport, as the case may be.

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*(i) Art.1.1(a): The name ‘Transport Integrator’ is given here to the multimodal transport operator to reflect the title of the overall project ‘Integrated Services in the Intermodal Chain’, of which this Regime forms part, and to distinguish the Regime from other transport regimes and the MTO from other operators in the field. However, the legal instrument eventually drafted may well adopt other expressions such as ‘Intermodal Transport Operator’ or ‘Multimodal Transport Operator’, if that is the wish of the Commission and the industries concerned.*

*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 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; see the Introduction (paragraphs 14 ff.).*

*(ii) Art. 1.1(h) contains a definition of “in writing” intended to make it clear that not only telegram, facsimile and telex, are within the definition of “in writing” but electronic communication generally. Whereas it may be premature to provide for electronic equivalents to paper transport documents, and in particular the bill of lading, there is, of course, no reason to discourage the parties from electronic communication in their day-to-day affairs. However, in some cases it is particularly important to preserve evidence in writing and, if so, it is necessary to determine to what extent something recorded fulfils the “in writing requirement”. There is no reason to treat electronic records differently as long as they fulfil the same functions as paper and this would be the case whenever the electronic record is accessible and can be read, i.e. retrievable from the electronic system in perceivable form. Even so, the Regime contains few “in writing- requirements”, viz., in addition to the requirements for transport documents (Article 3 ff.), only notice of claims (Article 13.1) and extensions of the limitation period (Article 14.3) must be in writing.*

*(iii) Art. 1.2: The effect of this provision is that the act or omission of any person entrusted or appointed to carry out the contract of transport or any part of it, which is within the scope of that person’s employment or mandate, shall be attributed to the Transport Integrator. Such persons include independent sub-contractors to*

whom transport has been sub-contracted and which, viewed in isolation, may be subject to a unimodal regime such as CMR, CIM, the Hague/Visby Rules or the Montreal Convention. Nonetheless legal relations between Transport Integrator and the cargo interest are governed by the Regime. Moreover, the Regime does not purport to deal with any rights of recourse which the Transport Integrator may have against such sub-contractors. The exercise or non-exercise of such rights remains a matter left to the commercial judgment of the Transport Integrator.

## **Article 2**

### **Scope of application**

The provisions of this Regime shall mandatorily apply to all contracts of transport between places in two different States, if

(a) the place for the taking in charge of the goods by the Transport Integrator as provided for in the contract of transport is located in a State member of the European Economic Community, or

(b) the place for delivery of the goods by the Transport Integrator as provided for in the contract of transport is located in a State member of the European Economic Community,

unless the parties to the contract have agreed that it shall not be governed by the Regime.

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*The scope provided for is restricted to the territory of the EU, but includes transports to and from the EU. 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.*

*This Regime should be introduced by an EU Regulation. The alternative form of a Directive, leaving some freedom to Member States as to the details of their*

*executive legislation, would not safeguard sufficient uniformity of the Regime in all Member States. It is, however, important, that the common Regime is genuinely one of uniform wording and therefore subject to common interpretation by national courts and, in the last resort, by the European Court of Justice.*

*The Regime shall be an offer to make use of simple and economically effective rules being approved by the EU and their Member States; therefore, it is not intended to be mandatory. If parties to a contract do not want to apply it, they may exclude its application.*

*Agreement that the contract of transport shall not be governed by the Regime may be in any form. It is sufficient that the agreement appears from an MTO's general conditions. Subject to agreement on higher monetary limits (Article 9.4), it is not permissible in principle to exclude the Regime in part, as this would invite variants and defeat the objectives of simplicity and transparency. Moreover, the transport document must contain a 'statement that the contract is subject to this Regime' (Article 4.1(a)). In the interests of commercial certainty, the consignee should be entitled to proceed on the basis that, if the Regime applies, it applies unqualified. However, it is not possible to prevent an MTO from incorporating some of the Regime's provisions in the MTO's own contract and thereby obtaining the same result as if the Regime had applied in part. In that situation, of course, Article 4.1(a) does not apply.*

*In many jurisdictions freight forwarders charging a fixed price for their services are considered to be carriers. As the Regime applies not only to an undertaking to perform but also to an undertaking to procure transport (Article 1(a)), the Regime may apply to freight forwarders. If they wish to procure the transport as agents only and avoid application of the Regime nonetheless, they can exclude it under Article 2.*

## **PART 2. DOCUMENTATION**

### **Article 3**

#### **Transport document**

1. When the goods are taken in charge by the Transport Integrator, he shall issue a transport document, which, at the option of the consignor, shall be in either negotiable or non-negotiable form.
2. The transport document shall be signed by the Transport Integrator.
3. The signature on the transport document may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means.

## **Article 4**

### **Contents of the transport document**

**1.** The transport document shall contain the following particulars:

- (a) a statement that the contract is subject to this Regime;
- (b) the general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the gross weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the consignor;
- (c) the apparent condition of the goods;
- (d) the name and principal place of business of the Transport Integrator;
- (e) the name of the consignor and, if known, of the consignee;
- (f) the place and date of taking in charge of the goods by the Transport Integrator;
- (f) the place of delivery of the goods;
- (g) the place and date of issue of the transport document;
- (h) the signature of the Transport Integrator in accordance with article 3.3;
- (i) the charge payable to the Transport Integrator to the extent payable by the consignee;
- (j) any other particulars which the parties may agree to insert in the transport document.

2. The absence from the transport document of one or more of the particulars referred to in paragraph 1 of this article shall not affect the validity of the contract or the applicability of any provision of this Regime.

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(i) Art. 4(a): See the Comment on Article 2.

(ii) Art. 4(i): *The requirement to state the charge, if any, payable by the consignee is limited to any charge known or ascertainable at the time that the transport document is issued.*

## **Article 5 Reservations**

1. Where the transport document contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the Transport Integrator knows, or has reasonable grounds to suspect, do not accurately represent the goods actually taken in charge, or if he has no reasonable means of checking such particulars, the Transport Integrator shall insert in the transport document a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.

2. If the Transport Integrator fails to note on the transport document the apparent condition of the goods, he is deemed to have noted on the transport document that the goods were in apparent good condition.

## **Article 6 Evidentiary effect of the transport document**

1. The transport document shall be prima facie evidence of the contract of transport.

2. Except for particulars in respect of which and to the extent to which a reservation permitted under article 5 has been entered, the transport document shall be prima facie evidence of the taking in charge by the Transport Integrator of the goods as described therein. Proof to the contrary by the Transport Integrator shall not be admissible if the

transport document is issued in negotiable form and the transferee has acted in good faith in reliance on the description of the goods therein.

### **Article 7** **Responsibility for particulars**

1. The consignor shall be deemed to have guaranteed to the Transport Integrator the accuracy, at the time the goods were taken in charge by the Transport Integrator, of particulars relating to the general nature of the goods, their marks, number, weight and quantity and, if applicable, to the dangerous character of the goods, as furnished by him for insertion in the transport document. The foregoing shall also apply where the person acting in this regard on behalf of the consignor is also the agent of the Transport Integrator.
2. The consignor shall indemnify the Transport Integrator against loss resulting from the irregularity, incorrectness or incompleteness of the particulars referred to in paragraph 1 of this article.
3. Subject to the provisions of paragraphs 1 and 2, the Transport Integrator shall indemnify the consignor against all loss suffered by him, by reason of the irregularity, incorrectness or incompleteness of the particulars inserted by the Transport Integrator or on his behalf.

## **PART 3. LIABILITY OF THE TRANSPORT INTEGRATOR**

### **Article 8** **Liability of the Transport Integrator**

1. The Transport Integrator shall be liable for total or partial loss of the goods or damage to the goods occurring between the time he takes over the goods and the time of delivery, as well as for any delay in delivery.
2. Delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon by the parties to the contract of transport or, in the absence of such agreement, within a reasonable time, having regard to the circumstances of the case.

3. If the goods have not been delivered within 90 consecutive days following the date of delivery determined according to paragraph 2, the claimant may treat the goods as lost.

4. The Transport Integrator shall not be liable for any total or partial loss of the goods, or damage to the goods, or delay in delivery of the goods to the extent that it was caused by circumstances beyond the control of the Transport Integrator.

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*(i) Art. 8.1: The basic liability rule in Article 8.1 is of a kind commonly found in transport regimes, whereby liability is attached to a period of time: the period between the time the Transport Integrator takes over the goods and the time of delivery. From the insurers' point of view such a liability risk can be assessed and rated. Before and after that period the risk is different. Commentators on other transport regimes agree that the time of take over is when the goods are received into the custody and control of the carrier concerned and the time of delivery is when that custody and control passes from the carrier to another person. This is also the case here with the Transport Integrator.*

*(ii) Art. 8.4: Article 8.4 states the only defence available to the Transport Integrator under the Regime. The result is a strict liability overall, which is similar to that found for contractual obligations in common law legal systems, and one stricter than that in unimodal regimes such as CMR, where carriers are exonerated if they can establish that they have exercised 'utmost care' (die äusserste vernünftige zumutbare Sorgfalt). Due performance of the obligation in question must be literally beyond the control of the Transport Integrator*

*Although Article 8.4 states the Transport Integrator's only defence, the provision embraces particular circumstances which may be specified as defences in other regimes. For example, the Transport Integrator is exonerated 'to the extent that' the loss, damage or delay is caused by circumstances beyond the control of the Transport Integrator. The corollary is that, if the Transport Integrator can establish that the loss, damage or delay was caused or contributed to by fault on the part of consignor or consignee, to that extent the Transport Integrator will be exonerated.*

## **Article 9**

### **Limitation of Liability**

1. When the Transport Integrator is liable for loss resulting from loss of or damage to the goods according to article 8, his liability shall be limited to an amount not exceeding 17 units of account per kilogram of gross weight of the goods lost or damaged.

2. The liability of the Transport Integrator for loss resulting from delay in delivery according to the provisions of article 8 shall not exceed twice the amount of the charge payable under the contract of transport.

3. The aggregate liability of the Transport Integrator, under paragraphs 1 and 2 of this article, shall not exceed the limit of liability for total loss of the goods as determined by paragraph 1 of this article.

4. By declaration of value or otherwise, the Transport Integrator and the consignor may agree on limits of liability exceeding those provided for in the preceding paragraphs of this article.

5. The unit of account referred to in paragraph 1 is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in paragraph 1 shall be converted into the national currency of a State according to the value of such currency on the date of the judgement or award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect on the date in question, for its operations and transactions.

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(i) Art. 9.1: Central to the effectiveness of the Regime is the establishment of a widely acceptable limit on the amount of the liability of the Transport Integrator. Concerning the reasons for the choice of 17 Special Drawing Rights, see the Introduction (paragraph 7). Note also that the limit is subject to the possibility of being broken as provided for in Article 10. The expectation, however, is that cargo-interests will have less incentive to break the limit than in the past; and that the Regime is such that the largely unnecessary (und often double) insurance, which is a feature to-day mainly because of legal uncertainties, will be avoided.

(ii) Art. 9.4: The purpose of a monetary limit of the kind found in Article 9.1, which is primarily to avoid unexpected exposure for the Transport Integrator, is not compromised by allowing consignors to make a declaration of value and to obtain full compensation up to that value. The underlying assumption is that the Transport Integrator may wish to charge extra in such a case, a so-called 'ad valorem freight'. However, there is no reason why the parties should not be entitled to agree on higher limits or indeed no limit at all and to do so in some other form than a declaration of value.

## **Article 10**

### **Loss of right to limit responsibility.**

The Transport Integrator shall not be entitled to the benefit of the limitation of liability provided for in this Regime if it is proved that the loss, damage or delay in delivery resulted from a personal act or omission of the Transport Integrator done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

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In Article 10 the Regime is taken one step in the direction of the rule found in Article 22.3 of the Montreal Convention, according to which the monetary limit for cargo cannot be ‘broken’ except by a declaration of value of the kind found in the Regime in Article 9.4. However, the Regime differs from the Montreal Convention in that the limit can be broken by wrongful intent or recklessness. Nonetheless, Article 10 will not be triggered easily or often because the wrongful intent or recklessness must be that not of servants or agents but that of the Transport Integrator personally. It must be personal in the sense of ‘actual, fault or privity’, a concept well understood where it is found in other transport legislation such as the 1957 International Convention Relating to the Limitation of Liability of Owners of Seagoing Ships. As the Transport Integrator is likely to be a corporation, the conduct is personal when it is the act or omission of a human being in a managerial matter which that person is empowered to resolve without further reference to any other person in the managerial structure of the enterprise. For example, if an organisation has a distinct transport department, the actual fault or privity of the manager of the transport department in that capacity is attributable to the corporate enterprise.

## **Article 11**

### **Non-contractual liability**

The defences and limits of liability provided for in this Regime shall apply in any action against the Transport Integrator in respect of loss resulting from loss of or damage to the goods, as well as from delay in delivery, whether the action be founded in contract, in tort or otherwise.

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*Article 11 is to prevent the cargo interest from seeking to obtain from the Transport Integrator higher compensation than is provided for by Article 9 by bringing a non-contractual claim. Due to the relatively high limit of 17 Special*

*Drawing Rights stated in Article 9.1 and the strict liability under Article 8 of the Regime, as well as the possibility provided for in Article 9.4 to agree on a monetary limit higher than 17 Special Drawing Rights, non-contractual claims are unlikely but should nevertheless be discouraged. However, the Transport Integrator is still exposed to the risk of actions for indemnification by his servants or agents and, in particular, his subcontractors, if the cargo interest for some reason or another finds it more convenient to institute actions against them. The Regime does not address this problem. The appropriate response, if the problem does arise, is left to the commercial judgment of the Transport Integrator. For example, the Transport Integrator may rely on a 'Himalaya clause' in the contract of transport to the effect that the rules under the Regime are extended to the benefit of servants, agents and independent subcontractors; and that, in order to prevent recovery exceeding the monetary limits of the Regime, any claims against them are aggregated with claims against the Transport Integrator. This would make actions against persons other than the Transport Integrator pointless. Alternatively, the Transport Integrator might insist on a 'circular indemnity clause' in the contract of transport to the effect that any amount recovered from other parties for claims subject to the Regime must be reimbursed to the Transport Integrator at least up to the amount that he has paid, or may have to pay, as indemnification to such parties.*

## **Article 12**

### **Dangerous Goods**

1. The consignor shall mark or label in a suitable manner dangerous goods as dangerous.
2. Where the consignor hands over dangerous goods to the Transport Integrator, the consignor shall inform him of the dangerous character of the goods and, if necessary, the precautions to be taken. If the consignor fails to do so and the Transport Integrator does not otherwise have knowledge of their dangerous character
  - (a) the consignor shall be liable to the Transport Integrator for all loss resulting from the shipment of such goods and
  - (b) the goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.
3. The provisions of paragraph 2 of this article may not be invoked by any person if during the transport he has taken the goods in his charge with knowledge of their dangerous character.

4. If, in cases where the provisions of paragraph 2 (b) of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where the Transport Integrator is liable in accordance with the provisions of article 8.

## **PART 4. CLAIMS AND ACTIONS**

### **Article 13**

#### **Notice of loss, damage or delay**

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the Transport Integrator not later than the working day after the day when the goods were handed over to the consignee, such handing over is prima facie evidence of the delivery by the Transport Integrator of the goods as described in the transport document.

2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this article apply correspondingly if notice in writing is not given within six consecutive days after the day when the goods were handed over to the consignee.

3. If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties at the place of delivery, notice in writing need not be given of loss or damage ascertained during such survey or inspection.

4. In the case of any actual or reasonable apprehension of loss or damage the Transport Integrator and the consignee shall give all reasonable facilities to each other for inspecting and tallying the goods.

5. No compensation shall be payable for loss resulting from delay in delivery unless notice has been given in writing to the Transport Integrator within 21 consecutive days after the day when the goods were delivered by handing over to the consignee or when the consignee has been notified that the goods

(b) placed at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade applicable at the place of delivery, or

(c) handed over to an authority or other third party to whom, pursuant to law or regulations applicable at the place of delivery, the goods must be handed over.

6. If any of the notice periods provided for in this article terminates on a day which is not a working day at the place of delivery, such period shall be extended until the next working day.

## **Article 14**

### **Limitation of Actions**

1. Any action relating to a contract of transport subject to this Regime shall be time-barred if judicial or arbitral proceedings have not been instituted within a period of nine months.

2. The limitation period commences on the day after the day on which the Transport Integrator has delivered the goods or part thereof or, where the goods have not been delivered, on the day after the last day on which the goods should have been delivered.

3. The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.

4. A recourse action for indemnity by a person held liable under this Regime against another person liable under this Regime may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if instituted within 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself.



## 3 Multimodal transport documents and the proposed Regime

### 3.1 The different purposes of transport documents in international trade.

1. Transport documents fulfil different purposes: they

- are used as *receipt* of the goods *as described* in the document.
- may incorporate the *conditions of carriage*.
- indicate the person entitled to *receive* the goods.
- may contain *additional information*, such as the places of receipt and delivery of the goods and the charges payable by the consignee.

2. When the goods are to be delivered to a named person (the consignee) the so-called *waybill* type of document, as well the *consignment note* issued by land carriers, is sufficient. Unless the consignor is acting as agent of the consignee, the contract of carriage is usually made with the carrier by the consignor; the consignor retains the right to give instructions to the carrier, including the right to replace the consignee, unless such right has been transferred to a third party (possibly a bank) or surrendered by agreement. In international conventions for non-maritime carriage, the consignor is estopped from giving new instructions to the carrier once he has parted with his original of the transport document. In maritime carriage, sea waybills are sometimes used in which case the right of control may be transferred to the consignee, usually by a notation on the document. So far, there is no international convention regulating the transfer of control. Reference is frequently made to the 1990 CMI Uniform Rules for Sea Waybills. It is not necessary to include similar rules in the Regime as it could be left to commercial practice to provide for transfer of control from the consignor to the consignee and the modalities for the Transport Integrator's delivery of the goods to the consignee.

3. When the parties intend to sell the goods in transit – maritime transit only, in practice – the *negotiable bill of lading* is used to transfer rights to subsequent buyers. Such transfer is achieved by the transfer of the bill of lading with or – in case of bearer bills – without the endorsement of the previous holder. The right of the transferee to get the goods from the carrier is guaranteed by his promise only to deliver the goods against the surrender of one original bill of lading. As this transferability function of the bill of lading fulfils an important commercial purpose it has been recognized worldwide as the law merchant (*lex mercatoria*) even without statutory support. Under the frequently used trade terms CFR

and CIF, the seller must provide the buyer with a negotiable bill of lading. Under the Hague Rules and Hague/Visby Rules, the consignor is entitled to obtain a bill of lading from the carrier upon demand (Art. III.3 ).

4. Bills of lading are frequently used even when no sale in transit is contemplated. The rules of interpretation of trade terms enacted by the International Chamber of Commerce – INCOTERMS – preserve the right of the buyer to get a bill of lading from the seller under CFR and CIF contracts. However, as from the 1990 version of INCOTERMS there is a reminder that the parties may agree otherwise when a sale in transit is not contemplated (clause A 8). This reminder was inserted in order to recognize the sea waybill, the problems of which had been addressed at that time in the 1990 CMI Uniform Rules. Even if no sale in transit is contemplated, under documentary credits banks may require a bill of lading when the goods are intended as security for the credit to the buyer. An adequate security may be achieved by giving the bank the right of control under sea waybills; but so far there has been a certain reluctance by banks to rely on such a right of control as a substitute for the bill of lading. Although, in most cases, a waybill or consignment note would fulfil the functions required of a transport document, the Regime should provide for negotiable types of transport documents (bills of lading) as well.

5. As far as multimodal transport is concerned, the current commercial practice appears to be to use transport documents in both negotiable and non negotiable form.

6. Negotiable multimodal bills in current use include BIMCO's "MULTIDOC 95" and "COMBICONBILL" and the FIATA Multimodal Transport Bill of Lading. However, some multimodal carriers have adopted their own in-house standard form (e.g. P&O Nedlloyd's *Bill of Lading for Combined Transport or Port to Port shipment*).

7. Among non negotiable transport documents specifically devised for multimodal transport two are worth mentioning for their widespread use in commercial transactions: BIMCO's MULTIWAYBILL and COMBICON-WAYBILL. Some carriers do have their own in-house seawaybill (e.g. P&O Nedlloyd's *Non-Negotiable Waybill for Combined Transport shipment or Port to Port Shipment*).

### 3.2 The impact of the proposed Regime on transport documents currently in use.

8. To avoid unnecessary costs to the industries involved, this Regime is designed to have the smallest possible impact in international trade and banking practice. Documents currently used will not need costly amendments: the particulars required by article 4 of the Regime are to be considered as reflecting the current commercial standard. As far as the notation required by article 4(1)(a) is concerned, the Transport Integrator may just stamp the front of a current multimodal bill with the statement that it "is subject to this Regime".

9. Any transport document issued under the Regime would fall within the scope of article 26 of the UCP 500 and, provided the specific document tendered for payment meets the

other requirements listed therein, it will be acceptable under letters of credits. Banking practice would not need to be amended.

10. Moreover, documents issued under the Regime, either in negotiable or non negotiable form, would comply with the requirements set out in INCOTERMS 2000 as a “usual” transport document according to CPT and CIP clause A8.

### 3.3 Electronic transport documents and the proposed Regime

11. The replacement of paper documents by electronic data interchange has been a possibility for quite some time. It was recognized already in INCOTERMS 1990 which, in its A 8 clauses, in the same manner as now do INCOTERMS 2000, stipulate:

*“Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraphs may be replaced by an equivalent electronic data interchange (EDI) message”.*

12. Although the CMI in 1990 presented its Rules for Electronic Bills of Lading and the possibility of EDI was recognized in the 1996 UNCITRAL Model Law on Electronic Commerce (Art. 17), the replacement of paper bills of lading with electronic procedures has so far progressed slowly. Presumably, the resistance to change is explained by the difficulty to obtain a workable system on a multilateral basis whereby everyone concerned is “on line”, and not only the carrier, consignor and consignee. The absence of statutory support probably does not matter, although some orthodox traditionalists insist that documents with transferability function are locked into a special category (*numerus clausus*) and that, therefore transferability based only upon the intention of the parties is insufficient.

13. While, as shown by the addition to INCOTERMS set out above (no. 11), it is easy and appropriate to provide for the replacement of paper documents in a bilateral relation, it is somewhat more difficult to achieve the same in a tripartite relation between a carrier, consignor and a consignee, and even more difficult on a multilateral basis.

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.

## 4 Conclusions and recommendations

### 4.1 Conclusions

The main conclusion of this work is that there is an actual possibility to create a simple uniform liability regime for multimodal transport which concentrates the risk of transit loss on one party, here referred to as the Transport Integrator.

Under the current-network system there may be said to be a certain balance between carrier and cargo interests to which cargo and liability insurers are accustomed. However, this proposed Regime is believed to be highly desirable as it would be considerably more transparent and much easier to manage for claim handlers. Also, it would protect customers whenever cargo insurance is missing or ineffective (in particular in stages between different modes of the transport). The overall cost benefits following from a less complicated system than the present may be marginal but are nevertheless desirable. Last but not least, why complicate matters – as in the present UNCITRAL Draft – when a simple and straightforward solution could be both justified and without detriment to commercial interests?

The proposed Regime represents a step forward towards a more efficient liability framework for multimodal carriage of goods and may be used by the Commission as the basis for extensive discussion with all industries concerned with the aim of providing the best available solution to the legal uncertainties multimodal transport is presenting.

### 4.2 Recommendations and actions to be taken

For the reasons stated above, the Panel recommends the Commission to take the following steps:

- (a) Start extensive consultation with all interested parties, using the proposed Regime as a basis for discussion. Carriers, insurers, freight forwarders, port authorities and cargo interests should be involved in the consultation, together with international organizations and multimodal and unimodal carriers' associations. Given the broad applicability of this regime and the consequences it may carry to trade worldwide, consultation should not be limited to interested parties based in the EU. Consultation should be carried out by way of conferences and round table discussions, followed by position papers.
- (b) If the need for further investigation or research emerges from the consultation process, a panel of independent experts should be appointed to deal with the issues raised.

- (c) Draft a Multimodal Transport Regulation based on this proposed Regime, as amended on the basis of the consultations referred to in sub (a) above and (where necessary) the further investigation referred to in sub (b) above. This form of legislation is the most suitable in order to ensure uniformity and consistency of enactment and interpretation.
- (d) Alternatively, draft a Multimodal Transport Directive based on this proposed Regime, as amended on the basis of the consultations and investigations referred to in sub (c) above.

The next table provides a summary of the main actions that can be identified for this task:

Action	Responsible actor(s)	Other actors involved	Time frame
<ul style="list-style-type: none"> <li>• Consultation with the Industry</li> </ul>	Commission	Industry and other interested parties	2006, Q2-Q4
<ul style="list-style-type: none"> <li>• Further investigation (if required)</li> </ul>	On Commission's initiative	Experts in the field of multimodal transport liability	2007
<ul style="list-style-type: none"> <li>• Preparation of draft legislation</li> </ul>	Commission		2007

## Annexes: Comments from the reviewers