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 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 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 Council[2], 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

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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

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.

UNCITRAL Proposal). This would probably trigger the entry into force of the UNCITRAL Convention. In the unlikely event that the US was 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 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 tan 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

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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.

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 1998[7]. 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 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

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

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]

- *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 modifications[10]. 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

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

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.

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 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.

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

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 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 transport[12]**.**

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.