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Working Party on Intermodal Transport and Logistics

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Paris, 4 October 2006

Item 6 of the provisional agenda

**RECONCILIATION AND HARMONIZATION OF CIVIL LIABILITY REGIMES IN
INTERMODAL TRANSPORT**

Compiled by the UNECE secretariat

The UNECE secretariat reproduces below the following transmitted documents:

- (1) Position paper of the European Association for Forwarding, Transport, Logistic and Customs Services (CLECAT) on the ISIC Project (Integrated Services in the Intermodal Chain) under consideration within the European Union.
- (2) Position paper of the International Road Transport Union (IRU) on the draft Convention on the Carriage of Goods [wholly or partly] [by sea] under preparation by the United Nations Commission on International Trade Law (UNCITRAL).
- (3) Reply by the UNCITRAL secretariat to the above position paper of the IRU.

* * *

Position Paper

Brussels, September 5th 2006

Joint ECMT/UNECE Working Party/Group on Intermodal Transport and Logistics *Reconciliation and Harmonization of Civil Liability Regimes in Intermodal Transport*

CLECAT (www.clecat.org) represents European freight forwarders, logistics service providers and Customs agents. FIATA (www.fiata.com) is the world level representation of our sector. In its capacity of EU representation, CLECAT is acting as Regional Body Europe on behalf of FIATA.

In view of their members' activities, CLECAT and FIATA have been closely following the various initiatives (FIAP - Freight Integrators Action Plan, ISIC Project - Integrated Services in the Intermodal Chain, Consultation on logistics for promoting freight intermodality) undertaken by the European Commission in order to enhance the use of intermodal transport. In particular, CLECAT was included among the members of the Advisory Board within the ISIC Project.

In this framework, CLECAT has expressed its Members' views on intermodal liability to the EU institutions several times¹. In particular, the proposed intermodal liability regime under discussion was analysed in detail during Advisory Board meetings within the ISIC project. Since this item will be discussed at the forthcoming Joint ECMT/UNECE Working Party/Group Intermodal Transport and Logistics, we would like to take this opportunity to share our views with the Working Party members.

Before commenting on the actual content of the proposed intermodal liability regime, we would like to start with a simple question: is there an identified need for such a regime? Our answer is simply no, for two reasons. First, although we acknowledge that there is no simple and unique rule to calculate liability in intermodal transport, clear rules and division of responsibility exist. The market offers solutions (e.g. FIATA Multimodal Bill of Lading, which has been in use for a couple of decades) that are tailored and suited to the most sophisticated shippers' demands. Second, we do not think that an EU-regime would enhance the use of intermodal transport, perhaps quite the opposite. Indeed, our experience tells us that the choice of the transport mode by the freight service provider AND his customer is rarely, if ever, made on the basis of the legal framework that governs it. The key factors are and will certainly remain the cost and quality of service. These ideas were expressed in clear terms by 100% of the stakeholders invited to participate as advisors in the project and to speak at the hearings where the Commission asked them to express their views.

Secondly, beyond the lack of need for a new regime, CLECAT sees possible negative effects in the proposed system. Indeed, it would first add complications because of the mere fact that it would be "just another liability regime", lacking the necessary universality in order to make it functional worldwide. Transport is characterised by globalisation and we take the view that any

¹ See:

Comments on FIAP: <http://www.clecat.org/dmdocuments/PPFIAP2003.pdf>

Reply to consultation on logistics : <http://www.clecat.org/dmdocuments/PP004OSECR060323ConsultLogistics.pdf>

framework liability regime should thus stem from international initiatives. In addition, the proposed system would surely lead to a substantial increase in costs, and in particular insurance costs. When one looks at the current differences of liability ceilings in the different transport modes (between 2 and 17 SDR's), the choice of the upper ceiling seems overambitious. No insurer would absorb extra liability at zero cost and this additional cost would simply be brought onto the end user's account. Since the cost is one of the key elements in the choice of a transport mode, this could lead to an increased use of the CMR and road transport, which is considered by many users as more simple and effective, to the detriment of intermodal (or co-modal) solutions offered by MTI's.

In view of the above, CLECAT would like to inform all those concerned that its certainly cannot encourage this additional attempt to table draft uniform intermodal liability rules, as contained in the ISIC study. Instead, CLECAT generally advocates "voluntary enhanced awareness programmes" to improve knowledge of existing liability regimes, as well as a more extensive use of one of the best practices in this regard, the FIATA Multimodal Bill of Lading. Resources can be profitably devoted to enhancing the level of awareness of operators and users by making appropriate vocational training trails available.

CLECAT, in conjunction with FIATA (our sector's mouthpiece at UN level), has participated actively in the important work which is being carried out by UNCITRAL and likely to produce a comprehensive international proposal in the near future. For this reason, with all best intentions, alternative proposals would not reach any other result but detracting from the resources already devoted to this complex agenda.

For readers who wish to gain more information on our reasons to fundamentally object this attempt, please refer to the position papers published on the general, intermodal and logistics' section of our website (www.clecat.org):

http://www.clecat.org/index.php?option=com_content&task=view&id=166&Itemid=42

Thanks for your attention.

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**Transport law:
Draft Convention on the Carriage of Goods
[wholly or partly] [by sea]**

Infringement

**of the Convention on the Contract for the international
Carriage of Goods by Road (CMR Convention),
done in Geneva on 19 May 1956**

and

**of the Convention of the Law of Treaties (Vienna Convention),
done in Vienna on 23 May 1969**

Transmitted by the International Road Transport Union (IRU)

I. Introduction

At its thirty fourth session (A/56/17, par. 345), held from 25 June to 13 July 2001, the United Nations Economic Commission on International Trade Law “...**decided to establish a working group to consider issues as outlined in the report on possible future work (A/CN.9/497)**”. By referring to these tasks, the Commission decided that this group (Working Group III) “...**should initially cover port-to-port transport operations; however, the working group would be free to study the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations...**”.

During its thirty-fifth session (A/57/17, par. 223), held from 17 to 28 June 2001, the Commission noted that “...**it would be desirable to include within its discussions also door-to-door operations and to deal with those operations by developing a regime that resolved any conflict between the draft instrument and provisions governing land carriage in cases where sea carriage was complemented by one or more land carriage segments**”.

No document states that the Commission authorised Working Group III to prepare an instrument which, instead of “resolving any conflict” with “provisions governing land carriage”, will, on the contrary, be a source of conflict with the latter and will expose potential contracting States to violations of the Convention on the Contract for the International Carriage of Goods by Road (CMR Convention), of 19 May 1956 as well as the Convention on the Law of Treaties (Vienna Convention) of 23 May 1969¹.

In fact, the draft Convention on the carriage of goods [wholly or partly] [by sea], as it emerged from the work of Working Group III (A/CN.9/WG. III/WP. 56), contains articles 27, 89 and 90, which, following analysis, show an evident conflict with the CMR Convention and the Vienna Convention.

II. Infringement of the CMR Convention and the Vienna Convention

Briefly and without entering into the distinctions made by the authors of article 27, this new instrument subjects to the provisions of land transport law, including the CMR Convention, claims or dispute arises out of loss, damage to goods or delay occurring solely before the time of their loading on to the ship and/or after their discharge from the ships. Other claims, disputes or questions will then be submitted to the provisions of the new instrument.

Yet, by selecting the provisions of land transport law (including the CMR), which will apply and those which will not apply (when one knows that all the provisions of the CMR will imperatively apply), article 27 of the new instrument deliberately enters into conflict with the CMR Convention.

¹ Among the 47 States, contracting parties to the CMR Convention, 39 States have also ratified the Vienna Convention. Considering that before their drafting, several provisions in the Vienna Convention already had customary rules status, their binding nature for all States, including those who haven't ratified it, is the result of numerous judgements and opinions of the International Court of Justice (cf. Judgement in the Case Concerning Avena and other Mexican Nationals, Mexico v. USA, Summaries of Judgements, Advisory Opinions and Orders, 2004, p.38; Judgement in the Aegean Sea Continental Shelf case, Reports 1978, p.39, Judgement in the Icelandic Fisheries Jurisdiction Case, Reports 1973, p. 14; Judgment on the Jurisdiction of the ICAO Council, Reports, 1972, p.67; p.14; Advisory Opinion on Namibia, Reports, 1971, p.47). This reminder is very important in cases where the issue of a State's non-adherence to the Vienna Convention or the non-retroactivity of the latter would possibly be brought up.

Indeed, Working Group III adopts article 89 which foresees that “...**nothing contained in this Convention prevents a contracting State from applying any other international instrument which is already in force...**” including the CMR Convention.

However, this provision, which, at first sight, appears to brush aside the application of article 27 of the draft on international carriage of goods by road, is largely toned down by article 90, which foresees that “**As between parties to this Convention, it prevails over those of an earlier convention to which they may be parties**”.

The provision of article 90 of the Working Group III draft exposes States, contracting parties to the CMR Convention to violations, both of the provisions of article 41, paragraph 1 of the Vienna Convention on the Law of Treaties and the provisions set out in article one, paragraph 5 of the CMR Convention.

Article 41, paragraph 1 of the Vienna Convention foresees that:

“Two or more of the parties to a multilateral treaty (in this case the CMR Convention) may conclude an agreement to modify the treaty as between themselves alone if:

- a. **the possibility of such a modification is provided for by the treaty, or**
- b. **the modification in question is not prohibited by the treaty and:**
 - (i) **does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;**
 - (ii) **does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.”**

Concerning letter (a) of article 41, paragraph 1 of the Vienna Convention, the CMR Convention allows derogation of its provisions in case of frontier traffic and, also, in cases where countries authorize the use in transport operations entirely confined to their territory of a consignment note representing a title to the goods.

It goes without saying that the draft developed by Working Group III is not limited to the two exceptions mentioned in the CMR Convention and that therefore it does not fulfil the condition mentioned in letter (a) of article 41, paragraph 1 of the Vienna Convention.

Concerning letter (b) of article 41, paragraph 1 of the Vienna Convention, it is useful to underline article 1, paragraph 5 of the CMR Convention, which prohibits further modifications aside from the ones mentioned in the preceding paragraph. To avoid the prohibition of modifications being circumvented, notably by the *inter se* agreement, the article in question contains the following commitments by States, contracting parties of the CMR Convention:

“The Contracting Parties agree not vary any of the provisions of this Convention by special agreements between two or more of them...”

The prohibition:

- of “any” of the provisions of this Convention does not lend itself to any restrictive interpretation;
- of modifying “by special agreements between two or more” contracting parties, excludes any agreement departing from the provisions of the CMR Convention, even an *inter se* agreement, as proposed in article 90 of the draft convention developed by Working Group III.

Moreover, even in the hypothesis that the CMR Convention would not prohibit *inter se* agreements – which is not the case – the two specific conditions (“i” and “ii” of article 41.1, letter (b) could not be respected cumulatively, which is also prohibited by letter (b) of article 41.1 of the Vienna Convention. In this regard, we will continue to repeat that the potential entry into force of the draft of Working Group III would deprive the States that have not adhered to this draft from benefiting from the rights they have under the CMR Convention.

For example, countries A, B and C are contracting parties of the CMR Convention and countries A and B are also contracting parties of the new instrument developed by Working Group III. Conforming to the principle of *pacta tertiis nec nocent nec prosunt*, confirmed by article 34 of the Vienna Convention, the new instrument developed by Working Group III must not create either obligations or rights for country C. Yet, the adhesion by countries A and B to the project of Working Group III would annul, because of article 90 of the draft, the right of country C to request that countries A and B apply to the carriers of country C, undertaking transport operations between countries A and B, the CMR Convention, conforming to their commitment with regards to each contracting party, including country C, as stipulated in article 1, paragraphs 1 and 5 of the CMR Convention.

The extension of the provisions of the draft of Working Group III on international carriage of goods by road would break the unity of land transport law, as it currently extends from the Atlantic to the Pacific. Following the entry into force of the mentioned draft, there will not be one single legal regime but two profoundly different legal regimes, both applying to the road. In this way, the fundamental objective of “standardizing the conditions governing the contract for the international carriage of goods by road”, included in the preamble of the CMR Convention (which explains the reason for prohibiting the *inter se* agreements), would be destroyed, and, with it, the will of 47 States wishing to have uniform rules on the contracts of international carriage by road.

III. Conclusions

Maintaining the provisions of article 90 of the draft Convention on the carriage of goods [wholly or partly] [by sea] and their possible entry into force would expose the States, contracting parties of the CMR Convention to infringement of this Convention and the Vienna Convention and would, consequently, mean a double violation of public international law.

Therefore, whatever the reasons for developing this draft, they do not justify the violation of two International Conventions developed under the auspices of the UN.

The IRU invites the United Nations Commission on International Trade Law to limit the range of the future Convention on the carriage of goods [wholly or partly] [by sea] to port-to-port transport or, at least, to withdraw article 90 of the text of the draft convention and, if necessary, to adapt other provisions in order to avoid all infringements of the prohibition against modification of the CMR Convention.



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LA/TL KL/lr

21 August, 2006

Dear Mr. Marmy;

Thank you for your letter dated 8 June 2006 expressing the concerns of the International Road Transport Union (IRU) with respect to the work currently underway in Working Group III (Transport Law) of the United Nations Commission on International Trade Law (UNCITRAL) on the draft convention on the carriage of goods [wholly or partly] [by sea] (the Draft convention).

In your letter, you raise a number of concerns on behalf of your organisation, which I will discuss below, but first, please allow me to make a few clarifications regarding certain points expressed in your correspondence. Note that all documents to which reference is made in this letter may be found on the UNCITRAL website at www.uncitral.org.

Mandate

As a preliminary matter, you have raised the issue of whether the Commission has granted Working Group III the mandate to proceed with its work on the Draft convention on the basis of 'door-to-door' transport operations, as opposed to 'port-to-port' transport operations. In this regard, you cite two excerpts from the reports of the Commission of its thirty-fourth and thirty-fifth sessions that consider this issue.

Following thorough discussion of the proposed sphere of application of the Draft convention in the Working Group, the Commission has considered the issue of 'door-to-door' versus 'port-to-port' coverage of the Draft Convention on several occasions in addition to those cited in your letter. I make reference to all of those instances below in order to provide a complete record of those discussions.

At its thirty-fourth session in 2001, "the Commission decided to establish a working group to consider issues as outlined in the report on possible future work (A/CN.9/497). ... The Commission also decided that the considerations in the working group should initially cover port-to-port transport operations; however, the working group would be free to study the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations, and, depending on the results of those studies, recommend to the Commission an appropriate extension of the working group's mandate."¹

The following year, at its thirty-fifth session, "The Commission noted that the Working Group, conscious of the mandate given to it by the Commission (A/56/17, para. 345) (and in particular of the fact that the Commission had decided that the considerations in the Working Group should initially cover port-to-port transport operations, but that the Working Group would be free to consider the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations), had adopted the view that it would be desirable to include within its discussions also door-to-door operations and to deal with those operations by developing a regime that resolved any conflict between the draft instrument and provisions governing land carriage in cases where sea carriage was complemented by one or more land carriage segments (for considerations of the Working Group on the

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¹ Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17, (A/56/17), para. 345.

issue of the scope of the draft instrument, see A/CN.9/510, paras. 26-32). It was also noted that the Working Group considered that it would be useful for it to continue its discussions of the draft instrument under the provisional working assumption that it would cover door-to-door transport operations. Consequently, the Working Group had requested the Commission to approve that approach (A/CN.9/510, para. 32).”²

In response to that request, the Commission at that same session in 2002 “...approved the working assumption that the draft instrument should cover door-to-door transport operations, subject to further consideration of the scope of application of the draft instrument after the Working Group had considered the substantive provisions of the draft instrument and come to a more complete understanding of their functioning in a door-to-door context.”³

This mandate was referred to by the Commission at its thirty-sixth, thirty-seventh and thirty-eighth sessions, in 2003, 2004 and 2005, respectively.⁴

The door-to-door scope of application of the Draft convention is thought to be of particular importance, as the Draft convention is intended to be a global instrument that must take into account the needs of worldwide trade and the requirements of modern international maritime container carriage.

IRU Concerns Regarding Potential Conflict of Conventions

With regard to the specific concerns of IRU in respect of possible conflicts that are thought to exist between the CMR and the Draft convention, Working Group III has taken a multi-pronged approach to safeguarding against conflicts between the Draft convention and any future and existing unimodal inland transport conventions.

1) No Conflict in Scope of Application

The Draft convention very carefully defines its general scope of application in draft article 8 to be to international maritime contracts of carriage, which are required, pursuant to the definition of “contract of carriage” in draft article 1, to be “for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.”

In contrast, the scope of application of the CMR is set out in article 1(1) to be to “every contract for the carriage of goods by road in vehicles for reward”, and then goes on to define the international aspects of that particular contract of carriage by road.

Thus, as a preliminary matter, the Draft convention and the CMR are by the very terms of their scope of application intended to apply to different contracts of carriage: the Draft convention carefully limits its application to the master maritime contract of carriage under which the carrier undertakes to carry goods from one place to another and which *must* provide for international carriage by sea, while the CMR applies to international contracts of carriage by road, including to any subcontracts for international road carriage that may exist under the master maritime contract. The application of these two instruments is thus intended to be mutually exclusive.

2) Draft article 27

The second aspect of the approach taken in the Draft convention to safeguard against conflicts with future and existing unimodal inland transport conventions is found in draft article 27,⁵ which is intended as a conflict of convention provision by establishing a type of ‘network system’ of liability in the Draft convention. This rule

² *Ibid.*, (A/57/17), para. 223.

³ *Ibid.*, para. 224.

⁴ *Ibid.*, (A/58/17), para. 205; (A/59/17), para. 62, and (A/60/17), para. 180, respectively.

⁵ “[Article 27. Carriage preceding or subsequent to sea carriage

“1. When a claim or dispute arises out of loss of or damage to goods or delay occurring solely during the carrier’s period of responsibility but:

(a) Before the time of their loading on to the ship;
(b) After their discharge from the ship to the time of their delivery to the consignee;
and, at the time of such loss, damage or delay, provisions of an international convention [or national law]:
(i) according to their terms apply to all or any of the carrier’s activities under the contract of carriage during that period, [irrespective whether the issuance of any particular document is needed in order to make such international convention applicable]⁵, and
(ii) specifically provide for carrier’s liability, limitation of liability, or time for suit, and
(iii) cannot be departed from by private contract either at all or to the detriment of the shipper,
such provisions, to the extent that they are mandatory as indicated in (iii) above, prevail over the provisions of this Convention.]

“[2. Paragraph 1 does not affect the application of article 64(2).]

“[3. Article 27 applies regardless of the national law otherwise applicable to the contract of carriage.]”

operates so that as far as the loss, damage or delay giving rise to the claim occurs during carriage preceding or subsequent to the sea carriage, provisions of an international convention that provide for carrier's liability, limitation of liability or time for suit *prevail* over the provisions of the Draft convention to the extent that such other convention declares itself applicable and its liability provisions are mandatory. As such, the Draft convention has been carefully tailored to preserve to as great an extent as possible the application of the future and existing unimodal inland transport conventions.

The decision to adopt a limited network system was made following extensive discussion in the Working Group (see, in particular, A/CN.9/526, paras. 219-267), and after consideration of a detailed study of the issues prepared by the UNCITRAL Secretariat (A/CN.9/WG.III/WP.29).

Further, draft article 27 of the Draft convention is modeled on the approach taken in article 2 of the CMR, which makes the CMR applicable to the whole of the carriage in situations when "the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air" except where it can be proved that the loss, damage or delay could only have occurred in the course of, and by reason of, the carriage by other means of transport.

Of additional interest is the recognition in most existing unimodal inland transport conventions, including the CMR, that commercial reality dictates that the modern carriage of goods must often take into account carriage under two or more means of transport to include pre- and post-mode transport, and that some scheme for accommodating that commercial reality must be sought. In addition to article 2 of the CMR, reference may be had in this regard to articles 1(3), 1(4) and 38 of the Uniform Rules concerning the contract for International Carriage of Goods by Rail, Appendix to the Convention concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999 (CIM-COTIF 1999), article 2 of the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway 2000 (CMNI), articles 18(5) and 31 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, as amended by the Protocol signed at Le Hague on 28 September 1955 and by the Protocol No. 4 signed at Montreal on 25 September 1975 (the Warsaw Convention), and articles 18(4) and 38 of the Convention for the Unification of Certain Rules for the International Carriage by Air, Montreal 1999 (the Montreal Convention).

In fact, it is noteworthy that the maritime transport industry has already to a great extent developed its own network system, for example, by adopting for widespread use the 1992 UNCTAD/ICC Rules for Multimodal Transport Documents, and the COMBICON combined transport bill of lading adopted by the Baltic and International Maritime Council (BIMCO 1971, updated in 1995).⁶

These documents, and several others, adopt the network system, which has been widely accepted by the market as an effective way to govern liability issues. For example, while the Hague/Visby Rules do not apply to inland carriage, clause 11(1) of the COMBICONBILL, read with clause 9(1) thereof, applies the Hague/Visby Rules as a matter of contract law, and clause 11(1) adopts the network system to resolve any conflict with a mandatory international convention or mandatory national law that applies to the carriage covered by the COMBICONBILL. The Draft convention thus adopts the approach currently in use in industry, and for which the inspiration came from article 2 of the CMR.

3) No action against non-maritime performing parties under the Draft convention

Another aspect of the approach taken in the Draft convention to safeguard against any conflicts which could still arise with future and existing unimodal inland transport conventions, in spite of the two safeguards described above, is that the Working Group has decided to eliminate the possibility of making claims pursuant to the Draft convention against road haulers and other inland carriers. The introduction of the concept of the 'maritime performing party' in

⁶ See A/CN.9/526, paras. 232 and 234. Reference may be had to the UNCTAD/ICC Rules generally, and to the relevant clauses of the COMBICONBILL as follows:

"9. Basic Liability

(1) The Carrier shall be liable for loss of or damage to the goods occurring between the time when he receives the goods into his charge and the time of delivery. ..."

"11. Special Provisions for Liability and Compensation.

(1) Notwithstanding anything provided for in Clauses 9 and 10 of this Bill of Lading, if it can be proved where the loss or damage occurred, the Carrier and the Merchant shall, as to the liability of the Carrier, be entitled to require such liability to be determined by the provisions contained in any international convention or national law, which provisions:

- (a) cannot be departed from by private contract, to the detriment of the claimant, and
- (b) would have applied if the Merchant had made a separate and direct contract with the Carrier in respect of the particular stage of transport where the loss or damage occurred and received as evidence thereof any particular document which must be issued if such international convention or national law shall apply.

(2) Insofar as there is not mandatory law applying to carriage by sea by virtue of the provisions of sub-clause 11(1), the liability of the Carrier in respect of any carriage by sea shall be determined by the ...Hague/Visby Rules. The Hague/Visby Rules shall also determine the liability of the Carrier in respect of carriage by inland waterways as if such carriage were carriage by sea. ..."

the Draft convention, and ongoing refinements to the definition of that party, serve to limit direct actions under the Draft convention to actions between the contractual parties to the overarching maritime contract of carriage, and to actions against the maritime performing party.⁷ Non-maritime performing parties are left outside of the scope of the liability regime of the Draft convention for the very purpose of leaving the contractual relationships under the CMR and other unimodal inland transport conventions intact. Consequently, actions with respect to inland performing parties, including domestic road and rail carriers, will be subject only to any applicable national law or applicable inland transport convention, including the CMR.

Draft articles 27, 89 and 90 of the Draft convention

As a further matter of clarification, draft article 27 (as it appears in the most recent iteration of the Draft convention in A/CN.9/WG.III/WP.56) has been in the Draft convention since the outset, and is intended as the principal conflict of convention provision of the Draft convention, using a type of network system to eliminate or minimize any conflicts with future and existing unimodal inland transport conventions,⁸ such as the Convention on the Contract for the International Carriage of Goods by Road, 1956, as amended by the 1978 Protocol (the CMR). As noted above, this approach is quite common in modern commercial transport, and is, in fact, also used in the CMR.

On the other hand, draft articles 89 and 90 of the Draft convention (in its most recent consolidated iteration in A/CN.9/WG.III/WP.56) were inserted into the text in the version of the Draft convention contained in A/CN.9/WG.III/WP.32 (these articles were then draft articles 83 and 84, respectively). Draft article 89 was inserted into the text in response to a suggestion by the Working Group to include for discussion an *alternative* approach to that of the article 27 network system approach for the resolution of possible conflicts between the Draft convention and future and existing unimodal inland transport conventions.⁹ Draft article 90 was inserted into the text in response to a suggestion in the Working Group that it would be helpful to some States attempting to avoid conflicts with other transport conventions if article 91, as it currently appears in the Draft convention, were amended to add language stating that the Draft convention would prevail over other transport conventions except in relation to States that are not members of the Draft convention.¹⁰ The drafting decision was made to make such additional text a separate provision, which is draft article 90 in the current version of the Draft convention.

Your letter assumes that articles 27, 89 and 90 will all be contained in the final text of the Draft convention. However, in addition to the clarifications noted in the paragraph above, it should be noted that the Working Group has not yet considered the text of draft articles 89 and 90, nor the extent of any relationship that may exist between articles 27, 89 and 90, and is expected to do so at its 18th session, currently scheduled to be held in Vienna from 6-17 November 2006. In anticipation of that discussion, the UNCITRAL Secretariat will be preparing a Working Paper for consideration by the Working Group on the issue of conflict of conventions. Concerns raised by the IRU will be reflected in that document.

Conclusion

These important safeguards in the Draft convention, along with ongoing efforts to further refine and clarify the text, show that every attempt has been made, and continues to be made by the Working Group, to exclude any conflict between the Draft convention and unimodal inland transport conventions, such as the CMR. Further, there should be no obstacle for any State to adhere to both the Draft convention and the CMR, since the scope of application of the Draft convention and of the CMR are clearly different: the Draft convention applies to the master maritime contract of carriage, while the CMR applies to any contract for the international carriage of goods by road, which may include the road carrier's sub-contract under the master maritime contract of carriage.

As noted above, the UNCITRAL Secretariat will be preparing a Working Paper for consideration by the Working Group at its next session in November 2006 on the issue of conflict of conventions, and full discussion of all issues relating to conflict of conventions is expected to take place at that session.

⁷ Article I(f) "Maritime performing party" means a performing party that performs any of the carrier's responsibilities during the period between the arrival of the goods at the port of loading [or, in case of trans-shipment, at the first port of loading] of a ship and their departure from the port of discharge from a ship [or final port of discharge as the case may be]. In the event of a trans-shipment, the performing parties that perform any of the carrier's responsibilities inland during the period between the departure of the goods from a port and their arrival at another port of loading are not maritime performing parties.

⁸ For a more complete explanation of the intended operation of draft article 27, reference may be had to paragraphs 49 to 53 of A/CN.9/WG.III/WP.21.

⁹ See A/CN.9/526, para. 247.

¹⁰ See A/CN.9/526, para. 196.

Finally, I have taken the liberty of sending a copy of this response to Mr. José Capel Ferrer, Director of the Transport Division of the United Nations Economic Commission for Europe, so that he may forward it to the States Parties to the CMR for their complete information, as he has with respect to the IRU position paper.

Yours sincerely,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end.

Jernej Sekolec
Secretary
United Nations Commission
on International Trade Law