

**VIRTUAL EXPERT GROUP MEETING ON LEGAL FRAMEWORKS  
FOR MULTIMODAL TRANSPORT OPERATIONS IN ASIA AND THE PACIFIC  
BANGKOK, 26-27 AUGUST 2020**

**Background note by the Secretariat**

**Selected legal issues affecting multimodal transport operations in Asia and the Pacific**

**I. Introduction**

1. As multimodal transport and connectivity has gained acceptance as an integral component of the systems approach of conducting business in an increasingly competitive and interdependent global economy, the availability of technology and better information systems are also providing enhanced capacity to coordinate services across modes and between modes and terminals. In other words, current trends point to emerging opportunities for multimodal transport to become a key driver of sustainable development by allowing each mode to be played to its specific strengths, while complementing others in offering seamless transport solutions. Through multimodal transport, existing capacities and infrastructure can be used more effectively, serve more adequately the requirements of global supply chains and promote a better balance between modes.

2. The current legal frameworks, however, do not reflect developments that have taken place in terms of transport patterns, technology and markets. Instead, the present legal framework consists of several international conventions designed to regulate unimodal carriage, diverse regional/sub-regional agreements, national laws and standard term contracts. Consequently, both the applicable liability rules and the degree and extent of a carrier's liability vary greatly from case to case and are unpredictable.<sup>1</sup> While there have been, over the years, several attempts at drafting a set of rules to govern liability arising from multimodal transport, none of these has brought about international uniformity. A fragmented and complex legal framework creates uncertainty, which in turn creates transaction costs as it gives rise to legal and evidentiary enquiries, costly litigation and rising insurance costs.<sup>2</sup> For developing countries, and for small and medium-size transport users, particularly, the concern is considerable. Without a predictable legal framework, equitable

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<sup>1</sup> United Nations Conference on Trade and Development, "Multimodal Transport: the feasibility of an international legal instrument", UNCTAD/SDTE/TLB/2003/1

<sup>2</sup> Ibid

access to markets and participation in international trade is much harder for small or medium players.<sup>3</sup>

3. There is no international treaty covering transport operations involving more than one mode of transport that is currently in force and implemented. None of the previous initiatives have succeeded in establishing a broadly accepted and utilized set of international rules that would be based on an international treaty and would thus have the force of law. So far only agreements covering requirements for infrastructure are in force, which are operationally complemented by industry-led initiatives.

4. At the global level, the main providers of multimodal transport services appear to be mostly freight forwarders, who often do not themselves own or operate any means of transport but arrange for the performance of individual modal stages of transport by traditional unimodal carriers. Furthermore, big liner shipping companies are increasingly expanding their services to offer door-to-door transport by engaging other carriers to perform different modal stages of a multimodal transaction.<sup>4</sup> In the absence of a common framework, this inevitably presents a series of other challenges related to sub-contracting and the difficulties associated with identifying the stage/mode of transport where a loss, damage or delay in delivery occurs and, therefore, the applicable liability regime.

5. Beyond the traditional legal issues, the fact that there is no uniformity in the definition of the most generic type of transport operations involving several modes of transport also warrants attention. The terms “intermodal transport”, “multimodal transport” and “combined transport” are often used interchangeably and even arbitrarily. Despite the fact that a number of researchers and organizations have developed definitions of these concepts, there are also various definitions found in international legal instruments and in the national legislation of some countries; the proliferation of terms sometimes leads to misunderstandings and different interpretations, and therefore to difficulties in their application by the transport industry.

6. The legal issues affecting multimodal transport are extensive and cannot be covered comprehensively in a background note. Nonetheless, the present document attempts to compile and summarize selected key points on this topic as a basis for further discussion in the context of the project implemented by ESCAP on the harmonization of legal frameworks for multimodal transport operations in Asia and the Pacific. The literature reviewed in compiling the present document supports the preliminary conclusion that the challenges associated with this endeavour are common across countries and regions, are persistent and remain largely unchanged over several decades. While legal convenience and certainty would benefit multimodal transport and reduce costs, the choice of the transport mode by the freight service providers and customers continued to be primarily based on the cost and quality of service, rather than the legal framework. Meanwhile, operational solutions to the legal obstacles are offered by the market that are tailored

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<sup>3</sup> Ibid

<sup>4</sup> Ibid

and suited to shippers' demands. However, recent developments in terms of institutions, policies, technologies and markets may present an opportune moment to resume efforts to tackle these issues.

7. In this light, the following sections will provide an overview of the most commonly cited legal, practical and financial issues associated with multimodal surface transport<sup>5</sup> in general but will also touch upon region-specific issues and examples of practices. These sections are followed by a set of possible ways forward, for the consideration of the Expert Group.

## **II. Key considerations in regulating multimodal transport**

8. Three main elements are key for regulating an efficient multimodal transport system. These elements are (i) transport infrastructure; (ii) legal/administrative requirements, and (iii) industry practices.

### *(a) Infrastructure Agreements supporting multimodal transport*

9. Infrastructure requirements have been successfully coordinated and harmonized at the regional level, initially from a unimodal standpoint, namely by defining networks of highways, railway lines and navigable rivers, followed by efforts to incorporate the rise of multi-modalism in infrastructure planning. Some notable examples for the purposes of the present document are the ESCAP Intergovernmental Agreement on Dry Ports;<sup>6</sup> the UNECE European Agreement on Important International Combined Transport Lines and Related Installations (AGTC);<sup>7</sup> and the OSJD Agreement on Organizational and Operational Aspects of Combined Transportation between Europe and Asia.

10. The AGTC Agreement, being the earliest of the three examples, defines minimum standards for combined transport infrastructure, including rail lines and terminals. It contains an annex that lists all the lines and corridors to which this minimum standard will apply, which is updated regularly in the light of the information received from the States concerned. It creates a common framework for transport infrastructure planning in almost all European States. The agreement developed in the framework of OSJD defines the network of main lines for combined transport and the main technical parameters of such lines. The agreement has been developed on the basis of the AGTC and is generally similar in the subject and structure.

11. The ESCAP Intergovernmental Agreement on Dry Ports was devised with the intention to strengthen regional cooperation among ESCAP member States towards promoting inclusive and sustainable transport through the coordinated development of the regional transport and logistics system. It is, thus, meant to complement the Intergovernmental Agreements on the Asian Highway

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<sup>5</sup> The present document and scope of the project initially does not cover air transport. Member States may wish to advise the secretariat with regard to the possible inclusion of aviation in the study.

<sup>6</sup> For full text see <https://www.unescap.org/resources/intergovernmental-agreement-dry-ports>

<sup>7</sup> For full text see <https://www.unece.org/fileadmin/DAM/trans/conventn/agtce.pdf>

Network and on the Trans-Asian Railway Network by facilitating modal integration at the infrastructure planning stage towards the formation of a common regional multimodal network and connecting to the region’s major sea and river ports. It is similar in its structure to the AGTC; the Agreement defines a list of dry ports of international importance and prescribes a uniform and flexible minimum standard for their development. The Agreement is supplemented by the “Regional Framework for the Development, Design, Planning and Operation of Dry Ports of International Importance”.

12. These agreements, while critical to the development of a transport system that is conducive to efficient multimodal movement of goods, do not address the complex legal realities of multimodal transport, some of which are outlined in the following sections. Furthermore, they also seem to cover limited geographical scope, as summarized in table 1, below. It can also be observed that some countries are bound by all indicated agreements owing to geographical overlap of the mandates of the respective organizations. In that regard, it may also be worth examining the compatibility of obligations under the different agreements, in terms of the minimum design and operational standards prescribed.

**Table 1: Participation of selected ESCAP member States to international and sub-regional conventions and agreements related to infrastructure supporting multimodal transport**

Country	ESCAP Intergovernmental Agreement on Dry Ports (2013)	European Agreement on Important International Combined Transport Lines and Related Installation, 1991 (AGTC)	Agreement on Organizational and Operational Aspects of Combined Transportation between Europe and Asia, 1997
China	v		v
Georgia		v	
India	v		
Iran, Islamic Republic of	v		
Kazakhstan	v	v	v
Kyrgyzstan			v
Lao People’s Democratic Republic	v		
Mongolia	v		v
Republic of Korea	v		
Russian Federation	v	v	v
Thailand	v		
Turkey		v	
Uzbekistan			v
Viet Nam	v		

*(b) Key legal and administrative components of multimodal transport*

13. The main problem arising from the unpredictability of the applicable legal regime when it comes to multimodal carriage is financial in nature. In unimodal transport, each party assumes specific risks, liabilities and limitation of liability for its own portion of the contract of carriage. Traditionally, sellers and buyers protect their interests by means of cargo insurance (first party

insurance). Carriers, who are under the obligation to deliver the goods in good condition protect themselves from liability by purchasing a liability insurance (third party insurance).<sup>8</sup> This is fairly straightforward in the case of unimodal carriage under one of the existing regimes.<sup>9</sup>

14. The issue becomes further complicated, however, in the case of multimodal transport. In practice, multimodal transport by, in fact, subcontracting carriage is more common than the actual performance of carriage by more than one mode by one and the same carrier. Accordingly, when a multimodal carrier subcontracts stages of the transport, the multimodal carrier becomes the consignor in relation to the employed subcontracting carrier.<sup>10</sup> Consequently, there are two or more contract levels in multimodal carriage; one for the main contract, i.e. the contract between the original consignor and the multimodal carrier, and one or more for the subcontracts, i.e. the contracts between the multimodal carrier acting as consignor and the subcontracting carrier or carriers.<sup>11</sup>

15. The ensuing uncertainty as to the applicable law, then, leads the cargo claimant and the carriers to be unable to realistically predict the amount of compensation, if any, to be paid in any scenario. Under these circumstances, insurance costs tend to increase i.e. when damage occurs, the cost of establishing which insurer bears the loss falls on both insurers, and consequently both carriers' and shippers' insurance premiums remain quite high.<sup>12</sup>

16. In cases where damage, loss or delay of the goods occurs during a stage of the carriage which the multimodal carrier did not actually perform, the multimodal carrier may be able to seek recourse from the actual carrier that did perform this stage of the carriage. The multimodal carrier may be burdened with carrier liability as regards the consignor or consignee for the entire transport, but in relation to the actual carrier he is the consignor and thus able to seek redress for damage or loss under the relevant unimodal regime. Problems occur when a recourse action does not provide the multimodal carrier with the desired amount of compensation. The two layers of contracts are often subject to different legal regimes and may lead to different levels of liability for the multimodal and the actual carrier.<sup>13</sup> In this case, the least favorable outcome is when the multimodal carrier is held liable for a larger amount than can be regained from the actual carrier in a recourse action. This is known as the recourse gap.

17. The differences in compensation to be paid between one liability regime and another can be significant, primarily because carriage law has developed per mode of transport, nationally as

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<sup>8</sup> Briant, A. M., "A critical look at the United Nations Convention on International Multimodal Transport of Goods", Institute of Air and Space Law, McGill University, Montreal (1996)

<sup>9</sup> The unimodal frameworks are: CMR (road), CIM (rail), SMGS (rail), CMNI (Inland navigation), Warsaw Convention/Montreal Convention (air transport)

<sup>10</sup> Hoeks, M. A. "Multimodal Transport Law: The law applicable to the multimodal contract for the carriage of goods", Erasmus University Rotterdam (2009).

<sup>11</sup> Ibid

<sup>12</sup> Ibid

<sup>13</sup> Ibid

well as internationally. Each mode of transport was regulated by its own set of rules from the beginning, but since not all modes of transport evolved at the same time or under the same conditions, the accompanying legal regimes did not either. Nevertheless, all unimodal carriage regimes seem to follow the same basic principles. These are, indicatively, that:

- a carrier is automatically liable for failure to deliver the promised result, unless force majeure can be proven, and
- the carrier cannot invoke the liability limit each of the carriage regimes entails in cases where wilful misconduct or intentional damage or loss of the cargo can be established.

18. In the latter case, it should be noted that carrier liability limits differ significantly per mode of transport, since they are specifically tailored to each mode's demands and risks. These monetary limitations were developed in the course of history with the intent to lighten the carrier's burden of risk regarding loss of or damage to the goods during transport. The differences stem from the average value of the goods shipped per mode of transport. For example, the limit for road carriage is on average only half that of rail or air carriage, while in maritime regulations the limits can be up to 8 to 9 times lower than those found in the air or rail transport regimes.<sup>14</sup> Other differences between the regimes are found in the time bars on protest and litigation, which damages qualify for redress, which court has jurisdiction, rules on carriage documentation, the liability of the carrier for subcontractors and so on.<sup>15</sup>

19. Another issue which can lead to complications is damage or loss of goods brought about by multiple causes. Such cases are especially complex if different but equally detrimental causes are connected to different transport stages. Multiple causes may lead to more than one applicable unimodal carriage regime if the damage cannot be divided or if the components of the causes cannot all be allocated to one specific transport segment.<sup>16</sup>

20. Against this background, it is argued that the aim of a uniform framework for multimodal carriage is not only to provide operational efficiency but also adequate legal protection to the various private interests at stake. Carriers have two main concerns: limiting their responsibility in case of loss or damage to the cargo and minimizing the cost of their insurance. With regard to limitation of liability, various international unimodal conventions already provide for numerous and broad defences to liability and low limits on the amount recoverable, either in terms of a maximum amount per unit of weight or per package. In the context of multimodal transport, carriers were particularly concerned about protecting themselves against the risks of extensive exposure to liability.<sup>17</sup>

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<sup>14</sup> Hoeks, M. A. "Multimodal Transport Law: The law applicable to the multimodal contract for the carriage of goods", Erasmus University Rotterdam (2009).

<sup>15</sup> Briant, A. M., "A critical look at the United Nations Convention on International Multimodal Transport of Goods", Institute of Air and Space Law, McGill University, Montreal (1996)

<sup>16</sup> Op. Cit

<sup>17</sup> Ibid

21. Shippers, on the other hand, are generally concerned with the prompt and safe delivery of the goods. In the context of multimodal transport, small shippers tend to consider strict carrier's liability as an incentive to good performance which could result in lower cargo insurance premiums if the carrier's liability is higher. Large shippers, however, tend to prefer a less strict legal regime. For example, if carriers were to be made strictly liable for the full value of the cargo, many shippers might decide to forego cargo insurance and the freight rates would probably increase to reflect the carrier's costs of insuring his/her added liability.

22. It follows that, because of the lack of an international convention on multimodal carrier liability, it is difficult to determine at the outset of a multimodal transport what – international and/or national – law will apply to the contract as a whole or to its various parts. Which regime is deemed applicable depends on a several factors such as the nature and the extent of the multimodal contract, which modes of transport have been accounted for in the contract and in what way, what documents have been drawn up, the addressed court's views on the scope of possibly applicable unimodal conventions, to name a few.<sup>18</sup>

*(c) Limitations of existing legal instruments*

23. The first efforts to establish a suitable legal regime for multimodal transport were made by the International Institute for the Unification of Private Law (UNIDROIT) and date back to the 1930s. To date, extensive discussions continue, among others, on the optimal type of liability regime namely the choice between uniform and network liability systems or combination thereof. In the uniform system the same rules of liability will apply throughout the entire transport, irrespective of mode of transport or where the loss/damage occurred. The advantage of this system is the transparency of the contract from the beginning. The disadvantage is the possibility of a recourse gap (see para.16 above), i.e. the main contract (the multimodal contract) will be subject to the uniform system, but the second layer of contracts will still be subject to the applicable regime depending on mode.<sup>19</sup>

24. The network approach divides the journey into stages as if there had been separate contracts for each stage. If the loss or damage could be localized to a certain mode, that mode will be matched with the applicable regime. The benefit of this approach is that the main contract and the second layer of contracts will be matched, and the same rules will apply. The disadvantage would be cases of non-localized loss<sup>20</sup> and gradual loss, plus the uncertainty as to what rules to apply in-between the applicability of two different regimes, e.g. goods stored in warehouses awaiting shipment.<sup>21</sup> Attempts to harmonize the legal framework for multimodal carriage have been based

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<sup>18</sup> Hoeks, M. A. "Multimodal Transport Law: The law applicable to the multimodal contract for the carriage of goods", Erasmus University Rotterdam (2009).

<sup>19</sup> Englundh, E., "Carrier Liability in Multimodal Transport", Lund University, Faculty of Law (2015).

<sup>20</sup> Non-localized loss is a term used when it is not possible to determine the stage of transport (or mode) at which the damage, loss or delay of the goods occurred. Equivalently, localized loss is used when the stage of transport where the loss, damage or delay occurred can be pinpointed.

<sup>21</sup> Op. Cit.

on these two approaches, while more recent instruments have introduced the so called “limited network” system whereby elements of both approaches apply (see paras. 30-31)

25. In 1980, a first complete international legal instrument was concluded and adopted, namely the **United Nations Convention on International Multimodal Transport of Goods**<sup>22</sup> (hereinafter the MT Convention). Despite this initial success, the Convention has not yet entered into force since the required number of Parties for its entry into force is 30, while the actual number of Parties to this Convention is 11, and there have been no new accessions since 1996.

26. According to its provisions, a multimodal transport operator (hereinafter MTO), defined as a person concluding a multimodal transport contract and assuming responsibility for it, is held to issue a multimodal transport document. This document has to contain information on the goods transported under the responsibility of the MTO and indicating the name of the consignor and the consignee, as well as the intended journey route. The multimodal transport document accredits for the receipt of the goods as described in the document. The responsibility of the MTO for the goods under this Convention covers the period from the time the goods are taken into his/her charge to the time of their delivery. The MTO assumes liability due to loss of, damage to or delay in delivery of the goods, unless the MTO proves that he/she or his/her agents have taken every measure of precaution to avoid the damage. The MTO is not entitled to the benefit of the limitation of liability provided for in this Convention if it is proven that the loss was caused intentionally or recklessly. Any action under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years from the moment of delivery or loss of the goods.

27. Multimodal transport under this Convention therefore places the responsibility for transport activities under one operator, who then manages and coordinates the total task from the shipper’s door to the consignee’s door, ensuring the continuous movement of the goods along the best route, by the most efficient and cost-effective means, to meet the shipper’s requirements of delivery.

28. As straightforward as this may seem in principle, the Convention has not attracted a sufficient number of Parties for its entry into force. This in turn, warrants a closer examination of the reasons and identification of lessons learned in pursuing new solutions. In particular, three factors are most commonly cited in this regard; the first is the basis of liability of the MT Convention, which is modelled after the United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules), which were considered by and large to be less “friendly” to carriers’ interests than other available frameworks.<sup>23</sup>

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<sup>22</sup> For full text see: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XI-E-1&chapter=11&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-E-1&chapter=11&clang=en)

<sup>23</sup> Hoeks, M. A. “Multimodal Transport Law: The law applicable to the multimodal contract for the carriage of goods”, Erasmus University Rotterdam (2009).



29. The second inhibiting factor broadly discussed in the literature is the monetary limitation of liability, which was considered too high by some. Under the MT Convention, the liability of the MTO is uniform for both localized and non-localized loss, but, in cases of localized loss the liability limitation is determined by any applicable international convention or mandatory national law which provides a higher limit of liability than that of the MT Convention. The third factor alleged to have contributed to the failure of the MT Convention to enter into force, concerned the uniform liability of the Convention, which gave rise to concerns in relation to recourse actions by the MTO against a subcontracting unimodal carrier and to introduce mandatory liability levels in relation to transports otherwise not subject to mandatory law (for instance road and rail transport not covered by the CMR or by the COTIF-CIM and SMGS Conventions).

30. The most recent addition to the list of uniform multimodal carriage regimes is the **Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea**,<sup>24</sup> also known as the Rotterdam Rules, which was signed in Rotterdam on 23 September 2009. This Convention started out meaning to uniformize the legal aspects of sea transport. But although it may originally have been an attempt to unify no more than sea carriage, it encompasses contracts for multimodal carriage as well, provided there is a sea-leg.

31. The carrier liability under the Rotterdam Rules is in principle also a uniform one; namely all carriage is to be governed by the maritime regime of the Convention, unless – however, the carriage stage in question falls within the scope of one of the (many) exceptions.<sup>25</sup> The result is that non-sea carriage stages may partly be governed by the rules of conventions that provide mandatory rules on carrier liability specifically tailored to the mode of the transport stage in question.<sup>26</sup> Consequently, the Rotterdam Rules essentially introduce a so-called limited network system which has proven too complicated for practical application. Consequently, this instrument has also not attracted sufficient number of Parties for its entry into force.

32. One of the reasons that the network system approach is considered to complex is that several of the current unimodal carriage regimes extend their scope beyond the mode of transport that is their primary focus, as long as one leg of the transport is carried out by the mode in question (e.g. CMR). This can cause more than one unimodal regime to apply to claims arising from a multimodal contract of carriage, which leads to confusion as to which of these regimes actually governs a specific dispute,<sup>27</sup> often leaving it to the discretion of the court to determine on a case-by-case basis. In turn, this increases the uncertainties and risks of a recourse gap and open the multimodal transport operator to higher liability exposures.

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<sup>24</sup> For full text see [https://www.uncitral.org/pdf/english/texts/transport/rotterdam\\_rules/Rotterdam-Rules-E.pdf](https://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/Rotterdam-Rules-E.pdf)

<sup>25</sup> Hoeks, M. A. “Multimodal Transport Law: The law applicable to the multimodal contract for the carriage of goods”, Erasmus University Rotterdam (2009).

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

33. It is worth noting, nonetheless, that the Rotterdam Rules provide a legal framework that, contrary to other available instruments, does take into account the many technological and commercial developments that have occurred in maritime transport more or less recently, such as increasing containerization, growing demand for door-to-door carriage under a single contract, and the development of electronic transport documents.

34. Looking more specifically at the Asia and Pacific region, there is no shortage of similar attempts for unification at the sub-regional or, even, the corridor level. A prominent such example is the **ASEAN Framework Agreement on Multimodal Transport**<sup>28</sup> of 2005 (AFAMT), which has entered into force for 8 out of 10 ASEAN member States, but still cannot not be considered as a legal instrument that sees full implementation. Its substantive provisions were derived from both the MT Convention of 1980 and the subsequent UNCTAD/ICC Rules for Multimodal Transport Documents (see section (d) below), attempting, thus, to find an implementable “middle ground”, without, however, resolving the fundamental difficulties identified by industry in previous attempts to harmonize the legal framework for multimodal transport. This was further exacerbated by the fact that the Agreement requires subsequent implementing protocols and national reforms, including on the establishment of competent national bodies for the registration multimodal transport operators under the Framework Agreement, that are still lagging in ASEAN countries.

35. A further example is that of the **Agreement on the Development of Multimodal transport on the Europe-Caucasus-Asia Corridor**,<sup>29</sup> which was concluded in 2009 under the auspices of the TRACECA programme and meant to govern the conditions for multimodal transport along the corridor. The system established by its provisions seem to follow the basic characteristics of a uniform liability system, i.e. the same set of rules applies irrespective of the stage of transport during which loss, damage or delay occurs. Therefore, under this Agreement the Multimodal Transport Operator (MTO) has presumed liability for loss, delay or damage to goods placed in his/her charge unless proven that there was no fault or neglect. While the Agreement makes no reference to other provisions of mandatory law or applicable unimodal liability regimes, there is implicit recognition of subcontracting carriage in the definitions and in provisions on the grounds for liability of the MTO, who is required to take out appropriate insurance. At the time of writing, the Agreement is not fully operational as the Contracting Parties are in discussions on the modalities of implementation. It is also worth noting that this Agreement is of limited geographical scope.

36. Looking at the available examples, it becomes clear that there is no single instrument or regime currently governing multimodal transport operations successfully globally or regionally.

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<sup>28</sup> For full text see <https://cil.nus.edu.sg/wp-content/uploads/formidable/18/2005-ASEAN-Framework-Agreement-on-Multimodal-Transport.pdf>.

<sup>29</sup> For full text see <http://www.traceca-org.org/en/home/basic-documents/>.

Table 2, below, gives an indication of the proliferation of legal frameworks with respect to selected ESCAP member States:

**Table 2: Participation of selected ESCAP member States to international and sub-regional conventions and agreements related to the contract of carriage for multimodal transport operations**

Country	UN Convention on International Multimodal Transport of Goods, 1980 (not in force) <sup>30</sup>	UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2009 (not in force) <sup>31</sup>	ASEAN Framework Agreement on Multimodal Transport (AFAMT), 2005	TRACECA Agreement on the Development of Multimodal Transport, 2009
Armenia		v (signatory)		v
Azerbaijan				v
Cambodia			v	
Georgia	v			v
Indonesia			v	
Kyrgyzstan				v
Lao People's Democratic Republic			v	
Myanmar			v	
Philippines, the			v	
Tajikistan				v
Thailand			v	

*(d) Commercial practices and industry-led initiatives*

37. Since no international uniform law regime has been able to make it to operational status, contractual standard rules have been developed and broadly used. One such example is the ICC Uniform Rules for a combined transport document (URC). This set of contractual standard rules was incorporated in several widely used standard transport documents.<sup>32</sup> In 1992 these rules were replaced by an updated set of contractual provisions for multimodal transport documents namely the UNCTAD/ICC Rules,<sup>33</sup> which can be considered a merger between the URC and the UN Convention on International Multimodal Transport of Goods. This standard set of contract rules attempts to fill the gap in the field of international multimodal transport liability legislation that was expected initially to have been covered by the UN Convention. The rules have been incorporated in widely used multimodal transport documents such as the FIATA Multimodal Bill of Lading (FBL).<sup>34</sup>

<sup>30</sup> The only ESCAP member State that has become a party to this convention is Georgia which made it through acceptance in 1996. There are totally 11 Parties to this convention out of 30 required for its entry into force.

<sup>31</sup> There are 5 Parties to this Convention out of 20 required for its entry into force. The only ESCAP member State which signed this Convention in 2009 (but has not become a Party) is Armenia.

<sup>32</sup> Hoeks, M. A. "Multimodal Transport Law: The law applicable to the multimodal contract for the carriage of goods", Erasmus University Rotterdam (2009).

<sup>33</sup> See <https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=339>.

<sup>34</sup> Op.Cit.

38. These Rules, however, do not have the force of the law but are of purely contractual nature and apply only if they are incorporated into a contract of carriage, without any formal requirement for “writing” and irrespective of whether it is a contract for unimodal or multimodal transport involving one or several modes of transport, or whether or not a document has been issued. Once they are incorporated into a contract, they override any conflicting contractual provisions, except in so far as they increase the responsibility or obligations of the multimodal transport operator. The Rules, however, can only take effect to the extent that they are not contrary to the mandatory provisions of international conventions or national law applicable to the multimodal transport contract.

39. FIATA’s multimodal transport documents, most notably the FIATA Multimodal Bill of Lading (FBL) and the FIATA Multimodal Transport Waybill (FWB), as well as UNCTAD/ICC Rules for Multimodal Transport Documents play their important role in filling the legislative gap through recommendations for the unification of contractual relationship; at the same time, these are not legal instruments but recommendations for the transport and freight forwarding industry.

### **III. Possible ways forward**

40. The ESCAP secretariat has noted growing interest by ESCAP member States in strengthening the legal framework for multimodal transport operations, which are rapidly developing in the region but are hindered by the lack of uniform rules defining important provisions for such type of carriage of goods. However, it will be important to thoroughly examine the history of the issue which dates back almost a century already, and properly identify the reasons for unresolved issues, the short-comings of previous attempts, the evolution of relevant jurisprudence in the region, as well as the new and evolving market and technological conditions that may contribute to a revised and potentially more successful approach as compared to the past.

41. As part of the project and within the scope of envisaged activities, the secretariat proposes that the present document be considered a first basis for feedback from member States and regional industry stakeholders, which in turn will inform the preparation of a thorough study of the above issues, with a view to identifying possible ways forward and the subsequent conceptualization of a model legal framework, guideline or other relevant format.

42. Considering the complexity of the current legal patchwork, however, it is not unusual to consider the possibility that another liability regime may just add to the proliferation of regional law in this area. In such a case, in order to solve the existing problems in multimodal transport law without adding any more options for conflict, an instrument of a supplementary nature might be a reasonable option, as well. Although such an instrument would not erase all the difficulties in finding the rules of law applicable to a multimodal contract, it would be able to fill the gaps in the current legal framework without creating all sorts of new conflicts with the existing carriage regimes.

43. Another approach would be to develop guidelines that could serve to harmonize the understanding and applications of certain related processes within national legal systems. For example, this could include a draft guideline or model law for the member States that could contain the list of related provisions that could be incorporated into legal acts at national level with a view to facilitating harmonization of national rules and regulations on multimodal transport. Given that only a few countries of the region currently have enacted national laws on multimodal transport, such a model instrument could help in the promotion of a unified approach to the matters of multimodal transport through adoption of relevant acts of national legislation.

44. Furthermore, as mentioned earlier in this document, the UNCTAD/ICC Rules for Multimodal Transport Documents, the FIATA Multimodal Bill of Lading (FBL), the FIATA Multimodal Transport Waybill (FWB) and other relevant industry-led documents are being widely used worldwide through voluntary incorporation of their provisions into contractual documentation for multimodal transport operations which, in principle, can cover a wide range of matters on contractual relationships. At the same time, interpretation of contractual rules based on application of these documents can be fragmented and not always consistent region-wide in different jurisdictions. Therefore, another option would be the development of capacity building programmes tailored to assist practitioners and officials in uniform application of these contractual rules on multimodal transport, based on the existing recommendations.

45. Another option would be, depending on the readiness of member States in that regard, to embark on the process of negotiations of a new legal instrument which could be:

- Regional (with the potential involvement of all interested member States); or
- Sub-regional (with the involvement of member countries belonging to a certain sub-region); or
- Corridor-based (involving member States along one or several international intermodal transport corridor(s)).

46. It follows that there is no shortage of options that may be feasible and practical for different reasons. As such, these options should also be weighed in the light of careful research and analysis, as well as taking account of the needs and interests of all governmental and non-governmental stakeholders.

#### **IV. Considerations by the Expert Group**

47. The Expert Group is invited to consider the information in the present document and to provide its expert views, inputs and comments that will support the further identification of key and region-specific issues hindering the full deployment of multimodal transport.

48. The Expert Group may wish to consider that, at this early stage of implementation of the project, it is reasonable not to exclude any option at the outset, until such time as a thorough study report can be developed for further consideration. The Expert Group may also wish to provide further guidance to the secretariat with regard to the overall direction of the project.