**The European Union's Tacis TRACECA programme for Armenia, Azerbaijan, Bulgaria, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Romania, Tajikistan, Turkey, Turkmenistan, Ukraine, Uzbekistan**

EUROPEAID/120540/C/SV/MULTI

# Freight Forwarders Training Courses

for Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, Ukraine, Uzbekistan

## *Report on the legal situation of the freight forwarding industry in the TRACECA countries*

*(September 2005 – September 2007)*

This project is funded by the European Union

A project implemented by NEA and its partners STC, TRADEMCO and Wagener & Herbst Management Consultants

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## Report cover page

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| **Project Title**: | Freight Forwarders Training Courses (TRACECA) | |
| **Project Number**: | **EUROPEAID/120540/C/SV/MULTI** | |
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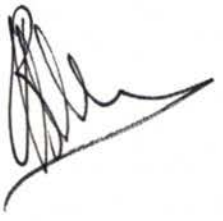
| **Signatures**: | |  |

**Date of report**: September 2007

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**Authors of report**: Mark Booker, Arina Komarova

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# Table of Contents

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# Project synopsis

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|---|---|
| Project Title: | Freight Forwarders Training Courses (TRACECA) |
| Project Number: | EUROPEAID/120540/C/SV/MULTI |
| Country: | Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, Ukraine, Uzbekistan |

*Overall project objectives*: To facilitate multi-modal transport and enable faster, safer and more reliable and efficient transport on the TRACECA corridor in order to increase security and improve access to international markets and increase the competitiveness of the TRACECA corridors.

*Specific project objectives*: The strengthening of the freight forwarder sector in the TRACECA countries through transfer of knowledge, capacity building for freight forwarders associations that are strong and able to take ownership of the further development and professionalism of the freight forwarding and develop improvement measures for the regulatory set-up.

*Planned outputs*:

10 country reports containing a comprehensive analysis of the existing situation with regard to the regulatory framework and the actual situation of the freight forwarding and transport industry in each of the TRACECA countries.

Report containing recommendations concerning the documents that are currently used in freight forwarding activities, improvement of restrictive practices, the creation of a level playing field and the improvement of the regulatory framework in each of the TRACECA countries.

Workshops for key stakeholders concerning abovementioned analysis and recommendations in each of the TRACECA countries.

Study tour for decision makers to disseminate project findings.

A sound basis for the foundation of 3 freight forwarders Associations in respectively Kyrgyz Republic, Turkmenistan and Tajikistan

Report containing an analysis of the current position of freight forwarder associations and a strategy for strengthening this position.

Study tour aimed at familiarizing the freight forwarders associations with best practices in Europe.

Comprehensive training materials according to FIATA minimum standard in English and Russian.

6 regional training measures, each minimum one week.

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*Project activities*:

*Phase 1: Promotion of necessary changes in the regulation*

| | |
|---|---|
| Task 1A: | Analysis of the existing situation. |
| Task 1B: | Benchmark with European countries and recommendations for changes in the regulatory framework. |
| Task 1C: | Promotion of changes in regulatory framework. |
| Task 1D: | Study tour aiming at dissemination of project findings among major decision-makers of regulatory bodies. |

*Phase 2: Strengthening of national freight forwarders associations*

| | |
|---|---|
| Task 2A: | Setting up freight forwarders association in Kyrgyz Republic, Turkmenistan and Tajikistan; re-establish freight forwarders association in Azerbaijan. |
| Task 2B: | Inventory of difficulties encountered and an a outline of a strategy for strengthening association. |
| Task 2C: | Advising existing freight forwarders associations. |
| Task 2D: | Encouragement of and assistance to the foundation of training centres. |
| Task 2E: | Dissemination of information for freight forwarders. |
| Task 2F: | Study tour for freight forwarding associations. |

*Phase 3: Specialist Training for freight forwarders*

| | |
|---|---|
| Task 3A: | Training needs assessment. |
| Task 3B: | Selection of trainees. |
| Task 3C: | Selection and development of training materials. |
| Task 3D: | Execution of training measures. |
| Task 3E: | Training Impact Assessment. |

*Project starting date*: 28 September 2005

*Start date of activities*: 28 September 2005

*Project duration*: 24 months

*Inputs*:

International expertise:
295 man-days Team Leader
200 man-days Trade and Transport Expert
165 man-days Academic Director
420 man-days Training and Project Coordinator
Local expertise:
290 man-days Short-term international senior experts
240 man-days Short-term local senior experts
Organisation of local support point in the beneficiary countries

Project implemented by: NEA Transport Research and Training (The Netherlands) and its partners in the consortium:
Wagener & Herbst Management Consultants (Germany)
TRADEMCO (Greece)
Shipping and Transport College Rotterdam (The Netherlands)

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# 1 Introduction

With regard to aspects of the project concerning the legal framework for freight forwarding in the region, the Contractor proceeded in line with the Terms of Reference with the objective of:

- Establishing **the current legal framework** in the Region concerning freight forwarding and multimodal transport, including already envisaged developments.
- **Benchmarking** with external examples so as to place the current situation in the region in context.
- Establishing the extent to which Counterparts would favour developing systems of freight forwarding which relied on improvements in technical knowledge, adequate liability systems backed by insurance and market competition to ensure standards, rather than relying on bureaucratic systems of **licensing**.
- Establishing to what extent Counterparts would be willing to adopt **international standards** in devising those **liability systems**.
- Establishing whether legal or commercial barriers existed to the development of the necessary insurance underpinning for those systems and what further initiatives might be necessary in the future.
- In the light of the above, assisting counterparts in further developing concepts for the legal framework for Freight Forwarding and Multimodal Transport.

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# 2 The current legal framework in the region

*Analysis of the existing draft technical annexes*

Previous sessions of the IGC elaborated versions of a possible draft Technical Annex on Freight Forwarding and on Multimodal Transport. The Contractor analysed these draft Technical Annexes and concluded that neither of them appeared sufficiently developed to be ready for adoption taking into account both substance and presentation, the English texts in particular being unsatisfactory. Full details of the analyses are to be found as Annex 3 and Annex 4 below.

It also emerged that there was a likely impediment to further Technical Annexes being ratified across the whole TRACECA region because of a lack of consensus caused by divergence in pace of economic and legal reform within different states.

The draft TA on freight forwarding as presented at the outset of the project did not follow established international examples:

- The definitions present difficulties of interpretation, which could be removed if they were replaced by more recognised international examples (for which English and Russian versions exist) and the meaning of which is clearer
- The English language version is in very imperfect English
- The text does not seem to distinguish between the role of a forwarder as agent or principal. In Europe different provisions usually apply to the two roles
- The basis and limits of liability of the forwarder and client as set out in the draft are unclear in many particulars
- There are potential problems with the period of notice for claims and with the time bar against legal action

The draft TA on Multimodal Transport as similarly presented at the outset of the project:

- Like the draft TA on freight forwarding, contains imperfections in the definitions and in the language quality of the English text
- Attempts to incorporate two different systems of multimodal transport (international and former soviet-style "direct mixed communication) under one set of rules and this causes major conflicts and confusion within the text
- At present therefore appears to be an unworkable mixture of two different and incompatible systems
- Uses quoted passages from the 1980 Multimodal Transport Convention but not within a coherent framework
- Does not state clearly whether it is intended to be restricted to international transits within the region only or to all international transits
- Appears to include domestic transits and appears to give precedence to national law in a number of places
- Shows an imperfect understanding of the mechanisms (network or uniform basis of liability) by which such an instrument can be made to work in practice
- Has a basis and limits of liability of the MTO that are unclear
- Has notice periods for claims and time bar provisions that are confusing and may cause practical difficulties for both sides to the contract

The Contractor's initial assessment led it to have severe doubts about the suitability of either draft instrument for the region.

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*Specific Country Information*

Through the National Secretaries participating states were asked for information on the current legal framework. Annex 5 below brings together information provided to the project by TRACECA National Secretaries in response to the questionnaire on the current legal situation devised by the Contractor at the outset of the project. It includes the dialogue which later developed concerning specific national drafts under development during the project life. The information showed that while counterparts were debating possible unified action at regional level within the IGC TRACECA they were also contemplating quite divergent national laws on similar subject matter. The existence of the project allowed counterparts to focus again on a more regional approach to modernising freight forwarding and multimodal practices. The information on the current situation was later amplified by material supplied by delegates at the workshops in Istanbul.

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# 3 Benchmarking with relevant legal frameworks from outside the region

The Contractor examined a number of legal instruments as comparators for the draft Technical Annexes on Freight Forwarding and Multimodal Transport prepared within the IGC TRACECA to see whether existing international or national models could provide a more suitable framework for the region.

*Analysis of models which could be used as alternatives to the existing draft Technical Annexes*

The Contractor analysed the terms of the UNCTAD/ICC Rules for a Multimodal Transport Document and the FIATA Model Rules on Freight Forwarding and concluded that both of them presented a significant interest for the region as part of a package of measures to encourage a uniform approach within legislation and to facilitate the use of the FIATA FBL as a multimodal transport document with contract conditions attached to it. Full details of the analyses are to be found in Annex 6 and 7 below.

The UNCTAD/ICC Rules:

- provide a voluntary contractual regime allowing assessment of liability in multimodal transport but could be adopted as mandatory law in the region
- already underpin the FIATA multimodal transport bill of lading (FBL) and the legal terms of contract which appear on the reverse of the FIATA FBL
- could therefore be introduced in the region pending the adoption of an international regime for multimodal transport which is still some years away
- to be fully effective in the region would require adoption at an international level as they may conflict with certain existing national laws which may otherwise take precedence

Application of the UNCTAD/ICC Rules across the TRACECA region would facilitate use of the FIATA FBL by FIATA registered forwarders and allow very similar provisions to be used by other Multimodal Transport Operators in relation to liabilities and claims. This application could be achieved by means of a Technical Annex to the MLA in place of the existing draft on multimodal transport which is not considered a satisfactory instrument. Some kind of legislation is likely to be necessary to overcome different provisions in Civil Codes or existing provisions on freight forwarding. A Technical Annex would allow phased introduction across the whole region. However when this option was discussed with counterparts, no consensus existed for such a solution at the time of the discussions.

The FIATA Model Rules for Freight Forwarding Services:

- constitute a voluntary contractual regime dealing with the liability of the forwarder as an agent or as a principal issuing his own transport documents such as the FIATA FBL
- could therefore be a suitable framework for devising standard trading conditions for freight forwarding for FIATA affiliated Freight Forwarder Associations in the TRACECA states
- may conflict with national law in certain details and so may require *either* intervention at an international level to maximise harmonisation *or* adjustment to fit the national laws of each state
- contain some provisions which appear to go too far in protecting the forwarder in relation to its customer.

The Model Rules could assist in achieving a high level of uniformity of contract terms in the region, but it may not be realistic to expect that a single identical document could be adopted for all the countries. One option considered would be for each national association to establish a committee of logistics experts, legal experts and insurance specialists to devise a satisfactory national text, using the Model Rules as the starting point. Another option considered would be for the core provisions to be incorporated in a Technical Annex to the MLA so that they would override any conflicting national law. It is highly significant for the 10 former Soviet Republics, members of TRACECA, that the Russian Federation has adopted a

generally satisfactory text based on the FIATA Model Rules as the "General Rules for the Freight Forwarders of Russia" (considered in Annex 8 below). This is available as a direct Russian language model which could be adopted or adapted by Counterparts from those countries with a reasonable degree of confidence. The Rules would, however, need to be reviewed to eliminate any possible conflict with individual national law.

Counterparts expressed substantial interest in the concepts contained in the FIATA Model Rules and it is likely that standard trading conditions developed in the region will in future, as in Russia, be heavily influenced by them. This interest, however, seemed to fall short of a desire for incorporation of the Rules as the main framework for legislation on forwarding without further amendment.

*Use of the FIATA FBL within the TRACECA Region*

As the FIATA FBL initially appeared both a suitable document and suitable set of contractual rules for regulating multimodal transport, the Contractor held discussions with FIATA concerning use of the FIATA FBL in the region and FIATA was supportive of the wider use of this document and the legal contract conditions attached to it based on the UCTAD/ICC Rules.

It should be noted, however, that use of the FIATA FBL and its terms are strictly controlled by FIATA and such use is reserved for members of FIATA only. The extent to which the FIATA FBL is used will therefore partly depend on success in further developing the local Forwarder Associations affiliated to FIATA. The FIATA FBL cannot therefore provide the complete regulatory solution to goods in transit issues concerning freight forwarding but it will be an important and growing part of the solution.

It should also be noted that the FBL terms apply only where the freight forwarder acts as a Multimodal Transport Operator (MTO) or carrier. Other solutions have to be considered where the forwarder merely completes transit paperwork or arranges, as agent for the shipper, for others to perform all the actual services. Here again FIATA appears to offer a viable solution in the form of its 'Model Rules for Freight Forwarding Services" which are mentioned above.

The FIATA FBL terms have been analysed by the Contractor and full details can be found in Annex 9 below. There are a number of areas where the FBL terms may be in conflict with national law, for example:

1. Basis of liability as set out in Clause 6.2
2. Limits of liability as set out in Clauses 8.3,8.5,8.7
3. Time bar for claims as set out in Clause 17

While the FBL terms successfully resolve any conflict in favour of national law, this is not an ideal solution if seeking to achieve harmonisation across the region. For this reason, promotion of the FBL alone will not provide a total solution (even for FIATA members) unless some action is taken to facilitate its use at national or international level, for example, using the mechanism of the MLA technical annexes, some separate multilateral or bilateral agreements, or making changes to national laws to accommodate the FBL.

*Views of international organisations on options for the region*

In attending the formal sessions of the UN (ECE) 2006 GFP biannual meeting on Trade Facilitation in February 2006, the Contractor took the opportunity to hold informal meetings with representatives from the International Road Transport Union (IRU), UNCTAD and UN (ECE) to seek their views on developing the draft Technical Annexes on Freight Forwarding and Multimodal Transport. The Contractor also considered with them current international legislative developments relevant to the project.

IRU provided documentation on a UNIDROIT initiative on freight forwarding, dating from the 1950s, attempting to create an international convention on freight forwarding. This was criticised at the time by FIATA because there was lack of clarity between the role of the forwarder as Principal and as agent. It is

an outdated model though it contained concepts since taken forward by other initiatives. It is significant that the international community failed to achieve consensus on a convention on freight forwarding and has not since attempted to do so again, but has fallen back on contractual conditions to meet local circumstances.

Discussions with UNCTAD focussed on the possibility of incorporating the UNCTAD/ICC Rules as national law or within a regional agreement. It was pointed out to the Contractor that the Rules are in the form of a contract rather than traditional legislative form. However, with minor adjustments, UNCTAD representatives thought the Rules could be used as the basis for legislation and this has indeed already been done in other parts of the world. UNCTAD pointed out that the Rules maintained the negligent navigation defence of the Hague Rules and that this was something that TRACECA states might wish to delete if they adopted the Rules as a Technical Annex or as national legislation.

UNCTAD representatives emphasised the desirability of maintaining global uniformity in the manner of use of such instruments as the UNCTAD/ICC Rules. They strongly counselled against the development of a "cut and paste" approach for international law development within TRACECA, taking clauses from a number of different instruments to produce something original and untested. This is what was done in the two existing draft technical annexes, which are based on recent Russian precedents. It is not an approach supported by UNCTAD as they feel that such documents do not generally achieve legal consistency and may be incompatible with internationally recognised systems.

They were supportive of an approach based on incorporation of UNCTAD/ICC Rules by reference ie of a very simple TA referring to the UNCTAD/ICC Rules in their entirety. This would have the merit that the TA could be very simply amended should there be any change to the Rules.

They also mentioned the option of using the 1980 Convention on Multimodal Transport in a similar way. This convention is not in force but its provisions have been used in national law in some countries. Some of its provisions were included in the existing draft TA on multimodal transport, but in the inconsistent "cut and paste" manner criticised by UNCTAD. The Convention is a lengthy and complex document and it has not been accepted by western nations mainly because of opposition from shipowning interests. It remains a possible option for consideration by counterparts, particularly as some countries stated that they have taken its principles into account in attempting to frame draft legislation. However, the UNCTAD/ICC Rules provide a much simpler framework and are already in extensive use in Europe and are the basis for the FIATA FBL, all of which adds to their attraction in the context of TRACECA.

Contact was also established with the International Chamber of Commerce, who were jointly responsible for development of the UNCTAD/ICC Rules but they failed to come back with any comments or suggestions concerning the use of their Rules in the Region.

*International legislative developments which impacted on the project objectives*

There are a number of international initiatives relating to multimodal transport which impacted on the project objectives.

The UN agency **UNCITRAL** is discussing a draft instrument on multimodal transport. This may within 2-3 years become an international Convention open for signature and ratification. It would directly affect the proposed draft TA on Multimodal Transport as both instruments deal with the same subject matter. The draft UNCITRAL text is very controversial. It was originally drafted by the Comite Maritime International (CMI) and as such has been criticised as biased towards maritime as compared with land based transport. It also deals with many matters not previously regulated in an international transport convention and is perceived to be biased in favour of major carriers and multinationals to the detriment of small shippers. While a final draft convention may be agreed, this is still by no means certain as there is mounting opposition to many of the proposals.

The **European Union** is also seriously investigating the same issues of multimodal transport liabilities. It recently published a report "Integrated Services in the Intermodal Chain". This proposes a uniform liability regime for multimodal transport within the EU, with liability based on strict liability and compensation equal to the highest level set in the international Air and Rail transport conventions i.e. 17 SDRs per kilo (but without any separate per package limit). This uniform regime would be achieved either by a Regulation setting out a precise text or by a Directive setting a number of objectives but leaving each state to introduce legislation in accordance with its own tradition of legal drafting.

If the present EU proposals were adopted, they could be of significant interest to the TRACECA states. The report commissioned by the EU specifically states that it would be beneficial if the regime were extended to the territory of the European Union's near neighbours and there would be clear benefit in applying the same legal regime to multimodal transport from nearest to furthest point along the TRACECA corridor. It would be feasible for the MLA parties to adopt the EU regime in its entirety by reference in a Technical Annex.

However, the major difficulty for the present project (and for Counterparts) is that the proposals are at an early stage. As with the present UNCITRAL draft proposals, there is no guarantee that a consensus will emerge and that any of the present proposals will be implemented. They have been already been severely criticised by a number of respondents, notably by CLECAT, the European Association representing 28 national Forwarder Associations. Some of the criticisms appear valid, for example:

- the recommendation that the regime should be one of uniform liability, but applied on a voluntary basis, would potentially bring it into conflict with the existing unimodal conventions, making it unenforceable in the courts
- if the regime is made mandatory to overcome this problem, it would introduce what would effectively be a further international convention into the world rather than moving towards greater global harmonisation. CLECAT believes this could tend to increase rather than reduce costs

CLECAT points out that the FIATA FBL terms provide an existing commercial solution to the problems addressed in the EU proposals, though they do not point out that those terms are overridden by any conflicting national or international law, so they do not presently offer a full solution, unless adopted through legislation.

**The CIS Countries** (which include 10 of the TRACECA member States) are currently reviewing the framework agreement on "Direct Mixed Communication" of 1959 between the then Soviet states of the Economic Cooperation Council. Direct Mixed Communication was a system of multimodal transport involving road, rail and canal, river, lake and inland sea transport including all interchange points and terminals and it has been perpetuated to some extent in new national legislation of the now independent Republics. The CIS review envisages:

- development of an intergovernmental framework agreement between CIS countries on multimodal transport
- harmonisation and mutual recognition of national licensing systems including those affecting freight forwarding
- development of common rules for international freight forwarding services

It is realistic to suppose that the 10 TRACECA states participating in this work will probably modify their legislation in line with the CIS conclusions and recommendations. Equally, however, they may influence the outcome of the CIS discussions by promoting international best practice and that made this project doubly relevant to them by familiarising them with alternative models.

*Benchmarking with national models outside the region*

The Contractor also carried out extensive benchmarking with other national systems of freight forwarding and multimodal transport outside the region and detailed analysis is to be found in Annex 8, notably concerning the Russian Federation, France Germany, the Netherlands and United Kingdom which

represent a complete spectrum of possible options. At this stage in the project counterparts expressed particular interest in developments in the Russian Federation which still affect the majority of TRACECA states in their external trade and which had already heavily influenced the work the IGC had done on draft Technical Annexes. Some aspects of more recent Russian legislation provided potentially suitable models, but in other aspects Russian legislation still appeared to favour previous systems of logistics operation rather than looking forward to adopting western European market orientated solutions.

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# 4 Issues concerning regulation/licensing of freight forwarding activities

The draft TA on Freight Forwarding Operations available at the outset of the project merely hinted at a regulatory role in its Article 3. It referred to some "Rules of Freight Forwarding Activity" yet to be devised. These Rules would deal with

- documents to be used
- quality requirements to be met
- procedures to be followed

Freight forwarding in Europe has always been a dynamic activity and forwarders have been at the forefront of the commercial development of multimodal transport. The Contractor strongly counselled against placing undue bureaucratic restrictions on their activities. It was particularly doubtful about any attempt to dictate operational procedures for forwarding as this would inevitably inhibit technological and commercial innovation. Forwarders have to work within the legal and operational constraints affecting all businesses and the individual modes of transport and have to respect national and international Customs and documentation procedures. In general that may be regarded as providing sufficient safeguards for customers where a satisfactory liability and insurance regime is also in place.

Those states which still retained a strong desire to regulate operational details of forwarding activity could devise their own internal Code or Law but they should be aware that if this is too restrictive it would place their national forwarders at a competitive disadvantage in a globalised economy..

# 5 The Contractor's interim recommendations on options for development of the Technical Annexes and on the regulation of freight forwarding

Following initial analysis and discussions, the Contractor made some interim recommendations on options for developing the draft Technical Annexes.

*Annex on Multimodal Transport*:

- the existing draft could be revised. This would involve a considerable amount of work as it was an imperfect document both because of lack of overall coherence and in very many of its details
- counterparts could opt to adopt the UNCTAD/ICC Rules as a legally binding regional instrument or to recognise them in their national laws and systems
- they could adopt the provisions of the 1980 Multimodal Convention
- they could await the outcome of the European Union's present work on multimodal transport and then align their regimes on the new EU regime
- they could await the outcome of the present work in UNCITRAL and then resolve to achieve ratification of any new convention in each of the TRACECA states within a stated period of time

*Annex on Freight Forwarding Operations*:

- the existing draft could be revised. This would involve considerable work as it was an imperfect document in many of its details.
- a new draft could be devised based on the FIATA Model Rules for Freight Forwarding Services
- the subject matter of the present draft could perhaps be left to be dealt with by contract in the form of regional or national standard trading conditions without any statutory force and remaining subject to national laws, as has been done in Russia with the "General Rules"

The Contractor therefore provisionally recommended that:

1. Counterparts should consider abandoning the two existing draft Technical Annexes. The draft on Multimodal Transport in particular contained so many imperfections that it would be more difficult to revise it than to start again with a new structure.
2. Any principles on which the drafts were based should be listed by Counterparts and used as an aide-memoire against which to assess alternative proposals. It would be important to set out the reasons why any principles were agreed and the objectives in including material in the existing drafts.
3. A solution based as much as possible on reference to existing complete internationally recognised systems of liability-apportionment rather than on new and untested principles or on previous Soviet models should be used. This would also make it easier for any new regime to be easily updated in line with updates in the underlying model.
4. The strategy should also ideally permit the substitution of a different model (for example a hypothetical future EU regime for multimodal transport) for the one initially chosen, as circumstances evolve.
5. Separate provision might need to be made by TRACECA states which were formerly Soviet Republics for any residual system of "Direct Mixed Communication" that they still operate internally or between them.
6. Adoption of the UNCTAD/ICC Rules on a statutory basis would be the most immediately practicable option to use within a TA on Multimodal Transport as this would facilitate use of the FIATA FBL by FIATA affiliated forwarders within the region.
7. The objectives behind the TA on Freight Forwarding Operations could most easily be achieved by reference to the FIATA Model Rules for Freight Forwarding Services.
8. Whether Rules of that sort should be brought in uniformly as a legally binding Technical Annex rather than as recommended standard trading conditions varying to suit the conditions of the different states would depend on the extent to which existing national laws conflict with them.
9. Counterparts should avoid incorporating licensing and operational restrictions on freight forwarders and Multimodal Transport Operators when developing new legislation

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# 6 Results of the workshop to consider the legal framework for freight forwarding in the TRACECA region 21-24 Nov 2006 Istanbul

By the time the workshop was held, the countries had gained extensive experience dealing with issues of the legal framework for the freight forwarding industry at national level and also within the initiatives undertaken at the level of CIS and TRACECA.

The workshop was designed to share information about the state of development in every country covered by the Project activities on the issues of licensing of freight forwarders, the use of FIATA documents, the availability and accessibility of insurance services, the principles ruling the liability of freight forwarders, the present national legal structures regulating freight forwarders activities, including tax treatment and other aspects. The strengthening of national freight forwarding associations was given a separate dedicated working session.

The workshop also performed the task of debating the acceptability of international standards and recognized business practices for use in the TRACECA region.

Core facts for selecting an appropriate solution to facilitate the development of the freight forwarding industry in the region of TRACECA were reported by the delegates as advised below.

*Debate in the workshop sessions*

**Armenia**

The representative of Armenia explained that forwarding is regulated by only one article in the Civil Code but a law on forwarding is at an advanced draft stage. It was decided not to have a requirement for licensing.

The Union of Freight Forwarders of Armenia is an active member of FIATA. Until recently it had little positive contact with the Ministry of Transport but this has changed since the MOT started elaborating a draft law on freight forwarding in which work the Union has assisted.

The representative of Armenia commented that insurance for forwarders and their customers was insufficiently developed in his country. There was a lack of legal certainty and a lack of confidence in insurance. Legislation and practical advice was required to deal with these issues and it would be helpful if TRACECA could promote regional solutions.

**Azerbaijan**

The representative of Azerbaijan gave a detailed explanation of the legislation in his country. All companies in Azerbaijan have to be legally registered and the Civil Code regulates the framework for freight forwarding activity but with insufficient detail. Azerbaijan recognises the concept of the contractual carrier in multimodal transport, such carrier having responsibilities towards the owner of cargo. In this context, the forwarders' Association had developed model general trading conditions to simplify the process of making contracts for multimodal transport. The conditions followed international practice and customers and forwarders could refer to them as part of their contract. The representative emphasised that laws needed to be supplemented by clear contractual terms dealing with practical issues.

There was a very active forwarder's Association in Azerbaijan founded on 11th July 1997, contrary to what had been reported. The Association had not been disbanded. It promoted healthy competition and improvement in services and had very fruitful contact with other associations such as in Germany and Bulgaria. Unfortunately, the Association was no longer recognised by FIATA. After examination of the situation, the delegates concluded that the non-recognition occurred because for legal technical reasons

the Association appeared not to be independent of the state government, which gave it direct financial support. The Contractor suggested that there were ways in which the state government could assist an association while preserving its independence so that it would be recognised by FIATA. Thus the state government usually lacked specific expertise in freight forwarding and could commission research from the association for which the association could charge. The representative from Romania cited other ways in which a state could support a national association without interfering with its independence and volunteered to provide specific examples for the Azerbaijan delegation. It was essential that the legal status of the Azerbaijan Association should be adjusted as soon as possible to allow it to participate again in FIATA activities.

The Association and its leading members were actively assisting the government to draft new legislation for freight forwarding activity, including an amendment to the Civil Code concerning forwarding activity. The Contractor commented favourably both on the concept of association involvement with the drafting process and also on the concrete measures being planned in Azerbaijan.

The representative of Azerbaijan raised a further issue which concerned his own country and some others in the region. This related to the need for schedules of service items to satisfy the local tax authorities. The tax authorities often did not understand the business of a freight forwarder and treated some items as income when the sums received were only to pay disbursements on behalf of a customer. Reference was made to COMBITERMS as a helpful guide in this respect and again the representative from Romania stated that he could provide useful examples from Romania.

**Georgia**

The representative of Georgia explained that the Ministry of Economic Development dealt with all transport regulations in Georgia, the separate Ministry of Transport having been disbanded. The legislation on forwarding depended on the Civil Code and then on the Law on Transport and modal Codes for sea, rail and road transport, the air Code at present not dealing with forwarding activities. It was a very liberal system and forwarding activity was developing strongly through competition and absence of bureaucratic licensing.

The representative of Georgia called for unification of the rules on forwarding across the region as far as reasonably practicable and for steps to be taken to improve the availability and quality of insurance services. The absence of adequate insurance services put a brake on development of exchanges with western based forwarders. The Contractor commented that it remained true that western European customers still found difficulty in arranging cargo insurance when goods passed the boundaries of the former Soviet Union because of the lack of possible recourse against forwarders/carriers in the FSU. These problems related both to lack of clear legislation and contract terms but even more to lack of developed and reliable liability insurance services for forwarders and carriers. It was an issue that could lend itself to treatment at regional level through TRACECA.

**Kazakhstan**

The representative of Kazakhstan explained that there had been considerable legislative activity and the situation concerning freight forwarders was now considered adequate. It had been decided not to require licensing or certification, though it is proposed to allow voluntary certification as evidence of quality standards. Foreign businesses may participate in forwarding activity provided they are locally registered.

The national Association is an active member of FIATA and there are no legal restrictions on the use of the FIATA FBL and a number of forwarding companies regularly use FIATA documents when moving general cargoes and grain, oil and metals as principals. They only undertake movements as principals if they can assure safe and timely transport. The use of the FIATA documents usually occurs because of a request coming from a customer. The forwarders do not systematically suggest use of the FIATA documents. The most common situation for the use of FIATA documents is when there is a documentary letter of credit and the banks request the issue of a negotiable FIATA FBL to be transferred from seller to buyer as part of the process. The Contractor commented that this illustrated the importance of the FIATA

FBL as a key document in international trade and evidence of the reliability of the freight forwarder who issues it.

The representative from Kazakhstan provided an answer to why the FIATA FBL was considered to be too difficult and expensive to use by some forwarders. He believed that the difficulties arose when the FBL was incorrectly completed by the forwarder showing the forwarder's name in the "sender" box. The name of the consignor should normally appear in this box. When the forwarder put his own name in the sender box his company became subject to export currency and taxation restrictions and also to customs regulations, all of which were naturally problematical. This was not a problem with the FBL as had been reported to the TRACECA secretariat but a problem of lack of proper procedures by the forwarders. The Contractor confirmed that this analysis appeared to be correct and that FIATA should inform its members in more detail as to how the FBL should be completed. It would be helpful if models of a completed FBL for containerised and general cargoes could be made available by FIATA to other national Associations.

There is now a well developed insurance and banking system in Kazakhstan but insurance is not compulsory for forwarders. However facilities exist both for single journey and annual insurances. The representative from Kazakhstan felt that proper insurance facilities were vital for the region and that further facilitation work in economies less developed than Kazakhstan would be useful to all TRACECA states. For various reasons, risks were disproportionately high across the whole CIS. This meant insurance was expensive and this in turn made the cost of transport unattractive when reliable operators were used.

**Kyrgyzstan**

The representative from Kyrgyzstan explained that there was no national law on forwarding and that forwarding was regulated by a provision in the Civil Code and Codes for modes of transport. There was no licensing. According to the Civil Code, forwarders acted as agents and responsibility for delay was placed on the carrier. The representative emphasised that there were big differences between the situation in Western Europe and in the CIS countries and the rules of Western Europe did not yet suit the CIS where work had been going on since 1994 to try to find solutions to the problems of freight forwarding.

The national forwarding Association had been formally created in 2004 and had joined FIATA. There was nothing to prevent the use of FIATA documents in principle but experience with the FIATA FBL was problematic. Kyrgyz forwarders could not obtain the FBL direct from the national Association but had to purchase them from Kazakhstan and Russia and the cost was high, at least $50. The customer wanted the lowest rate possible and the cost of the FBL was prohibitive. It was also believed that the FBL made the forwarder responsible as the owner of the goods for any loss leading to a claim against the forwarder. There was a debate concerning these points. The Contractor suspected that the high cost of the FBL was probably due to profits being taken by the association supplying them to the Kyrgyz forwarder and to the inevitable cost of the insurance cover. However, where a forwarder undertook activity as a principal in multimodal transport, it incurred certain liabilities. Sooner or later these liabilities would be enforced by customers and the cost of meeting these liabilities would be much higher than the cost of operating under the FBL. The representative from Romania emphasised this point very strongly. It was necessary to have a protective legal framework if you operated as a principal and the FIATA FBL was the best method practically available today. It was not a question of looking at the cost of the FBL but rather of the risks of being completely unprotected without the support of trading conditions and without insurance if you operated without the FIATA FBL. Forwarders who took such risks would eventually go out of business. It was agreed that better information should be provided by FIATA on the use of the FIATA FBL and the question of the cost of its sale should be raised with FIATA. However it remained the only practical answer for forwarders who wanted to operate in an international field as principals and not agents. As for the customers, they would sooner or later have a very unpleasant surprise when they used a cheap forwarder and lost all their goods without any possibility of recovery and the word would then spread through the market that quality of service was as important as getting the cheapest price.

**Moldova**

The representative from Moldova explained that freight forwarding is regulated through provisions in the Civil Code and 1998 Regulations. Model contract clauses were also devised and recommended for use by all forwarders. Forwarders acting as carriers should follow a model contract and contract conditions. The unfortunate reality of the situation was, however, that forwarders and customers often failed to fill in the necessary paperwork. Too many forwarders simply failed to carry responsibility for their actions. Many failed to insure their liabilities because they could not see the point in incurring "unnecessary" costs when insurance was not compulsory. In this they differed from Customs brokers who did take their responsibilities seriously. Forwarders were still looking at the short term and at cost saving. The Ministry considered this a serious problem which would continue until claims against uninsured forwarders led to a few bankruptcies. Forwarders would only learn the hard way and the necessity of insurance and a proper attention to contracts would then be understood.

The national forwarders' Association was an active member of FIATA, having been created in 1998. It has recently been restructured to include Customs brokers and undertakes training for FIATA certification issuing approximately 35 certificates a year. There is no legal obstacle to use of FIATA documents but so far few forwarders ever issue them.

Based on her local experience, the representative from Moldova considered that recommendations of best practice would not be enough for TRACECA-wide action. Any measures taken should be compulsory so that forwarders were obliged to comply with them.

**Romania**

The representative of Romania explained that some years ago the association had to argue strongly with the Ministry of Transport about the role of the freight forwarder in the Romanian economy and its positive contribution to economic development. As a result of parliamentary lobbying by the Association, it was finally decided not to insist on specific licensing of freight forwarders. Subsequent development has proved this to have been the right decision for Romania and had reduced the scope for existing operators to retain virtual monopolies on traffic.

Romanian forwarders have been actively involved in FIATA since 1974. FIATA documents are widely used, particularly the FIATA certificate of receipt. In general, forwarders still mainly operate as agents rather than principals, fulfilling the orders given by customers. However, Romtrans is an example of a company which has established a separate division to carry out forwarding as a principal in accordance with western European practice. This kind of business is growing and any legislation should take account of its requirements.

The representative explained why the FIATA FBL was so important to any forwarder operating as a principal. Contrary to what seemed to be believed in some countries, the FBL **reduced** the potential liability of the forwarder because the contract with the customer could be insured on reasonable terms. If the forwarder in fact operated as a principal or carrier it was useless to try to pretend otherwise. You just ran the risk of being found fully liable to the customer and without any benefit of insurance. The FBL gave some legal certainty as to the forwarder's rights and obligations towards the customer. If it could become more widespread in the region it might persuade ship-owners to accept it as a transport document when accepting goods from a freight forwarder. It was not the case that by issuing the FBL the forwarder became the "owner" of the goods and so liable fully for any loss of the cargo. The forwarder was just a bailee of the goods and the nature of the bailment was then governed by the FBL and the national law. It was most important that the FBL should be completed in the correct way showing the customer as consignor and/or consignee. It should also be understood that the FBL was suitable **only** when the forwarder acted as a principal e.g. moving the cargo from door to door without making any contracts in the name of the customer. When the forwarder acted as a pure agent, as many still do in the region, it should have separate standard trading conditions, such as those found in the FIATA Rules for Freight Forwarders.

**Tajikistan**

The representative from Tajikistan explained that a law on freight forwarding activity had been passed. After debate it had been decided not to require specific licences or certification for forwarders. Registration of forwarding companies is simply carried out under the general law in the Ministry of Justice. Under the forwarding law there is a general freedom to carry out forwarding activities but there is no limitation of liability and forwarders should insure their liabilities.

An Association of freight forwarders had been formed on 16th September 2005 and registered at the Ministry of Justice. There is no legislative restriction on use of FIATA documents.

**Turkmenistan**

The representative of Turkmenistan explained that freight forwarding, like most kinds of activity, was licensed in Turkmenistan and was likely to remain so. Insurances were effected by Turkmen companies with 85% of risk being reinsured abroad.

FIATA recognition is not possible at present because FIATA insists on legal independence of any forwarders' association from the state government and this is contrary to national policy in Turkmenistan for all of these types of organisation.

**Ukraine**

The representative of Ukraine explained that in 2004 new Rules for Freight Forwarding Activity had been introduced and company law had been amended to cancel the requirement for licensing. Ukraine had carefully considered the advantages and disadvantages of licensing and had looked at the situation in neighbouring countries. Initially it had been intended to maintain licensing. However comparative analysis showed that there was a more dynamic and innovative market where licensing did not occur, provided the usual safeguards of the general company and business law applied to forwarders as to any other business entity. Since licensing had been abolished, there had been an increase in competition and in the type of services offered by forwarders and Ukraine was now convinced that it had made the right decision.

FIATA had a strong presence in Ukraine and FIATA training certificates were issued in increasing numbers.

Insurance for forwarders remained a problem as the insurance market in Ukraine was still weak. The representative thought that Ukraine would welcome TRACECA initiatives to strengthen the provision of insurance in the region, perhaps by uniting efforts to place reinsurance of risks.

**Uzbekistan**

The representative from Uzbekistan explained the legislative basis in his country. Owing to imperatives of national policy, forwarding activities were licensed like other business activities in Uzbekistan and this was unlikely to change.

The national forwarding Association had been a FIATA member since 1997 and participated in international work of FIATA. FIATA information was helpful to private companies carrying out forwarding activity.

Insurance companies were present in Uzbekistan but tackling of problems at a regional level concerning liabilities and insurance would be helpful in further developing services.

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# 7 Findings and conclusions from workshop and bilateral discussions

The most important findings and conclusions emerging from the workshops were:-

1. There is a consensus that licensing of the specific activity of freight forwarding does not assist with the development of the forwarding industry. This consensus is recent and based on evaluation of practices in many countries. Because of the overall internal political imperatives, one or two states will, however, probably continue to license forwarders for the foreseeable future. However there is no case for any provisions concerning licences and certification of forwarders for the TRACECA region as a whole. This represents very considerable evolution compared with the situation only four years ago.
2. There are no legal impediments reported concerning the use of FIATA documents. However, some national laws may override certain provisions in the FIATA FBL particularly with regard to limited liability. This increases the cost of liability insurance generally and therefore increases the cost of using the FIATA FBL for multimodal transport. Action at the TRACECA level could eliminate this problem, through an IGC resolution or in the form of a framework agreement. There are some misunderstandings concerning best practice in the use of FIATA documents. These will be remedied through the project training material but this should be supplemented by some specific guidelines from FIATA to its member associations and individual members who issue FIATA documents.
3. All delegations believe that action at the TRACECA level to harmonise the availability and reliability of insurance services (both liability insurance for forwarders and cargo insurance for customers) is vital to the general economic development of the region. In some states legislative measures may be needed but the problems relate more to absence or unreliability of services rather than absence of legislation. Insurance and reinsurance through overseas markets is possible in all the states but the insurance market itself is not enthusiastic because of the legal problems of making recoveries against forwarders and carriers, in spite of the fact that in most TRACECA states liability is in theory unlimited. In practice recoveries are rarely made. This highlights issues outside the terms of reference of the project, such as the reliability of court procedures and recovery of sums due under court judgements.
4. All agree that the basis of liability of the forwarder should be clearly expressed both as to the role of agent and principal and if possible unified so as to improve the basis for insurance of freight forwarders. The growing geographical spread of TRACECA has already weakened the common legal heritage of the original TRACECA states (based on former USSR laws and later initiatives of CIS states). It makes the finding of a common denominator far more difficult than when the TRACECA concept was launched in 1993 for CIS states only. It has already proved increasingly difficult to reach consensus on new technical annexes and such annexes will need to be more rather than less basic, dealing only with the small number of issues on which a consensus is possible.
5. All member states fortunately share the same basic legal structure in which the Civil Code normally includes a simple chapter on freight forwarding. Provisions in the Civil Code should not hinder future developments in freight forwarding and should be as flexible as possible. The example of the Russian Civil Code is interesting as it specifically states that limited liability may be introduced into laws made under the general authority of the Code. Of similar interest for the TRACECA region is the German Commercial Code (HGB) which defines statutory liability provisions but allows negotiated standard terms of business to depart from these. Both Russian and German systems therefore potentially fully accommodate the FIATA FBL terms and could be used as models in the TRACECA region. Attention should be paid also to the question of limitation periods for claims in the Civil Code as transport and forwarding claims may need to be shorter than in the general law.
6. Provision is needed to protect forwarders from inappropriate tax treatment of the sums they received from customers to pay costs and disbursements on behalf of those customers. These are not "income" of the forwarder nor do such transactions involve personal currency transactions by the forwarder for its own benefit.

7. The 2006 revisions to the proposed Technical Annex on freight forwarding have made it a more coherent document but have also moved it even further away from western European practice and would make effective use and insurability of the FIATA FBL more difficult. Nonetheless some of the provisions of the draft annex continue to find support among the CIS members of TRACECA who consider it suitable for conditions in their own countries. The draft, following further revision work, could be suitable for use as a model law forming the framework of a national forwarding law for certain countries. Its suitability and effectiveness as a proposed international technical annex to the MLA is still open to considerable doubt.
8. The proposed Technical Annex on Multimodal Transport also continues to raise considerable doubts. It would be preferable to consider a simpler framework agreement on MT transport which it might be possible to implement more easily than a Technical Annex of the MLA.
9. Cargo will select its own route from the Far East to Europe. The TRACECA network of routes will succeed to the extent that they are competitive with other routes. Part of this process of competition includes the nature of services and business terms offered by the freight forwarders. Legal structures should facilitate competition by the TRACECA network of routes rather than making them appear to be uncompetitive.

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# 8 Conclusions

**Issues concerning licensing and regulation of freight forwarding activities**

At the outset of the project, the draft Technical Annex on Freight Forwarding Operations submitted to the Contractor by Counterparts hinted at possible specific licensing and regulation of freight forwarding through reference to "Rules of Freight Forwarding Activity" yet to be devised. These Rules would deal with documents to be used, quality requirements to be met and procedures to be followed and would open the way for full licensing systems in any country so minded.

Freight forwarding in Europe has always been a dynamic activity and forwarders have been at the forefront of the commercial development of multimodal transport. The Contractor counselled against placing undue bureaucratic restrictions on their activities. Forwarders always have to work within the legal and operational constraints affecting all businesses and the individual modes of transport and have to respect national and international Customs and documentation procedures. In general that may be regarded as providing sufficient safeguards for customers where a satisfactory liability and insurance regime is also in place. FIATA themselves advise against formal regulation of freight forwarding services and such absence of regulation is common across most of the EU.

Only three or four years ago, the prevailing orthodoxy in the TRACECA region was in favour of licensing of freight forwarders but there has been a rapid evolution in favour of self-regulation. This has arisen through pragmatic observation of neighbouring systems and the sharing of experiences among TRACECA states. One of the most interesting debates at the Seminars held in Istanbul in November 2006 was on the issue of licensing. Country representative after representative explained why there had been a change in attitude, significant input coming particularly from Ukraine and Moldova, who had been influenced by comparisons made with Romania. Licensing there had ceased some time ago and the market had developed in a positive way. A consensus was reached that the market for freight forwarding services should be free, subject to normal quality safeguards affecting all types of business. At a TRACECA level, the Contractor is therefore pleased to be able to report a step-change in relation to previous projects where the requirement for licensing remained a key element. However, in Turkmenistan and Uzbekistan, licensing of all activities is likely to continue indefinitely for strategic political reasons.

**Issues concerning international standards in liability systems**

***Contractor's initial findings and recommendations***

Early in the project, the Contractor analysed the existing draft Technical Annexes on Freight Forwarding and Multimodal Transport and concluded that neither of them was sufficiently developed to be ready for adoption taking into account both substance and presentation. It also appeared that there would be difficulties in achieving ratification of further Technical Annexes across the whole TRACECA region because of a lack of consensus based on the divergence in pace of economic and legal reform within different states.

The Contractor's initial conclusions were that the terms of the UNCTAD/ICC Rules for a Multimodal Transport Document which set the basis for the FIATA FBL and the FIATA Model Rules on Freight Forwarding would present a significant interest for the region as part of a package of measures to encourage a uniform approach within legislation. It seemed preferable to encourage the use of tried and tested agreements and documents like these than to promote the development of yet another liability system to be applied only in the TRACECA region. Existing systems, capable of being satisfactorily insured could be introduced quite rapidly in the region pending the adoption of a mandatory international regime for multimodal transport which is still some years away.

This approach found favour with the representatives of the UN system with whom the Contractor had discussions. They were supportive of an approach based on incorporation of UNCTAD/ICC Rules by reference in a very simple TA or similar instrument. This would have the merit that the instrument could be very simply amended should there be any change to the Rules.

***Debate on the Contractor's initial recommendations***

There was an extensive debate at Istanbul in November 2006 concerning an approach based on adoption of the FIATA FBL terms/UNCTAD ICC Rules as the basis for multimodal transport, which would have been the simplest solution and the one most rapidly putting forwarders in the TRACECA region on a similar basis to those in Western Europe. However, such a move was considered too radical by most of the former Soviet Republics at a time when, for reasons of existing trade, compatibility with developments in the CIS and Russia also need to be guaranteed.

***Model Forwarding Law***

With regard to domestic and international freight forwarding practice, debate at Istanbul reached consensus that the basis of liability of the forwarder should be clearly expressed both as to the role of agent and principal even if many forwarders currently act only as traditional agents. There should be an attempt to unify legislation so as to improve the basis for insurance of freight forwarders. There was less potential conflict between Western European and Russian practice in this area as the Russian Federation has already adopted a text based on the FIATA Model Rules as the "General Rules for the Freight Forwarders of Russia" which appear more progressive than the Federal Law on the same subject and will act as the everyday standard for forwarders. It should also be noted that a key feature of the Russian Civil Code is that it specifically allows limited liability to be introduced in laws made under the Code and this is a necessary precondition for being able to implement the limited liability provisions which apply under the FIATA system.

As Counterparts considered it premature to adopt the FIATA system in its entirety into their legislation, delegates and the Contractor considered that further revision to the draft TA could make it suitable for use as a **model law** forming the framework of a national forwarding law for certain countries, rather than as a Technical Annex as originally proposed. The model law would allow for domestic forwarding activity which still took place in many of the former Soviet Republics as well as the international freight forwarding activity under TRACECA. Working with Counterparts, the Contractor was able to develop and present a possible model law based on these consensus principles. The text appears as Annex 1 accompanied by an explanatory memorandum.

The model law would allow for a unified core system within the TRACECA region while permitting variations to suit conditions in individual states. As such it is hoped that it could be implemented more rapidly than the previously proposed draft Technical Annex and that it would introduce a system both closer to that in western Europe and to the latest developments in the Russian Federation, which are themselves slowly moving closer to western practice.

***Agreement on multimodal transport liabilities***

Given the doubts expressed by the Contractor concerning the draft TA on Multimodal Transport and the apparent reluctance by counterparts to accept proposed alternatives based on existing international standards such as the UNCTAD/ICC/FIATA Rules, delegates agreed that it might be pragmatic to consider a simpler **framework agreement on MT transport** which could be implemented more easily than a Technical Annex of the MLA in current circumstances. Such a framework agreement could be implemented quite rapidly by a few pioneering states without causing prejudice to the MLA itself. Other states could then join the agreement. This was the procedure with the original Sarakhs Agreement which later saw success as the MLA.

Consequently the Contractor later worked alongside counterparts to produce a draft agreement of the IGC TRACECA on the development of multimodal transport under which key elements of the FIATA system would be incorporated in an agreement which should also function satisfactorily in relation to existing trade patterns. This proposed solution marked the greatest extent of compromise that could be achieved between the conflicting interests during the project life. The elaborated draft agreement and an explanatory memorandum form Annex 2 below.

**Issues concerning insurance of forwarder's liabilities**

The question of insurance was raised repeatedly by delegates during the workshop sessions in Istanbul during November 2006. The future success of forwarders in the region in attracting a clientele outside the region will depend partly on the perceived fairness of the liability regime but much more on the effectiveness of insurance in making real recoveries possible in the case of loss and damage.

All delegations indicated that action at the TRACECA level to harmonise the availability and reliability of insurance services (both liability insurance for forwarders and cargo insurance for customers) would be vital to the general economic development of the region. In some states, legislative measures may be needed, but the **problems relate more to absence or unreliability of services rather than absence of legislation**. Insurance and reinsurance through overseas markets is possible in all the states but the insurance market itself is not enthusiastic because of the legal problems of making recoveries against forwarders and carriers. Although in most TRACECA states liability is in theory unlimited, in practice recoveries are rarely made. It would be particularly useful for trade if improved liability provisions, liability cover and claims experience could persuade cargo insurers to begin offering cover on export and import goods within Europe to include the transit within the former Soviet Union.

The work carried out by the Contractor and Counterparts in putting forward proposals to approximate forwarder's liabilities in the region more with those of the FIATA system should help by providing a more appropriate base for both liability and cargo insurance, if they are implemented. With regard to improving the insurance situation, the Contractor held discussions with providers in the European markets to see whether an initiative at TRACECA level, as called for by Counterparts, would be a realistic possibility.

***Mutual Insurance Scheme***

One option would be the creation of a TRACECA mutual insurance scheme/ P&I club for forwarders in the region. This could be of long term benefit particularly if reinsurance could be arranged through a selection of reputable insurers. However, the Contractor concluded from recent discussions that this would be premature. The bad claims record of just a few operators could cause financial difficulties for the entire new system and cause it to fail. Another major consideration in present circumstances is that mutual schemes operate on the basis of contributions estimated on likely claims experience. If claims made by the totality of participants involved in a scheme exceed the anticipated claims, the mutual organisation is required to make "calls" on the members to pay supplementary contributions. This can be problematic for operators who are under local or central government control as they are unable to incorporate unknown future liabilities in their budgeting, whereas conventional insurance premiums cover all losses arising during a stated insurance period. With a certain number of forwarding operations in the region remaining state owned, it is considered that a mutual option is probably not the best one to consider at present, though it should be retained for future consideration.

***Pool Insurance Scheme***

Without going so far as mutuality but limiting developments to an insurance pool, the market considers that an initiative at regional level could be a commercial success following the initial start-up phase. With conventional insurance, each operator is individually charged a premium and the minimum premium level may appear rather high to operators in the region. The benefit of a pool scheme in comparison is that the anticipated total premium income is substantial. Individual operators may then benefit from the economies of scale which the pool offers and this can allow lower minimum premiums for small and medium sized their business practices to avoid or reduce claims

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There would need to be a central regional focus for any scheme (which could usefully operate from the premises of the TRACECA Secretariat or of any regional Forwarders' Association which may be formed as part of the process of institutional strengthening in the region). There would also need to be a local focus based on the National Forwarder Associations.

The regional focus would administer aspects of the group scheme such as:-

- the overall insurance policy conditions applicable to the scheme
- maintenance of reinsurance for the scheme outside the region
- helpline on the scheme and matters arising
- compilation and dissemination of information on claims experience, legal cases etc

The National Associations would have the task of:-

- working with group appointed local brokers/insurers to promote the scheme
- vetting members for admission to the scheme on the basis of quality controls
- dispute resolution

It would be necessary for local associations to take the task of quality controls very seriously. If operators with poor operational standards and bad claims experience were admitted, this would cause the pool premiums to rise in future years for all scheme members. The need for absolute transparency, as in all questions of insurance, would have to be clear to all concerned from the inception of any scheme.

The administrative costs of the scheme incurred by the regional focus and National Associations could be met from premium income in such a way as to provide a small net revenue stream for those organisations which would help their financial sustainability. Such a scheme would therefore be beneficial in terms of institutional development and improvement of the knowledge base in the region as well as meeting the expressed need for better commercial insurance products.

The Contractor considers that there would be merits in investigating the possibilities further in the future by means of a feasibility study which would need to establish hard market data, as any initiative would ultimately become a commercial venture, following start-up.

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# Annexes to the Report

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**Annex 1 Proposal for a Model National Law on Freight Forwarding Activity**

**Chapter 1. General Provisions**

**Article 1. Definitions**

"**Contract**" means the contract of freight forwarding concluded by the Forwarder and Customer
"**Customer**" means any natural or legal person at whose request or on whose behalf the Forwarder undertakes its professional activities or provides advice, information or services.
**"Delivery"** means the handing over of the goods to the consignee, or the placing of the goods at the disposal of the consignee in accordance with the Contract or with the law or usage of the particular trade applicable at the place of delivery, or the handing over of the goods to a third party to whom, pursuant to the law or regulations applicable at the place of delivery, the goods must be handed over.
"**Freight Forwarding**" means the provision of advice, information or services for the organisation of carriage of goods by any type of transport and the drawing up of the documents of carriage, documents for Customs purposes and other documents necessary for effecting the carriage of goods.
"**Forwarder**" means a natural or legal person which undertakes Freight Forwarding (whether as an agent or a principal)
"**Services**" means any activity undertaken by the Forwarder in the course of its business on behalf of the Customer.

**Article 2. Scope of application**

**1.** This Law regulates Freight Forwarding activities in the Republic of xxx

**2.** The parties to the Contract may determine the terms of the Contract not stipulated by this Law, other laws of the Republic of xxx or other normative legal acts adopted in accordance with the Civil Code of the Republic of xxx.

**3.** The provisions of this Law shall not cover Freight Forwarding in the field of postal communication.

**Chapter 2. The Rights and Duties of the Forwarder and the Customer**

**Article 3. The Rights of the Forwarder**

**1.** The Forwarder shall be entitled to undertake any or all of its services as an agent or as a principal.

**2.** When the Forwarder contracts as principal for any services, it may perform such services itself or it may subcontract the whole or any part of such services as stipulated in the Contract.

**3.** Unless the Contract of freight forwarding stipulates otherwise, the Forwarder may, in the interest of the Customer, choose or change the type of transport, the route of the carriage of the goods, or the sequence of the carriage of the goods by various types of transport. In so doing the Forwarder must immediately notify the Customer about changes made in accordance with this sub-article.

**4.** Except as provided in Article 3(3) above, the Forwarder may deviate from instructions of the Customer only if
i) this becomes necessary in the interests of the Customer due to unforeseen circumstances, or
ii the Customer's instructions are inexact or incomplete, or
iii) the Customer's instructions do not conform to the Contract
and the Forwarder cannot obtain the Customer's further instructions or consent within a reasonable time.

**5.** If incomplete information is submitted, the Forwarder must request the necessary additional data from the Customer. The Forwarder may abstain from fulfilling the Services stipulated by the Contract pending the submission by the Customer of the necessary documents, and also information about the properties

of the goods, about the conditions for their carriage and other information necessary for the fulfilment of the Forwarder's Services.

**6.** The Forwarder may check the accuracy of the documents submitted by the Customer, and also the information about the properties of the goods, the conditions for their carriage and other information necessary for the fulfilment by the Forwarder of the Services stipulated by the Contract.

**Article 4. The Rights of the Customer**

**1.** The Customer may:
i) request from the Forwarder relevant information about the carriage of the goods;
ii) give instructions to the Forwarder in accordance with the Contract;
iii) If the Contract so stipulates, choose the itinerary of travel of the goods and the type of transport.

**Article 5. The Duties of the Forwarder**

**1.** The Forwarder must provide Services in accordance with the Contract and with a reasonable degree of care, diligence, skill and judgement.

**2.** When accepting the goods, the Forwarder must issue a certificate of receipt to the Customer.

**3.** When acting as agent, the Forwarder must also submit to the Customer the originals of the contracts concluded by the Forwarder in the name of the Customer, on the basis of a power of attorney issued by him, in accordance with the Contract.

**4.** The Forwarder may not conclude in the name of the Customer a contract of insurance of the goods unless that is directly stipulated by the Contract.

**Article 6. The Duties of the Customer**

**1.** The Customer must promptly submit to the Forwarder full, exact and accurate information about the properties of the goods, about the conditions for their carriage and other information necessary for the fulfilment by the Forwarder of the Services stipulated by the Contract and also the documents necessary for fulfilling Customs, sanitary and other types of state control.

**2.** The Customer must pay the remuneration due to the Forwarder In accordance with the procedure stipulated by the Contract and also reimburse the expenses incurred by the Forwarder in the interests of the Customer.

**Chapter 3. Liability of the Forwarder and the Customer**

**Article 7. General Basis of Liability of the Forwarder as agent**

**1.** When acting as agent, the Forwarder shall be liable to the Customer, subject to sub-articles 2 and 3 below and to the limits of liability set out in Article 9 below, for loss resulting from loss of or damage to the goods as well as from delay in Delivery if it fails to exercise a reasonable degree of care, diligence, skill and judgement in the performance of the Contract.

**2.** When acting as agent, the Forwarder shall be responsible for acts and omissions of its servants and agents, when any such servant or agent is acting within the scope of his employment.

**3.** When acting as agent, the Forwarder shall not be liable to the Customer for acts and omissions of third parties, such as, but not limited to, carriers, warehousekeepers, stevedores, port authorities and other Forwarders, unless the Forwarder has failed to exercise a reasonable degree of care, diligence, skill and judgement in selecting, instructing or supervising such third parties on behalf of the Customer.

**Article 8. General Basis of liability of the Forwarder as principal**

**1.** The Forwarder shall be liable as a principal
i) when it performs Services by itself using its own facilities, installations or transport means, or
ii) when, by issuing its own transport document it has made an express or implied undertaking to assume liability as a principal.

**2.** The period of responsibility of the Forwarder, when acting as a principal, shall extend from the time when it takes the goods in its charge until their Delivery. Goods shall be deemed to be taken in charge when they are handed over to and accepted for carriage by the Forwarder.

**3.** When acting as a principal, the Forwarder shall be responsible for acts and omissions of its servants and agents, when any such servant or agent is acting within the scope of his employment and shall also be responsible for any other person of whose services it makes use for the performance of the contract as if such acts of omissions were its own.

**4.** When acting as a principal, the Forwarder shall be liable to the Customer, subject to the limits of liability set out in Article 9, for loss resulting from loss of or damage to the goods as well as from delay in Delivery unless it proves that no fault or neglect of its own, its servants agents or sub-contractors has caused or contributed to the loss, damage or delay in Delivery.

**5.** However, if the Forwarder proves that a violation of an obligation has been caused by breach of the contract of carriage and the stage of transport where the loss, damage or delay occurred is known, the liability of the Forwarder shall instead be determined on the basis [and in the amount] set by the rules applicable by law to that stage of transport.

**6.** Delay in Delivery occurs when the goods have not been delivered within the time expressly agreed upon by the parties to the Contract or, in the absence of such agreement, within a reasonable time, having regard to the circumstances of the case.

**Article 9. General Basis of liability of the Customer**

**1.** For non-fulfilment or improper fulfilment of the duties stipulated by the Contract and by this Law, the Customer shall be liable on the basis and in the amount determined in accordance with Chapter xxx of the Civil Code of the Republic of xxx and this Law.

**Article 10. Limitation of liability of the Forwarder**

**1.** If the nature and value of the goods have been declared by the Customer before the goods have been taken in charge by the Forwarder and inserted with the agreement of the Forwarder in the transport document, the Forwarder shall, subject to establishment of its liability in accordance with Articles 6 or 7 hereof, be liable in full for the loss of the goods and shall be liable for goods damaged in the amount equivalent to the value of the goods damaged, or, in cases where the damage to the goods is such that none of the goods can be recovered, the Forwarder shall have to compensate the loss in full.

**2.** In all cases when the nature and value of the goods have not been declared by the Customer in accordance with sub-article 1 hereof, the Forwarder's liability subject to the provisions of Articles 6 or 7 hereof for loss of, or damage to the goods shall be limited to 2 [8.33] SDRs per kilogram of gross weight of the goods lost or damaged unless a higher amount has been reimbursed by the person for whom the Forwarder is responsible.

**3.** In addition to compensation for loss or damage in accordance with sub-articles 1 or 2 hereof, the Forwarder shall refund any Contract remuneration paid by the Customer in full in case of total loss of the goods, and in proportion to the loss sustained in the case of partial loss, but no further compensation shall be payable.

**4.** Liability for loss resulting from delay in Delivery shall be limited to 5 percent of the Contract price for every day of delay. However, in any event, the liability of the Forwarder for delay may not exceed the amount of the Contract price.

**5.** In the case of all other losses whatsoever and howsoever arising, the Forwarder's liability subject to the provisions of Articles 6 or 7 hereof shall be limited to the lesser of
i) the loss incurred, or
[ii) 2 [8.33] SDRs per kilo of the gross weight of any goods subject to the Contract, or]
iii) 25000 SDRs [50000] [75000]

**6.** The value of goods shall be deemed to be their Invoice value.

**Article 11. Loss of the right to limit liability**

**1.** The Forwarder shall not be entitled to the benefit of the limits of liability provided in this Law if the Customer proves that loss, damage or delay in Delivery resulted from an act or omission of the Forwarder done with intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

**Article 12. Agreement on Changing the Measure of Liability of the Forwarder**

**1.** The Contract may stipulate increases in the responsibilities and limits of liability of the Forwarder compared to those established by this Law.

**2.** Any agreement on the elimination or reduction of the liability of the Forwarder established by this Law shall be null and void.

**Chapter 4. Claims and Actions**

**Article 13. Notification of Loss or Damage to the Goods**

**1.** Unless notice of loss or damage, specifying in writing the general nature of such loss or damage, is given to the Forwarder or its agent at the time of handing over of the goods to the consignee indicated in the Contract, such handing over shall be prima facie evidence of the Delivery of the goods in good order and condition.

**2.** Where the loss or damage is not apparent, the provisions of paragraph 1 of this Article shall also apply if notice in writing is not given within [6] [15] [30] consecutive days after the day when the goods were handed over to the consignee. The date of notification to the Forwarder shall be deemed to be the date of receipt.

**Article 14. Forwarder's lien**

1. Unless otherwise agreed in the Contract, the Forwarder shall have a general lien to distrain on goods, and any documents relating thereto, that are in its possession for any amount due at any time to the Forwarder from the Customer in relation to Services provided to the Customer. In this case the Customer shall also pay the expenses associated with the distraint on the property, including but not limited to storage costs.

**Article 15. Claims and Actions Made against the Forwarder**

**1.** The right to make a claim and action against the Forwarder shall be enjoyed by:
i) the Customer or a person authorised by him to make a claim and action,
ii) the consignee indicated in the Contract,
iii) the insurer that has acquired the right of subrogation.

**2.** The claim shall be made in writing. Documents confirming the right to make a claim and documents confirming the quantity and value of the goods (originals or copies thereof attested according to established procedure) must be attached to the claim.

**3.** The value of the Special Drawing Right (SDR) in units of the [insert national currency] shall be calculated in accordance with the method for determining the value applied by the International Monetary Fund. The conversion into [insert national currency] shall be effected on the date of the rendering of a court judgement or on the date established by agreement of the parties.

**Article 16. Limitation of Action**

**1.** The time-bar set for all purposes of this Law shall be one year.

**2.** In the case of loss, damage or delay to goods, time shall begin to run for the purposes of the time-bar on the day following the day of delivery of the goods or the date when the goods should have been delivered. With respect to other losses, time shall begin to run from the date of the event or occurrence alleged to give rise to a right to make a claim against the Forwarder.

**Chapter 5. Entry into Force**

**Article 17. Entry into Force**

**1.** This Law shall enter into force from .... [*enter provision according to Civil Code*]
**2.** The provisions of this Law shall be applicable to those rights and obligations which arise after its entry into force.

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## Explanatory memorandum on Model Forwarding Law

### Overview

The proposed model forwarding law seeks to retain suitable elements of the format and contents of the draft TA on freight forwarding wherever possible, in the same way as the Baku MLA built on the earlier work of the Sarakhs agreement. The draft TA was very similar in content to the Russian Federal Law on Freight Forwarding Activity and reflects some aspects of the common heritage Russian/CIS system which many counterparts from the FSU find familiar and attractive.

The Russian law/draft TA were, however, lacking in clarity in a number of areas and contained many ambiguities. Also they failed to cater adequately for the two possible roles of agent and principal which characterise modern freight forwarding practice. Under the Russian system, the forwarder is essentially liable as though it were a principal but has only the scope of activity of an agent, being subject to customer instructions in all its activities and having to account for its individual expenditures.

The proposed model law tries to cater for the existing structure of the forwarding industry and existing allocation of responsibility in some parts of the CIS while also creating a structure more compatible with Western European practice and in particular with that exemplified by the UNCTAD/ICC Rules, FIATA Model Rules and FBL terms, CMR and the recent EU initiative on multimodal transport. It also follows principles from the recently proposed draft Agreement on Multimodal Transport for the TRACECA region, which might be adopted in place of the earlier draft TA on the same subject.

### Liability under the proposed Model law

The model law makes a distinction between the forwarder acting as an agent with an obligation to place the Customer into direct contractual relationships with service providers and the forwarder acting as principal exercising its discretion on how the contract will be performed. The forwarder as agent is only liable for its failings in carrying out professional services. The forwarder as principal is liable for failure to deliver the service package it has offered and in particular the delivery of the goods to the consignee. Whatever the role undertaken there is, however, a common basis for compensation of the Customer based either on full compensation for loss or damage (where the value is declared) or alternatively on limited liability broadly compatible with the UNCTAD/ICC Rules, FIATA FBL terms etc. This should enable forwarders to offer liability options to their customers and would enable insurers to set premiums according to the level of risk accepted by the forwarder. The liability of the forwarder for errors and omissions is also limited to an amount which should be capable of being insured.

The Russian Civil Code allows laws to be made limiting liability and some advantage of this has been taken in the Russian Federal Law on Freight Forwarding on which the earlier draft TA was based. The same situation will apply across other parts of the TRACECA region but where it does not apply, changes would be necessary to the relevant Civil Code before limited liability could be introduced. It will therefore be necessary for each state to tailor the model to suit its own special circumstances but it is hoped that a broad approximation of laws will be possible based on the model.

### Options left for further discussion

In **Article 7.5**, the opportunity to follow the rule applicable to the mode of transport in use at the time of loss to fix the forwarder's liability is retained from the Russian/draft TA and FIATA models. One option would be for the *nature of liability* only to be determined by the rules for the specific mode of transport while the *limit* of liability would be still be set by the model law. The second option (if the square brackets were removed) would see both the liability and the limit of liability set by the rules for the specific mode of transport. This latter system may be easier to manage from an administrative point of view and would constitute a fairly clear "network" system of liability. It would sometimes though bring variable limits of liability in place of the fixed ones under the model law.

In **Article 9.2**, the proposed general limit is 2SDRs per kilo, following the precedent found in the UNCTAD/ICC Rules and in many European forwarding conditions. This is based on the maritime precedent of the Hague Visby Rules and reflects the fact that a substantial proportion of Western international trade includes a maritime element. In the TRACECA region, the relative importance of land-based transport is probably higher and for this reason it could be appropriate to consider a limit of 8.33 SDRs per kilo based on the CMR Convention limits. However, the insurance costs of forwarders' liability insurance would be higher with the higher limit and further research on this issue is recommended before a decision is taken.

In **Article 9.5**, dealing with compensation for professional errors and consequential losses, it is considered necessary to set a very clear maximum limit so that the liability can be insured at a realistic cost. The suggestion has been made of 25,000 SDR as the upper limit, which would be one third of the limit found in some Western European examples such as the UK, and could be considered more appropriate to the present circumstances of the TRACECA region. However, even this limit may be thought too high and should be verified for suitability by each state. If the square brackets on 9(5)(ii) were removed so that the provision was definitely included in the model law, the effect would be to reduce the limit still further in the case of small quantities of goods carried (less than a container-load). Counterparts may feel that one overall limit of a maximum sum is more appropriate to these kinds of loss than one based on a limit per kilo. A further option would be to retain only a limit per kilo, but this would result in very low compensation indeed for professional errors when only small quantities of goods were involved. It should be stressed that this section of the model law deals with situations other than loss or damage to the goods themselves, where a weight based limit is usually considered fair.

In **Article 12.2**, various options for the time limit for notification of loss or damage are left for decision. The UNCTAD/ICC Rules suggest 6 days, the Hamburg Rules 15 days and the Russian Federal Law/draft TA set 30 days. It is suggested that a notification period of 30 days is so long as to be liable to encourage fraud by customers and for that reason would not be recommended by the Contractor. A period of 7 days as provided for in the CMR Convention might be considered as a good workable solution and the 15 day period in the Hamburg Rules UNCTAD/ICC Rules as a compromise solution. Again it will be necessary for individual states to decide on their priorities.

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## Annex 2 Proposal for an IGC TRACECA Resolution or draft Multilateral Agreement on Multimodal Transport

### 1. Objectives

1.1. The Parties shall endeavour to harmonize their legislation to implement a unified legal framework using the definitions and based upon the concepts contained herein.

1.2. For this purpose the Parties may set up a Legal Working Group, as referred to in Clause 7 article 8 of the Basic Multilateral Agreement on international transport for the development of international corridor Europe-the Caucasus-Asia, which will adhere to the concepts and definitions contained herein to work out a legal instrument, ("the Instrument") mandatory for the signatories thereto.

### 2. Scope

2.1. The Instrument reached by means of this Agreement shall be the basis for further development of a legal framework for multimodal transport performed between places in two Parties, if the place of taking in charge or delivery of the Goods as provided for in the multimodal transport contract is located in a Party.

2.2. The contracting parties may decide to apply the provisions of the Instrument in full or in part for carriage performed involving one or several modes of transport, with issuance of a single transport document or without it.

### 3. Definitions

For the purposes of the Instrument, the following definitions shall bear the meanings as follows:

**Multimodal transport** means a goods transportation performed by at least two different modes of transport

**Multimodal transport contract** means a single contract for the carriage of goods by at least two different modes of transport

**Multimodal transport operator** (MTO) means a natural or legal person who concludes a multimodal transport contract and assumes responsibility for the performance thereof by issuing a document of multimodal transportation either in negotiable or non-negotiable form

**Carrier** means the person who actually performs or undertakes to perform the carriage, or part thereof, whether he is identical with the multimodal transport operator or not

**Consignor** means the person who concludes the multimodal transport contract with the multimodal transport operator.

**Consignee** means the person entitled to receive the goods from the multimodal transport operator.

**Multimodal transport document** means a document evidencing a multimodal transport contract issued in a negotiable or a non-negotiable form (consignment note of multimodal transportation, multimodal transport waybill and any other legally accepted form), whereby the MTO has accepted the goods for carriage and assumed the responsibility to deliver the goods as agreed thereby.

**Delivery** means the handing over of the goods to the consignee, or the placing of the goods at the disposal of the consignee in accordance with the multimodal transport contract or with the law or usage of the particular trade applicable at the place of delivery, or the handing over of the goods to an authority or

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

**Special Drawing Right** (SDR) means the unit of account as defined by the International Monetary Fund.

**Goods** means any property including live animals as well as containers, pallets or similar articles of transport or packaging not supplied by the MTO, irrespective of whether such property is to be or is carried on or under deck.

**4. Documents**

The form of the multimodal transport document used under the Instrument, may be advised by the Governments of the Parties.

The Government of one Party shall agree to recognize the form of the multimodal transport documents advised by the Government of any other Party, so as to avoid impeding the performance of a multimodal transportation performed between the Parties.

The Legal Working Group set up to develop the Instrument shall develop and recommend for use by the Parties the model document for multimodal transportation, referred to above as the multimodal transport document, in accordance with the UN layout key

**5. Insurance**

5.1 The Parties shall endeavour to provide a legal basis to enable the MTO to:

- insure his public liability risks in connection with the transportation process
- insure his liability in connection with the goods in his charge

5.2. The Parties shall however leave it to the discretion of the MTO to insure his liability or the goods in his charge, depending on the contractual arrangements with the client.

**5. Responsibilities of the multimodal transport operator**

5.1. The Instrument shall provide that the period of responsibility of the MTO shall include the whole time when the MTO has the goods in his charge, until their delivery.

5.2. The Instrument shall also provide that:

the MTO shall be responsible for acts and omissions of his servants or agents, when any such servant or agent is acting within the scope of his employment

the MTO shall be responsible for any other person of whose services he makes use for the performance of the contract, as if such acts and omissions were his own

5.3. The Instrument shall also provide that the MTO may undertake to perform or to procure the acts necessary to ensure delivery of the goods.

5.4. The Instrument shall provide the following modalities of delivering the goods to the consignee:

(a) when the MT document has been issued in a negotiable form "to bearer", to the person surrendering one original of the document, or
(b) when the MT document has been issued in a negotiable form "to order", to the person surrendering one original of the document duly endorsed, or
(c) when the MT document has been issued in a negotiable form to a named person, to that person upon proof of his identity and surrender of one original document; if such document has been transferred "to order" or in blank the provisions of (b) above apply, or
(d) when the MT document has been issued in a non-negotiable form, to the person named as consignee in the document upon proof of his identity, or

(e) when no document has been issued, to a person as instructed by the consignor or by a person who has acquired the consignor's or the consignee's rights under the multimodal transport contract to give such instructions.

**6. Liability of the multimodal transport operator**

The Instrument shall provide that:

6.1. The MTO is liable for loss resulting from loss of, or damage to, the goods as well as from delay in delivery, unless the MTO proves that no fault or neglect of his own, his servants, agents or sub-contractors has caused or contributed to the loss, damage or delay in delivery.

6.2. Delay in delivery occurs when goods have not been delivered within the time expressly agreed upon or, in the absence of such an agreement, within the time it would be reasonable to require of a diligent MTO, having regard to the circumstances of the case.

6.3. If the goods have not been delivered within 90 consecutive days following the date of delivery, the claimant may, in the absence of evidence to the contrary, treat the goods as lost.

**7. Limitation of liability of the multimodal transport operator**

The Instrument shall provide that:

7.1. If the nature and value of the goods have been declared by the consignor before the goods have been taken in charge by the MTO and inserted with the agreement of the MTO in the multimodal transport document, the MTO shall be liable in full for the loss of the goods and shall be liable for the goods damaged in the amount equivalent to the value of goods damaged, or, in case where the damage to the goods is such that none of the goods can be recovered, the MTO shall have to compensate in full for the goods lost. The value of the goods shall be deemed to be the Invoice value.

7.2. In all other cases when the nature and value of the goods have not been declared by the consignor, the MTO's liability for loss of, and damage to the goods shall be limited to 8.33 SDR per kilogram of gross weight of the goods lost or damaged.

7.3. Liability for loss resulting from delay in delivery, and for consequential loss or damage other than loss of, or damage, to the goods is limited to 5 percent of the transportation contract price for every day of delay. However, in any event, the liability of the MTO for the delay in delivery of goods cannot exceed the amount of the transportation cost agreed in the multimodal transport contract.

7.4. The MTO is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the MTO done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

**8. The right of lien**

The MTO shall have the right of lien on the goods and documents in his charge, until the MTO is fully paid for the transportation and reimbursed for other costs incurred in connection with the transportation, unless otherwise agreed by the Contract.

**9. Liability of the consignor**

The Instrument shall provide that:

9.1. The consignor is deemed to have guaranteed to the MTO all information given with respect to the goods, and, in particular, wherever applicable, their dangerous character.

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9.2. The consignor shall indemnify the MTO against any loss resulting from inaccuracies in or inadequacies of the particulars referred to above.

9.3. The consignor shall remain liable even if the multimodal transport document has been transferred by him.

9.4. The right of the MTO to such indemnity shall in no way limit his liability under the multimodal transport contract to any person other than the consignor.

## 10. Time-bar

10.1 The time-bar set for all purposes of the Instrument, shall be one year.

10.2 Time begins to run for the purposes of the time bar on the day following the day of delivery of the goods or the date when the goods should have been delivered.

## 11. The scope of the Instrument

Where neither other international agreements and conventions nor the Instrument make specific provisions, national law and the provisions of the contract shall apply.

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**Explanatory Note regarding proposed agreement on Multimodal Transport**

**Background**

Following extensive discussions with Counterparts (including the workshops held in Istanbul in November 2006) the Contractor concluded that few freight forwarders in the region are presently willing or able to offer the kind of comprehensive services as a principal available in Western Europe. In particular, use of the FIATA FBL is very rare although there are apparently no legal obstacles to its use. However there is a consensus that such services will emerge in the future and legal provision needs to be made to facilitate this, both in ordinary freight forwarding activity and in multimodal transport.

The Contractor pointed out in its earlier reports that the draft Technical Annex on Multimodal Transport was a complex mixture of old Soviet-style provisions and elements from the international system and that it could present difficulties of practical implementation. This seems to have been accepted by Counterparts who recognise that a simpler type of framework agreement could offer more flexibility both for immediate implementation and in the future. Although not strictly required by the TOR, the Contractor has therefore prepared with counterparts the detailed framework for such an agreement as a constructive response to earlier discussions.

**Implementation**

It has become increasingly difficult to reach consensus for introduction of new Technical Annexes to the MLA and this difficulty is likely to increase as new Member States such as Iran, Afghanistan and Pakistan join the MLA. Member States should also avoid overloading the MLA structure with too many annexes when alternative solutions may be equally or more effective.

The proposed framework agreement on multimodal transport is intended to give the parties to the MLA flexibility in terms of implementation strategy. It should allow those states who wish to proceed rapidly to adopt its provisions without the need to achieve consensus throughout TRACECA or to complete the formalities required by the MLA. States could incorporate the provisions in bilateral agreements, or three or four pilot states might decide to incorporate them in a simple multilateral agreement. It should not be forgotten that the 1996 Sarakhs agreement was such an instrument, brought rapidly into operation yet providing the basic core from which the MLA later emerged. It would therefore be possible to envisage incorporation of such an agreement within the MLA structure at a later date once it has been tested in practice by the pilot states. Multimodal transport legislation is undergoing rapid change internationally with the EU preparing a possible regional initiative while UNCITRAL is still working on a draft for an international convention in this field. It would be prudent for the TRACECA region to await the outcome of these developments before incorporating provisions on multimodal transport in the MLA. The proposed framework agreement could be used as an interim instrument to cater for the present situation.

If it wishes, the IGC TRACECA could establish a legal working group to perfect and implement the agreement. Alternatively an informal working group could be established by those states wishing to proceed rapidly. The Contractor recommends that the simplicity of the draft should be retained wherever possible and that Counterparts should avoid overloading it with extra detail, which was the main failing of the existing draft TAs.

The framework is intended for international use. However elements from the framework could also be used by Member States as guidelines for regulating liability in their domestic multimodal transport.

**Definitions**

The definitions used in the framework agreement are taken from the UNCTAD/ICC Rules, modified to fit the context of the region where necessary.

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**Basis of liability**

The proposed framework agreement provides a basis of liability for the MTO in clause 5 whereby the MTO accepts responsibility as a principal from door to door. This is in line with policy set out in paragraph 5.6 of the IGC strategy document for TRACECA development for the period up to 2015 and with the principles contained in the Multimodal Transport Convention of 1980. In addition, this is compatible with the UNCTAD/ICC Rules upon which the FIATA FBL is based and with the current draft framework for an EU Directive or Regulation on liability in multimodal transport.

**Limitation of liability**

The framework agreement at clause 7 recognises the existing practice in the region of full liability based on the value of goods lost or damaged but it is envisaged that this will be the case only where the MTO has agreed to enter the value in the MT document and the customer has agreed to pay a surcharge on the normal rate. In all other cases the agreement follows the EU initiative on MT transport in proposing a uniform limited liability regime but with a lower limit of 8.33 SDRs per kilo (the limit under the CMR) thought to be appropriate for the region. Any working group set up to implement the agreement may wish to review the suitability of this limit and its potential insurability.

For simplicity, calculation of the value of the goods is based on the invoice value, as a sales invoice will normally be available. Any working group may wish to debate whether the market value at point of origin or destination, replacement cost, or some other measure of value should be used as is the case in some other instruments.

**Documentation**

The framework agreement at clause 6 avoids imposing a uniform transport document but requires mutual recognition of such documents by states where they are not uniform. It hopes, however, that any working group set up would attempt to agree a uniform transport document for use with the agreement. Such a document, in line with the recommendations of a number of previous TRACECA projects since 1996, should adopt the physical format as elaborated by the United Nations (the UN layout key) so as to be compatible with commonly recognised software for electronic completion of documents whether as printed paper documents or as electronic virtual documents.

**Lien**

A simple lien is included in clause 8 as liens may not be available under all national laws. Any working group set up may want to consider giving the MTO a stronger lien for example as provided in the FIATA FBL terms.

**Consignor liability**

In line with the expressed wishes of Counterparts in discussions and in the earlier draft TA, quite strict duties are placed on consignors with regard to information furnished by them.

**Time limits for claims**

These have not been included as it is believed that the national Civil Codes deal adequately with giving notice of loss or damage to the carrier. However, if any working group wished to include an international provision, the Contractor would recommend taking the provision available in clause 9 of the UNCTAD/ICC Rules.

**Time bar**

The time bar has been set at one year, in line with most national and international legislation. It should be noted that this is less favourable to the MTO than the 9 month limit in the UNCTAD/ICC Rules and that of

many Western European MTOs. However, even in Western Europe, the 9 month limit is not always enforceable and it was felt that the one year limit would be more appropriate to existing conditions in the region. Any working group may wish to review this provision.

**Conclusion**

The framework has been developed to allow the possibility of early implementation of provisions largely consistent with existing practices in the region while being largely compatible with practices in neighbouring areas. It represents a compromise. As its terms are kept as simple as possible, it should make it much easier to update in the future than a more complex agreement containing many cross references and details.

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## Annex 3 Detailed Analysis of the draft Technical Annex on Freight Forwarding

### Overview

Previous sessions of the IGC elaborated versions of a possible draft Technical Annex on Freight Forwarding. Analysis of the then current draft was carried out at an early stage in the project and the sections below detail the findings of the Consultant at that stage in the project:-

"This is at present a very unsatisfactory document when read in English but the flaws may partly stem from problems in translation. The MLA makes English and Russian texts equally authentic. It is therefore essential that the English text should make sense, which is not the case in the last published version.

The definitions present difficulties of interpretation, which could be removed if they were replaced by more recognised international examples (for which English and Russian versions exist) and the meaning of which is clearer.

Many of the provisions of the present draft could be left to contract. The Consultant would recommend generally that only where the Civil or Commercial Codes or other national legislation prevents contractual freedom should the TA intervene to provide a uniform system. The Consultant will try to determine which residual areas need to be dealt with in the TA. Among these are likely to be:

- the basis of the forwarder's liability
- the limits of financial liability
- the time limits for claims and prescription/time bars

The Consultant considers that there may be practical benefits in developing uniform contract conditions for the region as "model rules" while limiting the contents of the Technical Annex only to matters where it is necessary to override national laws by an international law in order to improve the functioning of freight forwarding in the region.

The basis and limits of liability of the forwarder and client as set out in the draft are dangerously unclear in nearly all particulars and need urgent review.

The draft makes no attempt to distinguish between the role of a forwarder as agent or principal. There are strong arguments for suggesting that different provisions should apply to the two roles. It seems to be assumed in most parts of the draft that the forwarder is principal or carrier. The Consultant would recommend further discussion around this issue before any draft is finalised.

### Textual analysis of the Draft TA on Freight Forwarding

*Article 1:General Provisions*

Art 1.1 This conflicts with the definition of such services in Art 2. The scope of the TA is also expressed in such wide terms that it may conflict with other TAs on Road and Rail transport etc. As the first part of the clause does not add anything concrete to the TA it might be better to delete it altogether or to redraft it to deal precisely with the intended scope of the TA.

The second part of Art 1.1 may not allow contract terms to be taken into account but only specific laws, if any. This is probably not the intention. If this part is maintained in the text it would need to be reworded to achieve clarity. Alternatively it could be abandoned without damaging consequences.

Art 1.2 It is probably appropriate to exclude mail traffic. Perhaps consumer transactions should also be excluded, as it seems from the draft that special legislation may exist to cover these in some of the states.

*Article 2: Definitions*

Of the definitions shown, only 6 out of 14 are actually used in the body of the text and one of these (freight forwarding agent) is immediately abbreviated to "agent" when used. Furthermore, some of the definitions are repeated and/or conflicting. The Consultant wonders why the unused definitions were included. If their supposed usefulness relates to some possible future application in another document, it may be better to place the definitions in that document. Here the unused definitions merely cause confusion. No further comment is made at this stage on the unused definitions.

"Freight forwarding activity". This is neither a clear nor useful definition, though it is used in the text. A reference to "freight forwarding services" throughout would seem much more clear and straightforward.
"freight forwarding services". Most of the definition is good but the reference to "collecting of procuring payment or documents" is probably based on the FIATA Model Rules and there reads "collecting or procuring payment or documents". It is at present incomprehensible. The definition, to be clear, should perhaps relate these services to the definition of "freight forwarding agent" below by referring to "services.... carried out by a freight forwarding agent". The definition may otherwise catch every category of carrier or warehouse keeper as it is presently written.
"freight forwarding agent". The English needs a little attention but the definition is otherwise ok.
"Client". There are problems with the English in this definition and it is difficult to see what is gained by referring to "transport agents" who appear nowhere else in the draft TA. Other international examples contain a clearer and more comprehensive definition of "client" or "customer" and should be considered for use.
"Consignee". There are problems with the English. Also the definition should refer to the entitlement to receive the goods rather than just the physical reception of the goods. There is a good definition in the FIATA FBL.
"Cargo". The word usually used is "goods" rather than "cargo". The text refers to both "goods" and "cargo" but only "cargo" is defined. It is not clear why two terms are used and only one is defined. This could lead to confusion. Also it is apparently only property of the consignor that constitutes "cargo". The consignor as defined will not always own the cargo and, under the present definition, this kind of cargo would be excluded. Further work is needed here to achieve clarity.

*Article 3: Rules of freight forwarding activity*

It is assumed that these rules have not yet been devised. It is good drafting practice to place technical detail in lower level legislation and so this is to be commended here. However, it is also the Consultant's view that over-regulation of the industry should be avoided and the proposed Rules may become too restrictive. It is essential that they should not inhibit commercial flexibility and new operational initiatives. It may also prove difficult to reach agreement on procedures if the TRACECA IGC insists on placing too much detail in the Rules. Many matters could be left to contract or to existing legislation on business activities.

Some people may also argue that until the Rules are issued, the TA cannot take effect fully. The Consultant needs further information on what it is intended to include in the rules, how they will be brought into force and when.

*Clause or Article 4*

It is not clear why the sections change from "Articles" to "Clauses" between Article 3 and Clause 4. This needs to be standardised with other Technical Annexes, which refer to Articles.

Art 4.1. There are problems with the English. It is also not clear how any conflict between the agent's interest and the client's interest is to be resolved. The present wording is unclear on this. Further work is needed here.
Art 4.2 "Consequence transport means" makes no sense in English. The purpose of this clause is unclear. If a contract condition can prevail over a law, as seems to be the intention here, there does not seem to be any point in writing the law as the matter can be left to contract. However, it may be right to

restrict the forwarder's right to choose or change a mode of transport etc only to cases where this is in the interest of the client. Further discussion seems needed here especially as the forwarder's rights may conflict with those of the client as set out in Art 4.6 below.
Art 4.3. It is not clear what is meant by "in accordance with the conditions of the contract" in this clause. If it means that a lien must also be set out in the contract, one must ask why it is dealt with in this TA. Also, the lien seems to apply only to expenses and not to the charges invoiced by the forwarder, which is surprising. These provisions may conflict with national laws on liens/right of retention and with contract provisions without seeming to confer real benefit on the forwarder.
The client cannot be "responsible" for damage in these circumstances. Such a concept does not make sense in English. However, the forwarder could be made "not responsible", though there is no reasonable reason why the forwarder should not continue to be responsible for goods over which it exercises a lien. Further discussion is needed of the entire clause.
Art 4.4. The rights seem too wide and too vague and the clause may lead to practical problems if not improved.
Art 4.5. "reliability" should be "accuracy"
Art 4.6. It is not clear how the client's absolute right to choose the route relates to Art 4.2, which seems in potential conflict. On the other hand, the right to information seems to depend on the contract so one wonders why it is mentioned in the TA and not just left to the contract. Similarly, there is no point in granting a right to give instructions according to the contract, as the contract will then determine the rights and not the TA.

*Article 5: Duties of the freight forwarding agent*

Art 5.1. This only states the obvious and is considered unnecessary. Worse than this, it creates a possible conflict as a contract may conflict with the TA yet the TA here seems to compel the forwarder to follow the contract.
Art 5.2. Again, the utility of this is unclear, as it seems to create potential conflict between the contract and TA. Also, the subject matter repeats part of Article 4.2. This sub-article additionally demonstrates that the definition of "client" may be too restrictive to cover all the people who should be notified.
Art 5.3. This suggests there may be conflict between consumer legislation and the TA terms or contract terms. The situation requires further consideration and it may be better to exclude consumer contracts altogether and to develop separate procedures for these based on the consumer legislation. At present, the sub-article merely causes possible confusion as to whether the consumer's rights are determined by the TA or by some other law. Any conflict between the two is not resolved.
Art 5.4. It is not possible to make out any clear meaning in this sub-article, but it may be intended to deal with receipts given by the forwarder on receipt of goods.
Art 5.5. This makes no sense in English. It may mean that the forwarder will not arrange insurance for the client unless this is agreed in the contract.

*Article 6: Duties of the client*

Art 6.1. The obligations seem very wide. In particular, the Consultant considers that information on "transport conditions" is rather a matter for the professional knowledge of the forwarder than the client.
Art 6.2. This refers to the contract and such matters may be better left to the contract.

*Article 7: General base of responsibility*

Art 7.1. This does not seem to add anything substantive to the text.
Art 7.2. This is very unclear and unlikely to work in its present form to determine any responsibilities of the client, particularly when cross-referenced to Art 7.4.
Art 7.3 "forwarding service" and "forwarding services" are not defined terms. The reference should be to "freight forwarding services".
Is it intended that the TA should apply only to international transportation of goods? If so, this should be set out in a proper article on scope of the TA in Article 1.

Is it really intended that the 666.67 SDR limit should apply as the upper limit for any quantity of goods moved as is suggested by the reference to "any single transportation"? This would be a very low limit if say 2000 tonnes were despatched in one complete train for a client.
It is very unclear what is intended by the reference to "point 2 Clause 9". This whole sub-article requires major revision particularly as it appears to conflict with Articles 8.1 and 8.2. It is not clear what happens about delay and consequential loss.
Art 7.4. This is another unclear provision, which needs entirely rewriting. Also, it qualifies only Art 7 and not 8.
Art 7.5. This seems a dangerously open-ended provision leaving both forwarder and client potentially open to large losses without benefit of limitation, as it is not cross-referenced to Art 7.3.

*Article 8: Basis and degree of responsibilities of the agent*

It is very unclear how this Article is intended to relate to Article 7. They are quite different in their effect but deal substantially with the same subject matter. This is unsatisfactory.
Art 8.1. "authorised person" is unclear in its context here. "real cost" is thought to be a reference to "value" of the goods. It is confusing to refer to the "amount of compensation" in introducing a-d. Sub articles a-d appear to deal with assessing the *value* of goods at a particular time and place and are probably poor translations of provisions found in other international instruments. Unfortunately, as presented, they do not make sense though the intention may be that a client should not recover higher compensation than the value of its goods. It is not always easy to calculate the value of goods and some standard rules can help.
Art 8.2. "international freight forwarding service" is not defined but as "freight forwarding services" *are* defined, there is some confusion caused as to the effect of this provision. As previously mentioned, if it is intended to limit the TA to apply only to international movements, this should be clearly stated. It may be quite difficult to define the scope of the TA as forwarders sometimes limit their service to local activities, though the goods handled will subsequently go abroad. Further discussion is required on this issue, particularly as there are some serious differences with Art 7.3 which applies only to transport of goods, whereas Art 8.2 seems to be wider in scope.
It is not clear why a different limit is used in 8.2 compared to 7.3, nor why the parties may not agree higher compensation if they wish in their contract.
The concept of higher compensation being recoverable if the agent itself recovers more from a carrier is useful for clients given the low limit of liability of the forwarder, but it may prove difficult for clients to prove that the forwarder recovered more. The "third party" or subcontractor should be responsible to the agent and not for the agent as presently shown.
Art 8.3. This seems to be a slightly distorted version of the provision under the CMR.
Art 8.4. This appears to allow full compensation for lost profits. The proviso in Art 8.5 does not seem clear enough to provide any protection, particularly as this again has an undefined reference to "international freight forwarding service".
Art 8.6. This sets out a further and different way of calculating "value" to that shown in Art 8.2 and it is not clear what the intended relationship between the two sub-articles is.
Art 8.7. This provision is loosely based on CMR but with modifications that tend to make it less precise. Corrections are also needed to the English.

*Article 9: Notification of loss, non-delivery and damage to cargo*

Art 9.1. The "consignee" is defined in the TA and not the contract, so this reference is potentially confusing. Otherwise the clause only needs slight tidying.
Art 9.2. The period of notice is very long (3 to 7 days is more usual) and the consequences of failure to give notice is not made clear. The long period for notice could prejudice the forwarder's recourse against carriers who maintain shorter periods.

*Article 10: contract execution date*

Art 10.1. The sub-article does not presently make any sense in English, but is thought to be intended to deal with delay claims. It seems to be overridden by any contract, which makes it unclear why it is included in the TA.
Art 10.2. The sub- article also has seriously defective English. There seems to be repetition of provisions and lack of clarity. It is also not clear whether the liability of the forwarder is limited or not. Liability appears to be unlimited.

*Article 11: Basis and limit of responsibilities of the client to the agent*

Art 11.1. This is broadly satisfactory if the English is tidied up though limits on the client liability are not set out. The second sentence deals with a different topic and, for better clarity, could be placed in a separate sub-article.
Art 11.2. This too is broadly satisfactory if the English is improved. The use of these powers will most likely destroy any business relationship between client and forwarder but may be considered useful if court proceedings are taken out to recover a debt from a former client. However, national laws may already deal with such matters.

*Article 12: Agreement on changes of responsibility limit of the agent*

Art 12.1. This is a useful provision which only needs tidying up. However, it should be noted that it would be in conflict with CMR, which does not allow higher limits. It will work with the sea transport conventions without conflict.
Art 12.2. This too is a useful provision which only needs tidying up.

*Art 13: Complaints and claims against the agent*
Art 13.1. There is already a requirement for notice in Article 9 and so it is unclear what benefit there can be in also requiring a "complaint" before a claim is made. It would save bureaucratic costs if complaint and claim were combined.
Art 13.2. The list of potential claimants would normally include the consignor.
Art 13.3. Legal procedures for claims may be better left to national legislation.
Art 13.4. The six-month period appears long from the forwarder perspective, as it will be more difficult to gather evidence to defend the claim after such a long time.
Art 13.5. The wording is unclear, particularly the reference to "acceptance date" which may mean "receipt date".
Art 13.6. This appears satisfactory, subject to improvement of the English.

*Article14: Limitation of actions*

The time limitation of 1 year means that the forwarder will potentially face court action too late to be able to proceed against subcontracting carriers, who mostly benefit from a 1-year limitation period. Most international freight forwarders seek a 9-month limitation period in their contracts and this is the basis under the UNCTAD/ICC Rules for a multimodal transport document. The 9 month time bar has, however, not always been accepted by the courts. Further discussion seems appropriate."

Discussions with counterparts in the course of the project led to transformation of the draft TA concept into a possible proposal for a model law.

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# Annex 4 Detailed Analysis of the draft Technical Annex on Multimodal Transport

## Overview

Previous sessions of the IGC elaborated versions of a possible draft Technical Annex on Multimodal Transport. Analysis of the then current draft was carried out at an early stage in the project and the sections below detail the findings of the Consultant at that stage in the project:-

"This reads in some places as a more satisfactory document than the draft TA on freight forwarding, because it sometimes quotes directly from the English text of the 1980 Convention on Multimodal Transport. Those particular passages can be clearly understood. However, the document is at least as unsatisfactory overall as the other draft TA on forwarding because there seems to be a failure to understand the mechanisms (network or uniform basis of liability) by which such an instrument can be made to work in practice.

The draft TA tries to run two different systems of multimodal transport under one set of rules and this seems over-ambitious.

It firstly seems to perpetuate many of the characteristics of what the USSR termed "Direct mixed Communication". This was a special regime for multimodal transport within the USSR and it had elaborate operational rules. Considerable advance notice had to be given of any intended movements and the whole system was suited to the command economy, which in theory at least, no longer exists. There were also some practical timetables for latest times for despatch of goods by inland waterways subject to closure by ice in winter etc. The Consultant suspects that some of the provisions in the draft TA may be adapted from the old USSR legislation and the translation into English is not satisfactory.

Secondly there are a number of provisions drawn straight from the 1980 MT Convention. These are unobjectionable in themselves but they are not built into a coherent framework and potentially conflict with the provisions of the USSR system.

These difficulties with the draft can only be rectified when counterparts have debated and agreed on what system of multimodal transport they wish to adopt in the region. At present it appears to be an unworkable mixture of two different and incompatible systems.

It is also unclear whether it is intended to be restricted to international transits within the region or to all international transits and whether it includes internal domestic transits within the states. It does appear to include such domestic transits.

The proposed system refers constantly to national law of the individual states. It seems as if this law prevails in many places over the TA and, if so, the Consultant wonders why the TA is thought necessary. In such circumstances, the TA may not bring harmonisation but yet another complication in the legal system.

It will not be sensible to carry out further work on this draft until counterparts have agreed much clearer objectives.

An investigation is needed as to whether the Soviet "Direct mixed Communication" is still legally and operationally enforced in the region and whether it meets present requirements. If so, counterparts may wish to retain it for the time being as a separate regime under its own TA, or under bilateral arrangements. The system is unknown outside the former USSR and would not be adopted by some TRACECA states such as Turkey, Bulgaria and Romania. It would also not be acceptable for use with the EU. It may therefore be more appropriate to maintain it bilaterally between states which still find such a system useful pending liberalisation of their transport market, and with Russia if it still maintains such a system. A separate TA could then be developed to deal with western-style multimodal transport operations, compatible with world standards.

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**Textual analysis of the Draft TA on Multimodal Transport**

*Article 1: General Provisions*

The intended geographical scope of the TA is not set out. It regulates relations between "transport entities" (which are not defined) and various others in the chain of multimodal transport. The TA should perhaps retain the same scope as the Basic Multilateral Agreement, which applies to "international transport" as it is defined in the MLA.

The second sentence is taken from the wording of the 1980 Multimodal Convention. If counterparts decide to maintain the system of "Direct Mixed Communication", this sentence could be extended to exclude that type of operation from the western-style TA.

*Article 2: Definitions*

This draft TA is better than the one on freight forwarding in that most of the definitions set out are actually used in the text.

The exception is "multimodal terminal/node". For some reason, "hubs", "centres" and "interchange nodes" are used in the text apparently in place of the defined terminology of "multimodal terminal/node". There is a danger in defining words which are then used not at all or only intermittently. The danger is that other words must be assumed to have a different sense to those defined, otherwise the defined word would not have been defined. So one has to assume that a "hub" is not the same place as a "multimodal terminal/node" and this raises issues which may in fact not exist. In this case, it is clear that one standard phrase should be agreed to cover all these centres, maybe "multimodal terminal".

"Multimodal transport" is partly taken from the 1980 MT Convention text, but is a more restrictive definition than the one which appears there, for reasons which are not clear. Its relationship with the definition below urgently requires clarification.

"Direct multimodal transport" is a definition in potential conflict with the one above. It is used only once in the text and not strictly accurately as the text refers to "transportation" in Article 5. Reference has already been made to the problems in the draft caused by trying to deal with two apparently incompatible systems under one technical annexe. The Consultant assumes that "Direct Multimodal Transport" refers to the former USSR "Direct Mixed Communication". The reference to "using one loading unit" is interesting and needs to be clarified. It cannot be clarified at present as it is not clear what is meant by "one loading unit". Can the unit be as small as a pallet or does it have to be as large as an ISO container? As the definitions currently stand, only goods not using one loading unit fall under the other definition of "Multimodal transport".

"Multimodal Transport Operator" is largely taken from the UNCTAD/ICC Rules but the addition at the end of a reference to "or a transport operator" causes confusion.

"Multimodal Transport Contract" is confusing because of the reference to "or other carrier".

"Multimodal transport document" is taken wholly from the 1980 MT Convention.

Some terms which could usefully be defined, but are not, include "carrier" "consignor" and "consignee". Suitable definitions may be found in a number of places including the 1980 MT Convention and UNCTAD/ICC Rules.

*Article 3: Purposes*

3.1 This might be better placed in a preamble. The sense of the English is not clear.

3.2 It is not clear which rules are referred to. Are there to be common rules for all the countries or will each of the authorities develop their own rules? These state authorities seem to have a very wide discretion according to Article 3.

*Article 4:Organisation of Multimodal Transport of Goods*

4.1 It is strange to find a definition coming in here when "multimodal transport" has already been defined in Article 2. It seems to be a repetition of the definition of "multimodal terminal/node" which, is not then used in the text though it appears a useful definition.
The remainder of 4.1 is rather obscure. Firstly, it again seems to stress local, national powers rather than to lay out an international system for TRACECA. It is not made clear whether these national rules are of a higher status than the TA itself, but that is the impression given. It seems to pre-suppose that all services are operated by the state, which already is not the case in most TRACECA states.
The presumed meaning of 4.1 could perhaps be simplified to something such as "The parties shall maintain, update and publish lists of multimodal terminals open for business on their territories". That would be neutral and factual information, like the list of railway lines subject to COTIF Convention in Western Europe.
4.2 This detail does not seem very useful.
4.3 The English of this sub-article makes no sense.
4.4 The poor English again makes it difficult to understand any sense in much of this long sub-article. The detail also appears excessive. However, the sentence "when handing over goods..." is well expressed , except for the reference to "transport vehicles" where use of an internationally recognised phrase would be better.
The Consultant assumes that the last sentence means that the provision and use of containers is decided by contract. It could be useful to discuss whether there should be a minimum requirement to provide clean and weather tight containers.
4.5 It is not clear why the length of agreements between operators have to be regulated but not many other details. The reference to "contracts or treaties" causes confusion.
4.6 This is a reference to a Soviet system which is increasingly irrelevant in a free market economy. The reference to liability provisions is out of place here and would be better put elsewhere, for example Art 6.
4.7 There is further reference to "Rules" but it is not clear what these are or where they may be found.

*Article 5: Documentation of the Multimodal Transport Operation*

For some reason none of the paragraphs are numbered, which makes it harder to use this part of the document. On the other hand, most of the detail is taken from the English text of the 1980 MT Convention Articles 5-8 and is therefore easy to follow.

There is a danger in using material without understanding its context and in this article problems may arise from introducing into the 1980 MT scheme of things new references to the SMGS bill and direct multimodal transportation which may create potential conflicts. Also the reference in "n" to "the statement referred to in para 3 of Article 28" is to the MT Convention itself and is incorrect and confusing. You have to understand why you are using particular words and the authors have apparently not followed through what "n" says. In the MT Convention, "n" refers to an Art 28 which states that the MT document must contain a statement that the transport is subject to provisions of the MT Convention which prevent derogation from the Convention to the detriment of the shipper. There is no art 28 requirement in the TA and so "n" should not have been included.

*Article 6: Rights and responsibilities of Multimodal Transport Operator*

6.1 Common carrier obligations are increasingly rare, but they are introduced here. Also the nature of the obligations is left to national law, which may vary within the region.
6.2 It may be better to refer to the FIATA Rule for guidance. It is not clear how one determines what is a "best mode and route".
6.3 Where is the "defined standard period" to be found?
6.4 This is very vague and again it may be worth looking at the FIATA Rules
6.5 The FIATA Rules have a more straightforward clause on lien
6.5 The English is very bad here, particularly in the second sentence. The requirement for compulsory insurance merits further discussion though the concept is probably suitable in the TRACECA region provided it is possible to obtain such insurance commercially. The provision on insurance needs to be much more closely related to the liability provisions in the TA.

*Article 7: Rights and responsibilities of consignor*

7.1 This sub-article seems to have been mis-placed as it seems to relate to the liability of the MTO and would be better placed in Article 6. The right to claim seems to exist only where goods have been lost and not where they have been damaged so the wording needs to be revised to cover both situations. In one place the claimant is given a right to full compensation "equal to the value of the goods lost" but later on the network system applies i.e. the claimant must look to the underlying transport mode to determine compensation. There is no guidance as to what happens when it cannot be established where the loss or damage took place. It would be preferable to use existing international examples to define the basis of liability.
7.2 It is not made clear who is to be instructed by the consignor.
7.3 The final sentence lacks clarity.

*Article 8: Responsibility of the MTO*

This very important Article shows that the overall approach to multimodal transport was probably not agreed before drafting of the TA began. It is not clear from this article whether a goods owner must claim on the Multimodal Transport Operator or on the underlying carrier, which is a very fundamental confusion. This article also does not make it clear whether a regime of network liability or of uniform liability is established under the TA. Article 7 and 8 in part cover the same issues

As presently drafted there will be significant practical problems in dealing with claims. It would be better to consider the scheme for liability under the UNCTAD/ICC Rules or the MT Convention. The Article is headed "Responsibility" like Article 6 and might be less confusing if entitled "Basis of liability…".

8.1 The vital first sentence presently makes no sense in English. It would appear that the TA is subject to national codes and statutes and does not override these. If so, it will have very limited use in increasing predictability and harmonisation.
The second sentence also makes no sense.
The third sentence also makes little sense and is worrying as it seems to suggest that claims must be forwarded to the underlying modal carriers and not to the MTO. This rather defeats the accepted concept of multimodal transport where the goods owner deals with only one operator.
8.2 The first sentence makes no sense in English. The second sentence is presumed to refer to exceptions from liability "property accountability".
(a) seems too wide in its application and likely to be abused to the detriment of goods owners
(b) the same remarks apply and also (b) seems to repeat (a) which is likely to cause confusion as to the intended difference, if any, between them.
8.3 First sentence: This is potentially a good strong clause and it places the important burden of proof clearly on the MTO. However, the use of the word "necessary" is vague. There are good examples to follow in many international instruments to set the basis of liability of the MTO. It is not clear how 8.2 and 8.3 relate to one another as 8.2 seems to weaken the effect of 8.3.

8.3 Last sentence: This seems to impose potentially excessive liability on the MTO as the obligation is not qualified in any way.
8.4 This appears to be a garbled version of part of the 1980 MT Convention provisions in the first sentence. It makes no sense in English at present and also seems not to be placed in the most logical order within the article.
8.5 This is mainly taken from the 1980 MT Convention Article 10.1but the second sentence has been modified from Art 10.5 and the reference to "cost" is thought to be meant to be to "value".

The whole article requires substantial further work to perfect it.

*Article 9: Responsibility of the consignor*

It is not understood why a second article deals with "responsibility of the consignor" when this is the heading used in Article 7.

9.1 The wording is rather vague. The authors have combined various international examples but without sufficient precision. The last sentence seems to repeat the responsibilities of the consignor but in slightly different terms, which will cause confusion. It may be argued that it is not only the consignor who should be responsible for certain acts, but any person who is the owner or otherwise responsible for the goods at the relevant moment.
9.2 The first sentence makes insufficient sense in English to judge it properly. There are good international examples which could be substituted for it. The sub-article states that national law will apply and there may therefore be little point in putting provisions in the TA.
The second sentence also makes little sense but clearly intends to deal with demurrage and detention charges for equipment. There are suitable international examples to substitute.

*Article 10: Claims and disputes*

10.1 The provisions are broadly based on Article 25 of the 1980 MT Convention. They present a few potential difficulties which merit further discussion. The UNCTAD/ICC Rules set a time bar of 9 months. The time bar of 2 years may prevent the MTO from having a fair recourse against underlying carriers. The time of 6 months mentioned in 9.1 may be interpreted as a time bar by MTOs and this would be detrimental to goods owners. So the clause may present problems at present for both sides to the MT contract.
10.2 and 10.3 These are based on the provisions of Article 27 of the MT Convention but the English is defective in places.
10.4 The first sentence makes no sense in English.
The second sentence seems to have become detached from one of the other articles as it deals with the payment of compensation. The English is too unclear to make sense of the intention behind the clause.
The procedure for claims is set out. Normally this is a matter for national law and in fact the sub-article refers to "in accordance with existing procedure". It might be better therefore to leave this matter out of the TA altogether.
10.5 The relationship between the 6 month period for claims in 10.1 and the 5 month period mentioned here requires more thought. In general the international transport conventions require a very early notice of loss to be served on the carrier to make the carrier aware that a claim may be made. This allows the carrier to carry out an early and full investigation while the evidence still exists and while persons still remember the events. The present scheme in the draft TA does not require this and MTOs may suffer prejudice as a result. On the other hand to require a formal claim to be submitted within 5 or 6 months, ready for court action may be thought rather unfair for the goods owner. The sub-articles (a) and (b) are not fully thought through at present.

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*Article 11: Final provisions*

11.1 This seems to conflict with 11.2 below. It is also unusual to refer to "negotiations" in relation to court proceedings. Normally the court decides an action, not the parties.
11.2-11.5 These provisions are taken from Article 26 of the 1980 MT Convention with a few additions. The sub-articles apply only to *international* transport. The Consultant cannot be sure whether this is intentional or whether the authors have merely copied verbatim the provisions of Art 26 of the MT Convention without considering the effect. It will be necessary, as mentioned elsewhere, to define more clearly the intended scope of the TA, which elsewhere also seems to include national transport."

Discussions with counterparts in the course of the project led to transformation of the draft TA concept into a possible proposal for an international agreement on Multimodal Transport.

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## Annex 5 Specific country information

This Annex brings together information provided to the project by TRACECA National Secretaries in response to the questionnaire on the current legal situation devised by the Consultant at the outset of the project and the dialogue which later developed concerning specific national drafts under development during the project life. Further specific country information is contained in the Istanbul workshop reports above.

### Armenia

*Draft forwarding law*

The Armenian draft places great emphasis on the contract. It *may* allow customer and Forwarder to agree on liability in its article 4 (though this is not wholly clear as Art 6 states that the forwarder will be liable "on the base of the Civil Code common order procedure" and Art 14 refers also to compensation amounts, which could be place limits on the apparent freedom in Article 4). The requirements of Article 4 could be met largely through standard trading conditions, but again it is not wholly clear whether this is envisaged.

Similarly it seems that the forwarder may be able to operate as an agent or principal but the laid down procedure for pricing seems to envisage an agency role only, which is rather restrictive (Art 5)

It is therefore not yet clear whether the draft would facilitate or prevent the use of the FIATA FBL as a document and the FBL terms as a standard contract.

The provisions on compulsory liability and cargo insurance are controversial.

### Azerbaijan

There is a draft law on transport forwarding activity, but its status is presently unofficial.

Clauses 3-5 provide for licensing and certification of forwarders according to rules made by the Cabinet of Ministers

Clauses 5-8 state that forwarders make contracts on the basis of market principles of supply and demand and describe the nature of forwarding activities. The contract of forwarding must be made in writing.

Clause 9 deals with the forwarder's liability which is established according to the Civil Code and other relevant laws and charters as well as by the contract itself. Where an underlying carrier is responsible for the breach, the forwarder's liability is assessed according to the rules applicable to the liability of that carrier.

Clause 10 states that the customer must give sufficient instructions in a shipping order and is liable for any failure to do so.

Clause 11 gives the forwarder the right to subcontract services provided this is not contrary to client instructions and Clause 13 gives an unusually extensive right of lien.

The draft provides that the forwarder may elect to act as a carrier/principal along the lines envisaged by FIATA and Clause 14 sets out substantial details on the forwarder's responsibility in such circumstances.

The forwarder, acting as carrier, is responsible for the goods from time of their receipt to time of their delivery and is liable but not in the case of the following circumstances, provided it has not been at fault:

- Mistake or error of the customer
- Loading or unloading by the customer
- Inherent vice or natural deterioration of the goods
- Lack of or insufficient packaging
- Improper or incomplete addressing or marking of the goods
- Incomplete or incorrect data on the goods
- Circumstances which the forwarder could not avoid and the consequences of which it was unable to prevent.

These principles are taken from the CMR Convention and are a very satisfactory potential solution to the issue of how far a carrier/principal should be exonerated from responsibility.

Liability for ordinary loss or damage to goods is limited to 25 Swiss? Francs per kilo under Clause 14.8 and Clause 14.3 seems to protect the forwarder from claims for consequential loss. Similarly Article Clause 14.7 limits liability for delay to the amount of the freight or overall charges. The combined effect of the liability provisions should facilitate the underwriting of liability risks for forwarders acting as carrier/principal when compared with systems of unlimited liability.

The standard of care for the forwarder acting as agent is also sensibly based. The forwarder is responsible, under Clause 15, for fault or negligence in its own actions or in selection of third parties but is otherwise not responsible for losses. Liability, when established, is based on the provisions of Clause 14 i.e. limited liability.

Warehousing appears to be an activity carried out by the forwarder as an agent under Clause 16 subject to the liabilities of Clause 15. The provisions are somewhat lacking in clarity. There is an obligation on the forwarder to insure goods against fire flood and theft damage for their full value plus 10% unless the customer agrees different arrangements.

The draft also lists responsibilities of the customer and obligations of the forwarder to keep accounts.

Overall the draft presents some interest, particularly in its provisions on limited liability and attempts to place forwarding firmly within a market-economy system with minimum interference by the authorities.

**Moldova**

*Civil Code* (no 1107-XV of 6.06.02)

The liability of "transport agents" is set by the specific transport Codes.

*Law on transport* (no 1194-XIII of 21.5.97)

Relevant parts are Articles 7, 16-19

*Road Transport Code* (no 116-XIV of 29.7.98)

Relevant Articles are 2,3,25(2), 35

*Rules for freight forwarding activity* (no 195 of 9.12.99

- Allow forwarders to operate as road carriers
- No licensing required
- Tariffs are free

- Right of lien
- Does not define liability or limits

Counterparts reply that:

- No obligation to use specific document and use of FIATA docs therefore permissible but must be in Moldovan.
- Standard trading conditions permissible and AEM Trans Association has them. Can also use FIATA FBL terms
- Some compulsory and some voluntary insurances, not well developed.

*Draft Rules for rail freight forwarding* are under discussion.

However private forwarders may already work on basis of annual agreements with the railways.

*Analysis of Rules for freight forwarding activities*

I. General provisions

The Rules refer to the Road Transport Code, thus restricting its scope of regulation to the freight forwarding services in relation with the *road haulage* only.

The Rules provide for two types of transport operators: (1) those operating their own fleet and (2) those contracting other operators (quote: "contractual operator")...quote: "Freight forwarder can act as contractual operators". This means the Rules permit both roles – agents and principals.

Notice: the national legislation implies that FF may act as principal only for the purposes of road haulage.

II. Provision of services

*Contract* is said to be the legal basis for FF services. Its written form is mandatory.

The scope of services of the FF may include all goods handling operations, inland (meaning any transportation legs within the borders), documentation, escorting, insurance (when and if agreed), customs procedures plus advise, consulting, information supply, notifications.

Specific contractual scope is to be determined by the "order" issued by the client to the FF. The order is also to outline *the route* and *the mode of transport* to be used... Clause 9 of the Rules says: "should the order be incomplete or inconsistent with the FF contract, the FF is entitled to act as he deems necessary under the given circumstances, at the client's risks and costs".

The Rules directly allow for transport documentation made in accordance with either national law or international agreements and forms.

Insurance is made available only under the written order of the client, not being compulsory.

Dangerous and perishable goods are taken forward by the FF under the written order, otherwise all risks incurred with such transportation are with client.

III. FF Contract

General rule – the FF is an agent.

The contract must include: name and addresses of the parties, subject, rights and duties, liabilities. Model contract is annexed to the Rules, being recommended, not obligatory. So, business partners are quite flexible determining the set of contract provisions.

IV. FF Order (Instruction)

The order can be either part of a contract or be issued separately. Only written form is acceptable. However, it is not made explicitly whether the order may substitute the contract (ex. for the purposes of banking, taxation, other compliance purposes) or be an additional task for the FF within previously agreed framework contract. From the general sense of the Rules I would suppose that it is exactly the case, i.e. the order may be either be issued together with contract or follow it after a while, however within the same agreed framework contract.

Rules: "if an order is issued under the framework of the contract, it has to be immediately implemented by the FF"....."if an order is issued as a separate task, the FF has to confirm the acceptance thereof, and the order is than considered to be a contract."

The order can be also instructed on the phone. If this is the case, written order should follow within ten days thereafter.

Model order (instruction) is annexed to the rules having same force as a model contract.

V. Rights and duties of FF

Rights: to be reimbursed for costs incurred with services plus to receive remuneration; to perform transport operation (transportation contract is than to be in place); to agent third parties; to choose transport operators and to determine transport routes; to perform border crossing related services; right of lien; other FF services enlisted earlier in chapter II.

Duties: due performance; to follow instructions of a client, however, should instructions be found by the FF threatening secure delivery of goods, proper notification of a client will protect FF from relevant risks; proper documentation of incompliance of packing, quantity, etc; provision of sufficient transport vehicles.

Rights and duties of a client correspond to those of the FF.

VII. Liability

The Rules stipulate when the FF is liable and when he is not liable, and what a client is liable for, in general, not setting however any limits or basis of it.

**Ukraine**

*Civil Code* (particularly Chapter 65 Clauses 929-935)

- defines the freight forwarding contract including liability provisions
- Clause 916 defines carrier's right of lien

*Economic Code of Ukraine* (commercial code)

Clause 316 defines freight forwarding contract as a specific form of agreement

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*Law on Freight Forwarding Activity of 1.07.04 No 1955-IV*

The law gives detailed provisions regarding freight forwarders and the services they perform.

It contains basic definitions of "freight forwarder", "freight forwarding activity", "freight forwarding services", "client", "carrier" etc and applies to all modes except pipelines, recognising that forwarding is usually a multimodal business. It also applies to carriers when they undertake forwarding activity.

Article 5 allows formation of forwarder's associations and defines the scope of their activities while Articles 6 and 7 deal with state policy in forwarding based on principles of non-discrimination and avoidance of monopolies. It includes the interesting concept of expressly involving forwarders in the development of regulatory legal acts in the field of forwarding, as is done informally in most Western economies.

Article 8 refers to some state-devised rules on specific forwarding services, which has a slight flavour of command-economy thinking, but the article also allows other services agreed in the contract between forwarder and customer. There is a rather imprecise reference to Incoterms, which are primarily sales contract rules rather than transport rules. There is also a reference to insurance of goods, which does not make it clear whether this is compulsory or optional.

The forwarding contract must be in writing according to Article 9 and this article sets out the minimum information that must appear in the contract. It is not made clear whether the forwarder acts as agent only or also as principal, though the provisions on costs suggest that the forwarder is deemed to act as agent. It seems that the responsibility of the parties may be set out in the contract including limitation of responsibility for such matters as Act of God. Specific authorisation is given to undertake groupage traffic under one transport document. The movement of the cargo from point of origin to destination must be evidenced by appropriate documentation. Article 9 also deals with entitlement to charge fees and sets out categories of costs (which are not included in fees) in some detail.

Article 10 gives a right of lien, unless the contract provides to the contrary. The law does not deal with notice to the client and there may be a need for contract conditions to make the lien workable in practice. Article10 also gives the client the right to choose and change the route for the cargo movement and the forwarder similar rights provided these appear in the contract.

The basis of responsibility of the forwarder is unclear. Reference is made in Article 14 to the Civil Code, other laws and to the contract so the basic premise is probably unlimited liability. The Law itself apparently does not limit forwarder liability. However, Article 11 states that services must be rendered in accordance with the contract and this may open up the way for introduction of standard contract terms by the forwarder. It also states that "other responsibilities of the forwarder may be stipulated in the contract". Whether these could define the basis of liability, limit liability and introduce time bars on claims remains to be investigated. In practice, compensation may be according to some standard scales (in line with former Soviet models) which may in practice fall far short of actual full compensation. In Article 14, the forwarder is also made responsible for the actions of third parties as though they were his own, which is difficult to reconcile with the pure agency role which appears to be that of the forwarder in most areas of his activity.

Article 13 states that the forwarder insures the cargo and its liabilities in accordance with the law and the contract. It is left unclear whether either of these insurances is compulsory or optional.

*Law on foreign economic activity of 16.04.91 No 959-XII*

This defines the forwarder's activity in the soviet-style system of "foreign economic activity"

*Law on transportation of dangerous goods of 6.04.00 No 1644-III*

Defines forwarder's role as a consignor or consignee of dangerous goods

*Law on Railway Transport of 4.07.96 No 273/96*
*Statute of Railways of Ukraine of 6.04.98 No 457*

These define the activity of forwarding in railway operations

*Rules of freight carriage by air of 14/03/03*

Define the role of the forwarder as agent for the customer and/or the airline

*Merchant Shipping Code 1995*

Defines the role of the forwarder in maritime transport

*Law on Road transport of 5.04.01 as amended No 2344-III*
*Rules of cargo transportation by Road transport of 14.10.97 No 363*

These define the role of the forwarder in road transport

**Uzbekistan**

*Regulations for freight forwarding enterprises and procedure for rendering of freight forwarding services* (Decision of Cabinet of Ministers no 348 of 9.09.2000

This contains very extensive definitions, which are more a description of particular activities than binding legal definitions.

Article 6 places importance on the contract between customer and forwarder, which must be made in writing and registered with the authorities. The forwarder must assist the development of the export potential of Uzbekistan and development and choice of optimal transport routes.

Article 12 states that Licensing and certification is required and that the state may control pricing and general development of forwarding activity. Conditions for a licence are set by the Cabinet of Ministers of Uzbekistan and are issued by the Uzbek Agency of Automobile and River Transport. Present conditions include:

- Certificate of professional competence
- Solvency and office facilities
- Qualitative checks on performance

Under Article 18, the forwarder, in the absence of contrary instructions from the sender evidenced in the contract, may choose the vehicles, route and manner of delivery of the cargo, and may take appropriate steps to safeguard the cargo during the transit if circumstances so demand. The forwarder is entitled to charge a commission for its services and under Article 19 has a right of lien as fixed by national or international legislation.

Under Article 20, the forwarder is fully liable for his own failures and liable for acts of third parties as though they were his own, but with a right of recourse afterwards against the defaulting third party. Compensation is based on the value declared in the invoice.

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# Annex 6 Analysis of Suitability of the UNCTAD/ICC RULES for use in the TRACECA Region

## Overview

The Consultant's initial benchmarking assessment of the situation in the Region was that benefits would flow for both shippers and forwarders if there was increased use of the existing UNCTAD/ICC Rules in multimodal transport operations. With many international transits in the region involving a maritime journey on the Black Sea or the Caspian and/or combined road/rail transport, the UNCTAD/ICC Rules could provide a voluntary contractual regime allowing assessment of liability in multimodal transport. They also underpin the FIATA multimodal transport bill of lading (FBL) and the legal terms of contract which appear on the reverse of the FIATA FBL. The Consultant suggested it might be possible to incorporate the Rules as an effective "multimodal transport convention" in the region by making appropriate provision in a technical annexe of the MLA. This would further facilitate the use of the FIATA FBL by forwarders in the region. Comparative analysis of the UNCTAD/ICC Rules was carried out at an early stage in the project and the sections below detail the findings of the Consultant at that stage in the project:-

"The 13 UCTAD/ICC Rules have been analysed to establish whether there are likely to be any barriers to the use of the terms they contain in national legislation within the TRACECA region.

The initial conclusion is that few of the terms are likely to be in conflict with national legislation. Further work will be done to check whether any such conflicts exist in fact. Furthermore, the Rules clearly provide what is to happen in such situations. Rule 13 states "These Rules shall 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". The effect of Rule 13 is that where national law provides a different solution to that found in the UNCTAD/ICC Rules, *national* law will prevail, if there is no applicable international convention, but otherwise the Rules apply.

The situation in the TRACECA region is not likely to be substantially different from that found in the EU where there are still widely differing national legal regimes relating to goods in transit, but the UNCTAD/ICC Rules provisions nonetheless appear to work successfully in many door-to-door bill of lading terms, including the FIATA FBL.

## Textual analysis of the UNCTAD/ICC Rules

*Rule 1: Applicability*

The Rules can be applied both to multimodal and unimodal transits and whether or not a transport document is issued. No conflict is envisaged with national laws.

*Rule 2: Definitions*

This is not believed to present any likely conflict with national legislation as the definitions apply only to the contract situation and do not claim to be universal definitions.

*Rule 3: Evidentiary effect*

No serious conflict is thought likely with national law.

*Rule 4: Responsibilities*

It is not thought likely that the provisions will conflict with national laws. It should be noted that the provisions for delivery under Rule 4.3 are more extensive than in the corresponding parts of the FIATA FBL.

*Rule5: Liability of the multimodal transport operator*

5.1 The MTO is liable for loss damage or delay unless there is no fault or neglect on its part. This is a reasonable standard but it could be in conflict with any legal system which imposes strict liability or an 'obligation de resultat' on a contractor. The Consultant will endeavour to check whether such stricter standards in fact apply in any of the TRACECA countries. Under the Rules those higher standards will in that case apply so that national law will in any case be respected.
Similarly, the requirement for a declaration in relation to the need for timely delivery as a precondition for a delay claim could be in conflict with national law but will in that case be overridden.
5.4 The maritime defences are based on the Hague-Visby Rules and so are unlikely to cause difficulties, though it should be pointed out that the negligent navigation defence has been strongly criticised and does not appear in the Hamburg Rules to which Georgia and Romania are parties.
5.5 Values are calculated on the basis of value at the time of delivery, which is the maritime standard. It is possible that national laws would have different provisions.

*Rule 6: Limitation of liability of the MTO*

6.1 Specific limits of liability of 666.67 Special Drawing Rights per package or shipping unit or 2 SDRs per kilo are set, based on those under the maritime Hague-Visby Rules. These limits are quite low and could conflict with national laws which either maintain unlimited liability or dictate different limits. Efforts will be made to verify the situation in each of the states. In the event of conflict, the national law will prevail. The effect of any provision requiring unlimited liability would be to increase liability costs for MTOs and to make it more difficult to obtain standard insurance packages.
6.3 Where no sea or inland waterway transport is involved, the MTOs limit rises to 8.33 SDRs per kilo. This is equivalent to the limit under the CMR Convention and is considered adequate in most circumstances. It could nevertheless be in conflict with national law.
6.4 This states that if it can be established where the loss or damage occurred, any applicable international convention or national law will prevail, thus resolving any conflict with the Rules in favour of those provisions. The Rules provisions therefore apply essentially to damage which cannot be localised to sea transport or to a specific inland place where specific laws apply. In theory therefore, most "hidden damage" should be dealt with under the Rules. The Consultant will attempt to establish whether any national laws would prevent application of the Rules to hidden damage.
6.5 Compensation in the case of loss from delay or consequential loss is limited to the freight paid by the customer. This limitation could be in conflict with national law, in which case national law will prevail, but the consequence could be higher insurance costs for the MTO if unlimited liability applies. It should be noted that under the FIATA FBL twice the freight is recoverable i.e. a more generous standard applies.

*Rule 8: Liability of the Consignor*

It is not thought likely that this would be in conflict with national law

*Rule 9: Notice of loss or damage to the goods*

The notice provisions could be in conflict with national law. The Consultant will attempt to find out if there are any instances of conflict.

*Rule 10: Time Bar*

The time limitation of 9 months for bringing legal action may not be consistent with national law which is quite likely to impose a longer period of limitation. Attempts will be made to verify the situation in the different states. This is an area where incorporation of the Rules by law could overcome any problems.

*Rule 11: Applicability to Tort*

It is possible that a contractual renunciation of rights in tort by the customer would not be effective under national law. Incorporating the Rules by law would overcome any such problem.

*Rule12: Liability of servants and other persons*

The "Himalaya" clause for the protection of servants, agents and subcontractors of the MTO may not be effective in all the jurisdictions. This is another area where incorporating the Rules by law could be useful, if the principle of extending protection to subcontractors is accepted.

*Clauses creating presumptions as to evidence or interpretation*

The UNCTAD/ICC Rules state in a number of places that the contract is to be interpreted in a particular way or that certain circumstances constitute prima facie evidence of facts. This is the case for example in Rule 5.3 allowing the goods to be treated as lost after a delay in delivery of 90 days or in Rule 3 and in Rule 9 dealing with notice of claims. The provisions appear reasonable and ones which might normally be upheld, but it cannot be ruled out that national laws may specify different rules of evidence and interpretation.

**Conclusions**

*Compatibility with National law*

It may be seen from the above analysis that there are a number of areas where it is possible that UNCTAD/ICC Rules are in conflict with national law. The Consultant will attempt to verify whether any conflict in fact exists on a country by country basis. The most important of these may be summarised as:

4. Basis of liability as set out in Rule 5.1
5. Limits of liability as set out in Rules 6.1,6.3,6.5
6. Time limits for claims as set out in Rule 9
7. Time bar for claims as set out in Rule 10

*Potential effectiveness of incorporation of UNCTAD/ICC Rules by law as means to facilitate application of FIATA FBL terms in their entirety*

The FIATA FBL terms rely on the UNCTAD/ICC Rules and in many places use the same words in their provisions, but they include additional provisions which do not appear in the UNCTAD/ICC Rules. Incorporation of the latter rules into national laws either directly or by means of the MLA, could therefore remove many, but not all, areas of potential conflict between the FIATA FBL terms and national law.

Incorporation could remove potential conflicts in the most important areas of basis of liability, limits of liability and time limits for claims and time bars. It would not, however, deal with the following

- Methods and routes of transportation (Clause 11 of FBL)
- Problems in effecting delivery (Clause 12 of FBL)
- Freight provisions (Clause 13 of FBL)
- Jurisdiction (Clause 19 of FBL)

These may be regarded as of lesser significance to overall operations than the issues which would be successfully facilitated by incorporation. The Consultant will attempt to establish whether in fact any of the above would be a source of conflict with national laws sufficiently great to merit further attention."

On balance, this analysis tended to validate the concept of seeking to incorporate the UNCTAD/ICC Rules across the TRACECA region as a means to facilitate use of the FIATA FBL by FIATA registered forwarders and to allow or require virtually identical main provisions to be adopted by other Multimodal

Transport Operators in relation to liabilities and claims. However, counterparts decided that this option was premature and requested that the Consultant continue to assist with the development of a regional solution tailored more to existing local practice.

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# Annex 7 Analysis of Suitability of the FIATA MODEL RULES for Freight Forwarding Services for use in the TRACECA Region

## Overview

The FIATA Model Rules for Freight Forwarding Services provide a possible blueprint for standard trading conditions for freight forwarders. The Consultant's initial assessment was that they could be a suitable framework for adoption, with modifications, by FIATA affiliated Freight Forwarder Associations in the TRACECA states. They provide a voluntary contractual regime dealing with the liability of the forwarder as an agent or as a principal issuing his own transport documents such as the FIATA FBL. Some of the provisions appear to go too far in protecting the forwarder in relation to its customer.

The 20 Rules were analysed to establish whether there were likely to be any barriers in national legislation to the use of the terms within the TRACECA region.

The initial conclusion was that some of the terms might conflict with national legislation. But the Rules clearly provide what is to happen in such situations. Rule 20 states "These Rules shall only take effect to the extent that they are not contrary to the mandatory provisions of international conventions or national law applicable to the freight forwarding services". The effect of Rule 20 is that where national law provides a different solution to that found in the Rules, *national* law will prevail, if there is no applicable international convention, but otherwise the Rules apply. The anti-conflict wording used is identical in substance to that found in the UNCTAD/ICC Rules. A package of measures in the TRACECA Region based around the UNCTAD/ICC Rules and the FIATA FBL terms and Model Rules could be coherent and consistent.

## Textual analysis of the FIATA Model Rules for Freight Forwarding Services

*Rule 1: Applicability*

The provisions are considered unlikely to be in conflict with national legislation.

*Rule 2: Definitions*

The definitions are not believed to present any likely conflict with national legislation as they apply only to the contract situation and do not claim to be universal definitions. It is useful to have definitions of such matters as "mandatory law, "in writing" and "valuables". The definition of dangerous goods may be considered rather too wide by customer interests.

*Rule 3: Insurance*

There would only be a conflict with national law if this should make cargo insurance a compulsory responsibility of the forwarder, which is considered unlikely.

*Rule 4: Hindrances*

This could possibly conflict with national provisions on force majeure but as the forwarder undertakes to take reasonable steps in such situations, it is unlikely that the practical conflicts would be substantial.

*Rule5: Method and Route of transportation*

Because the provisions of this clause can be overridden by the customer in the contract it is considered unlikely that there would be conflict with national law.

*Rule 6: The freight forwarder's liability except as principal*

The Rule relates to the forwarder when acting in a pure agency role, arranging contracts on behalf of the customer with carriers and other contractors or completing customs and other paperwork for the customer. There is a requirement that the forwarder should act with due diligence and also exercise due diligence in selecting contractors. The provisions appear reasonable. They should only conflict with national law if this imposes strict liability or an 'obligation de resultat' on a contractor. The Consultant will endeavour to check whether such stricter standards in fact apply in any of the TRACECA countries. Under the Rules those higher standards will in that case apply so that national law will in any case be respected.

*Rule 7: The freight forwarder's liability as principal*

The Rule in 7.1 and 7.2 relates to a forwarder who either acts as carrier or takes on carrier responsibility by issuing its own transport document or alternatively performs other logistics services itself or through others as principal.

The liability of the forwarder in these circumstances includes liability for its sub-contractors and is determined on the "network" principle i.e. law applicable to a particular sector of activity will be applied to the forwarding contract whenever that activity takes place. The wording of the Rule is not wholly precise but its intention appears to be to avoid conflict with any applicable national laws.

*Rule 8: Exclusions, assessment and monetary limits of liability*

8.1 There is an exclusion of liability in respect of valuables and dangerous goods (as defined in Rule 2) unless notified to the forwarder as such. Loss following from delay is excluded unless expressly agreed in writing with the customer. Both provisions could conflict with national law, though the opportunity to negotiate away the exclusion makes it less likely that there would be a practical conflict.
Consequential loss is wholly excluded and this could potentially conflict with national law.
8.2 The point at which goods are valued for the assessment of compensation is not defined, so this must be supposed to be interpreted in accordance with national law in each state and there should be no conflict.
8.3 There is a single limit of compensation for *loss or damage* of 2 Special Drawing Rights per kilo on the gross weight of the goods, which is in partial accordance with the low limit set by the Hague-Visby maritime rules. This limit is quite likely to be in conflict with national law. The Rule, however, contains an interesting proviso which should reduce the extent of any conflict. It states that the limit of liability shall be 2 SDRs per kilo "unless a larger amount is recovered from a person for whom the freight forwarder is responsible" This would take account of the variations of contractual and imposed liability limits whenever the forwarder makes use of others in the performance of services. There is no express undertaking to apply the same principle when the forwarder directly performs the service itself, but that is probably the positive effect of the anti-conflict wording in Rule 20 on mandatory law.
In relation to *delay*, the liability is limited to the amount of fees paid for the service concerned. This limit may be in conflict with national law and it should be noted that the limit is less than that provided for under the FIATA FBL.
There is a provision in Rule 8.3.3 for compensation to be paid for losses, other than loss or damage or delay to goods. It is not made clear what these losses are and Rule 8.1.3 apparently excludes consequential losses altogether. It is thought the losses covered are those caused by errors and omissions of a professional kind such as errors in the completion of documentation. An overall upper limit is set but the amount of this is left blank in the Model Rules, to be determined by the situation in particular states, thus avoiding conflict with national law. By way of illustration, in a similar set of terms in use in the United Kingdom, the upper limit is set at 75,000 SDRs in respect of any one transaction.

*Rule 9: Notice of loss or damage to the goods*

The notice provisions could be in conflict with national law, particularly that in 9.2 which creates a potential time bar after only 14 days.

*Rule 10: Time Bar*

The time limitation of 9 months for bringing legal action may not be consistent with national law which is quite likely to impose a longer period of limitation.

*Rule 11: Applicability to actions in Tort*

It is possible that a contractual renunciation of rights in tort by the customer would not be effective under national law.

*Rule12: Liability of servants and other persons*

The "Himalaya" clause for the protection of servants, agents and subcontractors of the forwarder may not be effective in all the jurisdictions.

*Rule 13: unforeseen circumstances*

This is not considered likely to conflict with national law

*Rule 14: No set-off*

The prohibition on set-off and counterclaim by a customer may conflict with national law.

*Rule 15: General lien*

The rule itself recognises possible conflict by stating that it applies only " to the extent permitted by the applicable law".

*Rule 17: Duty of indemnification*

17.1 The general indemnity is not expressed precisely enough and could lead to difficulties of interpretation rather than conflict with national law.

*Rule 18: The customer's liability*

As with Rule 17.1, the indemnity sought from the customer may be considered too wide and vaguely expressed leading to potential problems of interpretation.

*Rule 19: Jurisdiction and applicable law*

This could possibly be in conflict with national law on jurisdiction and applicable law, but provision is made for specific agreement with the customer, which may reduce any potential conflict.

*Clauses creating presumptions as to evidence or interpretation*

The FIATA Model Rules state in a number of places that the contract is to be interpreted in a particular way or that certain circumstances constitute prima facie evidence of facts. This is the case for example in Rule 8.3.1 allowing the goods to be treated as lost after a delay in delivery of 90 days or in Rule 9 dealing with notice of claims. It is possible that national laws specify different rules of evidence and interpretation.

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**Conclusions**

It may be seen from the above analysis that there are more areas of possible uncertainty or conflict with national law in the Model Rules than in the UNCTAD/ICC Rules or the terms of the FIATA FBL. Information regarding conflict in the UNCTAD rules and FBL will mostly also be relevant to the Model Rules.

On balance, however, this analysis tended to validate the Model Rules as a possible source for a contractual set of standard trading conditions following modification to meet local conditions by associations in the TRACECA region. The Model Rules could assist in achieving a high level of uniformity of contract terms in the region, but it is probably not realistic to expect that a single identical document would be adopted for all the countries. The FIATA precedent was used by the Russian Federation in its recent "Rules" and retained the interest of counterparts for use in the region.

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# Annex 8 Benchmarking with national examples outside the region

## Russian Federation

*Overview*

Current legislation and models of the Russian Federation have been examined, as Counterparts are inevitably influenced by neighbouring systems, whose legislation is easily available to and comprehensible by them, whether or not it conforms to international best practice.

A key feature of the Russian Civil Code is that it specifically states that limited liability may be introduced in laws made under the Code. Freight forwarding contracts must be in writing. A network liability system may be applied when forwarders use carriers to perform the transport service and forwarders remain liable for the acts of employees and third party contractors. The Russian Civil Code itself seems to pose few problems in relation to application of FIATA standards. The Russian Federal Law on Freight Forwarding Activity is more problematic, while the third tier of regulation, the General Rules, seek to implement FIATA standards as fully as the Civil Code allows.

Liability insurance is not compulsory under the current laws, but is made a requirement of the Russian Freight Forwarders' Association General Rules.

It is significant for the project that the draft TA on Freight Forwarding appears to follow the Russian Federal Law on Freight Forwarding Activity word for word in most of its articles 3-14. Counterparts appear therefore, wittingly or unwittingly, to have decided to align their legislation directly on Russian legislation whose forwarding legal structure appears to be tailored to its own special situation. Retaining such a model for TRACECA runs the risk of constraining the present and future development of the freight forwarding industry to follow the Russian model. Of course that may be a valid choice if the underlying policy has been properly debated within each state, but otherwise it cannot be recommended, as the Russian model differs from the systems found in Europe.

More specifically, freight forwarding activities in Russia are governed by:

**The Civil Code**

**Chapter 25**

This general section deals with responsibility for breach of contract. The defaulter must compensate losses in full. However, under Article 400, other laws (but not contracts) may limit the right to full compensation. Advantage of this has been taken to some extent in the provisions of the Federal Law on Freight Forwarding, to limit liability.

Responsibility is based on fault under Article 401 unless another basis of responsibility has been set out in a law or contract. The absence of fault must be proved by the person who is in breach. In the case of *business contracts* the standard of responsibility seems to be even stricter. The business contractor is liable except upon proof that proper discharge was impossible because of force majeure, defined as "extraordinary circumstances which it was impossible to avert under the given conditions" It is not stated that any other basis may be set out in law or contract and this may explain why the Federal law does not seem to depart in any way from the Civil Code, which it otherwise could under the basic provision in Article 401.

Actions of employees are regarded as those of the contractor itself and the contractor is liable for third parties engaged to perform the contract.

Finally the contractor is liable for losses arising through delay, under Article 405. It is likely, (though not specifically stated in the text) that the Article 401 possibility to limit liability through laws, applies equally to

losses stemming from delay as to other losses, but again advantage is not taken of this within the Russian Forwarding Law.

**Chapter 41**

This is completely dedicated to the forwarding contract but adds little of substance to the general provisions of the Civil Code.

Article 801 makes the freight forwarding contract the dominant instrument but subject to any contrary provision found in the Federal Law on Freight Forwarding, other federal laws and acts.

Article 802 requires that the contract be in writing.

Article 803 makes the forwarder liable on the basis and to the extent determined in accordance with Chapter 25 above but allows the liability of the forwarder to be determined under the rules applicable to carriage where third party carriers have been engaged.

Article 804 obliges the client to give sufficient instructions and Article 805 repeats that the forwarder is liable for the acts of third parties.

**The Federal Law on Freight Forwarding Activities** (30.06.2003)

This has duplicated many of the provisions of the Civil Code and filled some of the gaps. It is unclear in many respects to a Western European eye, but may work within the context of the Russian system. Perhaps the most interesting feature of the Russian law is its remarkable similarity to the draft Technical Annex on Freight Forwarding. Most of the clauses are actually identical, so far as it is possible to judge from the translations into English.

Under this law, the contract must be made in a "simple written form", which in practice means that issuance of a FIATA bill would not be enough in itself to meet the formalities requirements. So, the FBL can only be issued in addition to the contract. However, the contract is normally based on the model recommended by the Russian Freight Forwarders' Association for General Rules as described below.

**Textual Analysis of the Russian Federal Law on Freight Forwarding activity**

*Article 1:*

Forwarding services consist of "rendering services in the organisation of the carriage of cargoes by any type of transport and the drawing up of the documents of carriage documents for Customs purposes and other documents necessary for effecting the carriage of goods".

The Contract may make provision for any matters not stipulated in laws, as is already stated in the Civil Code.

*Article 2*

This refers to Rules (not yet made) on various operational matters in very similar terms to the provisions found in Article 3 of the draft TRACECA Technical Annex on forwarding. This could allow maintenance of command-economy interference in operational matters and it is interesting that new Rules have not in fact been made and that the Civil Code and the General Rules for Freight Forwarders of Russia (a contractual document) appear to deal adequately with the practical aspects of documents etc.

*Article 3: The rights of the Forwarder and Customer*

The forwarder is free to organise the carriage, subject to contrary instruction from the customer and is given a right of lien. Many of the described rights could have been left to contract given the wide powers already contained in the Civil Code.

Many of the Russian provisions have been included in modified form in Article 4 of the draft TA on freight forwarding.

*Article 4: The duties of the forwarder*

Special provisions apply in relation to consumers. Most other provisions could be left to contract.

There is a specific requirement for the forwarder to issue a forwarding document to the customer and it will be seen later that the nature of this document issued in practice has a high importance in Russia, as it may determine whether liabilities are assessed in accordance with domestic or international rules.

Again very similar provisions appear in Article 5 of the draft forwarding TA.

*Article 5: The duties of the Customer*

These are mostly set out already in the Civil Code.

Very similar provisions appear in Article 6 of the draft TA on freight forwarding.

*Article 6: General grounds of liability*

In domestic forwarding, the liability is determined in accordance with the Civil Code i.e. it is full liability based on a very strict duty of care going beyond mere fault.

However, where "relevant forwarding documents" are issued in international forwarding, the limit of liability for breach of contract is fixed at 666.67 SDRs per package or unit, with no upper limit. This is the "common norm" applying to all kinds of loss other than loss or damage to the goods, for which specific provision is made in Article 7. There is no right to limit liability if there has been wilful misconduct on the part of the forwarder.

A separate provision stipulates a penalty of 10% of the outlays of either forwarder or customer

Very similar provisions appear in Article 7 of the draft TA. In some cases the draft TA has been indiscriminatingly copied from the Russian law-see the inappropriate reference in the draft TA to a "paragraph 2 Clause 9" which is present in the Russian law in a proper context but refers to quite irrelevant and inappropriate matter in the draft TA because the references have not been followed through properly in the draft TA.

*Article 7: loss, shortage or damage of the cargo*

The whole article is formulated in a manner that seems to contain uncertainties and ambiguities to a western eye. In particular it is not always clear whether provisions apply to domestic situations alone or to both domestic and international forwarding.

Article 7.1 adopts the basis of liability found in CMR for domestic loss. This appears compatible with the Civil Code general provision in Article 401.3 C.C, which allows law or contract to set a different standard of responsibility to that set out in the Civil Code for business transactions. It is useful to point out that this is less than strict liability (as used in some of the regional draft codes) and that the Russian law foresees circumstances (such as Hijack) where the forwarder may not be liable. When liable, loss must be compensated in full.

Article 7.2 makes the limit of liability in international forwarding 2SDRs per kilo unless a higher amount of compensation is obtained from an underlying carrier. It is not stated in the law but believed to be the case that international documentation must have been issued for these provisions to apply.

Article 7.3 allows the contract to provide for pro-rata reimbursement to the customer of forwarding charges in the event of loss and damage, which supposes that the contract may in fact exclude such reimbursement, raising questions as to why such provision is included in the law.

Article 7.4 requires lost profit to be compensated but without limitation of liability. This applies only to domestic traffic.

Article 7.5 makes provision for lost profit in the case of international traffic but subject to limitation as provided for in the law. As two limits are provided for vis 666.67 SDR per package or 2SDR per kilo it is rather unclear which limit applies. This is the more so as it is not made clear how loss of profit is calculated. It may normally be considered to be included already in the "value" of cargo if that cargo has been sold, as is contemplated in Article 7.6 which follows. So it is unclear whether this article 7.5 right is cumulative with other rights or already included in some calculations of loss and damage.

Furthermore nothing is said expressly about consequential losses and they may remain unlimited in both domestic and international traffic.

Article 7.7 allows the customer to treat the goods as lost if they are not delivered in 30 days.

The draft TA on freight forwarding retains all the above provisions on an almost identical basis, sharing the same ambiguities and uncertainties.

*Article 8: notification of loss*

Immediate notice of loss is required except for hidden loss in which case 30 days are available.

The Draft TA Article 9 contains identical provisions.

*Article 9: Liability for delay*

Compensation is due for delay except in the case of force majeure or customer fault. The liability is not stated to be subject to any limit in the case of business transactions. In the case of consumer transactions, a scale of compensation is set out. It is very unclear whether it is intended that compensation shall only be paid in the case of such personal transactions.

Similar provisions are contained in Article 10 of the draft TA.

*Article 10: Customer liability*

The customer appears to have unlimited liability if requisite information is not provided and the forwarder thereby suffers loss. This is generally the situation also in other countries.

Identical provisions appear in the draft TA Article 11.

*Article 11:Varying liability*

Increased liability may be agreed with the forwarder and the same provision appears in draft TA Article 12.

*Article 12:Claims and actions*

Claims must be made in writing within six months, but this period may be extended by the forwarder. The draft TA Article 13 is set in identical terms. The procedures effectively reduce the liberty of the customer to bring a claim right up to the end of the period of limitation of one year set out in the next article which does not seem logical or fair but may reflect general practices of Russian and ex-Soviet courts.

*Article 13: Limitation of actions*

There is a one year time bar, also found in the draft TA Article 14

**Transport Charters for specific modes**

These have to be referred to for the purposes of defining network liabilities of the Forwarder as described above, when using an individual modal carrier as a sub-contractor. They would also apply to forwarders operating as Multimodal Transport Operators (MTOs).

**General Rules for the Freight Forwarders of Russia**

These were adopted by the General Assembly of freight forwarders of Russia in 11.01.2002. They are recommended by the Russian Chamber of Commerce and approved by the Ministry of Transport of Russia. They are based on the FIATA model rules for freight forwarding services to a large extent but amplify these in an interesting way. However in relation to domestic responsibilities and limitations of liability, the Rules refer to the provisions of the Civil Code.

The Rules could provide a suitable model for use in the 10 former Soviet Republics of TRACECA.

**The Rules for Freight Forwarding Services of 06.02.1981**

These applied in those parts not conflicting with the current Law of 2003, as the law neither amended nor cancelled these Rules. The Rules listed operations and services in a very detailed manner, with regard to the specific modes of transport. They are replaced by the Rules of Freight Forwarding Activities issued by Decree on 8.09. 2006, considered below.

**The Rules of Freight Forwarding Activities of 08.09. 2006**

These replace the 1981 Rules and represent a continuing welcome shift away from soviet-style detailed prescriptive legislation to a much simpler, concise and more flexible form. They do not much affect the logistics of forwarding activity and so should not prevent future developments.

The Rules are coherent and deal primarily with instructions and documents, namely the Freight Forwarding Instruction, the Freight Forwarding Receipt and the Warehousing Receipt. The Rules require completion in writing and prior approval of forms by the relevant ministry. This should encourage the spread of uniform documentation as individual forwarders will find it tiresome to have to obtain approval, while this work can easily be carried out by a Trade Association on behalf of its members.

Clause 6 appears to authorize the use of the FIATA FBL and other FIATA documents in international transport if there is agreement with the customer, but it will probably be necessary for these to obtain approval from the relevant ministry in the first instance through the Russian Trade Association affiliated to FIATA.

The Rules do not prevent a forwarder from acting as a Principal. However, Clause 15 gives the customer certain rights to demand details of freight rates paid, which may strain the relationship with a forwarder-Principal if exercised, as a Principal will construct an inclusive rate for the door to door movement which will include making profit on the freight rate for individual segments of transport. The Rules appear to go

behind this commercial confidentiality of the Principal, albeit that Clause 15 is probably intended to apply mainly to the traditional agency role.

The existence of the Rules will allow minor practical details of regulation to be altered from time to time without having to pass a new forwarding law. Overall the Rules present an interesting model for those TRACECA states who share a common soviet legal heritage, but they may be of less interest to other states.

**Textual analysis of the General Rules for Freight Forwarders of Russia and comparison with the FIATA Model Rules for Freight Forwarding Services**

*Rule 1: Scope*

The Rules are for use of the members of the Freight Forwarders Association of Russia. It is not indicated whether they may be used by others.

They require incorporation in writing as this is a requirement of Russian law. Whether or not such a requirement is mandatory elsewhere, it is certainly a sensible requirement to adopt.

Rule 1.1.3 partly follows FIATA but FIATA allows the Customer the benefit of any more favourable terms negotiated as part of the contract. The Russian terms do not, which may be criticised.

*Rule 2: Definitions*

The definitions broadly follow the FIATA examples and are actually used in the text, unlike many found in draft instruments received by the Consultant from counterparts in the Region.

"delivery to the consignee" replaces "distribution" in the definition of freight forwarding services.

"Freight Forwarder" may apparently only apply to Russian forwarders entitled to operate in Russia. It is not clear how this is applied practically.

In the definition of "carrier", an addition is made to the FIATA material stating that the forwarder may be the contracting carrier. No mention is made of being a performing carrier. This tends to cause confusion with the later Rule 10 and this addition within the definition therefore seems unnecessary and unhelpful.

The definition of dangerous goods may be considered rather too wide by customer interests, but does precisely follow FIATA.

*Rule 3: Freight Forwarding contract*

With the exception of Rules 3.4 and 3.5, which follows Rule 17.1 and 4 of FIATA, the material here is original and describes the nature of freight forwarding obligations in terms which parallel the Civil Code and Law on Forwarding provisions. The provisions indicate that the services may go far beyond mere agency services and may even extend to carriage. This reflects the reality of modern forwarding.

*Rule 4: Freight Forwarding Documents*

This is another largely original Rule directly referring to FIATA documents.

*Rule5: Forwarding instructions*

This is also an original Rule which refers to a model form of instructions for customers to use but not developed at the time of printing of the Rules. The value of this Rule cannot at present therefore be assessed. It is a little repetitive in referring to the use of writing, which is already made a fundamental requirement by Rule 3.1, and
In defining "writing" which is already done in the definitions, but at least the definitions are identical!
The Rule generally appears useful in guiding the Customer on procedures but it is rather too vague in Rule 5.8 in seeking "complete information required" for implementation of the instructions. This could be abused to the disbenefit of customers.

*Rule 6: Freights*

6.1. It is thought that "places" should be "pieces" in the second sentence and that the sense of the Rule is to put the onus on the customer to require checking, except when goods leave the forwarder's own premises.

6.2. There is some repetition here as instructions must anyway be in writing

6.3 This usefully makes reference to the FIATA Dangerous Goods Declaration.

6.4 The decision whether or not to issue FIATA documents seems to be left to the customer. This does not seem very prudent or sensible. It would be preferable if, at the most, the Customer were given a right of veto, and/or right to request a different type of document e.g. conventional liner bill of lading. Normally it would seem sensible for the forwarder to use its initiative in issuing FIATA documents rather than to have to rely on a request from the customer. It is unlikely to help widen the use of FIATA documents if such a clause is maintained.

*Rule 7: Method and route of transportation*

This follows Rule 5 of the FIATA Model Rules

*Rule 8: Insurance*

This largely follows Rule 3 of FIATA Model Rules, but also requires forwarders to maintain liability insurance to match obligation when issuing FIATA documents. This seems very sensible.

*Rule 9: Rights and duties of the Freight Forwarder*

9.1-9.3 very clearly set out the different ways in which the forwarder may perform the contract through third parties, through its own transport (where a reference to performing carrier could be helpful) or as a contracting carrier using FIATA waybills in which latter case the FIATA terms shall apply. This could be a useful model for the region

9.5-9.7 are somewhat repetitive of other sections of the Rules e.g.3.5 but are no doubt put in for balance with the provisions immediately above. 9.5 roughly follows 6.1.1 of FIATA.

*Rule 10: Freight Forwarder's liability*

10.1 to 10.3, which are perhaps the most important provisions in the Rules, almost exactly follow the corresponding provisions in Rules 6 and 7 of the FIATA Model Rules, in distinguishing between pure agency, principal and carrier roles. It is encouraging that these clauses were apparently found compatible with Russian law and this should be a good precedent for the region.

10.1.1 The opening sentence does not read too clearly and is an addition to the FIATA wording which is repetitive and may be considered unnecessary. On the other hand the addition which is intended to

qualify 10.2.1 and 10.2.2 seems useful. It states that proof of carrier or principal status depends on the nature of the document issued.

Rule 10.1 relates to the forwarder when acting in a pure agency role, arranging contracts on behalf of the customer with carriers and other contractors. There is a requirement that the forwarder should act with due diligence and also exercise due diligence in selecting contractors. The provisions appear reasonable.

Rules 10.2.1 and 10.2.2 and 10.3 relate to a forwarder who either acts as carrier or takes on carrier responsibility by issuing its own transport document, or alternatively performs other logistics services itself or through others as principal. The liability of the forwarder in these circumstances includes liability for its sub-contractors and is determined on the "network" principle ie law applicable to a particular sector of activity will be applied to the forwarding contract whenever that activity takes place.

Rule 10.3 is an addition to the FIATA Model provisions but does not add much to the sense of the clauses.

Rule 10.4 repeats FIATA Rule 8.1 in excluding liability in respect of valuables and dangerous goods unless notified to the forwarder as such. Loss following from delay is excluded unless expressly agreed in writing with the customer. Consequential loss is wholly excluded. It is again interesting and useful that these exclusions are apparently compatible with Russian law as the provisions on consequential loss in particular might be considered to be in potential conflict with it.

*Rule 11: Assessment of compensation*

This remedies a lack in the FIATA Model Rules by defining the basis of compensation in terms which are based on the model of CMR. Again this is a useful model for the region, subject to being compatible with other national laws.

Rule 12: Monetary limits

12.1 makes financial limitation dependent on Chapter 25 of the Russian Civil Code.

12.2 seems to be intended to tie in with the Russian law on Forwarding, which sets different limits for national and international operations. When FIATA documents are used (it is not made clear whether this means any FIATA documents or just the FIATA multimodal transport documents) compensation for *loss or damage* is 2 Special Drawing Rights per kilo on the gross weight of the goods, as in Rule 8.3 of the FIATA Model Rules "unless a larger amount is recovered from a person for whom the freight forwarder is responsible"

12.3 limits compensation in relation to *delay* to the "actual losses incurred" which may be meant to preclude recovery without proof of loss but could equally be construed to provide potentially unlimited liability when such losses are proved. 12.4 may prevent this by tying the compensation back into that effectively provided under the liability provisions in the Russian Forwarding law, but there is certainly a degree of ambiguity which is not helpful. Under the FIATA Model Rules liability for delay is limited to the amount of fees paid for the service concerned. However, this limit may be in conflict with national law and is less than that provided for under the FIATA FBL. So neither the Russian nor the FIATA Rules may be perfect in this aspect.

There is no specific provision for other losses and these too must fall to be determined under Rule 12.4. FIATA does make provision for other losses in its Rule 8.3.3. An overall upper limit is set but the amount of this is left blank in the Model Rules, to be determined by the situation in particular states, thus avoiding conflict with national law. By way of illustration, in a similar set of terms in use in the United Kingdom, the upper limit is set at 75,000 SDRs in respect of any one transaction. But it is quite appropriate to determine this according to national law as has been done in the Russian Rules.

12.5 follows FIATA Rule 8.3.1 and is taken from the UN Convention on Multimodal Transport

12.6 and 12.7 exactly repeat 9.1 and 9.2 of the FIATA Model Rules on the customer's obligations to give notice of loss or damage. It seems an error not to have put these in a separate Rule in the Russian text, but the problem is one of clarity rather than substance. The notice provisions could be in conflict with national law elsewhere, particularly that in 12.7, which creates a potential time bar after only 14 days.

*Rule13: Time Bar*

The time limitation of 9 months for bringing legal action is controversial so it is interesting that it is considered to be compatible with the Russian Civil Code. It may not be consistent with national law elsewhere, which may insist on a longer period of limitation.

*Rule14: Liability of servants and other persons*

The "Himalaya" clause for the protection of servants, agents and subcontractors of the forwarder is apparently effective under Russian law. It is a very useful protection but may not be effective in all countries of the region.

It is surprising that equal protection from claims in tort is not given to the forwarder itself as is the case in Rule 11 of the FIATA Model Rules It is possible that a contractual renunciation of rights in tort by the customer would not be effective under Russian law, which makes the protection for servants etc difficult to understand.

There is similarly no right of set-off as given in Rule 14 of FIATA. This may be because such right conflicts with Russian law. If so, the situation is quite likely to be the same in the region.

*Rule 15: General lien*

The rule follows FIATA wording by stating that it applies only "to the extent permitted by the applicable law". It would be interesting to know what provisions apply under this law.

*Rule 16: The Customer's rights and obligations*

16.1, 16.2 and 16.4 are original additions, which mainly repeat provisions from elsewhere in the text.

16.3 follows Rule 3 of the FIATA Model Rules as does 16.5 which is based on FIATA Rule 16.

16.6 broadly follows FIATA 17.1 and 16.7 on General Average follows FIATA 17.2

16.8 is original and may be criticised both for its lack of clarity and for the possibility of unfair penalties being included in the contract.

*Rule 17: The customer's liability*

17.1 follows Rule 18 of FIATA exactly The indemnity sought from the customer may be considered too wide and vaguely expressed by some.

17.2 is an original and useful addition dealing with the difficult problem of vehicle demurrage or detention. It is very well expressed.

*Rule 18: Claims and actions*

This is similar to FIATA Model Rules 19 but in the English text the reference to "applicable laws" is slightly weaker than FIATA and no jurisdiction provision applies, which could lead to conflict with foreign forwarders and customers over choice of jurisdiction.

*Rule 19: Enforceability of the General Rules*

As in FIATA Model Rules 20, this states that the Rules take effect only to the extent they are compatible with international conventions and Russian law

**Direct Mixed Communication/Multimodal Transport**

Direct Mixed Communication was the Soviet model for multimodal transport relying on detailed rules for interchange between road, rail and inland navigation adapted to the climatic and geographical conditions of the Soviet Union. Its provisions are largely perpetuated in the individual charters for the different modes of transport more recently enacted by the Russian Federation. The multimodal provisions of these charters still retain a planned-economy approach to the whole logistics of multimodal transport and may not be regarded as appropriate models for the TRACECA region as it develops a more market-driven approach to the provision of services. The Charter provisions do not seem to facilitate the position of a customer seeking to claim for loss or damage occurring during multimodal transport.

The Russian Federation is also believed to have developed a draft law on multimodal transport, which has never been enacted, but which maintained a number of the features found in the existing Charters. It is significant that counterparts in TRACECA appear to have based the draft TA on Multimodal Transport substantially on this abortive work. Article 4 of the draft TA contains similar planned-economy provisions on the logistical organisation of multimodal transport services. These do not sufficiently allow for the different practical solutions which may now be adopted by carriers and would unnecessarily constrain the future, if enacted.

*Conclusions*

The Russian Civil Code does not seem to pose obstacles to implementation of most of the FIATA standards. The "General Rules" intended as standard trading conditions, provide a satisfactory model for the region.

The Russian law on freight forwarding activity is less satisfactory as a benchmark document, though it does have the merit of allowing limited liability in international traffic and the merit of being a serious attempt to move away from command economy style legislation in most of its provisions. The Rules just made under the Law are generally satisfactory in not impeding the use of the FIATA FBL.

The Russian Federation has not yet adequately adapted its former system of Direct Mixed Communication to meet modern trading conditions. The fact that draft legislation to regulate the whole sector has not yet been enacted and that the sector depends on the Civil Code and underlying single-mode Charters would seem to indicate that the difficult issues of policy in relation to multimodal transport services have not yet been fully clarified.

It is interesting to note that this Russian Federation law on freight forwarding forms the basis for the draft TRACECA TA on Freight Forwarding and may explain why this departs from more commonly found international benchmarks. The Russian Federation provisions have also influenced most of the draft forwarding laws currently being developed by Counterparts. This presents some potential problems because they lack full compatibility with the system implied in the UNCTAD/ICC Rules and the 1980 MT Convention and appear to contain legal ambiguities, which may not be serious in a Russian context but could be so in a wider international context.

**France**

While France does not have legislation that precisely covers the areas being benchmarked with regard to freight forwarding, the general structure of its "Contrats Types" (standard contracts) in the field of transport give some idea of how contract conditions for freight forwarders could be included in a package of legislative measures.

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**Germany**

*Overview*

The freight forwarder in Germany is subject to three tiers of regulation.

Basic responsibilities are set out in the Civil Code. The freight forwarder is liable for loss and damage to goods and the customer must be fully compensated for losses, if no different legislative or contractual arrangement applies. The Civil Code, like the Russian Civil Code therefore foresees the possibility of limited liability, but only if the parties to the contract agree on this, whereas under the Russian system there must first be legislation limiting liability.

The German Commercial Code (HGB) makes specific provision for forwarders, carriers and storekeepers. The forwarder can act as agent for another or in his own name as principal and carrier.

When acting as an agent, he must exercise due diligence in selecting carriers and other contractors and charges a fee for his services. He cannot add a mark-up to the freight charge. He is entitled to a lien if his fee and or the freight is not paid. Where a fixed price contract is offered the forwarder is treated as Principal/Carrier.

While there is a standard limitation period of 3 years for legal claims under Section 195 of the Civil Code, the HGB reduces this to 1 year for carriers and forwarders.

Standard Trading Conditions are dealt with in the German Civil Code Section 305: "standard business terms are all contractual terms pre-established for a multitude of contracts which one party to the contract (the user) presents to the other party upon the conclusion of the contract". The parties may agree in advance that particular standard business terms (such as ADSP) will apply to a particular type of transaction.

Most German forwarders trade under the standard ADSP conditions. They refer to them on their letterheads as an additional device to assist proof of incorporation. ADSP conditions are recommended by the Federal Association of Freight Forwarders, the Federal Association of German Industries and the Federal Association of Trade Enterprises and were jointly negotiated between them. They may therefore be said to apply by consensus.

More specifically, freight forwarding activities in Germany are governed by:

**The German Commercial Code (HGB)**

*Limits of Liability for carriage*

Under section 431 of HGB, the compensation payable for total loss of or damage to the goods is limited to an amount of 8.33 SDR per kilogram of the gross weight of the goods (the limit under CMR). In addition to the compensation, the carrier must refund the freight, public levies and other charges occasioned by the carriage of the goods. The compensation payable by the carrier for delay in delivery is limited to an amount equal to three times the freight. Under Section 433 If the carrier is liable for consequential loss connected with the performance of the carriage, the compensation payable is limited to an amount equal to three times the amount payable in the event of loss of the goods. This sets a readily insurable limit for consequential loss while allowing the customer an appreciable amount of compensation.

According to section 449 of HGB, the parties to a contract of carriage are not allowed to deviate from the statutory liability provisions unless agreement is reached after detailed negotiations but they may agree on different limits, provided these are neither lower than 2SDR, nor higher than 40 SDR per kilogram.

*Multimodal transport*

Section 452 of the HGB applies a network system to multimodal transport if one party proves on which specific leg of the carriage the loss, damage or delay occurred. In that case, the carrier's liability for such loss, damage or delay shall be determined by the law which would have applied to a contract between the parties to the multimodal transport contract for the carriage of goods on that specific leg of the journey. This therefore follows the same principles as the UNCTAD/ICC Rules for a multimodal transport document. By agreement, the network system can be replaced by the general provisions of the German Transport Law, unless such replacement is inconsistent with mandatory provisions of an international agreement binding on Germany.

**The German Freight Forwarders' Standard Terms and Conditions ADSp**

These well-established conditions apply by contract to most freight forwarding transactions in Germany.

They are extremely detailed in form and contain very specific provisions on scope of application, instructions to the forwarder, packaging, customs clearance, payment of freight, warehousing, lien, insurance of the goods, insurance of the forwarder's liabilities, limitation of liability, notice of claims, jurisdiction and applicable law. As such they are a good model of just how much may be left to contract rather than putting such great operational detail into regulations. The contractual option is much easier to amend subsequently than the legislative option.

However, the detail is very specific to a German situation and would probably not be suitable for copying in the TRACECA region. In addition, the nature of the presentation is by constant reference to particular sections of the German Commercial Code, HGB. This means that, in order to understand the full effects of the conditions, any reader would need to have access to and understand the implications of the HGB, which is a very large body of legislation. This is entirely satisfactory within the long established German culture, but it is not obvious that the method would transfer easily to the region.

The ADSp conditions are interesting in that they do sometimes take advantage of contractual liberties offered by the HGB, but in the main they are required or content to allow most important provisions concerning legal liabilities (as opposed to operational requirements) to be based on the HGB.

**Netherlands**

Most forwarders in the Netherlands operate under the FENEX conditions of the Netherlands Association for Forwarding and Logistics. These are, like the German ADSp conditions quite detailed in relation to operational matters.

As far as liability is concerned, the FENEX conditions are unclear in many particulars. They fail to distinguish adequately between the role of principal and agent and in all cases seek to provide maximum protection for the forwarder from various kinds of claim. It is not clear to what extent they are compatible with the provisions of the Dutch Civil Code. It is left to the customer and its lawyers to work this out for themselves after the event if they have agreed to application of the conditions. The culture of the conditions is rather reminiscent of that in the United Kingdom prior to 1984.

The FENEX conditions do not match together very well with FIATA standards and consequently the Consultant would not recommend their further consideration as a model.

**United Kingdom**

The United Kingdom laws are based on the Common Law as modified by specific legislation. There is no Civil Code and no Commercial Code, though some parts of commercial law, such as marine insurance and sale of goods, have been codified.

There is freedom of contract for freight forwarders, subject only to the Unfair Contract Terms Act 1977 and equivalent EU legislation, and to any overriding provisions of international conventions.

Any pure agency role of freight forwarders comes under the ordinary law applicable to contracts of agency. However, such contracts are now rare and it is assumed that a freight forwarder will normally operate as a Principal. There is no specific legislation concerning the relationship of the freight forwarder and its customer. The British International Freight Association (BIFA) however publishes a set of standard trading conditions for use by its freight forwarder members and this may be regarded as the industry standard. It is compatible with the FIATA FBL terms but includes some additional clauses.

There is no legal obligation for a freight forwarder to maintain liability insurance. However, BIFA insists that its trading members, who are authorised to issue the FIATA FBL, should maintain adequate liability insurance and a quota of professionally trained staff.

The United Kingdom is a good example of a self-regulated freight forwarding industry whose liability standards largely follow those of the FIATA FBL.

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# Annex 9 Analysis of Suitability of the FIATA FBL for use in the TRACECA Region

## Overview

The Consultant's initial assessment of the situation in the Region was that benefits would flow for both shippers and forwarders if there is increased use of the FIATA multimodal transport bill of lading (FBL) and the legal terms of contract which appear on the reverse of the FIATA FBL.

The 19 clauses which appear on the reverse of the FBL were analysed to establish whether there were likely to be any barriers to the use of the terms contained in national legislation within TRACECA.

The initial conclusion was that few of the terms are likely to be in conflict with national legislation. Furthermore, even where any conflict may exist, the FBL terms clearly provide what is to happen in such situations.

Clause 7.1 states 'These conditions shall only take effect to the extent that they are not contrary to the mandatory provisions of international conventions or national law'. Clause 18 states 'If any clause or part thereof is held to be invalid, the validity of this FBL and the remaining clauses or a part thereof shall not be affected'. The combined effect of the two clauses is that where national law provides a different solution to that found in the FBL *national* law will prevail, but all other provisions of the FBL shall be maintained.

The situation in the TRACECA region is not substantially different from that found in the EU where there are still widely differing national legal regimes relating to goods in transit. The FIATA FBL is nonetheless universally recognised as setting a benchmark standard with provisions that are mostly enforceable in all EU countries. The Consultant's initial recommendation to promote FIATA standards, especially with regard to the FBL, was therefore verified by the present analysis.

It should be noted, however, that use of the FIATA FBL and its terms are strictly controlled by FIATA and such use is reserved for members of FIATA only. The extent to which the FIATA FBL is used will therefore partly depend on success in developing Forwarder Associations affiliated to FIATA. The FIATA FBL cannot therefore provide the complete regulatory solution to goods in transit issues concerning freight forwarding but it will be an important and growing part of the solution.

It should also be noted that the FBL terms apply only where the freight forwarder acts as a Multimodal Transport Operator (MTO) or carrier. Other solutions have to be considered where the forwarder merely completes transit paperwork or arranges, as agent for the shipper, for others to perform all the actual services. Here again FIATA appears to offer a viable solution in the form of its 'Model Rules for Freight Forwarding Services which are separately considered.

## Textual analysis of the FIATA FBL terms

*Definitions Clause*

This is not believed to present any likely conflict with national legislation as the definitions apply only to the contract situation.

*Clause 1: Applicability*

The terms apply both to multimodal and unimodal transits. Again no conflict is envisaged.

*Clause 2:Issuance*

It is the issuing of the document which brings the terms into application. No conflict is thought likely with national law.

*Clause 3: Negotiability*

The issued FBL, in negotiable form, constitutes title to the goods. This is likely to be recognised in all states which admit the concept of maritime bills of lading conferring title to goods.

*Clause 6 : Liability*

6.1 The period of responsibility of the forwarder is wide and it is unlikely that national legislation would set more extensive responsibilities
6.2 The forwarder is liable for loss damage or delay unless there is no fault or neglect on its part. This is a reasonable standard but it could be in conflict with any legal system which imposes strict liability or an 'obligation de resultat' on a contractor. The Consultant will endeavour to check whether such stricter standards in fact apply in any of the TRACECA countries. Under the mechanism of the FBL those higher standards will in that case apply so that national law will in any case be respected.
Similarly, the requirement for a declaration in relation to the need for timely delivery as a precondition for a delay claim could be in conflict with national law but will in that case be overridden.
6.3 The exceptions from liability are ones generally recognised as areas where a contractor should not be held liable so it is unlikely that they would be in conflict with national law.
6.5 The defences in the case of sea carriage are based on those in the Hague Visby Rules and should not present any problems.

*Clause 7: Paramount clause*

7.1 This ensures that any conflict will be resolved in favour of international or national law which covers the same subject matter.
7.2 The Hague-Visby Rules are applied to carriage by inland waterway as well as sea transport and to all goods including live animals and whether the goods are carried on or under deck. This is an increase in the responsibility of the freight forwarder in comparison with international law. It is possible that it could represent a decrease in responsibility in relation to purely domestic transits governed by national law, though this is not thought to be likely.

*Clause 8: Limitation of liability*

8.1 Values are calculated on the basis of value at the time of delivery, which is the maritime standard. It is possible that national laws would have different provisions.
8.3 Specific limits of liability of 666.67 Special Drawing Rights per package or shipping unit or 2 SDRs per kilo are set, based on those under the maritime Hague-Visby Rules. These limits are quite low and could conflict with national laws which either maintain unlimited liability or dictate different limits. Efforts will be made to verify the situation in each of the states. In the event of conflict, the national law will prevail. The effect of any provision requiring unlimited liability would be to increase liability costs for forwarders and to make it more difficult to obtain standard insurance packages.
8.5 Where no sea or inland waterway transport is involved, the forwarder's limit rises to 8.33 SDRs per kilo. This is equivalent to the limit under the CMR Convention and is considered adequate in most circumstances. It could nevertheless be in conflict with national law.
8.6 This reiterates that if it can be established where the loss or damage occurred, any applicable international convention or national law will prevail, thus resolving any conflict with the FBL terms.
8.7 Compensation in the case of loss from delay or consequential loss is limited to twice the freight paid by the customer. This limitation could be in conflict with national law, in which case national law will prevail, but the consequence could be higher insurance costs for the forwarder.

*Clause 9: Applicability to Tort*

It is possible that a contractual renunciation of rights in tort by the customer would not be effective under national law.

*Clause 10: Liability of servants and other persons*

The "Himalaya" clause for the protection of servants, agents and subcontractors of the forwarder may not be effective in all the jurisdictions.

*Clause 11: Method and route of transportation*

It is possible that actions under this clause in conflict with a customer's stated instructions would either not be effective or be in conflict with national law.

*Clause 12: Delivery*

12.2 Storage at the sole risk of the customer where full delivery has not been possible could potentially conflict with any national law imposing responsibility on what would be at that point an "involuntary bailee" or holder of the goods.
12.3 Similarly the liberty to abandon the transit in certain circumstances where there is no fault on the part of the forwarder could potentially conflict with duties imposed by national law, though this is thought unlikely.

*Clause 13: Freight*

13.2 The provisions concerning currencies may not be effective in all the jurisdictions

*Clause 14: Lien*

The provisions on lien, or right of retention, although reasonable, may not be consistent with any specific national laws on the retention of goods. There is within the EU considerable variation in such provisions and international transport conventions have avoided dealing with the issue.

*Clause 17: Time Bar*

The time limitation of 9 months for bringing legal action may not be consistent with national law which is quite likely to impose a longer period of limitation. Attempts will be made to verify the situation in the different states.

*Clause 19: Jurisdiction*

The jurisdiction of the place of establishment of the freight forwarder is nominated as the exclusive place of jurisdiction. This would be the position under conventions such as the Lugano Convention which makes the place of establishment of the *defendant* the normal place of jurisdiction. It is possible, however, that some national laws may dictate a different way of deciding jurisdiction.

*Clauses creating presumptions as to evidence or interpretation*

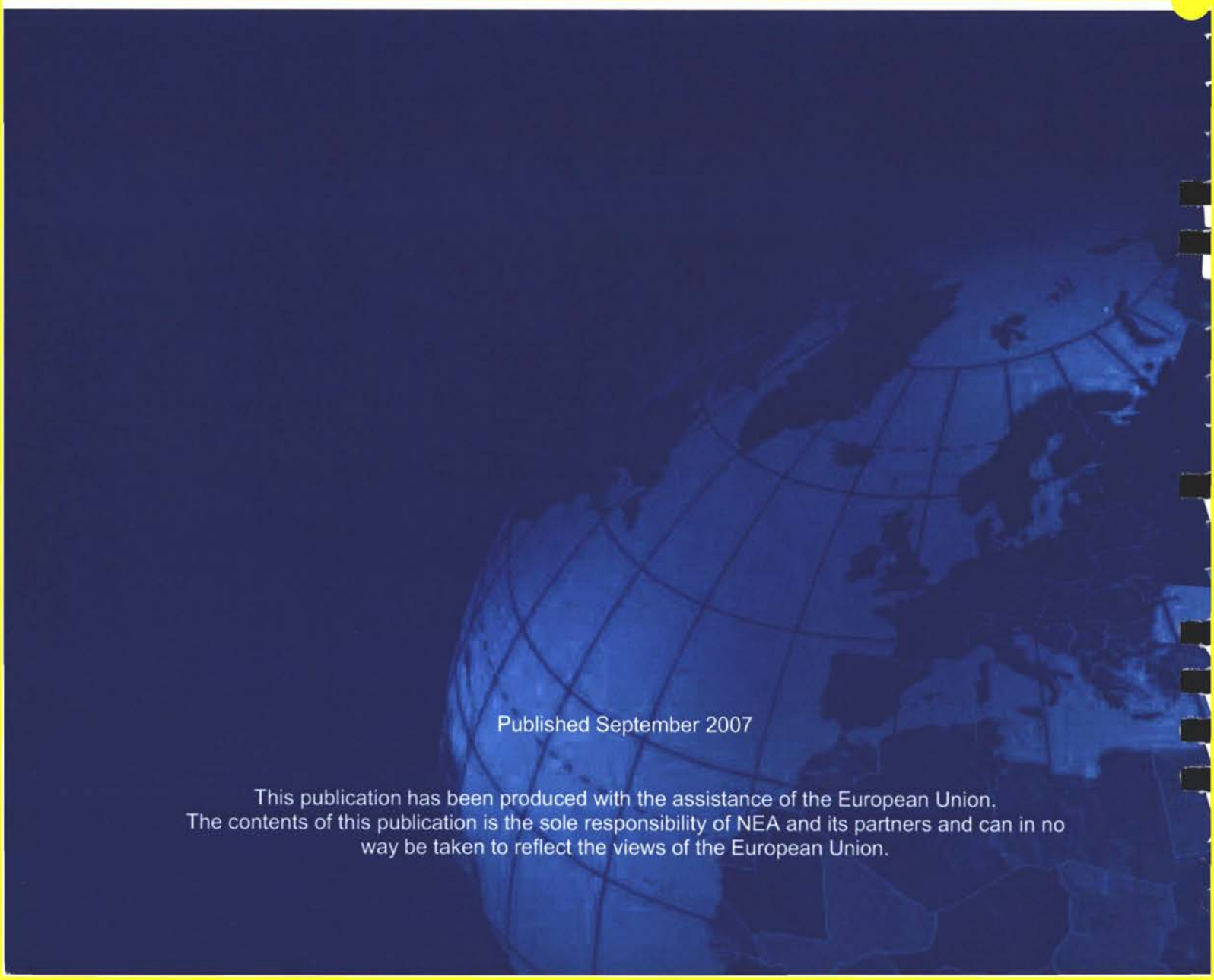
The FIATA FBL terms state in a number of places that the contract is to be interpreted in a particular way or that certain circumstances constitute prima facie evidence of facts. This is the case for example in Clause 18 dealing with partial invalidity or in clause 16 dealing with notice of claims. The provisions appear reasonable and ones which might normally be upheld, but it cannot be ruled out that national laws may specify different rules of evidence and interpretation.

**Conclusions**

It may be seen from the above analysis that there are a number of areas where it would be possible for the FBL terms to be in conflict with national law. These are not likely to affect most claims significantly. It will be up to the claimant customer and/or the court itself to establish the existence of conflict and to require application of national law, otherwise the FBL terms should in practice be applied.

There are several more potentially serious areas of conflict with existing local laws. The most important of these may be summarised as:

8. Basis of liability as set out in Clause 6.2
9. Limits of liability as set out in Clauses 8.3,8.5,8.7
10. Time bar for claims as set out in Clause 17



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