Development of the Technical Annexes on Freight Forwarding and on Multimodal Transport

Issues relating to contracts of freight forwarding and multimodal transport

Analysis of the existing draft technical annexes

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Analysis of the existing draft technical annexes

The Consultant has analysed the existing draft Technical Annexes on Freight Forwarding and on Multimodal Transport and concludes that neither of them is sufficiently developed to be ready for adoption taking into account both substance and presentation. The problem of presentation appears to be far more serious in the English texts, suggesting that translation difficulties may account for some of the apparent problems with the texts. Full details of the analyses are to be found as Appendix 1 and Appendix 2.

Furthermore it now appears that there is a reluctance for further Technical Annexes to be ratified 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 draft TA on freight forwarding does 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 and need review
- 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:

- 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
- Does not use quoted passages from the 1980 Multimodal Transport Convention 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 frequently appears to give precedence to national law
- 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 and need urgent review

- Has notice periods for claims and time bar provisions that are confusing and may cause practical difficulties for both sides to the contract

Analysis of models which could be used as alternatives

The Consultant has analysed the terms of the UNCTAD/ICC Rules for a Multimodal Transport Document and the FIATA Model Rules on Freight Forwarding and concludes that both of them present 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 Appendix 3 and 4.

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 could 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. 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, but it remains to be seen whether the consensus exists for such a move.

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 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 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 8 former Soviet Republics, members of TRACECA, that the Russian Federation has adopted a very satisfactory text based on the FIATA Model Rules as the "General Rules for the Freight Forwarders of Russia" (considered 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 need to be reviewed to eliminate any possible conflict with individual national law.

Use of the FIATA FBL within the TRACECA Region

The Consultant has held discussions with FIATA concerning use of the FIATA FBL in the region and FIATA is 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 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 mentioned above.

The FIATA FBL terms have been analysed by the Consultant and full details can be found in Appendix 5. 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, or making similar 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 Consultant 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 Consultant 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 Consultant that the Rules are in the form of a contract rather than traditional legislative form. However, with minor adjustments, UNCTAD representatives could see no reason why the Rules could not 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.

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 seems to have been done in the two existing draft technical annexes (even if they appear to be based on Russian precedents) and it is not an approach supported by UNCTAD as they feel that such documents do not generally achieve legal consistency and are 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 have indeed been proposed 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 because of opposition from shipowning interests. It should nonetheless be retained as an option for consideration by counterparts, particularly as some countries state that they have taken its principles into account in framing 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.

Benchmarking with other European examples

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. A detailed commentary is to be found at Appendix 6. 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.

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.

An analysis of the Rules is to be found at Appendix 7. They could provide a very suitable model for use in the 8 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.

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 merit consideration.

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.

Legislative developments which may affect the project objectives

There are a number of international initiatives relating to multimodal transport which may affect the project objectives in the medium to long term.

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. The overall view in Geneva was that while a final draft convention may be agreed, it is unlikely to be adopted for use in the foreseeable future.

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 (the proposed draft text is set out in Appendix ...) 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
- should the regime be 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 would 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 do not take precedence over any conflicting national or international law.

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 makes this present EU forwarding project doubly relevant to them.

Options for development of the Technical Annexes

There are a number of possible options to develop the draft Annexes.

In relation to the draft Annex on Multimodal Transport:

- the existing draft could be revised. This is likely to involve a considerable amount of work as it is presently a very 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

In relation to the draft Annex on Freight Forwarding Operations:

- the existing draft could be revised. This is likely to involve considerable work as it is presently 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"

Provisional recommendations

Based on the analysis above [and the facts concerning the present legal situation in the region], the Consultant provisionally recommends that:

1. Counterparts should consider abandoning the two draft Technical Annexes on Freight Forwarding. The draft on Multimodal Transport in particular contains so many imperfections that it will 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 will be important to set out the reasons why any principles were agreed and the objectives in including material in the existing drafts.
3. The Consultant would favour 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.
4. Such a strategy would have the additional benefit of putting in place mechanisms that would make it easier for the new regime to be easily updated in line with updates in the underlying model.
5. 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.
6. The Consultant accepts that provision may 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. This issue will need to be the subject of further discussion as it is a complicating factor in the equation.
7. The Consultant believes that 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.
8. The Consultant believes that 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.
9. Whether those Rules 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 will depend on the extent to which existing national laws conflict with them. This will only be known when the legal analysis of the present situation in each state (Task 1A) is complete.

Issues concerning regulation of freight forwarding activities

The present draft TA on Freight Forwarding Operations merely hints at a regulatory role in its Article 3. It refers 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 Consultant would strongly counsel against placing undue bureaucratic restrictions on their activities. It would be particularly opposed to 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 have 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 may place their national forwarders at a competitive disadvantage in a globalised economy. The Consultant has already pointed out in the Inception Report that the project resource is insufficient to be used in relation to solely national initiatives of this type.

(to be furtherdeveloped when Menno Arina and Mark meet up and in the light of the responses to the questionnaire)

[it will be worth stating that FIATA advise against formal regulation of freight forwarding services and that such absence of regulation is common in the EU (UK, Netherlands others?

There may therefore be no merit in devising a technical annex which goes further and attempts to regulate things at a regional level. It is unlikely that a consensus will be found and that will not be beneficial for the general operation of TRACECA.