

The European Voice of Freight Logistics and Customs Representatives

Brussels, 10th November 2008

RE: Questionnaire on multimodal transport documents and liability

CLECAT is the European Association for Forwarding, Transport, Logistic and Customs Services. Our members voice the interests of more than 19.000 companies employing in excess of 1.000.000 staff. In rough figures European freight forwarders and Customs agents clear 95% of all goods in Europe and handle 65% of the cargo transported by road, 95% of the cargo transported by air and 65% of the maritime.

1) A POSITIVE OVERALL PERCEPTION OF THE CURRENT SITUATION

a. The current use of transport documents:

CLECAT is in principle satisfied with the currently available Transport Documents. The existing liability regime governing multimodal transport in the EU is probably not a perfect solution, but we are loath to think that a regional regime can better serve trade. It would invariably result in being "just another liability regime", hence increasing complication instead of simplifying it. Industries solution which are able to bridge existing gaps exist and especially the FIATA Multimodal Transport Bill of Lading has been extensively used for years to the satisfaction of the contracting parties,

However, we would welcome a global/international approach towards a harmonized system which took account of the modern requirements of the supply-chain (*our Scandinavian Members particularly expressed their concerns about the lack of uniform rules on this matter, which implies an important gap in the regulation is perceptible*). CLECAT believes that a European approach alone might however not resolve the problem at international level, it might even be ill-suffered by our commercial partners. This being said, the newly adopted UNCITRAL multimodal convention is supposed to be the answer to these questions, but it does seem to have some major complications that make its application complex and uncertain at best.

CLECAT estimates that the costs of transferring between modes tend to be reasonable. In principle multimodal services are provided according to market conditions. It is however possible to improve on this issue by introducing innovative technology, which may contribute to encourage multimodal transport and create the conditions for even more competitive prices.

CLECAT believes that the current FIATA Multimodal Transport Bill of Lading is already a sufficient instrument, able to address the issues connected with liability in multimodal transport and that its harmonised application would tend to reduce administrative burden for traders. This document complies with most users' requirements and is widely used in documentary credit,

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being at the same time able to accommodate the requirements of a document of title and, if necessary, accommodate the requirements of straight transport bill.

b. The current use of electronic transport documents:

CLECAT encourages the further development of the electronic format in future:

- measures should be taken to make electronic use protocols universal
- there should be undisputable international standards for trading conditions and uses
- amending electronic protocols to existing conventions of carriage are an instrument to be favoured, in as much as they would allow for additional facilitation.

c. Liability under the current situation:

According to CLECAT, the current use of fall-back clauses as regards the liability for multimodal transport presently does not favour one particular transport mode. Indeed, the issue of liability is seldom a problem in choosing between modes of transport since they are suitable for different requirements of speed, distance, geographical constraints and commodity trading requirements. In principle, one should see that a higher liability regime (e.g. rail) would attract more users, but in reality the contrary is true. Indeed, mode selection depends on costs and efficiency and has no statistically relevant correlation to liability limitations.

Moreover, trading conditions with limitations of liability (such as the NSAB 2000¹) to a certain extent are often used in common law countries to govern liability for multimodal transport, but liability is full in international and domestic law in the absence of these trading conditions limitations. CLECAT reminds that in civil law, limitations of liability must be appropriately understood by the parties when it is difficult to associate the damage/loss or delay with a particular unimodal leg. Unless there are clearly specified (and in civil law systems, accepted) limitations of liability, full liability applies in multimodal operations, however unfair this may appear.

Finally, concerning bankers' and insurers' willingness to secure/pledge and insure multimodal transport of goods, CLECAT estimates that at present the market offers sufficient options to influence their decisions. However, we are aware that this constitutes a subjective evaluation and some institutions may wish to avoid a situation of uncertainty, however skilled they are or should be.

2) A UNIFORM EU MULTIMODAL E-TRANSPORT DOCUMENT? A UNIFORM EU LIABILITY REGIME?

a. The possibility of a uniform transport document in the EU:

CLECAT favours a uniform approach, with a single document applying a single liability regime irrespective of the mode of transport and suitable for all the functions of a transport document, on condition that this arrangement is protected by an internationally agreed convention, which rests on sufficient support by the most important international trading nations.

Indeed, liability cannot be addressed on local or regional level. Once a regulation is in place it should be applicable in all countries and all parts of the supply-chain. A mode-neutral approach with a single liability regime is also preferred as it is the way to avoid discrimination and to

¹ <http://www.swedfreight.se/en/About-us/NSAB-2000/>
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reduce the number of conflicts and legal interpretation. The FIATA Multimodal Transport Bill of Lading is an example of a Transport Document used and suitable for all the functions of a transport document. A uniform multimodal liability regime consisting for instance of a single Transport Document applicable to all modes and suitable for all the functions of a transport document would probably be acceptable for shippers as well as the road, rail, air, combined, maritime and inland waterways operators.

On the issue of whether there will be relevant political agreement on a single Transport Document at a global level, recent history has shown that earlier approaches have all failed to come up with a viable solution. Even more pessimistic are we that an EU-only approach would succeed in bringing more harmonisation.

The 1980 UN multimodal convention has not been adopted and so far the only document that claims to be doing the job is the FBL, or FIATA multimodal bill of lading, based on the UNCTAD-ICC model rules. In addition, the creation of a uniform regime within the EU would perhaps simplify things internally and backfire on our external trade, where many operators would then fallaciously think of themselves as protected, when in fact they would be dangerously exposed to the rigours of foreign actions. CLECAT would also like to underline that an increased attention on the issue of liability will inevitably detract from other more important issues such as innovation, cost reduction and enhanced technology investments, which could instead greatly help enhance multimodal efficiency.

For the above reasons, CLECAT considers that a single Transport Document applicable to all modes and suitable for all functions of transport documents in the EU will, in respect of cost benefit approach, probably:

- "complicate/hinder" multimodal transport, or have no influence at best;
- "make it more difficult" to obtain insurance coverage for multimodal transport in the international perspective, whilst it could simplify things in the internal market;
- "make it more difficult" to obtain financial services from banks for multimodal transport in the international perspective and perhaps make it more accessible in the internal market;
- "increase" legal certainty for multimodal transport, as limited to the EU and detract from it in our international transactions;
- "increase" conflicts of legislation for multimodal transport
- slightly "increase" freight rates and/or prices for transport services for multimodal transport
- "increase" friction costs related to court claims and litigation for multimodal transport, especially in international transport;
- "increase" business and administrative costs for adapting the internal processes to the new single standard document for multimodal transport
- "have no effect" on the security of multimodal transport

Finally CLECAT prefers to have evidence that tracking procedures are unreliable at this point in time, before having an opinion on whether a single Transport Document could enable a secure and reliable tracking procedure and decrease the need for controls in EU trade. We feel this is a very delicate issue that should be dealt with in a more articulated manner.

b. The possibility of a uniform electronic transport document in the EU:

CLECAT is in favour of electronic transport documents and a paperless business environment in general and would like to take the opportunity of this position paper to ask for more information
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on the so called "e-Transport Documents". Paper documents will probably be a thing of the past in a few years. Not only from an environmental point of view, but particularly from an economic and practical point of view, electronic transport documents are probably the way forward. This also corresponds with the work being done in the European Union (e.g. DG TAXUD and the Modernized Customs Code) and at a global level at the WCO. An ideal e-Transport document would be visualised by using standard internet connection, undersigned by using electronic signatures and be released in printable formats. The use of e-Transport Documents in the EU should go hand-in-hand with private guarantees (assurances from a trusted third party) to secure the transfer of the title, when this is required by the commercial transaction. As long as data security and confidentiality issues are taken care of and electronic documents can be used throughout the EU without any discrimination or hindrance, e-documents are highly welcomed by our sector, however more detailed information on the necessary legal steps would be appreciated.

c. The possibility of a uniform liability regime in the EU:

According to CLECAT, liability for multimodal transport should be harmonised at global level rather than EU level, because regional approaches alone will not be sufficient to address existing problem and can only create additional uncertainty. An additional EU multimodal liability regime would automatically create additional administrative costs.

CLECAT would add further comments on this topic. There is no international mandatory law applicable to intermodal transport and various attempts at creating it did not succeed. Therefore no actual simple rule to calculate responsibility and liability in intermodal transport is available. Liability in international transport is one of the least understood concepts by both service suppliers as well as customers. There is a significant need for a better understanding through training and skills development. It is a lack of knowledge that leads to a belief that there are no clear rules in respect of liability. Existing rules are not simple but are sufficiently clear and insurance protection is available. It is very unfortunate that such rules are often ignored or insufficiently understood. It is equally very sad that many fallaciously misconstrue the meaning liability and believe it means insurance. They may be led to believe that acquiring an EU liability regime would be a shortcut to cut on insurance costs, but this is technically a mistake experience suggests not to make.

The responsibility for timely delivery of the goods in good condition varies according the agreement of the parties and is regulated by law in other areas that have nothing to share with transport liability. It rests often with the owner of the goods or with the party who has an insurable interest in complying with the requirement of delivery. The attitude of considering the liability of the carrier as form of insurance is not only wrong, but it is very likely to backfire, in the event that parties resort the services of the court. National and international legislation allow the carrier to limit its liability and this is extended to the contractual freight operator, when damage can be ascribed to a particular mode of transport. The freight operator has a duty of care to handle its customers' goods in a responsible way and it is up to the courts to apply the law in the event of a claim. A simple way to avoid complications and disputes is to take out proper insurance cover.

CONCLUSION

CLECAT believes that the best action the EU can take in order to eventually achieve a multimodal liability regime is to promote the adoption of such an agreement at international level, by sticking

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to the most elementary common sense rules and by promoting the approximation of existing rules in a single scheme that provides certainty for trade and is mindful of the requirements of existing trade practices. CLECAT is concerned that a unilateral regional approach may simply create additional uncertainty, which may result into an increased likelihood of litigations.