
Arrangements of intermodal transport in the field of conflicting conventions

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The continuing advance of containerization emphasizes the need for a more uniform legal approach to international intermodal transport. With the current lack of a uniform instrument regulating such transport, the next best solution – both in legal theory as well as in practice – seems to be the broadly accepted network system knitting the existing unimodal transport regimes together. However, problems arise in reconciling the principles of the network system with the more desirable uniform approach of multimodal transport operations. This article looks at the ‘maritime plus’ approach in the UNCITRAL/CMI Draft Instrument against the backdrop of the scope rules of the existing unimodal transport conventions, and the CMR Convention in particular.

Introduction

‘Give the customer what he wants’ has always been a lucrative credo in any trade and naturally the transport business is no different. Adherence to this belief has caused a notable increase of door-to-door carriage the last few decades. Since door-to-door transport, especially international transport, mostly involves more than one mode of transportation, containerization can be seen as a catalyst for this increase. The development of the container made the changeover between different modes of transport much easier.

In the legal playing field however, these developments have exposed the lack of an international instrument regulating multimodal transport. Considering the magnitude of the contemporary door-to-door carriage such an instrument is not a luxury but a sheer necessity without which true economic and legal efficiency cannot be achieved.

Door-to-door transport is usually taken on by freight forwarders who are inclined to act as principal and provide the shipper with a single contract.¹ The single multimodal transport² contract they provide is seen in general as a ‘chain’ or ‘mixed’ contract, a contract that is nothing more than the contracts concerning each individual unimodal part of the transport chained together.³

This view correlates with the network system,⁴ in which the liability regime applicable on a

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¹ European Commission, ‘The economic impact of carrier liability on intermodal freight transport’, final report, London, 10 January 2001, IM Technologies Limited, Studiengesellschaft für den kombinierten Verkehr eV, 5.

² Multimodal transport is as a rule defined as: ‘The carriage of goods by at least two different modes of transport on the basis of a single multimodal transport contract’.

³ As opposed to a *sui generis* contract or *aliud* as it is called in Germany.

⁴ Not all jurists who adhere to the mixed contract view are by definition supporters of the network system, but it does logically result from the mixed contract view; see A van Beelen *Multimodaal vervoer. Het kameleonsysteem van Boek 8 NBW* (diss. Leiden 1996) Zwolle, WEJ Tjeenk Willink 1996, 32.

multimodal transport agreement is comparable to a chain that is composed of the unimodal regimes that would normally apply on each trajectory of the total voyage as if the parties involved had drawn up separate contracts for each mode of transport used.

A disadvantage of this system, that has been in use for want of a better one, is that there is such a complex array of arrangements designed to regulate unimodal carriage, that the applicable liability rules, and with them the degree and extent of a carrier's liability, vary greatly from one transport mode to another and are as such unpredictable. Any transport jurist would agree that an international instrument that regulates multimodal contracts in a uniform way, would be more efficient as well as more effective than the presently used network system.

The changing of the seasons

Most freight transport conventions date back to the early 20th century⁵ and have since evolved along unimodal lines, reflecting the way freight was mainly moved in the early days – on a unimodal basis. Hence the differences in these unimodal conventions; they reflect the specific customs and practices inherent to their own specific transport modes which have developed separately from one another.⁶

Sometimes, however, mutations in those day-to-day demands call for changes to a convention. In such cases large amounts of time, in general several years, are spent to consider all possible consequences of the changes that are to be made. Also time consuming are the extensive deliberations regarding the specific content of the proposed alterations that tend to be necessary as there usually are many different parties to reckon with, even when it comes to somewhat 'regional'⁷ conventions like the CMR⁸ or the CIM/COTIF.⁹

Yet even after all this has been brought to a seemingly good ending, it still happens that not all member states of the original convention ratify the newly proposed changes, so that the modified set of rules come into effect alongside the original one. This, for instance, was the case with the creation of the Hague-Visby Rules; not all member states of the Hague Rules ratified the Visby Rules protocol with the modifications and so both sets of rules ended up in use alongside each other. But it did not end there; even later a whole new convention, the Hamburg Rules, entered into force. This convention also failed to replace the elder two so that now there are three major conventions in effect in the field of the international carriage of goods by sea.¹⁰

In spite of this laborious and not always satisfying road, conventions are successfully ratified on occasion. Why is it then that there never seems to be any room for a well-considered plan regarding multimodal transport when the time for change comes? Apparently the way we think when it comes to transport regulations is still ruled as much by unimodal concepts as it ever was. Practically speaking, this means that we still depend upon the default network

⁵ Hague Rules 1924 (amended by Visby 1968), Warsaw convention 1929, CMR 1956, CIM/COTIF has its origins in the late 19th century (1890), in 1980 however it was fundamentally revised.

⁶ This is obvious when one for example compares the monetary limitations of liability under the various unimodal conventions. The limit for transport of goods by air is almost nine times higher than the limit for maritime conveyances. Which is unsurprising, as the goods transported by air usually have a much higher value than their counterparts that are being shipped by sea.

⁷ Most member states of both conventions are European.

⁸ Convention on the Contract for the International Carriage of Goods by Road, 19 May 1956. See regarding revisions of the CMR: M Evans, 'Is it possible to revise the CMR?' *International carriage of goods by road (CMR)* (J Theunis ed) London: Lloyd's of London Press Ltd 1987, 183–196.

⁹ CIM/COTIF: The Convention Concerning International Carriage by Rail (COTIF), 9 May 1980 provides that 'international through traffic' is subject to the 'Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM)', which forms Appendix B to COTIF. A new version of CIM/COTIF was formulated in 1999, but has not yet entered into force.

¹⁰ Major conventions indeed; the Hague Rules have 62 member states, the Hague-Visby Rules 52 and the Hamburg Rules 27. Some states are members of more than one convention at the same time. G Chandler, <<http://www.admiraltylaw.com/papers/cargo%20regimes.htm>>, August 1999.

system in the everyday transport practice, which means we have to make do with all its imperfections in the undeniable economic reality of international multimodal carriage.

Dealing with multimodal reality

At this point in time we can safely say that, even if there was complete consensus that a uniform arrangement would suit the reality of multimodal transport best, we should not hold our breath waiting for one to appear, or even a network-based convention for that matter. Of course, refusing to breathe rarely is the way to accomplish anything, but the enormous amount of deliberations and research already invested in the development of a fitting solution regarding the multimodal problem has also not really had the hoped for results. An extensive list of draft conventions have already tried and failed to gain the necessary sanctioning. Examples are the conventions drafted by the CMI, the 1967 Genoa Rules and the 1969 Tokyo Rules, but also the 1972 TCM drafted by ECE/IMCO and last but by no means least, the most famous of the list, the 1980 MT Convention by the United Nations. Sadly, none of these attempts brought about the consensus needed.

As one of the factors contributing to the apparent inaccessibility of a uniform arrangement might be the fact that Europe is very much attached to its own unimodal conventions regarding road and railway carriage, the CMR and the CIM/COTIF. This attachment has led to an extensive interpretation of the scope of application of the CMR in particular by the European courts,¹¹ which puts stretches of road carriage performed as part of a longer multimodal journey under a single contract within the range of this unimodal convention. According to some,¹² this stretches its scope of application beyond the intended boundaries.¹³ When it comes to the scope of most unimodal conventions, however, there is much discussion.¹⁴

These discrepancies in interpretation only increase the number of hurdles to be overcome during the drafting process of a new uniform international convention for multimodal transport. In the end, this leaves us without realistic short-term prospects when it comes to the effectuation of an international convention covering the subject. Understandably, the everyday practice of international carriage found other ways over the years to overcome some of the encountered problems.

One solution worth mentioning is the use of standard contract rules like the URM.¹⁵ These Rules apply when they are incorporated into a contract of carriage, by reference to the 'UNCTAD/ICC Rules for multimodal transport documents', and can act as a supplement to the existing legal regimes; they plug the holes so to speak. Besides directly playing a part in conventional private contracts, they have also been incorporated in widely used multimodal transport documents such as the FIATA FBL 1992 and the Multidoc 95 of the Baltic and International Maritime Council (BIMCO). Ultimately, though, these Rules may give the impression of simplicity, but they mask the precedence of mandatory regulations, both national and international, so that in the end the contracts adopting these Rules still are effectively private contracts. They may seal the gaps, but ultimately uncertainty still remains regarding liability and legal position.¹⁶

¹¹ For more details see paragraph 10: 'The CMR and its scope', p 430.

¹² I Koller, 'Quantum Corporation Inc v Plane Trucking Limited und die Anwendbarkeit de CMR auf die beforderung mit verschiedenartigen Transportmitteln', *Transportrecht* 2003–2, 47.

¹³ For a more detailed discussion on this issue see page 430 below.

¹⁴ GJ Van der Ziel, 'The UNCITRAL/CMI Draft for a New Convention Relating the Contract of Carriage by Sea', *Transportrecht* 2002–7/8, 267.

¹⁵ UNCTAD/ICC Rules for Multimodal Transport Documents.

¹⁶ UNECE, Inland transport committee, working party on Combined Transport, 'Possibilities for reconciliation and harmonization of civil liability regimes governing combined transport', study of the economic impact of carrier liability on intermodal freight transport , executive summary transmitted by the European Commission, 37th session, 18–19 April 2002, agenda item 9, page 6.

Annexation: The path for the future?

A more artificially contrived practice is the annexation of other transport modes into originally unimodal conventions, a practice which seems to be increasing. An early (and fairly limited) example of this is found in Article 2 of the CMR Convention. Article 2 §1 states:

Where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air, and, except where the provisions of Article 14 are applicable, the goods are not unloaded from the vehicle, this convention shall nevertheless apply to the whole of the carriage.

This means that where a truck is put on a ship, goods and all, like a kangaroo carrying its young after (or before) a stretch of road carriage in that same truck, the CMR rules apply not only to the road stretch(es), but to the whole journey including the sea leg.¹⁷

This expansion of the application of CMR is rather modest, but later examples do not show as much restraint. The CIM/COTIF Convention for instance extends its scope beyond mere railway transport by declaring itself applicable on other transport modes when certain terms are met. In Article 2 §2 it states:

The system of law provided for in §1 may also be applied to international through traffic using in addition to services on railway lines, land and sea services and inland waterways. Other internal carriage performed under the responsibility of the railway, complementary to carriage by rail, shall be treated as carriage performed over a line, within the meaning of the preceding subparagraph.

In other words, the rules of the CIM/COTIF convention are also applicable on the carriage of goods by other transport modes if this transport occurs regularly and complementary to the rail transport on a line that is included in the prescribed list. This is not restricted to the type of 'kangaroo' transport as described in the CMR convention. Even if the goods are offloaded into another container or vehicle the CIM/COTIF rules still apply.

A more recent example of the increasing annexation tendency can be found in Article 18 of the new Montreal Convention for International Air Carriage.¹⁸ This Article asserts in the last line of §4 that if a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air. So if the agreement between parties concerns air transport and lacks any indication¹⁹ that the consignor has consented to the (possible) use of alternative modes of transportation the Montreal Convention applies to the whole transport, even if the carrier decides to substitute the air carriage by road carriage.²⁰ For example, if one books a through air move from Rotterdam to New York any ocean or road links will be considered to have been air moves, and thus covered under the Montreal Convention, even

¹⁷ An exception to this rule emerges when the damage exclusively occurred on the non-road leg without any help from the road carrier, which is almost always the case so that Art 2 §1 has a severely limited reach in practice.

¹⁸ This new Montreal Convention (1999) regarding air transport has come into effect in November 2003 and can be seen as the successor to the 1929 Warsaw convention for international air carriage. The Montreal Convention also contains a more pure provision concerning combined carriage, namely Art 38. Article 38 declares that in case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of the Convention shall apply only to the carriage by air.

¹⁹ If the agreement includes any proviso giving the carrier the option to substitute the agreed means of transport with another, Art 38 applies and not Art 18 §4.

²⁰ Thereby defaulting on his agreement. Article 18 has the unfortunate side effect that this defaulting can actually be of benefit to him; if the cargo is lost due to wilful misconduct by the carrier during the (international) road leg of the journey, instead of the CMR the Montreal Convention applies which has no provision like Art 29 of the CMR which prohibits such a carrier from availing himself of the provisions in the convention regarding the limitation of his liability. So instead of unlimited liability in such a situation, the carrier is only liable up to 17 SDR per kilogram. This side effect has been strongly criticised: see C Harms and M Schuler-Harms, 'Die Haftung des Luftfrachtführers nach dem Montrealer Übereinkommen', *Transportrecht* 2003–10, 369–377.

though the actual airport of departure was London. All that will be required for this result is that the air waybill did not mention any road or ocean links.²¹

The UNCITRAL/CMI Draft Instrument: The tenacity of the unimodal perspective

This practice of incorporating other transport modes in unimodal conventions is risky, since it tries to do it at the expense of other unimodal conventions. As was mentioned above, the clash of conventions is already a very real problem and the issue might even become more troublesome if this annexation trend expands. And expand it will, as can be seen in the new UNCITRAL/CMI Draft Instrument for a New Convention on the Carriage of Goods [by Sea]. The words 'by sea' are still placed within brackets to show that even though a new unimodal maritime convention was the starting point for deliberations, it already is much more. At this stage in the drafting process the convention can be called 'maritime plus', meaning that the draft intends not just to regulate maritime carriage, but *all* multimodal transport including a sea leg. Simply put, it would regulate, besides the international sea transport leg, all parts of a multimodal transport that include a sea journey not subjected to an international²² mandatory regime of their own. Since the existing liability regimes concerning sea transport are port-to-port or narrower, 'maritime plus' was initially controversial,²³ but appreciating that a new convention that limited itself to port-to-port transport would probably not be enough to supplant the existing myriad of sea carriage conventions, the draftsmen went to work on a maritime regime that took into account the reality that the maritime carriage of goods was frequently preceded or followed by land carriage.²⁴

One has to admit that once again this is trying to solve the problem of multimodal carriage while clinging to a unimodal perspective. As a result, the newly created convention will have a narrower scope of application than should be aspired to, since it omits certain types of multimodal transport. On the other hand, this may just be the only way to achieve a complete multimodal carriage convention in the future, with the draft instrument acting as a stepping stone.

The adventures of the performing party

Vindication for the broad scope of application wielded by the draft instrument²⁵ was, according to the draftsmen, primarily found in the treatment of performing parties,²⁶ including the extent to which they are entitled to automatic 'Himalaya' protection.²⁷

²¹ I Koning, 'Trucking onder Warschau en Montreal', *Nederlands tijdschrift voor handelsrecht (NTHR)* 2004-4; MS McDaniel, *The Proposed Montreal Convention of 1999. An Act To Replace The Warsaw Convention of 1929*. <http://www.cargolaw.com/presentations_montreal_con.html>, Rotterdam 27 September 2000.

²² In Art 8 of the draft 'or national law' has been placed in brackets indicating that the inclusion of this part of the provision is uncertain as yet. See, for example, UNCITRAL (A/CN.9/WG.III/WP.23) 3 or UNCITRAL (A/CN.9/544) 7-9.

²³ MF Sturley, 'Scope of coverage under the UNCITRAL Draft Instrument', 2 *Journal of International Maritime Law* 2004, 146.

²⁴ UNCITRAL, 'Report of the Working Group on Transport Law on the work of its ninth session (New York, 15-26 April 2002)', thirty-fifth session, New York, 17-28 June 2002, (A/CN.9/510) 10, para 28. The UNCITRAL documents can be found on the website of the organization: <<http://www.uncitral.org>> and will be referred to in the following only by their code, which in this case was UNCITRAL (A/CN.9/510).

²⁵ UNCITRAL (A/CN.9/WG.III/WP.36) of 2004 entails a revision of some Articles of (A/CN.9/WG.III/WP.32) of 2003. When the difference is relevant A/CN.9/WG.III/WP.36 will from here on be referred to as 'the draft instrument (2004)' and A/CN.9/WG.III/WP.32 as 'the draft instrument (2003)'.

²⁶ According to the draft instrument (2004) Art 1(e), 'Performing party' means a person other than the carrier that physically performs or undertakes physically to perform any of the carrier's responsibilities under a contract of carriage, at the carrier's request or under the carrier's supervision or control.

²⁷ MF Sturley (n 23) 140 and 148. For the most recent version of the 'Himalaya' clause see the draft instrument (2004) Art 15 §4 and note 77, which states the intention to trim §4 down to 'maritime performing parties' instead of 'any person'. This is not necessary since only parties bearing responsibility under the instrument can avail themselves of its

By giving performing parties not only the same responsibility but also the same protection under the draft instrument (2003) as the carrier,²⁸ it was thought that an amount of uniformity could be reached which would otherwise not have been attainable. If all of the potential defendants in the sphere of litigation for cargo damage were subject to the same rules, there would be less of an incentive to pursue multiple lawsuits against different parties.²⁹ The combination of this arrangement with that of draft Article 8, which provides that the carrier is liable according to the rules of the international convention [or national law] that according to their terms apply to all or any of the carrier's activities under the contract of carriage regarding the carriage preceding or subsequent to the sea carriage, leads to a liability system in which both the carrier and the performing party are liable under the same rules. In this system, a performing party who contracts with a (multimodal) carrier to perform an international stretch of road carriage between Rotterdam and Vienna, which is part of a multimodal transport including an (international) sea leg, would be liable via the draft instrument (2003)³⁰ according to the liability rules in the CMR, as would the multimodal carrier.

This concept led to a lot of debate, not only concerning the performing party definition but also considering the magnitude of the proposed liability.³¹ The definition of the performing party was thought to be too broad and the liability too substantial.³² Among other things, the geographic reach of the instrument accompanying this treatment of performing parties was cause for concern. The example was given of goods being shipped from Tokyo to Rotterdam via Singapore, and whether the stevedore handling the goods in Singapore was subject to the draft instrument (2003) if either Japan or the Netherlands had ratified but Singapore had not.³³ The conclusion that this might be overextending the reach of the draft instrument and the fact that creating a direct right of action against a party with whom the cargo interests do not have a contractual relationship yielded disagreement,³⁴ were ultimately part of the reason for the limitation of the scope of draft instrument (2004) Article 15 to 'maritime performing parties'. This narrowing of the provision undercuts the justifying element Article 15 had when it comes to the broad scope of application wielded by the draft instrument.

Conflicts 'R' us

It is clear that the incorporation of other transport modes in a unimodal convention can cause more than one regime to be applicable on a certain stretch of carriage.³⁵

Since the draft instrument is only one restriction away from a multimodal regime, it was feared that its scope would conflict with existing unimodal regimes, particularly the CMR and the CIM/COTIF conventions.³⁶ The draft instrument seems to be based on the idea that the CMR and CIM/COTIF cannot apply to door-to-door carriage autonomously since the relevant

protection due to the added wording 'under this instrument' in §4. One of these parties bearing responsibility under the instrument is the performing party according to Art 15 §3 draft instrument (2004). As can be read in note 74 to Art 15, this is to be changed to 'maritime performing party' so that its content mirrors that of Art 14*bis* draft instrument (2004). Article 21 providing protection in case of non-contractual claims, might be better placed closer to Art 15 §4.

²⁸ The provision relating to the liability of performing parties is Art 15 draft instrument (2003) which in earlier versions was numbered Art 6.3.

²⁹ MF Sturley, 'The treatment of performing parties', *CMI Yearbook*, transport law document 6, 2003, 234.

³⁰ Article 15 in connection with Article 8 draft instrument (2003).

³¹ B Czerwenka, 'Scope of Application and Rules on Multimodal Transport Contracts', *Transportrecht* 2004-7/8, 301-302.

³² UNCITRAL (A/CN.9/WG.III/WP.25) 2.

³³ UNCITRAL (A/CN.9/526) 70.

³⁴ UNCITRAL, (A/CN.9/WG.III/WP.32) 27 note 81 (b).

³⁵ The conflict of convention provisions in Arts 83 and 84 of the draft instrument (2003) formulated by the Secretariat that are suggestive of international law, have been left out of consideration, since they have not only been drawn up in case Art 8, which is the quintessence of this commentary, was expunged, but also because they may yet be revised. See UNCITRAL (A/CN.9/526) 69 paras 247 and 250.

³⁶ MF Sturley (n 23) 146.

trajectories under a multimodal contract would not fulfil the prerequisites mentioned in the scope Articles in these conventions. If one believes this, a conflict with these conventions will not occur. The door-to-door carrier would in this view at most be a shipper under these conventions considering his contract with the performing party in question, for example a European inland trucker or railroad. This view corresponds with arguments in the text of a proposal concerning the scope and structure of the draft instrument submitted by the Italian Government³⁷ and is defended by others as well.³⁸ One has to realize, though, that not everyone is convinced of this point of view, especially not in Europe.³⁹ The grounds for this dissenting view will be presented in detail later.

Draft Article 8, a compromise

To achieve a proposal that could be ratified in Europe the draftsmen included a compromise suggestion in the draft instrument, based on the desire to achieve as uniform a system as possible and the belief that it will be almost certainly a political necessity to extend at least this much deference to the CMR and the CIM/COTIF.⁴⁰ The contractual carrier's liability would be determined by this compromise suggestion which can be found in Article 8 of the draft as already mentioned, and is referred to as the 'minimal network system'. Under Article 8, liability is based on the relevant international mandatory unimodal regime in case of localized loss, only declaring its own liability rules applicable in case such a regime is lacking. In case of unlocalized loss, the terms of Article 8 are not met and the draft instrument's own liability rules apply. To maximize uniformity only mandatory laws are respected on the theory that an international convention should have the power to override any regime that the parties themselves could contractually avoid.

The network system found in Article 8 is called a minimal one for good reason, since it is limited to the subjects of the carrier's liability, limitation of liability and time for suit. In all other areas covered by the draft instrument, it asserts that its provisions apply irrespective of any provisions with different instructions that may exist in other conventions.⁴¹ The reasoning behind this is of course that this way the convention is as uniform as possible. In a proposal by the Netherlands regarding the draft instrument,⁴² the argument is used that it would hardly be practical if different parts of a single transport are governed by conflicting provisions, which certainly has merit.⁴³ Regrettably, the example used to illustrate this point, namely the question of whether a negotiable document that is issued for door-to-door carriage becomes non-negotiable as soon as the road haulage part begins, is a little off the mark, since the CMR does not require a transport document to be applicable.

³⁷ UNCITRAL (A/CN.9/WG.III/WP.25) 3–4.

³⁸ I Koller (n 12) 45–50; F Berlingieri, 'Door-to-door transport of goods: Can uniformity be achieved?' *Liber Amoricum Roger Roland*, Brussels, De Boeck & Larcier NV 2003, 37–55.

³⁹ H Honka, 'The Legislative Future of Carriage of Goods by Sea. Could It Not Be the UNCITRAL Draft? An Academic's View', <<http://folk.uio.no/erikro/WWW/cog/cog.html>>, UNCITRAL paper 2002, 13; MA Clarke, *International carriage of goods by road: CMR*, London: Lloyd's of London Press 2003, 45–46 and 'A conflict of conventions: The UNCITRAL/CMI draft transport instrument on your doorstep', [2003] 1 *Journal of International Maritime Law* 28–39; KF Haak, *The liability of the carrier under the CMR* (diss. Utrecht), The Hague: Stichting Vervoeradres 1986, 98–99; A Messent and DA Glass, *Hill & Messent, CMR: Contracts for the international Carriage of Goods by Road*, London: Lloyd's of London Press 2000, 45; A van Beelen, 'CMR en overlading', *Vergelijkend Zeerecht (Liber Amoricum R.E. Japikse)* Leiden 1994, 35–50; Herber and Piper, *Internationales Strassentransportrecht*, München: Beck 1996, 85; K Thume (ed K Demuth et al), *Kommentar zur CMR*, Heidelberg: Verlag Recht und Wirtschaft 1994, 92.

⁴⁰ MF Sturley (n 23) 146–147.

⁴¹ UNCITRAL (A/CN.9/WG.III/WP.29) 21 para 72.

⁴² UNCITRAL (A/CN.9/WG.III/WP.33) 4–5.

⁴³ Indeed, this is one of the drawbacks of the default network system that is currently used when it comes to multimodal carriage.

Draft Article 8 and the CMR

The fact that the network system integrated in the draft instrument is limited to the subjects of the carrier's liability, limitation of liability and time for suit, demonstrates that it is based on the above-mentioned presumption that a convention like the CMR does not apply autonomously to international road carriage under a single multimodal contract.⁴⁴ After all, if such an international convention were seen as autonomously applicable, a conflict would ensue between the mandatory provisions included in this applicable international convention other than those provisions mentioned in Article 8 of the draft instrument and those regulating the same issues in the draft instrument.

As a matter of fact, the conditions that Article 8 prescribes even stop it from having the effect it was designed to generate. For the provisions of another international convention to prevail over the ones in the draft instrument, Article 8 demands that 'there are provisions of an international convention [or national law] that *according to their terms apply* to all or any of the carrier's activities under the contract of carriage' (*emphasis added*). Thus we are directed to the scope rules of the relevant convention itself to verify if it applies. A veritable circular argument.⁴⁵

For example, if the CMR does not in and of itself apply on a stretch of road carriage that is part of a multimodal transport, neither will it be applicable via Article 8 of the draft instrument. A way to remedy this⁴⁶ could be the replacement of the words 'according to their terms apply' in Article 8 with the words 'would have applied, if the shipper had contracted with the carrier in accordance with the conditions prescribed by this convention [or national law]'. After this substitution the CMR applies via Article 8 when it comes to its core provisions those concerning the carrier's liability. Nevertheless this still leaves open the question of whether this carving up of a convention is admissible.

If, however, the CMR is considered applicable autonomously, *ergo ex proprio vigore*, Article 8 nevertheless declares that only its mandatory provisions covering the carrier's liability, limitation of liability and time for suit prevail over those in the draft instrument. Since not only the CMR, but also most other international unimodal carriage conventions consist of more mandatory provisions than only those regarding liability, this leaves considerable scope for conflict.⁴⁷

Jurisdiction

One important mandatory provision that is found in most unimodal conventions is a provision regarding jurisdiction. The question of which court to address is a very basic one when one intends to litigate, on the outcome of which can depend the outcome of your entire case because not every court will interpret a certain convention the same way. For example, German courts are more likely to conclude that the conduct of a CMR carrier is considered to be wilful misconduct than Dutch courts are.⁴⁸ This has naturally resulted in the

⁴⁴ This is expressed in UNCITRAL (A/CN.9/WG.III/WP.29)19 paras 62–64 and 86. This document also makes it clear, however, that the draftsmen are aware of the existence of opinions contrary to their own. Some of those working on the draft may even share these contrary opinions.

⁴⁵ A similar argument can be used regarding Art 18 which regulates unlocalized loss; §2 states that in case of unlocalized loss the highest limit of liability in the international and national mandatory provisions *that govern* the different parts of the transport shall apply (*emphasis added*). Also debatable is the inclusion of the terms 'and national' in this provision; see above for a parallel discussion, fn 22.

⁴⁶ A remedy would indeed be needed since Art 8 was created to extend the effect to the CMR and/or CIM/COTIF under the draft instrument.

⁴⁷ Which has been recognized by the draftsmen, see UNCITRAL (A/CN.9/WG.III/WP.29) 19 para 64.

⁴⁸ KF Haak, 'Haftungsbegrenzung und ihre Durchbrechung nach der CMR in den Niederlanden', *TransportRecht* 2004–3, 104–107.

practice of road carriers, who are usually the first to know when something goes wrong, to rush to a Dutch court at the first sign of trouble to secure their right to invoke the limitations to their liability.⁴⁹

As the draft instrument also includes jurisdiction provisions,⁵⁰ which differ from those in the CMR, a conflict between these conventions would arise.⁵¹ Having outlined the importance of jurisdiction provisions it becomes clear that such a conflict is hardly something to aspire to.

The obvious way out of this predicament is of course the expansion of the 'minimal network system' in the draft instrument to a network system which allows every mandatory provision of the relevant unimodal convention to prevail.

The CMR and its scope

Even though the draftsmen of the instrument presume that the CMR does not apply according to its own scope rules to international road carriage if it is executed under an intermodal contract, the opposite view is held on a larger scale than the draftsmen might have wished.⁵² Obviously, this does not enhance the draft instrument's chances of ratification. Hindering it especially is the fact that a large number of courts in Europe interpret the scope of application of the CMR extensively as has been discussed above. In their view, the stretches of road carriage performed as part of a longer multimodal journey under a single contract fall within the scope of the CMR.

There are abundant reasons for this interpretation.

Reasoning behind the extensive interpretation of the scope of the CMR

First, Article 1 §1 of the CMR does not literally demand that the whole voyage has to be made exclusively by road, or even predominantly by road, just that it has to have a road leg.⁵³ An example of this is *Quantum*, a decision by the British Court of Appeal (*Quantum Corporation/Plane Trucking*)⁵⁴ in which it applied the CMR to a road leg in Great Britain in circumstances where the contract embraced more than one type of carriage. This leg was part of the contracted carriage by air from Singapore to Paris followed by the agreed carriage by road of the goods from Paris to Dublin. The goods were stolen in the course of being carried by road in Great Britain. Here the court was of the opinion that if international carriage is to or from a contracting state, the CMR applies to 'every contract for the carriage of goods by road' (emphasis added), whether or not the contract is for some other type of carriage as well.⁵⁵ This line of thought is also followed the German Supreme Court, the Bundesgerichtshof, which has explicitly said, concerning a multimodal transport from Neunkirchen to Portadown (Northern Ireland), that the CMR Convention is applicable on the road leg from Neunkirchen to Rotterdam.⁵⁶

⁴⁹ KF Haak, 'Jurisdictionperikelen in het internationaal wegvervoer: het einde van het sprookje van de verklaring voor recht?', *European Transport Law*, 2004–2, 140.

⁵⁰ UNCITRAL (A/CN.9/WG.III/WP.32) Arts 72–75 *bis*.

⁵¹ In Europe the EEC Convention stops the draft instrument's jurisdiction provisions from having any effect; according to Art 57 of the EEC Convention only conventions regulating jurisdiction regarding special subjects, such as the CMR (see the verdict of the Danish Supreme Court at 10 September 2003, *European Transport Law*, 2004–1, 74–78), existing at the time the EEC Convention came into effect have precedence over the EEC provisions. This means Arts 2–7 of the EEC Convention will take precedence over Arts 72–75*bis* of the draft instrument.

⁵² Note 39.

⁵³ UNCITRAL (A/CN.9/WG.III/WP.29) 29 para 115.

⁵⁴ Court of Appeal 27 March 2002, [2002] 2 Lloyds Rep 25–41 (*Quantum Corporation/Plane Trucking*).

⁵⁵ MA Clarke, 'A conflict of conventions: The UNCITRAL/CMI draft transport instrument on your doorstep', [2003] 1 *Journal of International Maritime Law* 32.

⁵⁶ Bundesgerichtshof 24 June 1987, *Transportrecht* 1987, 447.

Nor should the stipulation that the place of transfer of the goods and the place designated for delivery as specified in the contract are situated in two different countries, be seen as excluding road carriage under a multimodal contract from the scope of the CMR. The UK Court of Appeal concluded in *Quantum*, after examining other European decisions like *Resolution Bay*,⁵⁷ that 'the place of taking over and delivery of the goods under Article 1 §1 are to be read as referring to the start and end of the contractually provided or permitted road leg'⁵⁸ (*emphasis added*).

A consideration reinforcing this point of view is the fact that Article 1 §1 of the CMR is a unilateral conflicts rule, and that what is most important about the 'taking over' is that it marks the beginning of contract performance that must begin in one country and end in another.⁵⁹ Moreover, the expression 'taking over' should not be given too literal an interpretation; in the context of the CMR as a whole a carrier can even become liable as a CMR carrier without any actual physical take over of the goods at all, given that the contracting party may subcontract the whole agreed upon carriage.⁶⁰

Another case where the Court ruled that a stretch of road transport as part of a multimodal contract falls under the influence of the CMR⁶¹ is a ruling of the Rechtbank Rotterdam of 24 January 1992.⁶² There an *contrario* explanation of Article 2 CMR was used by the court. Article 2 states that if besides the carriage of goods by road use is made of 'kangaroo transportation', in this case the transportation of a truck including cargo on a sea ship, the CMR rules apply to the whole journey including the sea leg.⁶³ If, however, there is transshipment of the goods, the CMR does not apply to the sea leg⁶⁴ although it still applies to both of the road legs. The court also stated that to declare the CMR not applicable on such a leg would mean an unnecessary limitation of the scope of application of the convention which is contrary to the purpose of the convention to standardize conditions under which this kind of carriage is undertaken.

The other side of the coin

On the other hand, some say that article 2 can also be seen as proof that the CMR does not extend itself to carriage under a multimodal contract, since it can be said that the draftsmen of the CMR took up this provision to state exactly how far they were willing to extend the scope of the convention.⁶⁵ This theory, although it might bear contemplation, should nevertheless not be considered without keeping in mind that Article 2 expands the scope of

⁵⁷ Rb Rotterdam, 28 October 1999, *Schip en Schade* (S&S) 2000, 35. In this case a container of meat was transported from New Zealand to Rotterdam (NL) to Antwerp (B). The court declared CMR was applicable on the road leg from Rotterdam to Antwerp where the loss was said to have occurred, since Rotterdam was considered the place of 'taking over' the goods.

⁵⁸ Note 54, at point 59 and Rb Rotterdam (n 57) (*Resolution Bay*), point 4.3. In both decrees it is stated that the CMR even applies if there has been (international) road carriage under a multimodal contract that permits the carrier to make use of the road as transport mode even if this is not the mode of transport initially agreed upon.

⁵⁹ UNCITRAL (A/CN.9/WG.III/WP.29) 29, para 116 and MA Clarke, 'Carriage by Road. A Multimodal Mix-up', JBL 2002, March, 215.

⁶⁰ MA Clarke, *International Carriage of Goods by Road: CMR*, London: Lloyd's of London Press 2003, 45.

⁶¹ This court declared CMR even applicable on a national road leg, since the entire multimodal contract contained an agreement regarding international carriage.

⁶² Rb Rotterdam, 24 January 1992, *Schip en Schade* (S&S) 1993, 89.

⁶³ An exception to this rule emerges when the damage exclusively occurred on the non-road leg without any help from the road carrier.

⁶⁴ Under those circumstances the relevant regime of the other modality is applicable provided that it is mandatory.

⁶⁵ F Berlingieri, 'Door-to-door transport of goods: Can uniformity be achieved?' *Liber Americum Roger Roland*, Brussels: De Boeck & Larcier NV 2003, 42. The British delegation proposed the addition of Art 2 since without it the convention would be of little use to them: it would never apply to road transport in Great Britain. This indicates the *contrario* explanation of Art 2 to be the correct one, since only then can the CMR ever apply on British road transport. An international transport purely by road is after all quite impossible with the British Isles as the starting or end point (with the exception of Northern Ireland).

the CMR to cover another mode of transportation altogether; which is different from covering the mode of transport it is designed for if it comes under a contract also including other modes of transport.

Additional objections to the extensive interpretation of the CMR scope have also been made, even within Europe.⁶⁶

The first objection is of course that Article 1 §1 does literally demand that the contract only concerns road carriage, resulting in the conclusion that the CMR never applies to multimodal contracts,⁶⁷ which would severely limit its scope of application. Justification for this thorough curtailing is said to lie in the language; the French text of the CMR demands a 'contrat de transport de marchandise par route' (*emphasis added*), which is to be seen as a stricter requirement than in the English version, namely a 'contract for the carriage of goods by road' (*emphasis added*).⁶⁸ This conclusion appears somewhat excessive against the backdrop of its rationale.⁶⁹

Also put forward by those who would interpret the scope of the CMR restrictively is its history. While the CMR Convention was being drafted, a study was conducted by Unidroit containing a sharp distinction between multimodal and unimodal transport and the stated intention to negotiate a convention governing combined transport in the future. In this light, Article 2 can be seen as a provision the draftsmen took up to state how far exactly they were willing to extend the scope of the convention to other modes of transport. One should not forget, however, that the difficulties surrounding multimodal transport were already known even then, even though the real advance of containerized transport had yet to begin. Several proposals concerning an international arrangement on the issue had already failed, so it is unsurprising that the CMR draftsmen wanted to emphasize the importance of further discussion on the subject. This does not mean to say that the draftsmen of the CMR intended to keep the CMR out of play in case of further international developments in the field of multimodal transport. This conclusion would be an unjustifiable limitation on the scope of the convention.⁷⁰

Another suggested objection is that if the CMR were to apply under a multimodal contract this would cause more conflicts between the unimodal conventions than we bargained for; indeed, as we have seen above, conflicts will arise. However, these will not include the conflict Koller describes in his criticism on the *Quantum* ruling.⁷¹ If, for instance, we look at Article 18 §3 of the Warsaw Convention,⁷² we see that in principle the period of the carriage by air does not extend to carriage by any other mode performed outside an airport. However, if such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

This means that if an airport lies close to the border of a country, much international road carriage will be subjected to the Warsaw Convention. This does, however, not mean, contrary to Koller's opinion, that with regard to the same incident the CMR and the Warsaw Convention can both apply. The CMR can only apply on the road leg of the multimodal journey and if there is proof that the damage originated on the road leg so that the CMR will apply, the Warsaw Convention will not.

⁶⁶ For a substantial effort in this direction see I Koller, 'Quantum Corporation Inc. v Plane Trucking Limited und die Anwendbarkeit der CMR auf die Beförderung mit verschiedenartigen Transportmitteln', *Transportrecht*, 2003–2, 45–50.

⁶⁷ F Berlingieri (n 65) 39–40.

⁶⁸ I Koller (n 38) 47 sub 1.

⁶⁹ See also Art 33 §4 of the Vienna Convention on the Law of Treaties and Herber/Piper, *Internationales Strassentransportrecht*, München: Beck 1996, 54.

⁷⁰ KF Haak, *The liability of the carrier under the CMR* (diss. Utrecht), The Hague: Stichting Vervoeradres 1986, 98–99.

⁷¹ I Koller (n 38) 47 sub 4.

⁷² Which corresponds with the first line of Art 18 of the Montreal Convention.

The network approach

Even if after all this, one is still of the opinion that the CMR can not apply *ex proprio vigore* to an international road leg carried out under a multimodal contract, there is always the network approach.⁷³ At the very least the CMR does not resist being brought to bear via the network system. That the CMR is no stranger to the network system can be deduced from Article 2, where the network system is applied in cases of 'mode on mode'⁷⁴ transport.

An example proving that the network approach is employed internationally is the *Bravery* decision of the United States Court of Appeals for the second circuit.⁷⁵ In this case a door-to-door bill of lading was issued under which a container of bicycles was transported by land from Oconomowoc (USA) to Montreal (Canada), by sea from Montreal to Antwerp (B) and again by land from Antwerp to Spijkenisse (NL). During the last part of the transport which was performed by road, the truck, cargo and all, was stolen. The court sees this door-to-door contract as a 'mixed' contract⁷⁶ and as a result declares CMR applicable on the road carriage performed under it. The bill of lading did contain a choice-of-law provision opting for COGSA, but since this provision was contractual, the court concluded that the CMR, which applied by force of law on the road leg, prevailed.

Seeing a multimodal contract as a 'mixed' or 'chain' contract does not necessarily mean believing that the network approach which flows naturally from this interpretation of the contract is the best possible solution, but it does allow for a preference for a uniform system.⁷⁷ However, the network system is the system we end up with, as there is no international uniform system to govern this area and no consensus regarding such a system is expected to emerge in the near future. Not even the new draft instrument claims to be the cork to plug this leak.⁷⁸

Additionally, while we are internationally dependent on the network approach to supply some handholds in the area of multimodal transport, the CMR Convention is a useful and necessary tool to navigate those churning waters. It would be unwise to brush it aside solely to smooth over some bumps in the road for the draft instrument that is at best a partial solution to the existing troubles.

The bottom line

The UNCITRAL/CMI Draft Instrument has the potential to leave its stamp quite heavily on modern-day transport with its high number of door-to-door contracts. When it comes to the scope of its application, however, there are still many ruffled feathers to be dealt with. Article 8 of the instrument may be on the right path but it still needs far-reaching adjustments if it is to become the compromise that brings all parties together. Even then we are not out of the woods. If all the controversial issues surrounding the draft instrument were to be resolved and it attracted enough ratifications to come into effect, we still would not have an arrangement dealing with multimodal transport as a whole. Therefore, the effort to achieve consensus on this subject has to continue. For as long as consensus eludes us the network system will continue to be used without a concrete basis and the annexation of transport modes into unimodal conventions will likely only increase, causing ever more friction in an already over-complicated legal area.

⁷³ MA Clarke, *International carriage of goods by road: CMR*, London: Lloyd's of London Press 2003, 33.

⁷⁴ Also known as 'kangaroo', 'piggyback', 'roll on-roll off' or 'Hückepack' transport; see also MA Clarke, *International carriage of goods by road: CMR*, London: Lloyd's of London Press 2003, 29 and 31.

⁷⁵ US Court of Appeals 27 October 2000, *European Transport Law*, 2001, 212–226 (*Bravery*).

⁷⁶ *ibid*, point III.A, para 2.

⁷⁷ A van Beelen, *Multimodaal vervoer. Het kameleonsysteem van Boek 8 NBW* (diss. Leiden 1996) Zwolle, WEJ Tjeenk Willink, 1996, 32.

⁷⁸ GJ Van der Ziel, 'The UNCITRAL/CMI Draft for a New Convention Relating the Contract of Carriage by Sea', *Transportrecht*, 2002–7/8, 267.