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## Intermodal transport under unimodal arrangements

### Conflicting conventions: the UNCITRAL/CMI draft instrument and the CMR on the subject of intermodal contracts

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#### 1. The rise of the container

To provide a customer with what he wants and expects is usually good for business. Since this certainly is no different in the transport sector, there has been an overall increase of door-to-door transport over the last few decades. The genesis of containerization in the preceding century and its continued advance even now can be seen as a catalyst for this tendency. It is easy to see that the development of the container has made the changeover between different modes of transport much easier and as a result cheaper.

In the legal playing field however, these developments have exposed the lack of an international instrument regulating multimodal transport. Considering the scale on which we at present make use of multimodal transport, such an instrument can no longer be considered a mere luxury. At this point in time it can be deemed a strict necessity, without which the transport sector might not ever achieve true economic and legal efficiency.

This door-to-door transport which has become so popular is usually taken on by freight forwarders who are inclined to act as principal and provide the shipper with a single contract<sup>1</sup>. This single multimodal transport<sup>2</sup> contract they provide is seen in general as a ›chain‹ contract<sup>3</sup>, a contract that is nothing more than a chain of contracts concerning each individual unimodal part of the transport. There is also an opinion concerning the nature of a multimodal transport contract deviant from the mainstream. Supporters of this opinion see the multimodal transport as a new separate sort of contract, a ›sui generis‹ contract or ›aliud‹<sup>4</sup>.

If one sees the multimodal transport contract as a chain contract the natural step to take when searching for the applicable liability regime in any given case, is the one leading to the network system<sup>5</sup>. The network system is a system in which the liability regime changes according to the transport mode used. Has the loss occurred during a stretch of rail carriage for instance and would the CIM/COTIF normally have applied if the carriage had been under a transport contract entailing only rail carriage, then so does the CIM/

COTIF apply on the rail stretch under the multimodal contract.

The network approach is comparable to a chain that is composed of all the separate unimodal regimes that would normally have applied on each stage of the total voyage as if the involved parties had drawn up separate contracts for each mode of transport used.

This system has been in use in the transport sector for quite some time now and with good reason; there simply is no better alternative. One of the drawbacks of the network approach, 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 transport mode to transport mode and are as such unpredictable. And that is if it is known at which point during the carriage the damage or loss occurred<sup>6</sup>. Any transport jurist would agree that an international instrument that would regulate multimodal contracts in a uniform way, would be more efficient as well as more effective than the presently used network system.

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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 e. V., p. 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 Also known as a ›mixed‹ contract.

4 Adherents of this view are primarily found in Germany.

5 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, 1996, p. 32.

6 In everyday practice containerized carriage results in many cases where the exact location where the cargo was damaged can not be pinpointed. A similar problem causes damage that occurred over a longer period of time or had more than one cause.

SEA		INLAND WATERWAY		ROAD	RAIL	AIR
Hague Rules	HVR	Hamburg Rules	CMNI	CMR	COTIF/CIM	Warsaw convention/ Montreal convention
£ 100/pkg	2 SDR/kg or 666,67 SDR/pkg	2,5 SDR/kg or 835 SDR/pkg	2 SDR/kg or 666,67 SDR/collo or 1500 + 25000 SDR/container	8,33 SDR/kg	17 SDR/kg	17 SDR/kg

Table 1: Liability limitations under the various transport conventions

## 2. Everything changes

Almost all the unimodal transport conventions which are in use in the present day originated in the early part of the last century<sup>7</sup>. Since goods were transported on a unimodal basis in those days, the newly created conventions regulating the transport of goods each had a strictly unimodal focus. In present times we still make use of these same conventions but even though the carriage of goods itself has become more and more multimodal, the conventions regulating it has not. This gives our contemporary system of transport regimes somewhat of an antique feel, despite the efforts that have been put into keeping them up to date in other regards.

As a result the various regimes approach similar situations in a very dissimilar way<sup>8</sup>, making the task of harmonising the existing legal reality regarding the carriage of goods a daunting one.

Even if it has not lead to a multimodal oriented transport convention yet, efforts to conform transport conventions to the present day demands of the sector do take place. The process of revising or altering a convention takes time, several years is not uncommon. This time is spent considering all possible solutions and the consequences they may have if they are incorporated in the convention. Another reason for the fact that making changes in a convention is a slow moving process are the extensive deliberations between the various parties to the convention. These deliberations are not seldom of a political nature, thereby placing an extra hurdle on the road to consensus. In most cases there are many different parties to reckon with, even when it comes to somewhat regional<sup>9</sup> conventions like the CMR<sup>10</sup> or the CIM/COTIF<sup>11</sup>. Not only governments are involved in the revision process but also the large players in the relevant transport sector, which would seem logical since they are the ones that have to deal with the revision in daily practice.

Yet even if after all this deliberation a consensus has been reached, it still happens that not all member States of the original convention ratify the newly proposed changes. When this happens the modified set of rules comes into effect next to 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 didn't 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<sup>12</sup>.

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. The stagnation of the creative process when it comes to this legal area has us still depending on the network system by default in the everyday transport practice. A system without a sound basis in an international convention but which instead relies on the silent agreement admitting that there is no better alternative. A system which is not up to the task of regulating the economic reality of international multimodal carriage.

## 3. Intermodal transport; an unresolved puzzle

The history of endeavours to solve the intermodal transport problem extends back decades. Despite the expenditure of a lot of blood, sweat and tears, none of these have paid off as yet. The current expectations as to the outcome of any new project to create a new uniform arrangement regulating multimodal carriage are very low. This is not surprising, our inability to resolve an economically very important issue such as this irrespective of the enormous amount of deliberations and research already invested in the development of a fitting solution is very disheartening.

Examples of the past attempts at regulating intermodal transport are the conventions drafted by the CMI, the 1967 Genua Rules and the 1969 Tokyo Rules, but also the 1972 TCM drafted by ECE/IMCO and as a last example the most

7 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.

8 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.

9 Most member States of both conventions are European.

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

11 CIM/COTIF: The Convention Concerning International Carriage by Rail (COTIF), May 9, 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.

12 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, WWW<<http://www.admiraltylaw.com/papers/cargo%20regimes.htm>>, August, 1999.

famous of the list, the 1980 MT convention by the United Nations. Somehow however, each project failed to generate the needed consensus.

Reasons behind this failure can be found in the existence and history of the various unimodal conventions in use today. These are not easily set aside it seems, which is needed in order for a uniform regime on intermodal carriage to function. It is not hard to understand that especially ›regional‹ conventions like the CMR and the CIM/COTIF give rise to dissension during international deliberations. The mostly European contracting States of particularly the CMR are apparently very much attached to this convention. Since it has served the road transport industry for almost fifty years it is unlikely to generate many unexpected surprises for those involved in carriage under its scope, a characteristic that is very attractive economically speaking.

Of course, there is always the devil in details, but for this the blame should be cast at the shifting of the moral perspective in society in general and at the unquenchable thirst for debate jurists are flawed with in specific.

This assessment of the CMR has led to an extensive interpretation of the scope of application of the CMR in particular by the European courts<sup>13</sup>. Article 1 § 1 of the CMR states that the convention applies to ›every contract for the carriage of goods by road‹. The majority of courts in contracting States read this as to also entail contracts under which at least part of the carriage can be performed by road. This puts stretches of road carriage performed as part of a longer multimodal journey under a single contract within the range of this unimodal convention. Dissenting voices<sup>14</sup> have argued that this is stretching the application of the CMR beyond its originally intended boundaries<sup>15</sup>. Which, even if it were true, would not have to be an impediment to our current interpretation, because in almost fifty years the moral outlook of society has changed substantially and the interpretation of legal rules has to change accordingly for them to remain useful<sup>16</sup>.

The exact scope of carriage conventions, CMR or others for that matter, remains a subject subjected to a lot of discussion, their boundaries can not be said to be a clear cut line, rather they are a grey area<sup>17</sup>. These grey areas only increase the difficulties that have to be overcome when negotiating a new international convention for multimodal transport.

Ultimately this leaves us without prospects concerning a solution on an international basis in the near future. The transport sector itself could not leave it at that of course and found creative ways to diminish some of the tangles they encounter in practice such as the use of contractual standard rules.

The best example of rules like that are probably the URM<sup>18</sup>. These URM apply only when they are incorporated, however this is made, in writing, orally or otherwise, into a contract of carriage by reference to the ›UNCTAD/ICC Rules for multimodal transport documents‹, irrespective of whether there is a unimodal or a multimodal transport contract involving one or several modes of transport or whether a document has been issued or not. They have a complementary effect to any applicable carriage convention or national transport regulations. They try to fill in the holes left by those regimes; subjects these regimes can or will not regulate or subjects which are left open due to the unfortunate fact that unimodal conventions do not fit seamlessly together.

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).

One should not forget, however practical these Rules may be, they are only contractual in nature. They can not set aside any mandatory regulations of an international or even a national nature. In the end there may still remain uncertainty when it comes to the legal position between parties and their liability<sup>19</sup>.

#### 4. ›Borrowing‹ application scope

A tendency more artificial and definitely less fulfilling is the broadening of their application scope by unimodal conventions ›borrowing‹ from other unimodal transport conventions. To cope with the multimodal reality in international carriage, unimodal conventions seem to expand their scope of application by annexing other types of modalities. Article 2 § 1 of the CMR contains an early example of this practice, the so-called piggyback transport.

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 in case a truck is put on a ship with goods and all 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<sup>20</sup>.

In practical terms this does not expand the application of the CMR that much, but later examples show rather less 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.‹

13 For more details see paragraph 8 below.

14 I. Koller, ›Quantum Corporation Inc. v. Plane Trucking Limited und die Anwendbarkeit de CMR auf die Beförderung mit verschiedenartigen Transportmitteln‹, TranspR, 2003-2, p. 47.

15 For a more detailed discussion on this issue see paragraph 8.

16 See also M. A. Clarke, International carriage of goods by road: CMR, London: Lloyd's of London Press 2003, p. 8 paragraph 4b: ›people should not be bound by discussions or negotiations of which they may never have heard.‹

17 G. J. Van der Ziel, ›The UNCITRAL/CMI Draft for a New Convention Relating the Contract of Carriage by Sea‹, TranspR, 2002-7/8, p. 267.

18 UNCTAD/ICC Rules for Multimodal transport documents.

19 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, Thirty-seventh session, 18-19 April 2002, agenda item 9, p. 6.

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

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 ›piggyback‹ transport as described in the CMR. CIM/COTIF rules still apply, even if the goods are transferred into another container or vehicle.

The new air carriage convention, the Montreal convention<sup>21</sup> encloses a provision that shows the more recent increase of the expansion urge. Article 18 of this convention 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 indication<sup>22</sup> 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<sup>23</sup>.

Set in an example it means that if one contracts specifically for air carriage from Rome to Helsinki, any transport performed by road will be considered to have been air carriage, and thus covered by the Montreal convention, even though the actual airport of departure was Hamburg. All that will be required for this result is that the air waybill did not mention the possibility to replace the air transport by any other mode of carriage<sup>24</sup>.

### 5. Old habits die hard; the unimodal state of mind

Annexing other modes of transport into the existing unimodal conventions might not have led to a lot of problems if it weren't for the fact that the conventions that are being borrowed from do not intend to give up their territory. Regular transport over a COTIF-registered line under a through consignment note made out for a route over the territories of at least two States is regulated by the CIM/COTIF. But if an international part of this journey is made by road, it is very much possible that the CMR applies as well. The resulting clash of conventions increases the uncertainty as to what rules apply and who is liable and to what extent.

These results of annexation make its increase a worrisome development. Nor is the end of the trend in sight, as is demonstrated by 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; it may have been an attempt to unify sea carriage arrangements alone to begin with, currently it encompasses contracts including all modes of carriage on the condition that one of them is sea carriage.

Simply put it would regulate, besides the international sea transport stage, all parts of a multimodal transport that includes a sea journey not subjected to an international<sup>25</sup> mandatory regime of their own.

To avoid the inevitably ensuing conflicts with the existing conventions the secretariat was asked to prepare some provisions on this subject<sup>26</sup>, the results of which can be found in the articles 83 through 87 of the draft instrument<sup>27</sup>. These draft provisions have not been thoroughly discussed as yet and make a somewhat obscure impression.

Article 84, declaring the provisions of the draft instrument to prevail over those of an earlier treaty that are incompatible with those of the draft instrument, reminds of the fantastic Baron Munchausen who was able to pull himself out of a swamp by concentrating all his strength on pulling the pig-tail of his wig up, thus getting himself out of the bog.

Needless to say that these conflict of convention provisions will not be reckoned with in the following<sup>28</sup>.

The label they have put on this lopsided multimodal transport arrangement is ›maritime plus‹. Lopsided because its validity would only be served by regulating all multimodal transport except just some. It is understandable however that the drafters felt some trepidation toward the multimodal label knowing what happened to earlier attempts.

Regrettably the draft instrument reinforces the idea that we can only seem to approach intermodal transport in a unimodal way. A consequence of this type of approach is that the newly created convention will have a narrower scope of application than should be aspired to, leaving out certain multimodal transport types as it does. On the other hand, this may just be the only way to achieve a complete multimodal carriage convention in the time to come, with the draft instrument acting as a stepping stone.

21 This new Montreal convention (1999) regarding air transport has come into effect in November 2003 and can be seen as the successor of the 1929 Warsaw convention for international air carriage. The Montreal convention also contains a more pure provision concerning combined carriage, namely article 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.

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

23 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 article 29 of the CMR which prohibits such a carrier to avail 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‹, TranspR 2003-10, p. 369-377.

24 I. Koning, ›Trucking onder Warschau en Montreal‹, Nederlands tijdschrift voor handelsrecht (NTHR), 2004-4; M.S. McDaniel, The Proposed Montreal Convention of 1999. An Act To Replace The Warsaw Convention of 1929, WWW: [http://www.cargolaw.com/presentations\\_montreal\\_con.html](http://www.cargolaw.com/presentations_montreal_con.html), Rotterdam, 27 September 2000.

25 In article 8 of the draft ›or national law‹ has been placed between brackets indicating that the inclusion of this part of the provision is uncertain as yet. See for example: UNCITRAL, ›Preliminary draft instrument on the carriage of goods [by sea] – Proposal by Canada‹, (A/CN.9/WG.III/WP.23), p. 3 or: UNCITRAL, ›Report of Working Group III (Transport Law) on the work of its twelfth session‹ (Vienna, 6-17 October 2003), (A/CN.9/544), p. 7-9.

26 UNCITRAL, ›Report of Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March to 4 April 2003)‹, (A/CN.9/526), par. 247 and 250.

27 UNCITRAL, ›Transport Law: Draft instrument on the carriage of goods [wholly or partly] [by sea] – Note by the Secretariat‹, (A/CN.9/WG.III/WP.32), articles 83-87.

28 The conflict of convention provisions remind one of international public law in article 83 and 84 of the draft instrument (2003), have also been left out of consideration since they have been drawn up in case article 8, which is the quintessence of this commentary, were to be expunged. See UNCITRAL, ›Report of Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March to 4 April 2003)‹, (A/CN.9/526) p. 69, par. 247 and 250.

The ›maritime plus‹ system evolved from the concept of creating a new unimodal convention to replace the various current maritime conventions. It was thought however, that simply creating a new unimodal system would not be enough to receive the support such a draft needs to replace the existing three conventions which are deeply ingrained in the fabric of the everyday sea carriage practice. A new convention that limited itself to port-to-port transport would just not be enough of an incentive to coax all relevant parties to give up their old regulations.

When they came up with the ›maritime plus‹ system as a solution this expansion induced such an amount of debate<sup>29</sup> that it is unsurprising they did not press on any further.

Ultimately consensus was reached to proceed with the ›maritime plus‹ system for the time being since it is a system that takes into account the reality that maritime carriage is frequently preceded or followed by land carriage<sup>30</sup>. This conforming to contemporary demands is thought to be something that may give it enough additional value compared to the existing maritime regimes.

## 6. Uniformity as justification for a broad scope

Another cause to proceed with a door-to-door system in the new convention as opposed to a port-to-port regime the drafters thought to find in the treatment of performing parties. The idea to bestow responsibility upon the subcontractors that actually perform the carriage is not a new one, it can also be found in article 10 of the Hamburg rules.

The drafters saw in the incorporation of responsibility of what they called ›the performing party‹<sup>31</sup>, including the extent to which the performing party is entitled to automatic ›Himalaya‹ protection a vindication for the broad scope of the draft instrument (2003)<sup>32</sup>. By making the performing party liable under the draft instrument (2003)<sup>33</sup> on the one hand and giving the performing party protection by way of a ›Himalaya clause‹<sup>34</sup> on the other, they thought to create a uniformity that would not be attainable otherwise. The initially followed train of thought was that 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<sup>35</sup>. To achieve this the drafters combined the liability of the performing parties with 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. This combination leads to a liability system in which the carrier as well as the performing party are liable according to the same rules; a performing party that contracts with a (multimodal) carrier to perform an international stretch of road carriage between Antwerp (B) and Bamberg (G), which is part of a multimodal transport including an (international) sea leg, should be liable via the draft instrument (2003)<sup>36</sup> according to the liability rules in the CMR, as would the multimodal carrier<sup>37</sup>.

The extension of liability to all performing parties however, thus including road, rail and even air carriers, widened the scope of the convention even more and it enclosed a potential for serious practical problems<sup>38</sup>. During the debate surrounding the definition of a performing party and the dimension of the proposed liability that ensued, an example was given to illustrate that the geographic reach of the instrument

had seriously broadened on account of this treatment of performing parties. If for instance, goods were being shipped from Tokyo to Rotterdam via Singapore, the stevedore handling the goods in Singapore would be subject to the draft instrument (2003) if either Japan or the Netherlands had ratified but Singapore had not.

The drafters concluded that this was taking the scope of the convention too far, a direct cause of action against a performing party in a non-contracting State should not be maintained in the draft instrument<sup>39</sup>. The problem of how to avoid this deficiency however, has not yet been solved.

The existence of a direct right of action against a party with whom the cargo interests do not have a contractual relationship also yielded disagreement<sup>40</sup>. It would be unfair to base the performing party's liability on the draft instrument (2003) if the performing party does not even know it is performing part of a ›maritime plus‹ carriage<sup>41</sup>. Seeing that as a subcontractor, the performing party would normally receive separate transport papers from his principal, this lack of knowledge is clearly not unheard of.

Finally concluding that the definition of the performing party under the draft instrument (2003) was too broad and the liability too substantial, as was already suggested in the papers

29 *M. F. Sturley*, ›Scope of coverage under the UNCITRAL Draft Instrument‹, *Journal of international maritime law*, 2004-2, p. 146.

30 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), p. 10, paragraph 28. The UNCITRAL documents can be found on the website of the organisation: <<http://www.uncitral.org>> and shall be referred to in the following only by their code, which in this case would be UNCITRAL (A/CN.9/510).

31 According to the draft instrument article 1 sub 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.

32 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 ›draft instrument (2004)‹ and A/CN.9/WG.III/WP.32 as ›draft instrument (2003)‹.

33 The aimed at provision still seeing to the liability of performing parties is article 15 draft instrument (2003).

34 *M. F. Sturley*, ›Scope of coverage under the UNCITRAL Draft Instrument‹, *Journal of international maritime law*, 2004-2, p. 140 and 148. For the most recent version of the ›Himalaya‹ clause see draft instrument (2004) article 15 § 4, which reads: ›If an action under this instrument is brought against any person, other than the carrier, mentioned in article 14 bis and paragraph 3, [including employees or agents of the contracting carrier or of a maritime performing party,] that person is entitled to the benefit of the defences and limitations of liability available to the carrier under this instrument if it proves that it acted within the scope of its contract, employment, or agency‹.

35 *M. F. Sturley*, The treatment of performing parties, *CMI Yearbook, transport law document 6*, 2003, p. 234.

36 Article 15 jo. article 8 draft instrument (2003).

37 The CMR carrier would be liable as a performing party via article 15 § 1 draft instrument (2003), but he would also be able to defend himself against any actions under the draft instrument via article 15 § 4 draft instrument (2003), the ›Himalaya‹ clause. ›Performing parties would take the bitter with the sweet‹. See: *M. F. Sturley*, The treatment of performing parties, *CMI Yearbook, transport law document 6*, 2003, p. 235.

38 For the expressed reservations see: UNCITRAL (A/CN.9/526), p. 70–71, par. 251–256 and UNCITRAL (A/CN.9/WG.III/WP.32), p. 27 footnote 81.

39 UNCITRAL, (A/CN.9/526), p. 70, par. 253.

40 UNCITRAL, (A/CN.9/WG.III/WP.32), p. 27, footnote 81 sub b.

41 *B. Czerwenka*, ›Scope of Application and Rules on Multimodal Transport Contracts‹, *TranspR 2004-7/8*, p. 301.

by Italy and the United States that were the onset of the discussion<sup>42</sup>, the drafters decided to limit the scope of draft instrument (2004) article 15 § 1 to ›maritime performing parties‹.

As a consequence, this limitation saps all but a little of the strength article 15 (2003) had as a justifying element regarding the broad scope of the draft instrument; it does not contribute significantly to the effort to impose uniformity any more.

#### *Is more editing necessary?*

The Himalaya clause still found in article 15 § 4 of the draft instrument (2004)<sup>43</sup>, a provision which generates more questions than answers, now seems to be redundant<sup>44</sup>. The only ›persons‹ bearing any responsibility under the draft *ergo* the only ›persons‹ against whom an action under this instrument can be started are the carrier, the maritime performing party via article 15 § 1 draft instrument (2004) and the performing party via article 15 § 3 draft instrument (2004). The carrier and the performing party mentioned in article 15 § 3 draft instrument (2004) are expressly excluded from protection in article 15 § 4 draft instrument (2004)<sup>45</sup>, while the maritime performing party is already entitled to the carrier's rights and immunities provided by the instrument on account of article 15 § 1 draft instrument (2004) itself<sup>46</sup>.

Another paragraph that might not be strictly necessary is the mentioned § 3 of article 15 draft instrument (2004). A reason to retain it would be to provide clarity as to the liability of maritime performing parties for the actions and omissions of any person to whom it has delegated the performance of any of the carrier's responsibilities under the contract of carriage. To that end however the term performing party should be trimmed down to ›maritime performing party‹, so as to mirror article 15 § 1<sup>47</sup>.

This would seem wise, for otherwise article 15 § 3 generates liability for the performing party concerning the acts and omissions of any person to whom it has delegated the performance of any of the carrier's responsibilities under the contract of carriage, while the performing party as such bears no responsibility under the instrument for its own actions. Only the maritime performing party does since the term performing party in article 15 § 1 draft instrument (2004) has been trimmed to ›maritime performing party‹.

Nevertheless, it could be removed altogether as § 1 of article 15 draft instrument (2004) already imposes the carrier's responsibilities and liabilities on the maritime performing party. Thus the maritime performing party would already bear responsibility for the acts persons it has delegated to via article 15 § 1 and 14 *bis* draft instrument (2004).

These suggested alterations should achieve the decided upon aim of eradicating any liability a non-maritime performing party would have had under the draft instrument (2003). This means that under the final version of the draft instrument an action under the draft would no longer be possible against for instance a CMR or CIM/COTIF subcontractor.

This does not necessarily mean these parties do not deserve any protection by the draft instrument in case they are being sued for damages connected to the carriage.

Article 21<sup>48</sup>, the article providing this protection in case of all claims against the carrier or the performing party for loss of, for damage to, or in connection with the goods covered by a contract of carriage and delay in delivery of such goods, whether the action is founded in contract, in tort, or otherwise, needs some editing as well.

The article might be better placed closer to article 15 in light of its supplementary character. Namely, it also generates protection for the non-maritime performing parties, who should bear no responsibility or liability under the instrument.

These non-maritime performing parties will usually be CMR or CIM/COTIF carriers who do not need this protection since they can already defend themselves via article 28 CMR respectively article 51 CIM/COTIF, but it also covers subcontractors that have no protection of their own like for instance those who handle interim storage of the goods outside the maritime sector.

### **7. Scope expansion generates conflict**

If a transport convention incorporates other transport modes in its own unimodal oriented system, the price to pay is conflict. The fact that the draft instrument declares itself applicable on transport preceding and subsequent to sea carriage does not mean the conventions already regulating this kind of transport will just step aside. The draft instrument, being only one restriction away from a multimodal regime, rightly caused the concern that its scope would conflict with existing unimodal regimes, particularly the CMR and the CIM/COTIF conventions<sup>49</sup>.

Conversely, the basic idea on which the draft seems to be based is that conflicts will not occur, since the CMR and the CIM/COTIF do not (normally) apply on multimodal transport contracts<sup>50</sup>. The CIM/COTIF might possibly apply in some unlikely cases, but these are considered so rare as to be negligible. The CMR will never autonomously apply according to drafters of the instrument however, since they interpret article 1 CMR in such a way that the relevant stages under a multimodal contract do not fulfil the prerequisites mentioned in this scope article.

Interpreting the CMR in this way would indeed lead to the conclusion that there will be no conflict between the draft and the CMR. In this view, the door-to-door carrier would at most be a shipper under the CMR considering his contract with the performing party in question, for example a Euro-

42 UNCITRAL (A/CN.9/WG.III/WP.25), p. 2 and UNCITRAL (A/CN.9/WG.III/WP.34), p. 3-4, par. 5-9.

43 See footnote 34.

44 Seems, since the provision is somewhat obscure.

45 Quote from article 15 § 4: ›any person, other than the carrier, mentioned in article 14 bis and paragraph 3‹, see footnote 34.

46 Article 15 § 1 reads: ›A maritime performing party is subject to the responsibilities and liabilities imposed on the carrier under this instrument, and entitled to the carrier's rights and immunities provided by this instrument if the occurrence that caused the loss, damage or delay took place (a) during the period in which it has custody of the goods; and (b) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage‹.

47 There already is discussion to do so, see: UNCITRAL (A/CN.9/WG.III/WP.36), p. 15, footnote 74.

48 Which is a more pure example of a ›Himalaya‹ clause than article 15 § 4, since this provisions aims also to protect against non-contractual actions like tort against the carrier (and others).

49 M. F. Sturley, ›Scope of coverage under the UNCITRAL Draft Instrument‹, Journal of international maritime law, 2004-2, p. 146.

50 UNCITRAL (A/CN.9/WG.III/WP.25), p. 3-5. See also: I. Koller, ›Quantum Corporation Inc. v. Plane Trucking Limited und die Anwendbarkeit de CMR auf die Beförderung mit verschiedenartigen Transportmitteln‹, TranspR 2003-2, p. 45-50; F. Berlingieri, ›Door-to-door transport of goods: Can uniformity be achieved?‹ in: Liber Amoricum Roger Roland, Brussel, 2003, p. 37-55.

pean inland trucker. It appears, therefore, that even if the individual legs of the door-to-door carriage are subject to an international convention like the CMR, or to the law applicable to each of them, the application of the draft instrument to the global door-to-door carriage contract would not give rise to any conflict.

The fact that the opposing opinion is widely adhered to in Europe<sup>51</sup> is a real thorn in the draft instrument's side. And rightly so, for it is obvious this does not enhance the draft instrument's chances of ratification in Europe.

As there already has been an extensive ongoing debate when it comes to the scope of the CMR, this exchange of ideas will be used in the following to outline the status quo.

### 8. CMR: the convention that would not step aside

Even though the drafters of the instrument presume that the CMR does not apply *ex proprio vigore* to international road carriage if performed under a multimodal contract, the opposite opinion is adhered to on a larger scale than the drafters might have hoped. The large number of courts in Europe who interpret the scope of application of the CMR extensively as was discussed in the above constitute a legal hurdle to be taken on the road to ratification of the draft instrument.

In the following some of the ample reasons for this interpretation will be discussed.

#### *The CMR covers multimodal carriage*

The key to this issue is the part of article 1 § 1 CMR reading: »This Convention shall apply to every contract for the carriage of goods by road«. Article 1 § 1 does not literally demand the whole voyage specified in the contract to be made exclusively by road, or even predominantly by road, just that it has to have a road stage<sup>52</sup>. One of the many possible examples of this is »Quantum«, a decree of the English Court of Appeal (Quantum Corporation/Plane Trucking)<sup>53</sup> in which it applied the CMR on a road stage in Great Britain which was performed under a multimodal contract. This road stage was part of the contracted carriage by air from Singapore to Paris followed by the agreed upon road carriage from Paris to Dublin. During the road carriage in Great Britain the goods were stolen. The Court of Appeal 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<sup>54</sup>. An early example of a court ruling fitting in this line of thought is a ruling by the Bundesgerichtshof, which explicitly declares concerning a multimodal transport from Neunkirchen to Portadown (Northern Ireland) that the CMR convention is applicable on the road stage from Neunkirchen to Rotterdam<sup>55</sup>:

»Für die Landstrecke gilt die CMR, wie sich aus Art. 1 des Abkommens ergibt«.

Neither should the stipulation that the place of taking over 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 English Court of Appeal concluded in »Quantum«, after examining other European decisions like »Resolution Bay«<sup>56</sup>, 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«<sup>57</sup> (emphasis added by authors).

That article 1 § 1 of the CMR is a unilateral conflicts rule supports this view and what is most important about the »taking over« is that it marks the beginning of contract performance which must begin in one country and end in another<sup>58</sup>. One should also remember that in the context of the CMR as a whole a carrier can even become liable as a CMR carrier without him actually taking over the goods at all, seeing that the contracting party may subcontract the whole agreed upon carriage. Logic dictates that the expression »taking over« should not be given too literal an interpretation<sup>59</sup>.

The Rechtbank Rotterdam also ruled that a stage of road transport as part of a multimodal contract falls under the influence of the CMR in a ruling on January 24th 1992<sup>60</sup>. In this ruling the court uses an *a contrario* explanation of article 2 CMR. Article 2 declares that if besides the carriage of goods by road use is made of »piggyback transport«, in this case the transportation of a truck including cargo on a sea ship, the

51 H. Honka, »The Legislative Future of Carriage of Goods by Sea. Could It Not Be the UNCITRAL Draft? An Academic's View«, WWW: <http://folk.uio.no/erikro/WWW/cog/cog.html>, UNCITRAL paper 2002, p. 13; M. A. Clarke, International carriage of goods by road: CMR, London: Lloyd's of London Press 2003, p. 46-46 and »A conflict of conventions: The UNCITRAL/CMI draft transport instrument on your doorstep«, Journal of international maritime law, 2003-1, p. 28-39; K. F. Haak, The liability of the carrier under the CMR, (diss. Utrecht), The Hague 1986, p. 98-99; A. Messent & D.A. Glass, Hill & Messent, CMR: Contracts for the international Carriage of Goods by Road, London: Lloyd's of London Press 2000, p. 45; A. van Beelen, »CMR en overlading«, in Vergelijkend Zeerecht (Liber Americum R. E. Japikse), Leiden 1994, p. 35-50; Herber/Piper, Internationales Strassentransportrecht, München: Beck 1996, p. 85; K. Thume, Kommentar zur CMR, Heidelberg 1994, p. 92.

52 UNCITRAL (A/CN.9/WG.III/WP.29), p. 29, par. 115.

53 Court of Appeal 27 March 2002, [2002] 2 Lloyds Rep p. 25-41 (Quantum Corporation/Plane Trucking), can also be found in: European Transport Law, 2004-4, p. 535-560, with remark P. Laurijssen, p. 561-570.

54 M. A. Clarke, »A conflict of conventions: The UNCITRAL/CMI draft transport instrument on your doorstep«, Journal of international maritime law, 2003-1, p. 32.

55 Bundesgerichtshof, 24 June 1987, TranspR 1987, p. 447.

56 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) and on to Antwerp (B). The court declared CMR applicable on the road stage from Rotterdam to Antwerp where the loss was said to have occurred, since Rotterdam was considered the place of »taking over« of the goods.

57 Court of Appeal 27 March 2002, [2002] 2 Lloyds Rep. p. 25-41 (Quantum Corporation/Plane Trucking) at consideration 59 and Rb Rotterdam, 28 October 1999, Schip en Schade (S&S) 2000, 35 (Resolution Bay), consideration 4.3. In both decrees it is also 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 initially agreed upon mode of transport.

58 UNCITRAL (A/CN.9/WG.III/WP.29), p. 29, par. 116 and M. A. Clarke, Carriage by Road. A Multimodal Mix-up, JBL 2002, March issue, p. 215.

59 M. A. Clarke, International carriage of goods by road: CMR, London: Lloyd's of London Press 2003, p. 45.

60 Rb Rotterdam, 24 January 1992, Schip en Schade (S&S) 1993, 89. In this case a crane was to have been transported on a lorry from Cairo (Egypt) to Alexandria (Egypt), by sea to Antwerp (B) and then by road to Geleen (NL). The crane was damaged on the road trajectory in Egypt. The court declared CMR even applicable on the national road trajectory in Egypt, since the entire multimodal contract contained an agreement regarding international carriage; the place of taking over of the goods and the place of delivery, as specified in the contract, were situated in two different countries, of which at least one was a contracting country.

CMR rules apply to the whole journey including the sea leg<sup>61</sup>. If however, there is transshipment of the goods, the CMR does not apply to the sea leg<sup>62</sup>.

According to the *a contrario* line of reasoning however, the CMR still applies to both of the road stages. Not to apply the CMR on such a stage, so states the Rotterdam court, would mean an unnecessary limitation of the scope of application of the convention which is contrary to its purpose of standardizing conditions under which this kind of carriage is undertaken.

In addition to this, article 2 generates even more food for thought; it expands the CMR scope to cover another mode of transportation altogether; it annexes except when certain prerequisites are met<sup>63</sup>. It is placed behind article 1 to show that it serves as an augmentation of the scope of application of the CMR. This is a considerably larger step than covering the mode of transport it is designed for if performed under a contract also including other transport modes. So, if scope-article 1 states that the CMR applies on all international contracts for the carriage of goods by road and scope-article 2 even extends this to other transport modes performed under a multimodal contract in case of piggy-back carriage, it must follow that road carriage performed under an international multimodal contract is also covered by the CMR.

#### The antithesis

On the other hand, it is said that article 2 is proof that the CMR does not extend itself to carriage under a multimodal contract, since it was included by the drafters of the CMR to state exactly how far they were willing to extend the scope of the convention and no further<sup>64</sup>. This opinion is based on the drafting history of the CMR<sup>65</sup>. While drafting the CMR convention a study was conducted by Unidroit containing a sharp distinction between multimodal and unimodal transport and the stated intention to negotiate a separate convention governing combined transport in the future. Held against this backdrop article 2 is seen by those who would interpret the scope of the CMR restrictively as a provision marking the outer limits of the convention scope<sup>66</sup>. One should not forget however, that at the time (in the 1950's) the difficulties surrounding multimodal transport had already reared their ugly heads, even though the real advance of containerized transport had yet to begin. Some proposals concerning an international arrangement on the issue had already gotten the worst of it so it is unsurprising that the CMR drafters wanted to emphasize the importance of further deliberation on the subject. This does not mean to say however that the drafters 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<sup>67</sup>.

The objections against the extensive interpretation of the CMR scope have not halted there. Examples of other objections can be taken from the inevitable legal discussion preceding the contemporary near-consensus that the CMR also covers road carriage under multimodal contracts. Near-consensus, since as with all legal points of view some dissent still exists<sup>68</sup>.

The first example is of course the assertion that article 1 § 1 does literally demand that the contract only concerns road carriage, resulting in the conclusion that the CMR never applies on multimodal contracts<sup>69</sup>, which would severely limit its scope of application. Justification for this thorough curtailing is said to be found in linguistics; 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 is made in the English version, videlicet a *»contract for the carriage of goods by road«* (emphasis added)<sup>70</sup>. Nonetheless, if one tries to reconcile this outlook with the rationale behind article 1<sup>71</sup>, which is to regulate international road carriage, this conclusion appears somewhat excessive.

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. And indeed, as we have seen in the above, conflicts will arise. But not, for instance, the conflict Koller defines in his criticism on the *»Quantum«* ruling<sup>72</sup>. If, for instance, we look at article 18 § 3 of the Warsaw convention<sup>73</sup>, 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. But 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, a lot of international road carriage will be subjected to the Warsaw convention. Nevertheless, this does 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 originat-

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

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

63 See article 2 § 1 CMR.

64 F. Berlingieri, *»Door-to-door transport of goods: Can uniformity be achieved?«* in: Liber Amoricum Roger Roland, Brussel, p. 42. Noteworthy: The British delegation proposed the addition of article 2 since without it the convention would be of little use to them: it would never apply to road transport in Great Britain.

65 K. F. Haak, *The liability of the carrier under the CMR*, (diss. Utrecht), The Hague 1986, p. 95, footnote 29.

66 Still, article two might mark the outer limits concerning the extension of the convention to other modes of transport, this does not mean to say the CMR can not be applicable on road transport itself under a contract containing additional agreements pertaining to other non CMR regulated carriage.

67 K. F. Haak, *The liability of the carrier under the CMR*, (diss. Utrecht), The Hague 1986, p. 98-99.

68 I. Koller, *Quantum Corporation Inc. v. Plane Trucking Limited und die Anwendbarkeit der CMR auf die Beförderung mit verschiedenartigen Transportmitteln*, TranspR, 2003-2, p. 45-50; F. Berlingieri, *»Door-to-door transport of goods: Can uniformity be achieved?«* in: Liber Amoricum Roger Roland, Brussel 2003.

69 F. Berlingieri, *»Door-to-door transport of goods: Can uniformity be achieved?«* in: Liber Amoricum Roger Roland, Brussel, 2003, p. 39-40

70 I. Koller, *Quantum Corporation Inc. v. Plane Trucking Limited und die Anwendbarkeit der CMR auf die Beförderung mit verschiedenartigen Transportmitteln*, TranspR, 2003-2, p. 47 sub 1.

71 See also article 33 § 4 of the Vienna Convention on the Law of Treaties which states that: *»when a comparison of the authentic texts discloses a difference of meaning, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.«* and Herber/Piper, *Internationales Strassentransportrecht*, München 1996, p. 54.

72 I. Koller, *Quantum Corporation Inc. v. Plane Trucking Limited und die Anwendbarkeit der CMR auf die Beförderung mit verschiedenartigen Transportmitteln*, TranspR 2003-2, p. 47 sub 4.

73 Which corresponds with the first line of article 18 of the Montreal convention.



ed on the road trajectory so that the CMR will apply, the Warsaw convention will not.

### 9. The compromise

Although the creators of the draft instrument were convinced that a convention like the CMR does not autonomously apply on carriage performed under a multimodal contract, they were afraid European States would not ratify the newly proposed convention. A convention they thought would set aside the CMR, since from their point of view the only way the CMR can be applied on multimodal transport at the moment is via the network system lacking a solid legal base.

In order to persuade Europe to ratify the new convention the creators of the draft instrument thought up a compromise that is 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<sup>74</sup>.

According to this compromise suggestion to be found in the earlier mentioned article 8 of the draft instrument, the carrier's liability would be determined by something known as the 'minimal network system'. Article 8 bases liability of the carrier 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<sup>75</sup>. A demonstration that this minimal network system integrated in the draft instrument is based on the above mentioned presumption that the CMR lacks autonomous effect in case of intermodal carriage<sup>76</sup>, is the fact that it is limited to the subjects of the carrier's liability, limitation of liability and time for suit<sup>77</sup>. 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.

If the terms of article 8 are not met, for instance if the loss can not be localized, one has to look to the system of liability regulated by the draft instrument itself. This liability regime is also applicable on the stretches of sea carriage performed under a contract which falls under the sphere of influence of the draft instrument<sup>78</sup>. The core provisions such as the basis of liability in those cases is to be found in article 14, the limits of the liability in article 18 and the time for suit in articles 66–71 of the draft instrument.

Strangely, its own wording stands in the way of article 8 having the effect it was made for. It demands, for the provisions of another international convention to prevail over the ones in the draft instrument article, that 'there are provisions of an international convention [or national law] that according to their terms apply (emphasis added) to all or any of the carrier's activities under the contract of carriage'. In this way we are directed to the scope rules of the relevant convention itself to verify if it applies. A veritable circular argument<sup>79</sup>.

If applied on the CMR for example, it means that 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 its core provisions via article 8 of the draft instrument. A way to remedy this, and a remedy is needed indeed because article 8 was created to extend some range of action to the CMR and/or CIM/COTIF under the draft instrument, could be the re-

placement 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 considering the carrier's liability. *Nota bene*, this alteration still leaves the question unanswered if this carving up of a convention is even admissible.

If, however, the CMR is considered applicable autonomously, *ergo ex proprio vigore*, article 8 of the draft 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.

The CMR, but also the other unimodal carriage conventions regulate many more subjects on a mandatory basis than the liability of the carrier alone, as does the draft instrument. If the draft instrument were to come into effect it is likely that more than one convention will apply on the carriage supplemental to sea carriage, thereby creating ample conflicts between the draft instrument and the existing unimodal transport conventions<sup>80</sup>.

### 10. Jurisdiction vicissitudes

One fairly important mandatory provision that is found in most unimodal conventions is a provision regarding jurisdiction. The question which court to address is a very basic question when one intends to litigate, one on which the outcome of the entire action can depend since the theory that every court should interpret a convention the same way is just that, a theory. In reality courts in one State will interpret a convention quite differently from courts in another State. This is the natural consequence of having a different legal culture as a starting point in every State.

Naturally the CMR has its own jurisdiction provisions and when it comes to debates surrounding this issue, the CMR more than deserves a place in the spotlight.

#### *Jurisdiction under the CMR*

One of the reasons for this honor is that the CMR is not only subject to different interpretations by different na-

74 *M. F. Sturley*, 'Scope of coverage under the UNCITRAL Draft Instrument', *Journal of international maritime law*, 2004-2, p. 146–147.

75 The network system found in article 8 is called a minimal one with 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, see UNCITRAL, (A/CN.9/WG.III/WP.29), p. 21.

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

77 Which is, of course, the reason why it is called a 'minimal' network system.

78 For the liability of sea carriers however, there are additional provisions such as article 22 to reckon with.

79 A likewise argument can be used regarding article 18 which regulates the limitation of liability in case of unlocalized loss; § 2 states that in case of unlocalized loss the highest limit of liability in the international and national mandatory provisions that govern (emphasis added) the different parts of the transport shall apply. Also debatable is the inclusion of the terms 'and national' in this provision; see for a parallel discussion footnote 25.

80 Which has been recognized by the drafters, see UNCITRAL, (A/CN.9/WG.III/WP.29), p. 19, par. 64.

CMR rules apply to the whole journey including the sea leg<sup>61</sup>. If however, there is transshipment of the goods, the CMR does not apply to the sea leg<sup>62</sup>.

According to the *a contrario* line of reasoning however, the CMR still applies to both of the road stages. Not to apply the CMR on such a stage, so states the Rotterdam court, would mean an unnecessary limitation of the scope of application of the convention which is contrary to its purpose of standardizing conditions under which this kind of carriage is undertaken.

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The first example is of course the assertion that article 1 § 1 does literally demand that the contract only concerns road carriage, resulting in the conclusion that the CMR never applies on multimodal contracts<sup>69</sup>, which would severely limit its scope of application. Justification for this thorough curtailing is said to be found in linguistics; the French text of the CMR

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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. And indeed, as we have seen in the above, conflicts will arise. But not, for instance, the conflict Koller defines in his criticism on the *»Quantum«* ruling<sup>72</sup>. If, for instance, we look at article 18 § 3 of the Warsaw convention<sup>73</sup>, 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. But 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.

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

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

63 See article 2 § 1 CMR.

64 F. Berlingieri, *»Door-to-door transport of goods: Can uniformity be achieved?«* in: Liber Amoricum Roger Roland, Brussel, p. 42. Noteworthy: The British delegation proposed the addition of article 2 since without it the convention would be of little use to them: it would never apply to road transport in Great Britain.

65 K. F. Haak, *The liability of the carrier under the CMR*, (diss. Utrecht), The Hague 1986, p. 95, footnote 29.

66 Still, article two might mark the outer limits concerning the extension of the convention to other modes of transport, this does not mean to say the CMR can not be applicable on road transport itself under a contract containing additional agreements pertaining to other non CMR regulated carriage.

67 K. F. Haak, *The liability of the carrier under the CMR*, (diss. Utrecht), The Hague 1986, p. 98–99.

68 I. Koller, *Quantum Corporation Inc. v. Plane Trucking Limited und die Anwendbarkeit der CMR auf die Beförderung mit verschiedenartigen Transportmitteln*, TranspR, 2003-2, p. 45–50; F. Berlingieri, *»Door-to-door transport of goods: Can uniformity be achieved?«* in: Liber Amoricum Roger Roland, Brussel 2003.

69 F. Berlingieri, *»Door-to-door transport of goods: Can uniformity be achieved?«* in: Liber Amoricum Roger Roland, Brussel, 2003, p. 39–40

70 I. Koller, *Quantum Corporation Inc. v. Plane Trucking Limited und die Anwendbarkeit der CMR auf die Beförderung mit verschiedenartigen Transportmitteln*, TranspR, 2003-2, p. 47 sub 1.

71 See also article 33 § 4 of the Vienna Convention on the Law of Treaties which states that: *»when a comparison of the authentic texts discloses a difference of meaning, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.«* and Herber/Piper, *Internationales Strassentransportrecht*, München 1996, p. 54.

72 I. Koller, *Quantum Corporation Inc. v. Plane Trucking Limited und die Anwendbarkeit der CMR auf die Beförderung mit verschiedenartigen Transportmitteln*, TranspR 2003-2, p. 47 sub 4.

73 Which corresponds with the first line of article 18 of the Montreal convention.

ed on the road trajectory so that the CMR will apply, the Warsaw convention will not.

### 9. The compromise

Although the creators of the draft instrument were convinced that a convention like the CMR does not autonomously apply on carriage performed under a multimodal contract, they were afraid European States would not ratify the newly proposed convention. A convention they thought would set aside the CMR, since from their point of view the only way the CMR can be applied on multimodal transport at the moment is via the network system lacking a solid legal base.

In order to persuade Europe to ratify the new convention the creators of the draft instrument thought up a compromise that is 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<sup>74</sup>.

According to this compromise suggestion to be found in the earlier mentioned article 8 of the draft instrument, the carrier's liability would be determined by something known as the 'minimal network system'. Article 8 bases liability of the carrier 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<sup>75</sup>. A demonstration that this minimal network system integrated in the draft instrument is based on the above mentioned presumption that the CMR lacks autonomous effect in case of intermodal carriage<sup>76</sup>, is the fact that it is limited to the subjects of the carrier's liability, limitation of liability and time for suit<sup>77</sup>. 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.

If the terms of article 8 are not met, for instance if the loss can not be localized, one has to look to the system of liability regulated by the draft instrument itself. This liability regime is also applicable on the stretches of sea carriage performed under a contract which falls under the sphere of influence of the draft instrument<sup>78</sup>. The core provisions such as the basis of liability in those cases is to be found in article 14, the limits of the liability in article 18 and the time for suit in articles 66–71 of the draft instrument.

Strangely, its own wording stands in the way of article 8 having the effect it was made for. It demands, for the provisions of another international convention to prevail over the ones in the draft instrument article, that 'there are provisions of an international convention [or national law] that according to their terms apply (emphasis added) to all or any of the carrier's activities under the contract of carriage'. In this way we are directed to the scope rules of the relevant convention itself to verify if it applies. A veritable circular argument<sup>79</sup>.

If applied on the CMR for example, it means that 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 its core provisions via article 8 of the draft instrument. A way to remedy this, and a remedy is needed indeed because article 8 was created to extend some range of action to the CMR and/or CIM/COTIF under the draft instrument, could be the re-

placement 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 considering the carrier's liability. *Nota bene*, this alteration still leaves the question unanswered if this carving up of a convention is even admissible.

If, however, the CMR is considered applicable autonomously, *ergo ex proprio vigore*, article 8 of the draft 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.

The CMR, but also the other unimodal carriage conventions regulate many more subjects on a mandatory basis than the liability of the carrier alone, as does the draft instrument. If the draft instrument were to come into effect it is likely that more than one convention will apply on the carriage supplemental to sea carriage, thereby creating ample conflicts between the draft instrument and the existing unimodal transport conventions<sup>80</sup>.

### 10. Jurisdiction vicissitudes

One fairly important mandatory provision that is found in most unimodal conventions is a provision regarding jurisdiction. The question which court to address is a very basic question when one intends to litigate, one on which the outcome of the entire action can depend since the theory that every court should interpret a convention the same way is just that, a theory. In reality courts in one State will interpret a convention quite differently from courts in another State. This is the natural consequence of having a different legal culture as a starting point in every State.

Naturally the CMR has its own jurisdiction provisions and when it comes to debates surrounding this issue, the CMR more than deserves a place in the spotlight.

#### *Jurisdiction under the CMR*

One of the reasons for this honor is that the CMR is not only subject to different interpretations by different na-

74 M. F. Sturley, 'Scope of coverage under the UNCITRAL Draft Instrument', *Journal of international maritime law*, 2004-2, p. 146–147.

75 The network system found in article 8 is called a minimal one with 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, see UNCITRAL, (A/CN.9/WG.III/WP.29), p. 21.

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

77 Which is, of course, the reason why it is called a 'minimal' network system.

78 For the liability of sea carriers however, there are additional provisions such as article 22 to reckon with.

79 A likewise argument can be used regarding article 18 which regulates the limitation of liability in case of unlocalized loss; § 2 states that in case of unlocalized loss the highest limit of liability in the international and national mandatory provisions that govern (emphasis added) the different parts of the transport shall apply. Also debatable is the inclusion of the terms 'and national' in this provision; see for a parallel discussion footnote 25.

80 Which has been recognized by the drafters, see UNCITRAL, (A/CN.9/WG.III/WP.29), p. 19, par. 64.

tional courts as all conventions are, it also literally defers to the *lex fori* when it comes to assessing the entitlement of the carrier to avail himself of the provisions of the CMR which exclude or limit his liability<sup>81</sup>.

Obviously, instead of creating the uniformity that is the purpose of any international treaty, this stimulates unwanted heterogeneity<sup>82</sup>.

In practice this has had some unwanted but hardly unexpected side effects. Ever since the Dutch supreme court, the Hoge Raad, passed judgment in the ›anti-breakthrough‹ decrees<sup>83</sup> in 2001, road carriers have flocked to the Dutch courts whenever possible. These ›anti-breakthrough‹ decrees entailed a new, stricter formula concerning what is considered wilful misconduct under article 29 CMR. Under this formula, wilful misconduct covers both intentional conduct as well as consciously reckless conduct meaning that the acting person knew about the danger inherent to said conduct and was aware of the fact that the chance that the danger would materialize because of this conduct was considerably higher than the chance that it would not, but would not let this knowledge stop him from behaving in this manner.

Because this is a much stricter demand than a German court would utilize in a likewise situation, it is clear that a Dutch court concludes less often than a German one would that a carrier has conducted himself in a manner equivalent to wilful conduct, leaving him the coveted limited liability based on the CMR provisions<sup>84</sup>.

Since the carrier is usually the first to know when loss or damage occurs it is fairly easy for him to be the first to call upon the court of his choice for a negative declaration of non-liability or limited liability (*›negative Feststellungsklage‹*)<sup>85</sup>. The shipper who in his turn tries calling upon a court of law in another State is (usually) thwarted in his attempt by virtue of article 31 § 2 CMR, the *lis pendens* provision.

### *lis pendens*

Article 31 § 2 states that if an action is pending before a competent court or tribunal, or a judgement has been entered by such a court or tribunal, no new action shall be started between the same parties on the same grounds and between the same parties.

The purpose of this provision is the avoidance of two (or more) incompatible decrees regarding the same case between the same parties. The occurrence of which would not only damage the esteem in which the legal authorities are held, but it would also generate legal insecurity and provide a lot of practical problems when it comes to the enforcement of said decisions<sup>86</sup>.

To ascertain when an action will be blocked by the rule in article 31 § 2 one essentially has to determine two things, the first one being at which point in time an action becomes ›pending‹ and the second one being when an action is considered a new action between the same parties based on the same grounds.

In the English Commercial Court case *Merzario v. Leitner*<sup>87</sup>, Merzario sued Leitner in England in October 1999 for damages under an international contract for the carriage of goods. The English proceedings were served upon Leitner later that month. Earlier on however, Leitner had already commenced his own action against Merzario in Vienna in July 1999, seeking from the Austrian court a negative declaration of non-liability. These proceedings were, unfortunately for Leitner, only served on Merzario in December 1999. The

question for determination by the Court of Appeal was at which point an action is deemed to be ›pending‹ in the sense of article 31 § 2 CMR, since if Leitner's action was already pending at the moment Merzario started the proceedings in England, the English proceedings would have to be dismissed. The English court unanimously judged that an action becomes pending on the moment it is served upon the other party<sup>88</sup>. Merzario served first and thus his action was allowed to go forward<sup>89</sup>.

But did this bar Leitner's proceedings in Austria? By calling upon the Austrian court Leitner sought a negative declaration of non-liability. In other words, is such an action a new action between the same parties on the same grounds as is prescribed in article 31 § 2 CMR? This question did not evoke as unanimous an answer by the English judges as the former one did. The majority ruled that the Austrian claim for a negative declaration is such an action as would, if it had been pending, have barred the English action, being an action between the same parties on the same grounds<sup>90</sup>. As the disagreeing judge felt strongly enough to issue a ›dissenting opinion‹, it is clear that the English opinion on the issue is not written in stone yet.

The term ›the same grounds‹ would seem to suggest that another action can be commenced in another jurisdiction based on the same facts, but pleaded on different grounds.

81 Article 29 CMR.

82 K. F. Haak, ›Haftungsbeschränkung und ihre Durchbrechung nach der CMR in den Niederlanden‹, TranspR, 2004-3, p. 104.

83 *Cigna/Overbeek*, HR 5 January 2001, *Schip en Schade* (S&S) 2001, 61 and *Philip Morris/Van der Graaf*, HR 5 January 2001, *Schip en Schade* (S&S) 2001, 62. More recent: HR 22 February 2002, NJ 2002, 388 (*De Jong & Grauss/CGM*) and HR 11 October 2002, NJ 2002, 598 (CTV/K-Line).

84 For a critical analysis of the German case law, see: K. Thume, ›Durchbrechung der Haftungsbeschränkungen nach § 435 HGB im internationalen Vergleich‹, TranspR 2002-1, p. 1-7 and F. Fremuth, ›Haftungsbeschränkungen und deren Durchbrechung im allgemeinen deutschen Frachtrecht und nach der CMR‹, TranspR 2004-3, p. 99-104.

85 K. F. Haak, ›Jurisdictionperikelen in het internationaal wegvervoer: het einde van het sprookje van de verklaring voor recht?‹, European Transport Law, 2004-2, p. 140.

86 K. F. Haak, ›Jurisdictionperikelen in het internationaal wegvervoer: het einde van het sprookje van de verklaring voor recht?‹, European Transport Law, 2004-2, p. 140.

87 Court of Appeal 23 January 2001, [2001] 1, Lloyd's Rep p. 490-511 (*Andrea Merzario Ltd v. Internationale Spedition Leitner Gesellschaft GmbH*).

88 T. Rüsner, ›Lis pendens under the CMR‹, LMCLQ 2001-4, p. 460-465.

89 Helpful was that the Austrian judge handling the case also deemed an action pending as of the moment it is served. The fact that in this case English law determined whether the action was ›pending‹ or not was inferred from the *Siegfried Zelger v. Sebastiano Salinitri* European Court of Justice case ((Case 129/83) [1984] ECR 2397), in which the Court decided that in order to determine at which procedural stage an action becomes ›definitely pending‹ in light of article 21 EJJC, regard must be had to the national law of the court in question.

90 *Andrea Merzario Ltd v. Internationale Spedition Leitner Gesellschaft GmbH*, Court of Appeal 23 January 2001, Lloyd's Rep. 2001-1, p. 490-511, par. 103. See also M. A. Clarke, *International carriage of goods by road: CMR*, London: LLP 2003 and A. Messent & D.A. Glass, *Hill & Messent, CMR: Contracts for the international Carriage of Goods by Road*, London: Lloyd's of London Press 2000, par. 10.37. For a dissenting view see: *Frans Maas v. CDR Trucking* [1999] 2 Lloyd's Rep., 179. Here the Commercial Court decided that the existence of proceedings brought by a carrier seeking a negative declaration did not prevent a sender or consignee from commencing an action against that carrier in another appropriate CMR jurisdiction. It considered that only substantive claims leading to monetary judgments which could be enforced could bar a subsequent action.

That this is not the article's intention is made clear by the French text, which prohibits further action »*pour la même cause*«. <sup>91</sup>

#### »Negative Feststellungsklage«

The subject whether or not the action for a negative declaration of non-liability or limited liability, (»*negative Feststellungsklage*«), is an action on the same grounds as a »*Leistungsklage*«, a claim for damages, may have caused some diverging of opinions in Great Britain, but in Germany it can be said to have grown into a full-scale controversy.

The root of the problem is of course the referral to the *lex fori* in article 29 of the CMR which as a consequence stimulates the phenomenon of forum shopping as has been outlined in the above. It is not surprising that in this context murmurs were heard naming the negative declaration of non-liability or limited liability an abuse or manipulation of procedural law.

The usage of the negative declaration of non-liability was initially legitimized however, by a decree of the European Court of Justice called the »*Tatry*«. <sup>92</sup> In this case the European Court of Justice held that a negative action like the action for a declaration of non-liability was capable of barring a subsequent positive action like the action for damages under the European Judgments and Jurisdiction Convention (EJJC) article 21. Thus actions for damages and actions for declarations of non-liability were accorded equal treatment for the purposes of article 21 EJJC. In fact, the European Court of Justice (ECJ) explicitly invokes the principle of »equality of arms« (»*Chancengleichheit*«) as it has been developed under the fundamental fair trial provision in article 6 of the European Convention on Human Rights.

Even though the jurisdiction rules of the EJJC do not apply in CMR cases <sup>93</sup>, this decree tends to figure as a template for cases involving a negative declaration of non-liability or limited liability in CMR contracting States like The Netherlands and as we have seen in England.

Surprisingly, this is not (any longer) the case in Germany.

Thinking the early bird catches the worm, *Herber* <sup>94</sup> responded to this European Court of Justice decree with great haste. He issued a warning not to apply this »*atypische Manipulation*« in CMR procedures, being of the opinion that the *Tatry* doctrine frustrates the right of suit of the claimant (which is, according to *Herber*, not just a procedural term but a substantive value). *Herber* pleads for the retention of German procedural law in German CMR cases in which the »*positive Leistungsklage*« has precedence over the »*negative Feststellungsklage*«. The mandatory right of the claimant to call upon the court of his choice conferred on him by the CMR should prevail over the chronological priority of actions principle found in article 21 EJJC if *Herber* and *Heuer* were to have any say in the matter.

As happens so often others, like *Basedow* <sup>95</sup>, did not share this opinion and raised objections against it. The result was the query as to what direction the German courts would take. At first there was still some confusion over which path to follow, as can be deduced from the example that in subsequent years two courts applied the *Tatry* doctrine and two did not. The OLG Düsseldorf <sup>96</sup> threw the first punch by declaring that when interpreting article 31 § 2 CMR the »*Leistungsklage*« should be seen as equal to the »*Feststellungsklage*« with the consequence that an earlier action for a declaration of non-

liability generates »*Sperrwirkung*«. The OLG rejected *Herber's* opinion based on the »*Chancengleichheit*« of both parties involved. The verdict of the OLG Nürnberg <sup>97</sup> proceeds in this line of reasoning. In the Nürnberg procedure a Dutch carrier was to transport goods from Germany to Belgium. The actual transport was performed by a Belgian subcontractor. After the Dutch carrier obtained a negative declaration of non-liability from a Belgian court, the German court declared itself not competent to try the claim of the German sender based on the *Tatry* doctrine.

Almost at the same time the opposite point view was represented in a decree of the OLG Köln <sup>98</sup>, followed somewhat later by the OLG Hamburg <sup>99</sup>. In the latter case a Dutch carrier who expected a claim for damages by his German principal had taken the first step and sought a declaration of non-liability at the court in Rotterdam before the principal had taken any legal steps. When the carrier was subsequently called upon to appear before the Landgericht Hamburg he pleaded that the German court was not competent based on the fact that there already was a case pending at the Dutch court in Rotterdam. The Landgericht and later the OLG Hamburg rejected this point of view and with it explicitly the earlier decree of the OLG Düsseldorf. The OLG Hamburg did not see any valid reasons to apply also the strict chronological priority of actions principle said to be contained in article 21 of the EJJC by the European Court of Justice on CMR cases. On the contrary, the OLG Hamburg was of the opinion that the guaranteed right of choice granted to the petitioner of the »*Leistungsklage*« resisted the employment of the mentioned EJJC provision. In the light of the in article 31 § 1 sub b imbedded competence (the place where the goods were taken over by the carrier or the place designated for delivery

91 *A. Messent & D.A. Glass, Hill & Messent*, CMR: Contracts for the international Carriage of Goods by Road, London: Lloyd's of London Press 2000, par. 10.39 and *R. Löwe*, »The CMR provisions concerning claims and actions«, in: *International carriage of goods by road (CMR)*, (*J. Theunis ed.*), London: Lloyd's of London Press Ltd. 1987, p. 152.

92 *Tatry* (Case 406/92) [1994] I ECR, *Schip & Schade* (S&S) 1996,1; *Nederlandse Jurisprudentie* (NJ) 1995,659.

93 Article 57 of the EEX convention states: »This Convention shall not affect any conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments«.

The CMR is such a convention and has, as a consequence, precedence over the provisions in the EEX.

Examples: OGH (Österreich) 18 December 2000, *European Transport Law* 2003, p. 354–356; BGH 27 February 2003, *TranspR* 2003-7/8, p. 302–303.

94 *TranspR* 1996-5, p. 196. Later on he defended his point of view afresh, *R. Herber*, »Probleme um Art. 31 CMR – endlich ein Ende des Mißbrauchs durch negative Feststellungsklage des Frachtführers?«, *TranspR* 2003-1, p. 19–21. He was supported by *K. Heuer*, »CMR und EuGVÜ: Nochmals zur Frage der internationalen Zuständigkeit (Art. 31 Abs. 1 CMR/Art. 20 EuGVÜ) und zur Einrede der Rechtshängigkeit bei negativer Feststellungsklage (Art. 31 Abs. 2 CMR/Art. 21 EuGVÜ)«, *TranspR* 2002-6, p. 221–225. See also *Herber/Piper*, *CMR, Internationales Straßentransportrecht*, München 1996, Art. 31, remark 26. De Meij has expressed his disagreement with this point of view in his dissertation: *P. De Meij*, *Samenloop van CMR-Verdrag en EEX-Verordening*, (diss. Groningen), 2003, p. 197 and 247–248.

95 *Basedow*, *Münchener Kommentar zum Handelsgesetzbuch*, München 1997, article 31 CMR, remark 22., article 31, remark 30. See also *Helm*, *Frachtrecht II*, article 31 CMR, remark 49.

96 OLG Düsseldorf 17 June 1999, *TranspR* 2002-6, p. 237.

97 OLG Nürnberg 6 March 2002, *TranspR* 2002-10, p. 402–403.

98 OLG Köln 8 March 2002, *TranspR* 2002-6, p. 239–243.

99 OLG Hamburg 7 November 2002, *TranspR* 2003-1, p. 25–26.

is situated) this right of choice is meant specifically for the benefit of the sender or the consignee.

Now there was not only discord on the subject in German legal literature, but also in German case law. As a matter of course all eyes turned to the BGH to resolve the matter.

Luckily the wait was not a long one. In 2003 the *denouement* came when the BGH decreed in two separate judgments on the same day<sup>100</sup> that a pending ›negative Feststellungsklage‹ does not give rise to the defense of *lis pendens* under article 31 § 2 CMR. These decrees embody the procedural counterpart of the aforementioned material ›anti-breakthrough‹ decrees by the Dutch supreme court, the Hoge Raad. The BGH evinced the opinion that a ›Leistungsklage‹ has right of precedence based on the purpose and tenor of the CMR<sup>101</sup>, although not based on German procedural law as was argued by *Herber* and *Heuer*<sup>102</sup>. Remarkably, the BGH does not reject the concept of a negative declaration of non-liability as such, but ponders:

»Es könne offenbleiben, ob die Parteien des dortigen rechtsstreits mit den Parteien des hiesigen Rechtsstreits als identisch anzusehen seien. Denn die negative Feststellungsklage sei grundsätzlich nicht geeignet, gegenüber der vorliegenden Leistungsklage zugunsten der Beklagten die Einrede der anderweitigen Rechtshängigkeit nach Art. 31 Abs. 2 CMR zu begründen. Vielmehr sei der Leistungsklage auch gegenüber der früher erhobenen negativen Feststellungsklage der Vorrang einzuräumen.«<sup>103</sup>

Subsequently is deliberated that the *Tatry* doctrine should not be applied on CMR cases:

»Im Rahmen der Auslegung und Anwendung von Art. 31 Abs. 2 CMR seien nicht die vom Gerichtshof der Europäischen Gemeinschaften und daran abschließend vom Bundesgerichtshof zu Art. 21 EuGVÜ entwickelten Grundsätze anzuwenden, wonach auch die früher erhobene negative Feststellungsklage Vorrang vor der später erhobenen Leistungsklage habe. Art. 31 Abs. 1 CMR enthalte einige zwingende (Art. 41 CMR) und gemäß Art. 57 EuGVÜ vorrangige materiellrechtliche Wertung dahingehend daß dem materiell Berechtigten das Recht zur Auswahl der nach der CMR möglichen Gerichtstände zustehe.«<sup>104</sup>

According to the BGH, the CMR intends the choice which court to call upon to be in the hands of the party that intends to exert the rights it gained from the underlying transport contract. In other words:

»Das Wahlrecht dient der prozessualen Durchsetzung der materiellrechtlichen Ansprüche aus einem der CMR unterliegenden Beförderungsvertrag. Es ist daher zum Schutz desjenigen bestimmt, der Rechte aus einem solchen Vertrag geltend macht.«<sup>105</sup>

The risk that this will result in diverging decrees regarding the same occurrence between the same parties, the avoidance of which is the sole purpose of article 31 § 2 CMR, is recognized by the BGH but apparently is considered an unfortunate but unavoidable side-effect.

One can imagine that the different approach of the declaration of non-liability or limited liability by German, Dutch and English courts could result in a stalemate when it comes to the implementation of decrees. Article 31 § 3 CMR declares that when a judgment entered by a court or tribunal of a contracting country has become enforceable in that country, it shall also become enforceable in each of the other contracting States, as soon as the formalities required in the country concerned have been complied with. These formalities can not

entail the reopening of the case of course, since that could lead to the diverging decree in another State article 31 § 2 intends to prevent.

Normally speaking a Dutch court would grant the request to recognize and implement a German decree based on article 31 § 3 CMR and article 985 of the Dutch Code of Civil Procedure<sup>106</sup>. In the event however, that two diverging decrees exist in Germany and in the Netherlands the called upon Dutch court will most likely refuse the request. It would violate Dutch public order for a Dutch court to recognize a foreign decision which is in direct contradiction with an existing Dutch decision.

It is noted that even under the European Judgments and Jurisdiction Regulation (44/2001) it would be a ground for refusing recognition and enforcement of the foreign decree that it contradicts an existing decision in the country where recognition and enforcement is requested. Article 34 § 3 EJJR states that a judgment shall not be recognized if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought<sup>107</sup>.

#### **Article 31 § 1 sub b CMR; the place where the goods were taken over**

Another reason the CMR is worth mentioning when it comes to jurisdiction provisions is the interpretation of article 31 § 1 sub b. Especially when it comes to determining what can be considered the ›place where the goods were taken over by the carrier‹ in case the main carrier has subcontracted portions of the carriage<sup>108</sup>.

On the whole, jurisprudence seems to gravitate towards determining the place of take-over as the place where the contract of carriage commenced<sup>109</sup>.

The BGH is no different and argues that the place of take-over is the place where the goods were originally taken over from the sender, even:

100 BGH 20 November 2003, TranspR 2004-2, p. 74–77, also found in European Transport Law, 2004-2, p.255–263 and BGH 20 November 2003, TranspR 2004-2, p. 77–79, also found in European Transport Law, 2004-2, p. 264–269.

101 *K. F. Haak*, »Jurisdictionepikelen in het internationaal wegvervoer: het einde van het sprookje van de verklaring voor recht?«, European Transport Law, 2004-2, p. 146.

102 *R. Herber*, »Probleme um Art. 31 CMR – endlich ein Ende des Mißbrauchs durch negative Feststellungsklage des Frachtführers?«, TranspR 2003-1, p. 19–21 and *K. Heuer*, »CMR und EuGVÜ: Nochmals zur Frage der internationalen Zuständigkeit (art. 31 Abs. 1 CMR/Art. 20 EuGVÜ) und zur Einrede der rechtshängigkeit bei negativer Feststellungsklage (Art. 31 Abs. 2 CMR/Art. 21 EuGVÜ)«, TranspR 2002-6, p. 221–225. See also: *K. Otte*, »Zur Einrede der Rechtsanhängigkeit bei negativer Feststellungsklage (Art. 31 Abs. 2 CMR, Art. 21 EuGVÜ bzw. Art. 27 EuGVVO)«, TranspR 2004-9, p. 347–350.

103 BGH 20 November 2003, TranspR 2004-2, p. 77.

104 BGH 20 November 2003, TranspR 2004-2, p. 78.

105 BGH 20 November 2003, TranspR 2004-2, p. 79.

106 Wetboek van Burgerlijke Rechtsvordering.

107 *P. De Meij*, Samenloop van CMR-Verdrag en EEX-Verordening, (diss. Groningen), 2003, p. 216, 219 and 251.

108 *A. Messent & D.A. Glass, Hill & Messent*, CMR: Contracts for the international Carriage of Goods by Road, London: Lloyd's of London Press 2000, par. 10.35.

109 OGH Wien, 1 April 1999, TranspR 2000-2, p. 34–36; BGH 31 May 2001, TranspR 2001-11/12, p. 452–453; Rb Maastricht, 28 May 2003, Schip en Schade (S&S) 2004, 57; OLG Köln, 25 May 2004 (unpublished); *Moto Vespa S.A. v. MAT (British express) Ltd.*, [1979] 1 Lloyd's Rep. 175; *Ulster-Swift Ltd. v. Taunton Meat Haulage Ltd.*, [1977] 1 Lloyd's Rep. 346.

»Wenn die Klage gegen den Unterfrachtführer gerichtet ist und dieser das Gut an einem anderen Ort als dem der ursprünglichen Übernahme in seine Obhut genommen hat.«<sup>110</sup>

The grounds on which the BGH bases this judgement are to be found:

»Im Sinn und Zweck des Art. 31 Abs. 1 CMR, der darin besteht, Streitigkeiten aus der CMR unterliegenden grenzüberschreitenden Beförderungen auf ganz bestimmte Gerichtsstände zu beschränken. Dadurch sollen Klagen aus ein und demselben Beförderungsvertrag vor unterschiedlichen Gerichten verschiedener Staaten vermieden werden.«<sup>111</sup>

The BGH does not seem to realize that even if all courts in CMR contracting States were to adhere strictly to this interpretation of article 31 § 1 sub b CMR, differing decrees by courts in different States regarding the same CMR contract would still be possible. The dupe in a given case could for example pursue an action against the main carrier in Germany where he has his principal place of business and an action against the subcontracting carrier in France where the goods were originally taken over<sup>112</sup>. Only when it comes to an action between the same parties as well as on the same grounds does the CMR draw the line<sup>113</sup>.

Whereas there are various arguments thinkable why this may be the incorrect way to interpret article 31 § 1 sub b CMR when it comes to CMR carriage alone, these arguments only become more valid when it comes to contracts involving intermodal carriage. It would generate illogical results for instance if one were to apply this rule to the famous *Quantum* case<sup>114</sup>. The strict adherence to this view would generate jurisdiction for a court or tribunal in Singapore. A court halfway around the world from the place where the damage occurred and probably a very inexperienced one when it comes to applying the rules of the CMR seeing that Singapore is not a contracting State<sup>115</sup>. Furthermore, as the place of taking over would then be named a place that has no connection with the road carriage whatsoever. The Court of Appeal decided differently from the German BGH, it considered that the place of taking over of the goods could be read as referring to the place which the contract specified for the taking over by the carrier in its capacity as international road carrier (in the case in question, Paris)<sup>116</sup>.

In spite of all this, the OLG Köln only recently copied the argumentation of the BGH in a case involving a multimodal contract<sup>117</sup>. In this particular case the goods were to be transported from Sevenoaks (Great Britain) by truck to London (Great Britain), from there on by plane to the airport Köln/Bonn (Germany) and finally by truck to the final destination, Amsterdam (the Netherlands). Although the OLG had found the CMR to be applicable on the international stretch of road carriage on which the damage to the goods had occurred, it did not hold itself to be competent to try the case based on article 31 § 1 sub b CMR since it did not consider Köln nor Bonn the place of take-over. As if the situation in the BGH case were no different from its own, the OLG reasons as follows:

»Denn bei der Beförderung durch einen Frachtführer – wie auch bei einem Hauptfrachtführer, der sich (teilweise) eines Unterfrachtführers bedient – ist bei einem – wie hier – einheitlichen Frachtvertrag als Übernahmeort im Sinne von Art. 31 Abs. 1 lit. b) CMR derjenige Ort anzusehen, an dem das Sendungsgut ursprünglich, d. h. beim Absender übernommen wurde.«

The contrived nature of the idea that the place of taking over meant in article 31 § 1 sub b CMR can only be the place where the contract of carriage commenced becomes evident if one remembers that an intermodal carriage contract can be characterized as a sum or chain of unimodal contracts. A decree that did reckon with this special character of the intermodal carriage contract is the already mentioned *Resolution Bay* case<sup>118</sup>. The court in Rotterdam declared it had jurisdiction to try this case based on the circumstances that the cargo had been transferred from the sea ship that had brought it from New-Zealand to a lorry in Rotterdam into the custody of the subcontracting road carrier so that it could be transported to Antwerp by road. In the eyes of the court this designated Rotterdam as the place of taking over regarding the CMR carriage<sup>119</sup>. In another decree by the same court<sup>120</sup> supporting this line of reasoning it declared itself without jurisdiction to pass sentence in a case where the subcontracting road carrier had taken over the goods from his predecessor<sup>121</sup> in Klaipeda (Lithuania). Klaipeda was to be interpreted as being the place of taking over as meant in article 31 § 1 sub b CMR, not Hoogvliet (the Netherlands) where the goods were taken over at the commencement of the contract.

To consider the place of taking over meant in article 31 § 1 sub b CMR to be the place where the contract of carriage commenced is a severe disregard of the defending subcontractor's interests, a disregard the BGH has also exhibited in connection with the *»negative Feststellungsklage«*. It is even more of a disregard if the subcontractor transported the goods under a multimodal contract; it is not unusual for a multimodal contract to cover more than one continent so that geographically the original place of taking over and the place where the subcontractor performed his contracted carriage can be very far apart. This could lead to odd situations, the relevant transport could for instance have been by road from Amsterdam to Düsseldorf while the defendant, a local transporter, is being sued in Rio de Janeiro since that is where the goods were originally taken over. It could even occur that none of the involved parties have any connection with the called upon court, it could be selected by the plaintiff solely based on the outcome this court is expected to generate (forum-shopping).

110 BGH 31 May 2001, TranspR 2001-11/12, p. 453. See for a critical analysis: *P. De Meij*, Samenloop van CMR-Verdrag en EEX-Verordening, (diss. Groningen), 2003, p. 126–129.

111 BGH 31 May 2001, TranspR 2001-11/12, p. 452.

112 *I. Koller*, »Gehilfen des CMR-Frachtführers und Art. 31 CMR«, TranspR 2002-4, p.134.

113 Via the *lis pendens* doctrine as can be found in article 31 § 2 CMR. See paragraph 10 under *»lis pendens«*.

114 Court of Appeal 27 March 2002, [2002] 2, Lloyds Rep. p. 25–41 (Quantum Corporation/Plane Trucking), mentioned in the above, paragraph 8.

115 That is, if a Singapore court would even have to apply the CMR, which is not certain.

116 Court of Appeal 27 March 2002, [2002] 2, Lloyds Rep. p. 25–41 (Quantum Corporation/Plane Trucking) at consideration 59, see also paragraph 8 in the above under *»The CMR covers multimodal carriage«*.

117 OLG Köln, 25 May 2004 (unpublished).

118 Rb Rotterdam, 28 October 1999, *Schip en Schade* (S&S) 2000, 35 (Resolution Bay), mentioned in the above, paragraph 8.

119 According to par. 4.3 the court would also have regarded Rotterdam as the place of take-over if the cargo had not been given into the care of a subcontractor but had been carried on by the main carrier himself.

120 Rb Rotterdam, 19 October 2000, *Schip en Schade* (S&S) 2001, 126.

The OGH Wien<sup>122</sup> states that the designation of the place of taking over as the place where the contract of carriage commenced is justified since this place is easily discernable by all parties involved in the transport since it is stated in the transport papers:

»Wesentlich ist vielmehr, daß der vom Abkommen vorgesehene Anknüpfungspunkt für alle am Transport Beteiligten (und damit potentiell Ersatzberechtigten oder Ersatzpflichtigen) aus den Papieren unschwer vollzogen werden kann.«

Which would be true if it were not common practice to provide a subcontracting road carrier with new transport papers, specifically tailored to the subcontracted carriage. These will usually not mention the original place of take-over. This way, the subcontractor may not even be aware that the carriage he will perform is part of a larger transport stage<sup>123</sup>. In those situations it should not be taken for granted that the subcontractor is acquainted with the place the goods were taken over originally<sup>124</sup>.

Decisive is the actual place where the goods were taken over by the subcontractor<sup>125</sup>. The wording of article 31 § 1 sub b CMR is clear on that. A court in the vicinity of the place where the goods were actually taken over would have less trouble finding evidence as to the exact causes of the loss or damage to the cargo, especially if the causes were for instance bad packaging, incorrect loading up or incorrect transferral<sup>126</sup>.

Not decisive should be, as Koller argues, the in the subcontractor's contract indicated place of taking over<sup>127</sup>.

#### CMR jurisdiction and the draft instrument

As the draft instrument also includes jurisdiction provisions<sup>128</sup> which differ from those in the existing unimodal conventions such as the CMR, a clash between these conventions would be inevitable<sup>129</sup>. It will make the legal position of all parties involved that much more insecure because the answer to the question what jurisdiction rules are applicable can have drastic consequences.

An obvious way to avoid this predicament is the already in the above proposed revision of the ›minimal network system‹ as employed in the UNCITRAL/CMI draft instrument in to a full-scale network system which lets every mandatory provision of the relevant unimodal convention prevail. Indeed, this would be detrimental to the uniformity the system in the draft instrument strives to attain, but honestly, with a mere ›unimodal plus‹ approach true uniformity may just be one bridge too far.

If the network system in the draft were to be expanded as suggested however, the draft instrument could do a lot of good in the field of intermodal transport. It would create more uniformity in the area of international sea carriage law<sup>130</sup> and it could fill up some holes concerning for example the liability in case of unlocalized loss under multimodal contracts by virtue of a complementary effect to the existing unimodal conventions. With that last beneficial effect in mind the expansion of the draft instrument to include all sorts of intermodal carriage instead of just the carriage including a sea leg is at the very least food for thought.

## 11. Conclusion

The question whether or not a court or tribunal has jurisdiction over a case is one of the very first questions it has to answer. And it's not an easy one either in some transport lawsuits. Since the ›multimodal plus‹ and ›network minus‹ solution of the UNCITRAL/CMI draft instrument complicate this already difficult question even more, the value it might add to the international legal field concerning the carriage of goods in its current state is questionable. It certainly will not generate the aspired to uniformity as it is now.

It would be a shame however, if the supplemental effect the draft instrument could have in cases of unlocalized loss for instance would not get a chance. A complementary effect to the existing transport conventions by the draft instrument could do a world of good and that such an arrangement is needed can be derived from the popularity of contractual standard forms like the UNCTAD/ICC Rules.

To realize the objective of making the draft instrument acceptable for ratification and so achieving the beneficial complementary effect it may have on multimodal carriage, a lot of work and thought still has to be directed at the avoidance of conflict with the existing conventions.

Clearly we have enough problems as it is interpreting the unimodal carriage conventions, we really don't need the added strain of a new convention throwing conflicting provisions in the mix.

121 Who had carried the goods by ferry.

122 OGH Wien, 1 April 1999, TranspR 2000-2, p. 36. See: P. De Meij, Samenloop van CMR-Verdrag en EEX-Verordening, (diss. Groningen), 2003, p. 126-127 and 163-166.

123 P. De Meij, Samenloop van CMR-Verdrag en EEX-Verordening, (diss. Groningen), 2003, p. 127.

124 I. Koller, »Übernahmeort und Gerichtsstand bei der Einschaltung von Fixkostenspediteuren und Unterfrachtführern – Anmerkung zu OGH Wien, TranspR 2000, 34 –«, TranspR 2000-4, p. 152.

125 K. Thume, Kommentar zur CMR, 1994, Art. 31, remark 25.

126 Basedow, Münchener Kommentar zum handelsgesetzbuch, München 1997, article 31 CMR, remark 22.

127 I. Koller, »Gehilfen des CMR-Frachtführers und Art. 31 CMR«, TranspR 2002-4, p. 135.

128 Which are still under discussion, hence the existence of two variants in the draft instrument at this point in time; UNCITRAL, (A/CN.9/WG.III/WP.32) Variant A article 72-75 bis and Variant B article 72-75. The chief difference between them is the lack of the ›lis pendens‹ doctrine in variant B.

129 Nota bene: In Europe the EJJC convention prohibits the draft instruments jurisdiction provisions from having any effect; according to article 57 of the EJJC convention only conventions regulating jurisdiction regarding special subjects, such as the CMR (see the verdict of the Danish supreme court at September 10th 2003, European Transport Law, 2004-1, p. 74-78.), existent at the time the EJJC convention came into effect have precedence over its provisions. This means article 2-7 of the EJJC convention will take precedence over article 72-75bis of the draft instrument.

130 By replacing the three principal existing sea carriage conventions, the Hague Rules, the Hague-Visby Rules and the Hamburg Rules.