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Maritime Plus and the European status quo

The current framework of international transport
law, ‘maritime plus’ and the EU

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1 Multimodal transport and the law

The use of standardised intermodal containers, which enhances the safety of goods in transit and reduces operating costs, has caused multimodal transport to become a global phenomenon since its introduction in the maritime environment during the previous century. Despite its practical success, however, the proliferation of this type of transport has up until now not been matched by suitable uniform legislation. Political discord and the fact that the use of more than one mode of transport under a single contract complicates the legal situation exponentially probably lie at the root of this deficiency.

Although the multimodal contract of carriage contends with some other legal impediments, the most prominent one seems to be that of ambiguity with regard to the applicable law. The reason for the obscurity in this area is that there is no international multimodal transport convention to lay the ground rules on how to approach a multimodal contract.

Current national and international transport law only regulates carriage by a single means of transport. This is reflected by the international carriage conventions such as the CMR for road carriage contracts,¹ the COTIF-CIM for rail carriage,² the Montreal Convention for air carriage,³ the CMNI for inland waterway carriage⁴ and the Hague Rules,⁵ the Hague-Visby Rules⁶ and the Hamburg Rules for the carriage

¹ The Convention on the Contract for the International Carriage of Goods by Road, signed at Geneva 19 May 1956.

² The Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 as amended by the Protocol of Modification of 3 June 1999 (Vilnius) – Appendix B (CIM).

³ The Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on 28 May 1999.

⁴ The Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway of 22 June 2001.

⁵ The Hague Rules; The Brussels Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924.

⁶ The Hague-Visby Rules; the Hague Rules as Amended by the Brussels Protocol of 23 February 1968.

of goods by sea. National carriage regimes generally tend to reflect this 'unimodal' approach, although the occasional domestic regime diverges from this structure. The German *Handelsgesetzbuch*, or Commercial Code, for instance, bundles the rules on all non-maritime carriage into one subsection, whereas sea carriage has its own set of rules.⁷ Some pioneers have even incorporated rules on multimodal contracts.⁸ These latter multimodal approaches are generally no more than network systems however, meaning that they cause a combination of the relevant unimodal transport rules to apply to a multimodal contract. This is a logical result of the hierarchy which exists in contemporary law.

2 The legal pecking order in the EU

The network approach, which may be characterised as 'live and let live', is the result of the fact that national legislators are generally left little room to manoeuvre by the mandatory international regimes. In the case, for instance, of the rules that are to be applied to the international air stages of a multimodal transport, the Montreal Convention specifically determines that it covers such transport in Article 38 MC. The air carriage convention cannot simply be set aside, since it consists largely of mandatory law, as do its road, rail, sea and inland waterway cousins. Because international law is positioned somewhat higher up the legal hierarchy than national law, a national legislator is unlikely to choose to apply other rules to such air transport than those of the Montreal Convention. The adoption of different national rules would be contrary to the obligations the state has taken upon itself by becoming a member of

⁷ Articles 407-450 HGB for non-maritime carriage and Article 6556-663b HGB for maritime carriage.

⁸ Examples include Articles 452-452d HGB of the German Commercial Code and Article 8:40-52 BW of the Dutch Civil Code.

the international convention.⁹

Of course, an international treaty generally should not need national rules in order to apply, aside, that is, from any legislation that might be needed to implement the treaty into the national legal sphere. International transport treaties like the Montreal Convention supply their own scope of application, within which they should be applied regardless of what national rules indicate. One could say international law is created to override national law.¹⁰ Thus, if the state where the court addressed is situated is party to a transport convention that is applicable according to its rules on scope of application, the said court is bound to apply this convention whether the applicable national regime concurs or not.

The same applies to the relationship between national legislation and contractual provisions: national law takes precedence over the provisions of the contract. It should be noted, however, that this is only the case where the national rules are mandatory.

But what of the position of the rules made in Brussels? Where does primary and secondary EU law fit into this picture?¹¹ To answer this question, we must start with the basics. The EU in its current form originates from a series of treaties. The first were the three treaties creating the ECSC, the EEC and EURATOM.¹² These three Communities, which attracted more members over the years, were later combined by the

⁹ According to Article 26 of the Vienna Convention on the Law of Treaties (VC) every treaty in force is binding upon the parties to it and must be performed by them in good faith. This is a codification of the globally accepted adage '*pacta sunt servanda*'. Deviation from international treaties by means of national law is incompatible with this principle and therefore to be avoided.

¹⁰ De Witte 1999. Many nations have either legislation or decisions by their supreme courts that establish the supremacy of international law: in the Netherlands, Article 90 Dutch Constitution; in Belgium, Belgische Hof van Cassatie 27 May 1971 (Fromagerie Franco - Suisse Le Ski / 'Smeltkaasarrest'); in France, Article 55 French Constitution and Cour de Cassation 24 May 1975 (Cafés Jacques Vabre); and in Greece, Article 28 Greek Constitution.

¹¹ Strictly speaking, since the Lisbon Treaty of 1 December 2009, one should refer to primary and secondary EU law.

¹² The Treaty of Paris of 1951, which established the European Coal and Steel Community (ECSC) and the Treaties of Rome of 1957 establishing the European Atomic Energy Community (EURATOM) and the European Economic Community (EEC).

Treaty of Maastricht of 1992 into the European Union and merged into a single legal entity by the Lisbon Treaty of 2009. According to the European Court of Justice (ECJ), which is an EU institution, sovereignty is vested in the Treaties.¹³ However, this assertion has only been granted limited acknowledgement by national governments in a Declaration attached to the Treaty of Lisbon.¹⁴ The main question therefore is to what extent the doctrine emanating from this sovereignty concerning the precedence of EU law over national law is accepted by the EU Member States.¹⁵

The supremacy doctrine was formulated clearly for the first time by the ECJ in 1964, in *Flaminio Costa v Enel*.¹⁶ In its decision the ECJ stated:

“By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

¹³ ECJ 5 February 1963, *case 26/62 (Van Gend & Loos v Netherlands Inland Revenue Administration)*, [1963] *ECR 1* and ECJ 15 July 1964, *case 6/64 (Flaminio Costa v Enel)*, [1964] *ECR 585*. This concept is not generally accepted however. Chalmers, Davies & Monti 2010, p. 187; Lepsius 2006, p. 29; Sorrentino 2006, p. 123-124.

¹⁴ “17. Declaration concerning primacy - The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.”

¹⁵ Chalmers, Davies & Monti 2010, pp. 184-185. This is only one of four doctrines emanating from the sovereignty concept. The others are that EU law alone should determine the quality of the legal authority of different norms; that EU law can determine the extent of its authority; and the fidelity principle of Article 4(3) TEU.

¹⁶ ECJ 15 July 1964, *case 6/64 (Flaminio Costa v Enel)*, [1964] *ECR 585*. In ECJ 5 February 1963, *case 26/62 (Van Gend & Loos v Netherlands Inland Revenue Administration)*, [1963] *ECR 1* the ECJ touched upon the issue, but the primary focus of that decision was on direct effect. Craig & De Búrca 2008, p. 345. In 1970 the ECJ underlined the primacy of EU law again in *Case 11/70 Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] *ECR 1125*.

...

The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories.

...

The precedence of Community law is confirmed by Article 189, whereby a regulation 'shall be binding' and 'directly applicable in all Member States'. This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.

It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."

Thus the ECJ has made its point of view quite clear. But is this radical opinion accepted by the EU Member States? In truth, there have been only a few instances in which a national constitutional court has given a national measure priority over an EU measure. In two cases national courts have decided against surrendering individuals wanted in another state within 45 days. These decisions were based on the thinking that, since the measures concerned were in the third pillar, they did not have to take priority over national law at that time.¹⁷ In essence, there is

¹⁷ The surrender of the individuals was prescribed by a European arrest warrant issued based on the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States *Attorney General of the Republic of Cyprus v Konstantinou* [2007] 3 CMLR 42 and *Re Enforcement of a European Arrest Warrant* [2006] 1 CMLR 36. Chalmers, Davies & Monti 2010, p. 204.

tension between the ECJ's view of the status of EU law and that in certain Member States. In *Gauweiler* for instance, the German *Bundesverfassungsgericht* (BverfG), the German constitutional court, clarified that it did not deem it contradictory to the realisation of a united Europe to declare EU law inapplicable in Germany by exception.¹⁸ Generally speaking, however, there seems to be a trade-off between the acceptance of the supremacy of EU law in most cases and the fact that only a small proportion of EU law is invoked before domestic courts. Member States tend to accept the supremacy of EU law when they consider it to be acting within its proper sphere of competence. In most Member States the conceptual basis for this acceptance is not the ECJ's reasoning in *Costa*, but rather provisions found in their own domestic legal orders.¹⁹

The fact that EU law as a general rule is granted supremacy over national law in EU Member States does not, however, tell us anything about its status in relation to international law. For example, is it of a higher order than the international law of the carriage conventions, or should the carriage conventions be considered superior?

In 2004 the ECJ clarified the matter, at least insofar as it concerns secondary EU law and the Montreal Convention.²⁰ In answer to the question whether Regulation No 261/2004 or the Montreal Convention should take precedence, the ECJ determined in *IATA and LFAA v Department for Transport* that:

“Article 300(7) EC21 provides that ‘agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States’. In accordance with the Court’s case-law, those agreements prevail over

¹⁸ BverfG 30 June 2009, www.bverfg.de/entscheidungen/es20090630_2bve000208.html (*Gauweiler v Treaty of Lisbon*).

¹⁹ For instance Article 55 or 88(1) of the French Constitution and Article 11 of the Italian Constitution. Craig & De Búrca 2008, pp. 354, 357 and 365.

²⁰ ECJ 10 January 2006, case C-344/04 (*The Queen ex parte International Air Transport Association, European Low Fares Airline Association v. Department for Transport*), *Jur.* 2005, p. I-00403, see also *NJ* 2006, 372.

²¹ Currently Article 218 TFEU.

provisions of secondary Community legislation.”²²

Although clearly stated, this does not provide any insight into the relationship between EU law and all international treaties, merely those of which the EU is a member. The Montreal Convention may be an integral part of the EU legal order, the other carriage conventions are not.²³ The newest air carriage convention was signed by the Community on the basis of Article 300(2) EC.²⁴ Thus, it follows from Article 218(7) of the Treaty on the Functioning of the European Union (TFEU) that it takes precedence over secondary EU law, as it is an international agreement concluded by the EU.²⁵ Primary EU law, on the other hand, is not set aside. As part of the EU legal order, the air carriage convention does not precede either the TFEU or the TEU.²⁶

Article 218 TFEU does not provide any guidelines concerning treaty law that has not been entered into by the EU. As a result, the relationship between these two layers of law is still unclear.

²² Once a treaty concluded by the EU comes into force its provisions form an integral part of EU law. ECJ case c-181/73, *Haegeman v Belgium* [1974], ECR 449. See also Mendez 2010, under 1. This article can also be found at: <http://ejil.oxfordjournals.org>.

²³ Although the Montreal Convention is a part of the EU legal order it should be noted here that the EC’s instrument of approval concerning the air carriage convention contained a declaration in which is stated that the Member States of the European Community have transferred competence to the Community for liability for damage sustained in case of death or injury of passengers and damage caused by delay and in the case of destruction, loss, damage or delay in the carriage of baggage. This made the EC, and currently the EU, competent to adopt rules in this area. It also states that since the competence of the EU is liable to continuous development it reserves the right to amend the declaration accordingly. As a result the status of the part of the Montreal Convention which contains rules concerning the carriage of is somewhat obscure. For the declaration see: www.icao.int/icao/en/leb/mlt99.pdf. Currently the EU is working on acceding to the COTIF. This is possible because *Article 38 COTIF, as modified by the Vilnius Protocol, permits regional economic organisations to accede to the Convention. Whether the EU can and will also accede to the appendices such as the CIV and CIM has not been made known.*

²⁴ Currently Article 218 TFEU. The Montreal Convention was approved by Council decision of 5 April 2001 and entered into force, so far as it concerned the Community, on 28 June 2004.

²⁵ Epiney, Hofstötter & Wyssling 2008, p. 142; Vandamme 2005, p. 190.

²⁶ See Article 218 TFEU. Tietje 2008, p. 57.

In any event, the hierarchy of international and EU law might, at this point in time at least, not seem such a relevant question as regards multimodal transport. After all, there is no EU Directive or Regulation on multimodal contracts, nor is there any such instrument regulating the carriage of goods in general.

As long as there is no international convention on multimodal transport however, there is a chance that Brussels will decide to implement regional, *i.e.*, EU, regulation. In spite of the fact that the industry appears to favour a global approach rather than a regional one, it seems that future EU legislation on this subject is being contemplated. In recent years, prominent legal professionals have been asked for advice, and even to draft potential systems, on several occasions.²⁷

But even if Brussels does not see fit to create a Directive or Regulation on multimodal transport, the question as to the legal status of EU law in relation to the international carriage conventions is still a valid one. The fact is that the Rome I Regulation on the law applicable to contractual obligations of 2008 is likely to add to the confusion over applicable law in the near future. Although the Regulation does not seem to be causing much discomfort at the moment, this may change if one of the Member States of the EU decides to ratify a new carriage convention.²⁸ If this were to happen, which is hardly unlikely given the recent developments in sea carriage law, the consequences of Article 25 Rome I would need to be examined.

Article 25 is meant to regulate the Regulation's relationship with existing international conventions. It does this by determining that: *“the Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.”* The key elements here are the fact that the provision only causes the Regulation to cede to international

²⁷ An example of this is the draft system created by Professors Clarke, Herber, Lorenzon and Ramberg in 2005. Clarke, Herber, Lorenzon & Ramberg 2005.

²⁸ Excepting Denmark, since the Rome Convention was not replaced by the Rome I Regulation in this EU Member State.

conventions (a) to which one or more Member States were party as at 17 June 2008, and (b) that contain conflict-of-law rules relating to contractual obligations. Firstly, these conditions require some explanation. What, for instance, is meant exactly by ‘conflict-of-law rules’? Secondly, they cause the hierarchy of the different layers of law to become important once again. For if the scope-of-application rules of the carriage conventions should not be considered to be ‘conflict-of-law rules’ as, for instance, Wagner suggests, then the status of the international regime will determine whether it applies by means of the national regime appointed by the Rome I Regulation or whether it is considered to be a set of ‘overriding mandatory provisions’, as meant by Article 9 Rome I and thus granted application even in those cases where it is not part of the law appointed by the standard procedure of the Rome I Regulation, and accordingly has precedence *ex proprio vigore*.²⁹ Of course, this latter option is possible only if international conventions that are not part of the EU legal order are deemed to take precedence over secondary EU law.

3 The shape of things to come

When there is a need to determine the law applicable to a multimodal carriage contract, the most efficient starting point still seems to be international law. Since there currently is no international law that regulates the multimodal contract as such, originating either from the EU or elsewhere, the existing transport conventions are the best place to start the investigation. The ‘unimodal’ carriage conventions mentioned in the first paragraph tend either to apply to parts of multimodal transport contracts or to extend their scope of application to certain specific types of multimodal carriage. Therefore the scope of application of these

²⁹ Wagner 2009. W.E. Haak also supported the view that scope-of-application rules are not truly conflict-of-law rules, arguing that since they only demarcate the applicability of a set of rules, they do not refer to the applicable domestic law. Haak (W.E.) 1973, p. 33.

conventions will be analysed in the following, starting with the CMR, the international road carriage convention. There follows a brief discussion of the CMNI and the COTIF-CIM – brief because these conventions largely share the phraseology of the basic scope-of-application provisions of the CMR and there has been much less controversy in legal literature and case law on their scopes of application in multimodal carriage.³⁰ As a result, any ambiguity which is discussed concerning the basic scope of application of the CMR, as established in Article 1 CMR, seems to concern the COTIF-CIM and the CMNI equally.

Unlike the CMR, the scope of the Montreal Convention does not generate many differences in interpretation when it comes to multimodal carriage. Article 38 MC is quite clear on the multimodal aspirations of the Convention. It applies to international air carriage, whether this is part of a multimodal contract or not.³¹ The air carriage convention is therefore mostly interesting as regards multimodal carriage when it comes to the convention's 'extracurricular activities', *i.e.*, the extensions of its scope of application beyond mere air carriage.

The final mode of transport to be reviewed is sea carriage. Although the currently operational sea carriage regimes are worthy of some attention, they are also not scrutinised in detail here. From a multimodal point of view it is not the existing regimes that are of most interest: the attention-grabbing regime is the one that is meant to set aside the current sea carriage conventions. The Rotterdam Rules with their 'maritime plus' approach may not be a fully fledged multimodal transport

³⁰ Basically, Article 1 CMR determines that the *Convention "shall apply to every contract for the carriage of goods by road in vehicles for reward"*, Article 1 COTIF-CIM that it "shall apply to every contract of carriage of goods by rail for reward", and the CMNI in Article 2 that it applies to any contract of carriage, whereby a contract of carriage is "any contract, of any kind, whereby a carrier undertakes against payment of freight to carry goods by inland waterway" according to Article 1 CMNI.

³¹ According to Article 38(1) MC, its provisions shall apply only to the carriage by air in the case of combined carriage performed partly by air and partly by any other mode of carriage, provided that the carriage by air is the international carriage of persons, baggage or cargo performed by aircraft for reward, or is the gratuitous carriage by aircraft performed by an air transport undertaking.

regime, but they come close.³² These Rules are intended to regulate all contracts of carriage that include a sea leg. This includes any carriage by other modes of transport that precedes the sea carriage or is subsequent to it. It is therefore the Rotterdam Rules and their fit into the currently existing framework of carriage law that will form the focal point of the analysis of sea carriage law.

In light of the Rotterdam Rules and their potential entry into force in the future, the ensuing paragraphs will again discuss Article 25 of the Rome I Regulation and its possible consequences. With the possibility of individual Member States of the European Union ratifying the Rules in the near future, the question as to the nature of ‘conflict-of-law rules’ becomes sufficiently relevant to merit a review.³³

4 The ‘multimodal’ scope of the CMR

4.1 The ‘contract for the carriage of goods by road’

Article 1 CMR defines both the *ratione materiae*, the material scope of application or the subject-matter covered by the convention, and the *ratione loci*, the geographic scope of application. Of the various paragraphs in Article 1 CMR, it is the first that contains the core scope-of-application provisions.³⁴ It contains the following text:

³² The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, signed at Rotterdam on 23 September 2009.

³³ Since the ceremony in September of 2009, 21 States have revealed their intent to ratify the Rotterdam Rules by signing the new convention. Among these States are the Netherlands, Denmark, France, Greece, Poland and Spain. A complete list of signatories can be found at www.uncitral.org.

³⁴ The second through fourth paragraphs contain more or less marginal demarcation rules, such as definitions and exclusions of specific types of carriage such as funeral consignments. The fifth paragraph can almost be said not to relate to the Convention’s scope of application at all, as it merely entails an agreement by the Member States not to deviate from the Convention in bi- or multilateral agreements among themselves except in relation to a few specifically mentioned areas.

This Convention shall apply to every contract for the carriage of goods by road in vehicles for reward, when 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, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties.

Thus the *ratione materiae* is determined objectively, independent of any rules of private international law.³⁵ But, objective or not, the words 'contract for the carriage of goods by road' have been the subject of ample discussion. It is these words that have turned out to be very prone to contrary interpretations by different courts of law.³⁶ The different views on the precise circumstances that will cause the CMR to apply by means of Article 1 CMR can be roughly divided into three categories:

- (I) The CMR applies to road carriage provided for in a multimodal contract by means of Article 1 CMR, even if the road stage is merely domestic, as long as the contract as a whole is international.
- (II) The CMR applies to road carriage provided for in a multimodal contract by means of Article 1 CMR, but only if the road leg itself fulfils all the conditions set by Article 1, meaning that it must be international.
- (III) The CMR does not apply to any part of a multimodal transport by means of Article 1 CMR, because a multimodal contract is not a contract for the carriage of goods by road.

³⁵ De Wit 1995, p. 92. In Italy the *Corte Suprema di Cassazione*, the Supreme Court, maintains the rather exceptional view that the scope of application of Article 1 CMR is restricted by the provision found in Article 6 (1) (k) CMR. Because this last provision determines that the consignment note should contain a statement that the carriage is subject to the rules of the CMR, the *Corte* believes that the application of the CMR is conditional on such a statement, even though Article 4 CMR determines that the absence, irregularity or loss of the consignment note shall not affect the existence or the validity of the contract of carriage which shall remain subject the provisions of the CMR. Berlingieri 2006, p. 40. Not all the lower Italian courts share this view of the CMR's scope of application. Margetson 2008, p. 130.

³⁶ See Haak & Hoeks 2005, pp. 95-97.

It seems that the only thing that can be said with any degree of certainty is that the text of Article 1 CMR does not support the application of the CMR rules to the non-road carriage legs of a multimodal carriage contract.³⁷

4.2 Article 1 CMR: The ‘pro’ CMR view

The view that the words ‘contract for the carriage of goods by road’ do not literally require the whole voyage to be made by road, merely that the contract includes a road stage, is held by many commentators and courts in Europe.³⁸ Indeed, the article does not state that the carriage has to be exclusively – or even predominantly – by road.³⁹ Therefore, if there is international road transport to or from a Contracting State according to the contract, the CMR applies to the said transport, whether or not the contract is for some other type of carriage as well.⁴⁰

It can be argued that interpreting these words differently, so that the CMR does not provide for the possibility of applying by means of Article 1, would lead to unwarranted inconsistencies between similar carriage contracts. Take for instance a contract for international carriage by road, for instance from Warsaw in Poland to Seville in Spain. Such a

³⁷ Ramming 1999, p. 329.

³⁸ Clarke 2003 *International carriage of goods by road*, p. 46 and Clarke 2003 *JIML*; Haak 1986, pp. 98-99; Messent & Glass 2000, p. 45; Van Beelen 1994; Thume 1994, p. 92; Putzeys 1981, pp. 103-104; A/CN.9/WG.III/WP.29, p. 29, par. 115, www.uncitral.org; *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another*, [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535; *Datec Electronic Holdings Ltd v UPS Ltd* [2006] 1 *Lloyd's Rep* 279; Cour de Cassation 25 November 1995, *Bulletin des Arrêts de la Cour de Cassation* 1995, IV, pp. 248-249; Rb Rotterdam 11 April 2007, *S&S* 2009, 55 (*Godafoss*); Rb Rotterdam 28 October 1999, *S&S* 2000, 35; LG Bonn 21 June 2006, 16 O 20/05; OLG Düsseldorf 29 September 2005, I-18 U 165/02. Even the German BGH seemed to support this view in the past, but in a recent judgment the BGH has clarified its views as being quite the opposite. BGH 24 June 1987, *TranspR* 1987, pp. 447-454; BGH 30 September 1993, *TranspR* 1993, pp. 16-18.

³⁹ “*There is nothing in the Convention to indicate that, where a contract of carriage is to be performed partly by road and partly by other means of transport, this in itself results in the contract not being one for the carriage of goods by road in terms of Article 1, paragraph 1. In fact, the Convention implies the contrary.*” Fitzpatrick 1968, p. 311.

⁴⁰ Clarke 2003 *International carriage of goods by road*, pp. 45 and 29-30; Clarke 2003 *JIML*, p. 32.

contract would, as a rule, be subject to the CMR, as it would concern unimodal international carriage by road. Another contract providing for carriage from Warsaw to Rabat in Morocco would also be subject to the CMR by virtue of Article 2 CMR, as long as the goods remained on their trailer for the short sea passage from Algeciras to Tangier. If the CMR could not apply to the road stages of a multimodal contract by virtue of Article 1, however, the nearly identical third example of a contract entailing carriage by road from Warsaw to Algeciras and by sea from Algeciras to Tangier, with the goods being transferred from the trailer to the ship in this instance, would not be subject to the CMR. This would even be the case for the road stage between Warsaw and Algeciras, which would comprise the largest part of the transport.

It is hard to imagine that either the drafters of the CMR or those involved in the international carriage of goods would regard this latter outcome as sensible. It seems unjustifiable that rights and responsibilities for long international trucking legs in comparable cases should depend on whether a carrier by road does or does not undertake the sea leg, or, if he does undertake it, on whether or not the goods remain on the trailer.⁴¹ All the more so since the Convention was created to generate legal security and a semblance of protection for the shipper. At least application of the CMR to road carriage that is part of a multimodal transport presents courts of law with an internationally known set of rules instead of with a national regime of which they may not have any intimate knowledge.⁴²

4.2.1 An international contract

Among those who are of the opinion that the CMR can be applicable to parts of a multimodal contract by means of Article 1 CMR, there has been some discussion as to whether this is possible when the road stage

⁴¹ Lord Justice Mance in: *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another*, [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535 under no. 26.

⁴² The fear of foreign national law should in itself never constitute enough reason to stretch the scope of a convention beyond its intended boundaries however. Van Beelen 1994, p. 49.

itself is domestic. The *Rechtbank* Rotterdam for instance, is known to have expressed the view in the past that the CMR applies to road carriage provided for in international multimodal contracts. The most prominent dispute involved a damaged mobile crane which was carried from Cairo in Egypt to Geleen in the Netherlands.⁴³ Shortly after departure from Cairo the flatbed trailer on which the crane was loaded sank into the softer ground alongside the road due to the driver's negligence. Another crane was brought in to lift trailer and cargo back onto the road, but its cable snapped, toppling both crane and trailer. After the incident, the damaged crane was carried by sea from Alexandria to Antwerp, and transported from there to Geleen by road.

The *Rechtbank* chose to apply the rules of the CMR to the incident in Egypt due to the following disputable '*a contrario*' explanation of Article 2 CMR: since Article 2 CMR means that the CMR merely does not apply to the sea stage of the transport whenever the goods are unloaded from the road vehicle and loaded onto a ship, the CMR does apply to the road stages of such a transport, even if these are domestic. The Court deemed the contract to constitute an international carriage contract, as the place of taking over and the place of delivery were situated in two different countries. Furthermore, because part of this contract entailed road carriage, the Court found that the requirements of Article 1 CMR were met, at least insofar as the road stages were concerned. Therefore, the Court determined that judging the CMR inapplicable to all parts of the transport would needlessly and excessively restrict the CMR's scope of application, and would be contrary to the intentions of the parties to

⁴³ Rb Rotterdam 24 January 1992, *S&S* 1993, 89. In this judgment the Rotterdam Court was said to have followed the teachings of K. F. Haak. Van Beelen 1994, p. 43; Haak 1986, p. 99 and more recently Haak 2010, p. 47.

the convention to create a uniform regime.⁴⁴ However, the Rotterdam Court did deem it necessary for the transport to begin *and* end with road carriage, stating that it would stretch the scope of application of the CMR too far to apply the convention to a domestic road leg if it were the only road leg in the transport. This seems somewhat weak as arguments go, because if consistently employed, the ‘extensive pro CMR’ perspective⁴⁵ should cause the CMR provisions to apply to all road carriage under an international multimodal contract, and not merely in cases where there are two or more road legs with at least one at the beginning and one at the end of the transport. The convention does not supply any basis on which to support this type of differentiation.

Another weakness in the ‘extensive pro CMR’ position, as defended by the Rotterdam *Rechtbank* is that it seems to pay insufficient heed to the object and purpose of the CMR Convention. As touched upon earlier, the CMR is an international instrument and as such is meant to standardise the conditions governing contracts for the *international* carriage of goods by road. Indeed, this is stated literally in the preamble of the convention. To apply the CMR to domestic carriage simply because it forms part of an international carriage contract does not do

⁴⁴ Also in 1992, the *Rechtbank* Rotterdam drew a similar conclusion in relation to a series of potato transports from Gumeren in the Netherlands to several destinations in Italy. Rb Rotterdam 5 June 1992, S&S 1993, 107. Since this transport started with carriage by road in one country and ended with carriage by road in another country the CMR applied. That the potatoes had been carried by rail between the first and the last domestic road legs did nothing to counter the applicability of the CMR to the road carriage according to the *Rechtbank*. As in the previously mentioned case it was stated that if there had been ro-ro transport, the CMR would have applied to the whole journey based on Article 2 CMR, and that the CMR applied to the road carriage stages by means of Article 1 if the trailer had not accompanied the potatoes during the rail stage of the transport. It was not deemed necessary for the road stage itself to be international in order for the CMR to apply by means of Article 1 CMR. As long as 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 the CMR was to be applied to any road carriage the contract provides for.

⁴⁵ The view discussed in this section has been fittingly dubbed ‘pro CMR’ by Van Beelen 1994.

justice to this intent.⁴⁶ It seems illogical to apply an international convention to a part of a transport contract that would not have been covered by the said convention if it had been contracted for separately. Since a transport from Amsterdam to Utrecht is not governed by the CMR, nor is so-called 'horseshoe' transport from Alphen aan den Rijn in the Netherlands via Como in Italy back to Alphen aan den Rijn; such transport should also not be governed *ex proprio vigore* by the CMR if it forms part of a larger multimodal transport.⁴⁷ Since the *Rechtbank* chose to consider the transport stages of the contract separately by determining that the CMR did not apply to the sea stage unless the cargo remained on the trailer, logic dictates that the various road stages should also be considered separately.

There is a limit to the uniformity of law which treaties can or should achieve.⁴⁸ Van Beelen surmises that it is very probable that no one would even have thought to apply the CMR to domestic road carriage provided for in a multimodal contract if the rules found in Article 2 had not been incorporated into the CMR.⁴⁹

Furthermore, applying the CMR to domestic road carriage would very likely create recourse problems for the multimodal carrier.⁵⁰ And, as a last but certainly not least objection, there is Article 17 CMR. This article determines that the carrier is liable for any loss of the goods and

⁴⁶ Even though the aim of legal uniformity causes the use of treaty law in all situations with an international element to be very alluring, this is a temptation that ought to be resisted in this case as the text of the CMR indicates that it is not intended to apply to domestic carriage. The fear of foreign national law is in itself not enough reason to stretch the scope of a convention beyond its intended boundaries. Van Beelen 1994, p. 49. Cf. Laurijssen 2004, pp. 569-570.

⁴⁷ Hof's-Gravenhage 29 September 1998, *Se&S* 1999, 33.

⁴⁸ In *Quantum*, Lord Justice Mance determined to this end that: "Although we do not have to decide the position in relation to such a leg in this case, there would also seem to me no incongruity if it were to be concluded that an initial or final domestic leg falls outside CMR, like any other domestic carriage." *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another*, [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535.

⁴⁹ Van Beelen 1994, p. 47.

⁵⁰ The most significant example here is the fact that the kilogram limitation may vary; under the CMR it is 8.33 SDR, while under the domestic law of the Netherlands it is approximately a third of that amount. German national law, on the other hand, makes use of the CMR limitation amounts (Article 414 HGB), as does the U.K.

for damage thereto occurring between the time when he takes over the goods and the time of delivery. If the taking over and delivery mentioned in Article 1 CMR were meant to be understood as being the very first taking over at the start of the multimodal carriage and the final delivery at the very end of the transport, Article 17 would cause the multimodal carrier's liability to be regulated by the CMR during all parts of the journey, even during the non-road stages. The prevailing opinion seems to be, however, that this is not the case.⁵¹

4.2.2 International road stages

A more generally accepted view is that the 'place of taking over' and the 'place of delivery' of the goods as referred to in Article 1(1) CMR are to be understood as referring to the start and end of the contractually provided or permitted road leg.⁵² The German Supreme Court, the Bundesgerichtshof or BGH, adopted this point of view in 1987. In this judgment the BGH explicitly declared the CMR applicable to a road stage performed under a multimodal contract. The contract was for carriage from Neunkirchen in Germany to Portadown in Northern Ireland, but only from Neunkirchen to Rotterdam was it to be carried out by road. Literally the BGH stated that: "*The CMR applies to the land stage of the carriage, as ensues from Article 1 of the Convention*".⁵³ Vis-à-vis the Northern Irish road stage of the transport between Belfast and

⁵¹ Ramming 1999, at p. 329 and Ramming 2007, p. 284.

⁵² *Quantum Corporation v Plane Trucking* [2002] 2 *Lloyds Rep* 25; Rb Rotterdam, 28 October 1999, S&S 2000, 35 (Resolution Bay); Rb Rotterdam 23 April 1998, S&S 2000, 10; OLG Köln 25 May 2004, *TranspR* 2004, p. 359, *VersR* 2005, 574; Rb Maastricht 28 May 2003, S&S 2004, 57; Rb Rotterdam 11 April 2007, S&S 2009, 55 (*Godafoss*); Rb Rotterdam 3 May 2006, *LJN* AX9359; *Datec Electronic Holdings Ltd v UPS Ltd* [2007] 1 *W.L.R.* 1325; Cour de Cassation 25 November 1995, Bulletin des Arrêts de la Cour de Cassation 1995, IV, pp. 248-249; Hof 's-Hertogenbosch 2 November 2004, S&S 2006, 117; Rb Antwerpen 23 September 1975, *ETL* 1976, 279; Rb Rotterdam 1 March 2001, S&S 2002, 89; Rb Rotterdam 15 May 2008, *LJN* BD4102.

⁵³ "Für die Landstrecke gilt die CMR, wie sich aus Art. 1 des Abkommens ergibt"; BGH 24 June 1987, *TranspR* 1987, pp. 447-454 at p. 447. In 2008 the BGH however explained that this judgment applied the CMR indirectly, namely by means of German national law, and not directly based on Article 1 CMR. BGH 17 July 2008, *TranspR* 2008, pp. 365-368.

Portadown, the BGH on the other hand determined that the CMR did not apply, as this road stage did not cross any borders.⁵⁴

Academic commentators, such as Hill and Loewe, had voiced their preference for this interpretation long before the 1980s and, over the years, support for this opinion has steadily grown.⁵⁵ Since carriage to and from the United Kingdom always involves sea, rail, or air carriage, due to its geographic situation, the English have concerned themselves with the scope of application of the CMR regarding multimodal carriage from the very beginning. Indeed, the very existence of the expansion of the CMR's scope in relation to roll-on/roll-off (ro-ro) carriage, which is found in Article 2 CMR, can be ascribed to the English delegation.⁵⁶ Against this backdrop Hill has remarked that, when there are no ro-ro operations, the CMR is to be applied only to the segments of the transit of a cross-Channel shipment if the segment concerns the crossing of an international frontier on a road vehicle.⁵⁷

Quantum

A more contemporary English example of the view that the CMR applies to the international road stages of multimodal transports can be

⁵⁴ Cf. BGH 17 May 1989, *TranspR* 1990, pp. 19-20, *NJW* 1990, pp. 639-640, *ETL* 1990, pp. 76-80; OGH Wien 19 January 1994, *TranspR* 1994, pp. 437-439; Rb Haarlem 16 March 2005, *S&S* 2006, 137; Rb Rotterdam 30 November 1990, *S&S* 1991, 56; Hof Den Haag 25 May 2004, *S&S* 2004, 126; *Princes Buitoni Ltd. v Hapag-Lloyd Aktiengesellschaft and Another*, [1991] 2 *Lloyd's Rep.* 383.

⁵⁵ Loewe 1975; Hill 1975, pp. 604-605. Some examples of the more contemporary sources are: Wilson 2004, p. 246; Mankabady 1983, p. 136 and perhaps Clarke 2003 *International carriage of goods by road*, p. 29.

⁵⁶ At the instigation of the English delegation the drafters expressed the wish to extend the application of the Convention by adding this article, since without it the Convention would be of little use to them: it would never apply to road transport in England. Haak 1986, p. 94.

⁵⁷ Hill 1975, pp. 604-605.

found in *Quantum v Plane Trucking*.⁵⁸ The case involved the loss of a consignment of hard disks owned by Quantum, which were to be transported by Air France from Singapore to Dublin under an air waybill. The disks were flown from Singapore to Paris by Air France without incident. At Charles De Gaulle airport the three pallets were unloaded from the aircraft. The second segment of the transit was to be a ro-ro movement from Paris across the Channel via England, Wales and the Irish Sea in order to reach Dublin. While being carried by road towards the Welsh port of Holyhead, the goods were stolen by the driver and a supervisor in the employ of Air France's subcontractor for the second stage, Plane Trucking. At the time of the theft the disks were on board the same trailer vehicle onto which they had been loaded in Paris. When Quantum sought compensation for the loss of the goods from Plane Trucking, Plane Trucking contended that by reason of a "Himalaya" clause on the reverse side of the air waybill issued by Air France, it was entitled to invoke the same limits of liability as were available to Air France.⁵⁹ Although Air France accepted liability, a dispute ensued concerning the grounds.

During the proceedings all parties agreed that the Warsaw Convention on carriage by air, which applied between Singapore and Paris, did not apply to the movement between Paris and Dublin. But, while Air France argued that its contract terms applied to this stage, the claimants advocated application of the CMR. Under the contractual provisions Air France would be able to invoke a limit of liability, whereas under the

⁵⁸ *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another*, [2001] 2 *Lloyd's Rep.* 133 and *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another*, [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535. An interesting detail is that the question as to whether the CMR applied in this case actually touched upon both of the scope-of-application articles of the CMR. Although the attention of all parties involved in the proceedings was drawn to Article 1 CMR, Article 2 CMR played a part as well, albeit a minor one. As was mentioned only *en passant* in the judgments, the carriage across the Channel and the Irish Sea concerned ro-ro carriage.

⁵⁹ In general terms, a Himalaya clause is any clause in a bill of lading which seeks to extend to non-carriers any immunity, defence, limitation or other protection afforded to the carrier by law and/or the bill of lading. The clause takes its name from the *S.S. Himalaya* which starred in a decision by the English Court of Appeal; *Adler v Dickson (The Himalaya)* [1954] 2 *Lloyd's Rep.* 267.

CMR Air France could invoke no such thing due to the intentional theft by the driver, which caused any such invocation to be barred by Article 29 CMR.

At first instance, Mr Justice Tomlinson determined that one of the features of the CMR is that, as its full title suggests, and as Article 1(1) provides, it attaches to contracts rather than to carriage. Because of the attachment of the CMR to contracts, the judge insisted on considering the entire movement from Singapore to Dublin as a whole. After some deliberation he found that it was 'essentially' and 'predominantly' a contract for carriage by air, and that that which was true of the whole was also true of the parts.⁶⁰

Tomlinson's take on this matter was vividly criticised by Clarke by means of an unusual but accurate metaphor. He commented that if the contract of carriage was characterised based on the distance between Singapore and Paris relative to the rest of the journey, this was like saying that a cocktail such as a Bloody Mary should be classified as non-alcoholic because it contains more fruit juice than vodka.⁶¹

On appeal the judgment was reversed. The Court of Appeal applied the accumulation principle and concluded that the contract in dispute was for carriage by road within the parameters of Article 1(1) CMR in relation to the ro-ro movement from Paris to Dublin, and that Air France's own conditions were overridden accordingly to the extent that they would limit Air France's liability.⁶² The Court distinguished two key aspects to the quandary encountered when interpreting the meaning of 'contract for the carriage of goods by road in vehicles for reward' in Article 1(1) CMR. The first was the extent to which the application of the CMR depended upon a carrier having obliged himself

⁶⁰ Clarke 2002 *JBL*. Assessing a contract in this manner was named 'Gesamtbetrachtung' by the Germans and was rejected by the German judiciary as unsuited for the appraisal of multimodal carriage contracts. BGH 24 June 1987, *TranspR* 1987, pp. 447-454.

⁶¹ Clarke 2005, p. 184.

⁶² "Viewed overall, contracts can by their nature or terms have two separate aspects, and the present, despite the length of the air leg, was in my view just such a contract." *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another*, [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535, per Lord Justice Mance.

contractually actually to carry the goods by road, and whether options in the contract to carry the goods by another means were of influence in this matter. The answer to this question hung upon the force, in context, of the word 'for' in the reference in Article 1 CMR to a 'contract *for* the carriage of goods by road'. The second was the extent to which a contract could be both for the carriage of goods by road, within the scope of Article 1, and for some other means of carriage to which the CMR did not apply.

With regard to the first aspect, the Court concluded that limiting the application of the CMR to situations where the carrier promised unconditionally to carry the goods by road and on a trailer would be contrary to the convention's purpose of standardising the conditions under which this kind of carriage is undertaken.⁶³ It would exclude too many of the contemporary contracts of carriage, as these tend to contain options for alternative modes of performance, either in general or in relation to specific emergencies. When a carrier promises road carriage, but reserves the right to opt for some other means of carriage for all or part of the way, or leaves the means of transport open, or undertakes to carry the goods by some other means, but reserves the right to opt for carriage by road instead, the mere inclusion of extra options should not bar the application of the CMR when the carriage is performed by road. The permission contained in the contract provided the carrier with the power to determine the applicable legal regime. Such a contract should be considered a contract 'for' – in the sense of 'providing for' or 'permitting' – the carriage of goods by road which actually occurred under its terms.

Concerning the second aspect – whether or not a contract can be both for the carriage of goods by road and for some other means of carriage – it was submitted that the CMR would have been much clearer if it had contained a solution like that of Article 31 of the Warsaw Con-

⁶³ See also Rb Rotterdam, 24 January 1992, *Se&S* 1993, 89.

vention on carriage by air.⁶⁴ The Court seemed to be of the opinion that it would have contained such a solution had it not been for the extension of the scope of application found in Article 2 CMR, which made this impossible.

The Resolution Bay

In 1999 the Dutch *Rechtbank* in Rotterdam decided a case involving a container of lamb meat that had been transported from New Zealand to Rotterdam by means of the ocean-going vessel *The Resolution Bay* and thence by road to Antwerp, Belgium.⁶⁵ After arrival it was established that the meat had thawed en route and gone bad. The *Rechtbank* Rotterdam decided that the CMR applied to the damage if the claimants could prove that the spoilage had occurred during the road stage between Rotterdam and Antwerp. In light of the question as to whether the Court had jurisdiction in this matter it commented:

“P&O as combined carrier of goods has chosen to perform the part of the transport between Rotterdam and Antwerp by vehicle by means of road, while the contract, as contained in the CT-document, provided it with the permission to do so. As a result the place of taking over of the goods as meant in Article 1(1) CMR is the place where P&O or the auxiliary P&O charged therewith has taken over the goods for carriage by road, which in this case is Rotterdam.”

As in *Quantum*, the Court deemed the CMR applicable to the – international – road stage, even though the contract did not specify, but only permitted, carriage by road for this part of the transit. In contrast to the

⁶⁴ Article 31 WC stems from 1929 and could have been used as a template to resolve the issue of scope if Article 2 CMR had not prohibited this. Like Article 38 MC, Article 31 WC determines that in the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of the convention apply only to the carriage by air, and that nothing prevents the parties from inserting in the document of air carriage conditions relating to other modes of carriage.

⁶⁵ Rb Rotterdam 28 October 1999, *S&S* 2000, 35 (*The Resolution Bay*).

above-mentioned 1992 judgment,⁶⁶ this time the Court interpreted the place of taking over to mean the place where the goods were taken over for the carriage by road, instead of at the beginning of the transport as a whole.⁶⁷

4.3 Article 1 CMR: ‘contra CMR’

Although the BGH applied the CMR to multimodal road carriage by means of the network approach in the late 1980s and the early 1990s,⁶⁸ contemporary German legal literature defends a different point of view. The currently prevailing opinion among authors is that the scope of application defined in Article 1 CMR does not cover this type of carriage.⁶⁹ Many detailed objections to the application of the CMR to anything other than unimodal road carriage contracts, aside from those covered

⁶⁶ Rb Rotterdam 24 January 1992, *S&S* 1993, 89.

⁶⁷ Cf. Rb Rotterdam 11 April 2007, *S&S* 2009, 55 (*Godafoss*); In contrast: Hof ‘s-Hertogenbosch 2 November 2004, *S&S* 2006, 117; OLG Köln 25 May 2004, *TranspR* 2004, pp. 359-361.

⁶⁸ BGH 24 June 1987, *TranspR* 1987, pp. 447-454; BGH 17 May 1989, *TranspR* 1990, pp. 19-20; BGH 30 September 1993, *TranspR* 1991, p. 16-18.

⁶⁹ Basedow 1994 and Basedow 1999, p. 35. Older – and even some relatively recent – German case law seemingly shows that at least some of the German courts had a different take on the subject. BGH 24 June 1987, *TranspR* 1987, pp. 447-454; LG Bonn, 21 June 2006, 16 O 20/05; BGH 21 February 2008, I ZR 105/05. Even some scholars, such as Puttfarken, are known to adhere to the opposing point of view. Puttfarken 1997, p. 175. A recent judgment by the BGH has put an end to the debate, however, by determining that in its view the CMR does not apply to international road carriage which is part of a multimodal transport contract. BGH 17 July 2008, *TranspR* 2008, pp. 365-368.

through Article 2 CMR, have been raised, mainly in the last decade.⁷⁰ Until recently it was unclear where the German courts stood on this issue, although there were some cautious examples of courts that did apply the CMR to road carriage performed based on a multimodal contract, most likely in the wake of the 1987 and 1989 BGH judgments.⁷¹ However, the uncertainty has come to an end since July 2008, when the BGH ruled that the part of a multimodal contract of carriage that involves international road transport is not covered by the rules of the CMR if the road vehicle does not accompany the goods onto the other means of transport used.

4.3.1 **BGH 17 July 2008**

In May 2000, a Japanese manufacturer of copying machines contracted with a Japanese freight forwarder, who acted as carrier, for the carriage of 24 containers stowed with copiers from Tokyo to Mönchengladbach, Germany.⁷² The waybill that was issued for the carriage contained a clause granting the Tokyo District Court sole jurisdiction over any claims arising from the contract of carriage and a clause choosing Japa-

⁷⁰ There may be a connection between the emergence of the majority of the objections and the entry into force on 25 June 1998 of the TRG, the *Transportreformgesetz*. The TRG incorporated specific rules in Articles 452 through 452d HGB on the '*Frachtvertrag über eine Beförderung mit verschiedenenartigen Beförderungsmitteln*', the contract of carriage involving carriage by different means of transport. The German rules do not cover all multimodal carriage contracts but are restricted to those contracts of which the various stages would be covered by different rules of law had they been contracted for separately. ("...und wären, wenn über jeden Teil der Beförderung mit jeweils einem Beförderungsmittel (Teilstrecke) zwischen den Vertragsparteien ein gesonderter Vertrag abgeschlossen worden wäre, mindestens zwei dieser Verträge verschiedenen Rechtsvorschriften unterworfen,..." this requirement is found in Article 452 HGB.) It should be noted however that some writers, such as Koller, defended the restricted view of the CMR's scope long before the TRG came into being. Koller 1989, pp. 769-775.

⁷¹ BGH 24 June 1987, *TranspR* 1987, pp. 447-454; BGH 17 May 1989, *TranspR* 1990, pp. 19-20; OLG Düsseldorf 29 September 2005, I-18 U 165/02; LG Bonn 21 June 2006, 16 O 20/05. In OLG Köln 25 May 2004 (*TranspR* 2004, pp. 359-361) the CMR was applied to an international road stage of multimodal transport, but the OLG did so only because English law applied to the claim.

⁷² BGH 17 July 2008, *TranspR* 2008, pp. 365-368.

nese law as the law applicable to the contract. The containers were carried by sea from Tokyo to Rotterdam. In the port of Rotterdam the containers were transferred onto the trailers on which they were to be transported by road to Mönchengladbach. For this road transport a CMR consignment note was issued. One of the containers, however, failed to reach its destination unscathed. After it was taken over for carriage by road, but before it had even left the port area, the container was perforated by a large steel pole, damaging many of the 50 copiers inside.

After the LG Mönchengladbach had rejected the claim for compensation by the cargo interests' insurance company, as it could not sufficiently prove that it was authorised to claim, the OLG Düsseldorf judged the *Speditionsunternehmen* liable for the damage based on the CMR.⁷³ The OLG established that the CMR applied to the claim because the accident had occurred after the international road carriage from Rotterdam to Mönchengladbach had started and it deemed the CMR applicable to any international road carriage performed based on a contract for carriage, even if the said carriage contract also involved carriage by other modes such as, in this case, carriage by sea.

The BGH reversed the judgment of the OLG and rejected the claim as inadmissible, since it was of the opinion that German courts lacked jurisdiction regarding this claim. Unlike the OLG, the BGH did not deem the CMR directly applicable to the road carriage leg of the multimodal transport contract, following the opinion generally supported by the German legal literature.⁷⁴ Nor did it find that the CMR applied indirectly by means of Articles 452 or 452a HGB, as the parties had chosen Japanese law as the governing law for the contract and this prevented these articles of German national law from exerting influence on the matter.

⁷³ OLG Düsseldorf 29 September 2005, I-18 U 165/02.

⁷⁴ The BGH referred to: Koller 2004 *Transportrecht*, Article 452 HGB comment 19, Article 1 CMR comment 5 and 6; Koller 2004 *TranspR*; Herber 2006; Ramming 1999; Basedow 1997, Article 2 CMR comment 1; Fremuth 1994, comment 51; Drews 2003; Erbe & Schlienger 2005; Rogert 2005, pp. 15, 117; Mast 2002, pp. 185, 193; Herber/Piper 1996, Article 1 comment 45, Article 2 comment 6.

Hence, since the CMR did not apply, Article 31 CMR could not confer jurisdiction on the German courts. Therefore the Brussels I Regulation on jurisdiction applied, which granted exclusive jurisdiction to the Tokyo District Court, since there was a choice-of-forum clause thereto in the waybill.⁷⁵

The BGH gave several reasons for its decision, but admitted that the wording of the scope-of-application articles did not compel such an interpretation. Its first reason was the phrase 'contract for the carriage of goods by road' found in Article 1 CMR. This description indicated, according to the BGH, a contract for carriage solely by road. Secondly, the BGH pointed out that the CMR contains a provision specifically dealing with multimodal transport, namely Article 2 CMR. The existence of this Article was cause for the BGH to reason that the CMR applies to multimodal carriage contracts insofar as they are covered by Article 2 CMR, but no farther. The third reason brought to bear by the BGH was found in the Protocol of Signature of the CMR, which states that the drafters of the CMR intended to create a separate treaty to regulate multimodal carriage.⁷⁶ For that reason the BGH deemed the intent of the designers of the CMR to have been to refrain from regulating any or all parts of a multimodal contract. The purpose of the CMR, which is to harmonise the rules for the international carriage of goods by road, did not hamper this point of view, as this purpose relates to unimodal road carriage and mode-on-mode carriage involving road vehicles only.

It appears that the German legislator also adheres to this view of the scope of the CMR, since the German legislation refers to the hypothetical '*Teilstreckenrecht*', which is the law that *would have* applied to carriage by the leg of the transport in question *if it had been* unimodal,

⁷⁵ In addition, neither of the litigants was domiciled in a Member State of the European Union. See Articles 1, 4 and 23(3) Brussels I Regulation.

⁷⁶ Haak 1986, p. 95 footnote 31.

in Article 452a HGB.⁷⁷

4.3.2 Godafoss

In the Netherlands the Godafoss case was, until recently, an advertisement for the less extensive 'pro CMR' point of view. At first instance the *Rechtbank* Rotterdam confirmed once again the views concerning the CMR presented in *The Resolution Bay*.⁷⁸ A shipment of salted fish had been stolen during road transport from Rotterdam to Naples, Italy. Since the road stage was international the CMR was applied, even though the road carriage was part of a larger transport from Reykjavik in Iceland to Naples, which also included sea carriage. That the means of transport to be used between Rotterdam and Naples had not been specifically agreed was no obstacle to the application of the CMR according to the *Rechtbank*. Based on the contract the carrier was permitted to carry the shipment by road, which caused the road stage to fulfil the conditions set by Article 1(1) CMR. The Hof Den Haag decided otherwise on appeal however.⁷⁹ Referring to the BGH's 2008 judgment, the Hof deemed the CMR inapplicable for the following reasons. Firstly, the CMR might not explicitly exclude multimodal transport in Article 1(1), but neither did it explicitly include it. Secondly, Article 2 CMR expressly presents a specific type of multimodal transport as coming

⁷⁷ Furthermore, the BGH felt the need to explain that, although the English Court of Appeal had listed the BGH's previous judgments stemming from 1987 and 1989 as supporting its expansive view of the scope of the CMR in *Quantum*, in fact these judgments did not support the views expressed in *Quantum* at all. In both judgments German national law applied to the multimodal contracts of carriage as they were concluded by German parties, although this was not expressly mentioned in the judgments. The CMR was as a consequence applied indirectly, in that the CMR's liability rules were applied since they were part of the German legal sphere. There was no question of an autonomous application of the CMR, however. Koller had already implied as much in 2004 in a reaction to a judgment by the OLG Köln: "Der BGH hat zwar die Teilstrecke eines internationalen Kfz-Transports der CMR unterworfen. Er hat dies jedoch auf der Grundlage des deutschen Rechts getan, weil der multimodale Beförderungsvertrag aus der Sicht des deutschen Rechts einen gemischten Vertrag darstellt." Koller 2004 *TranspR*, p. 361.

⁷⁸ Rb Rotterdam 11 April 2007, *S&S* 2009, 55 (*Godafoss*).

⁷⁹ Hof Den Haag 22 June 2010, *S&S* 2010, 104 (*Godafoss*).

within the extended scope of the convention's application. Thirdly, the Protocol of Signature also argues against autonomous application of the CMR, as the drafters clearly had not seen the CMR as a regime that was sufficiently balanced to regulate multimodal transport in general. Fourthly, the Hof determined that the English *Quantum* decision should not be followed as it was founded on references to case law that did not unambiguously indicate that the CMR was applicable. There were therefore no pressing reasons to deviate from the BGH's point of view and, moreover, uniform interpretation of the convention was in the best interest of international trade. Furthermore, the Hof argued that the rules on jurisdiction found in the CMR present a practical obstacle to its application in multimodal transport, as they confer jurisdiction on the 'place of taking over' and the 'place of delivery'. If attached to the road carriage, these places might not always coincide with the beginning or end of the entire transport, which would create jurisdictional havoc and uncertainty. Therefore, an exclusive choice of forum, such as was made in the carrier's terms and conditions in this case, should be possible in multimodal transport.⁸⁰ In connection with this the Hof mentioned the Rotterdam Rules with their 'limited network system', which it alleged support such an exclusive choice.

However, there are two problems with this reference to the Rotterdam Rules. Firstly, these Rules have not yet entered into force. Secondly, even if they had entered into force, the Rotterdam Rules would only have allowed such an exclusive choice of forum in the case of volume contracts (*i.e.*, contracts of carriage that provide for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time).

The reasoning concerning Article 2 CMR is also not entirely convincing. It is obvious that Article 2 CMR extends the scope of application of the CMR. The article is, after all, meant to expand the application of the convention beyond mere international road carriage: based on this article the CMR equally applies to the sea or rail stage of a ro-ro trans-

⁸⁰ Especially considering the possibilities for damage to be caused during more than one transport stage and unlocalised loss.

port and to any domestic road stages the transport may entail. This does not mean that the application of the CMR to international road carriage which is part of a multimodal contract by means of Article 1(1) CMR is an expansion of the convention's scope, as the convention is meant to regulate international road carriage. The statement in the Protocol of Signature is also not a reason to curtail the application of the CMR on the same grounds. The CMR was never meant to regulate entire multimodal transports, it was merely meant to uniformly regulate international road carriage, whether part of a larger contract or not.

The fourth reason given by the Hof, the need for uniform interpretation is not as easily countered. The need for uniform interpretation indeed requires courts of law to look at how the other Member States of a convention interpret its provisions. The difficulty here, however, is that the other Member States provide a rather divergent spectrum of decisions. The one reason to choose the BGH's views over those of the English Court of Appeal is that the BGH is a supreme court, whereas the Court of Appeal is not.

4.4 Article 2 CMR: the ro-ro expansion

Article 2 CMR expands the CMR's scope of application beyond mere road carriage. The article determines that where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterway or air, and the goods are not unloaded from the vehicle, the CMR shall nevertheless apply to the entire transport. When however it is proved that any loss, damage or delay in delivery of the goods which occurs during the carriage by the other means of transport was not caused by act or omission of the carrier by road, but by some event which could only have occurred in the course of, and by reason of, the carriage by that other means of transport, the liability of the carrier by road shall not be determined by the CMR. Under such circumstances the liability of the carrier is governed by the 'conditions prescribed by law' for the hypothetical contract of carriage for the non-road stage alone. If there are no such conditions however, the CMR is to be applied.

4.4.1 The Gabriele Wehr

The main pitfall of Article 2 CMR seems to be the interpretation of the words 'conditions prescribed by law'. In *The Gabriele Wehr*, the *Hoge Raad*, the Dutch Supreme Court, was asked to clarify the Dutch point of view.⁸¹ Four trailers stuffed with Volvo parts were stowed on the deck of the vessel *The Gabriele Wehr*, which carried them from Göteborg, Sweden to Rotterdam under a non-negotiable waybill. During this sea stage, which was part of a larger transport, as the trailers came from various places in Sweden and were to be delivered in Born in the Netherlands, the vessel encountered a storm and the vehicle parts were damaged. The cargo underwriters promptly sued the road carrier for compensation under the CMR, whilst the latter invoked the 'perils of the sea' defence under the Hague-Visby Rules. In response the *Hoge Raad* approached the interpretation of the terms 'conditions prescribed by law' objectively.⁸² Because there was no international consensus in either legal literature or case law concerning the questions posed, and since the *travaux préparatoires* were not available to serve as reference, the *Hoge Raad* deemed the purpose and import of Article 2(1) CMR to be decisive.⁸³ As a result the *Hoge Raad* determined that 'conditions prescribed by law' were systems of objective transport law. These 'objective' transport regimes sometimes left room for contractual deviation, however, especially the Hague-Visby Rules. The lack of a bill of lading, for instance, or an agreement to carry on deck would normally cause them to be inapplicable to the sea carriage.⁸⁴ The objectifying approach of the *Hoge Raad* countered this unwarranted effect. In order to protect the shipper, who had no part in the contract of carriage concluded between the road and the mode-on-mode carrier, an abstract form of the actual mode-on-mode carriage contract had to be considered. The

⁸¹ HR 29 June 1990, *S&S* 1990, 110 (*The Gabriele Wehr*).

⁸² Such an approach is also advocated by Czapski: Czapski 1990, pp. 176-177.

⁸³ Articles 31, 32 and 33(4) of the Vienna Convention on the law of treaties support this. Haak (W.E.) 1990, pp. 328-329.

⁸⁴ Ro-ro operators generally issue non-negotiable receipts, not bills of lading. Haak (W.E.) 1990, p. 328.

relevant proviso of Article 2 CMR deemed the hypothetical contract to be “*a contract for the carriage of the goods alone ... made by the sender with the carrier by the other means of transport*”, which made it obvious that the hypothetical contract was not the existing contract between the carriers, and that the content and the specifics of this existing contract should not determine the hypothetical contract.⁸⁵

By objectifying the exception in Article 2(1) CMR, which is a special manifestation of the network system, special requirements set by the other unimodal carriage regimes, such as the issuance of a bill of lading, do not have to be met. Thus the *Hoge Raad* prevented the CMR rules from applying to the entire transport in all instances involving ro-ro carriage, which would have rendered the exception nearly useless. The CMR’s aim of unifying the liability of the road carrier was thereby achieved to a certain degree, the recourse option was – partially – preserved⁸⁶ and the shipper was prevented from having to cope with conditions and exceptions stemming from contracts he was not party to.⁸⁷

In Germany there seems to be less clarity concerning the meaning of the terms ‘conditions prescribed by law’. Koller for one refers to more than four different opinions, one of which is the Dutch approach in *The Gabriele Wehr*.⁸⁸ Basedow and Loewe concur with the Dutch *Hoge Raad*

⁸⁵ See also: Herber 1994, p. 381.

⁸⁶ Glass 2000, p. 579; Bombeeck, Hamer & Verhaegen 1990, p. 143; Haak 2005, p. 308.

⁸⁷ A few years after *The Gabriele Wehr*, the *Rechtbank* Rotterdam showed in its judgment in *The Duke of Yare* that the objective approach propagated by the *Hoge Raad* had taken hold. Although the general approach of the *Hoge Raad* was followed by the *Rechtbank*, *The Duke of Yare* also showed that the details of the mode of operation set out in *The Gabriele Wehr* were still in need of some clarification. As a starting point the *Rechtbank* followed the *Hoge Raad* by not projecting the mode-on-mode carriage contract onto the hypothetical contract. The *Rechtbank*’s second step, however, was to request the parties to furnish evidence concerning the contract of carriage that the shipper and the mode-on-mode carrier would have entered into had they contracted for the carriage of the goods alone. Thus the *Rechtbank* inserted a subjective element into the mix, which seems questionable in light of the *Hoge Raad*’s intent to objectify the issue. Rb Rotterdam 1 July 1994, *S&S* 1995, 99 (*The Duke of Yare*). See also Van Beelen 1997.

⁸⁸ Koller 2007, pp. 1162-1163, Article 2 CMR comment 8. Helm also adheres to the approach in *The Gabriele Wehr* of the Dutch *Hoge Raad*. Helm 1979, p. 440 comment 5.

and reject the use of the mode-on-mode contract as the template for the hypothetical contract. They argue that the specifics of the mode-on-mode contract should be disregarded because this would enable the road carrier to invoke exceptions to his liability which stem from the contract between him and the mode-on-mode carrier to which the shipper is not party, and which he therefore is unable to influence.⁸⁹

Mankowski on the other hand is of the opinion that consistently applying the objective approach takes matters too far. Although, as in *The Gabriele Wehr*, he deems it sufficient for the 'conditions prescribed by law' to be binding for only one of the parties, he also thinks that applying the Hague-Visby Rules when no bill of lading has been issued, or would have been likely to have been issued if the sender had contracted for the carriage of the goods alone with the mode-on-mode carrier, is contrary to the scope-of-application rules of the uniform instrument itself and thus unacceptable. Thus, as the relatively least harmful option, he encourages the road carrier to request a bill of lading from the mode-on-mode carrier, as in his view such a bill is a prerequisite for the application of regimes such as the Hague-Visby Rules.⁹⁰ In practice, however, such a request seems less than feasible.⁹¹

A precursor of the objective approach taken in *The Gabriele Wehr* was a case decided by the LG Köln in 1985. The LG established that "*auch der tatsächlich zwingende, von der Fährgesellschaft unabänderbar vorgegebene Vertragsinhalt zugunsten des Straßenfrachtführers berücksichtigt werden müsse*", and that therefore a bill of lading was

⁸⁹ Basedow 1997, p. 913. Loewe 1976, p. 524. This point of view is shared by Czapski. Czapski 1990, p. 176. For comparison: in multimodal transport the multimodal carrier is also not allowed to invoke conditions against the consignor stemming from the contract between him and the actual carrier. OLG Hamburg 10 April 2008, *TranspR* 2008, pp. 213-218.

⁹⁰ Mankowski 2004, p. 1060, Rz. 1409.

⁹¹ Quantum, for instance, would have had to ask the unidentified sea carrier to issue bills of lading for the ro-ro stages of the contracted transport across the Channel and the Irish Sea. It seems unlikely, however, that Quantum either had, or wanted, any contact with the subcontracting carriers. *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another*, [2001] 2 *Lloyd's Rep.* 133 and *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another*, [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535.

not required.⁹²

Clarke establishes that, as in Germany, the English views on this subject are not exactly homogeneous. To illustrate this he makes mention of three views: the concept that the hypothetical contract should be based on the contract between the carriers; the approach taken in *The Gabriele Wehr*; and a third possibility which proceeds from the perspective that the proviso is the exception whereas the application of the CMR is the rule. As such the exception should be strictly construed, meaning that the CMR rules apply unless a case falls clearly within the proviso. This is a solution that he admits was rejected by the Dutch *Hoge Raad* in *The Gabriele Wehr* and by a French court in 1986.⁹³

In Belgium, the Antwerp *Rechtbank van Koophandel* chose to follow the objective approach in 2000. This meant determination of the content of the hypothetical contract *in abstracto*. Because objective construction is intended to protect the consignor, who was not able to negotiate conditions concerning the carriage by the other mode, the *Rechtbank* determined that the non-road carriage regime needed to be applied without taking into account the specific circumstances of the case.⁹⁴

All in all, the objective approach taken in *The Gabriele Wehr* seems the pre-eminent solution to an issue that causes much dissension. It is analogous to the commonplace model of a reference to foreign law minus the conflicts rules of the said legal system.⁹⁵ Yet it has the disadvantage of not ensuring that the regimes governing the main contract and the sub-contract are aligned. Recourse actions by the CMR carrier against the mode-on-mode carrier may therefore fail to generate sufficient recompense. Nevertheless, it seems better than applying the CMR when no bill of lading has been issued or when carriage on deck has been agreed, as is apparently the practice of the French courts, since this causes the chances of recourse problems to be even greater.⁹⁶

⁹² LG Köln 28 May 1985, *VersR* 1985, p. 985. Herber 1994, p. 379.

⁹³ Clarke 2003 *International carriage of goods by road*, p. 42.

⁹⁴ Rb van Koophandel Antwerpen 25 February 2000, *ETL* 2000, pp. 527-540.

⁹⁵ Clarke 2003 *International carriage of goods by road*, p. 42.

⁹⁶ Cour d'appel de Paris 23 March 1988, *ETL* 1990, pp. 221-226 and Cour de cassation de France 5 July 1988, *ETL* 1990, pp. 227-228 (*Anna Oden*).

4.5 The love/hate relationship between multimodal transport and the CMR

Multimodal carriage and the CMR do not seem able to cope with existing either together or apart. Nevertheless, the only thing that is crystal clear at this point is that there is nothing resembling a general consensus on the scope of application of the CMR concerning multimodal transport. Both Articles 1 and 2 CMR have long been the subject of debate and disagreement. Since there is no international court which has a final say in CMR matters – the ECJ recently clarified that it is not authorised to assess the content of the CMR – this is not likely to improve in the future.⁹⁷

5 The ‘multimodal’ scope of the CMNI and the COTIF-CIM

As their terminology is very similar to that of the CMR, the basic scopes of application of both the CMNI and the COTIF-CIM raise questions akin to those flowing from Article 1(1) CMR. Whether the terms ‘contract to carry goods by inland waterway against payment of freight’ or the words ‘contract of carriage of goods by rail for reward’ can be considered to include inland waterway or rail carriage that is only part of a multimodal contract, is just as uncertain as under the road carriage convention. Due to the strong parallels, a mere referral to the situation outlined above concerning the CMR seems to be sufficient here. Besides the basic scope of application – international inland waterway and rail carriage – both conventions also cover specifically defined types of multimodal transport. The CMNI is less adventurous than its rail carriage cousin however. According to Article 2(2) CMNI, carriage without transhipment, both on inland waterways and also in waters to which maritime regulations apply, is governed by the inland waterway regime.

⁹⁷ ECJ 4 May 2010, case 533/08, (*TNT Express Nederland B.V. v AXA Versicherung AG*)

Provided, that is, that the distance to be travelled in waters to which maritime regulations apply is the smaller and that no maritime bill of lading has been issued in accordance with the applicable maritime law. This last condition is likely to cause conflict between the CMNI and the sea carriage conventions, such as the Hague and Hague-Visby Rules, which only apply if such a document has been issued. The Hamburg Rules do not require a document to be issued in order to apply to sea carriage, however. Here the condition that the sea stage of the transport must be shorter than the inland waterway stage may be of use to avert conflict. Nevertheless, if the sea stage is not insignificant enough to be 'absorbed' by the inland waterway carriage, both the Hamburg Rules and the CMNI will apply to the sea stage of the transport.⁹⁸

An additional, if less obvious, extension of the CMNI's scope of application beyond actual inland waterway carriage can be found by combining Article 16(1) CMNI, which states that the carrier is liable for loss resulting from loss or damage to the goods caused between the time when he took them over for carriage and the time of their delivery, and Article 3(2) CMNI, which determines that the contracting parties can agree that the taking over and/or delivery of the goods shall not take place on board the vessel. Since the CMNI applies to 'any contract of carriage according to which the port of loading or the place of taking over of the goods and the port of discharge or the place of delivery of the goods are located in two different States', and a 'contract of carriage means any contract, of any kind, whereby a carrier undertakes against payment of freight to carry goods by inland waterway', there is some small scope for bringing other modes of transport under the influence of the CMNI. If, for instance, the parties agree that the goods are to be taken over at the premises of the consignor, and delivered after road and inland waterway carriage at the premises of the consignee, the pre- and end-haulage by road could be covered by the CMNI.

⁹⁸ The Hamburg Rules are just as explicit as the Montreal Convention on their stance regarding sea carriage that forms part of a multimodal transport. According to Article 1(6) Hamburg Rules, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of the convention only in so far as it relates to the carriage by sea.

It seems prudent, however, to interpret this extension as very limited. To cause it to extend the CMNI beyond those preceding and subsequent non-inland waterway transports that are so supplementary in nature that they can be ‘absorbed’ by the inland waterway carriage is unwarranted, as this would mean applying the inland waterway convention to non-inland waterway carriage. And even though the CMNI refers to ‘the law of the State applicable to the contract of carriage’ for the period before loading and the period after discharge, application of these rules by means of the CMNI is an awkward solution. In particular since extending the CMNI’s influence to include independent stages of non-inland waterway transport would mean that international transport stages would also be included, and such transport might well already be governed by its own international regime. Such an interpretation would therefore cause potential conflict between the CMNI and other carriage conventions, which its drafters presumably did not intend. It is most likely that the extension to non-inland waterway carriage that is not of a completely subsidiary nature was not intended to go beyond the combination of inland waterway and sea transport referred to in Article 2(2) CMNI.

Like the CMR and the CMNI, the COTIF-CIM also expands its scope of application to carriage by other transport modes. Yet, unlike under the other two conventions, transhipment does not bar the application of COTIF’s CIM appendix. As long as a contract for international carriage involves rail transport supplemented by internal transport by road or inland waterway, carriage by sea or transfrontier carriage by inland waterway, Article 1(3) and (4) causes the CIM to apply to both the rail and non-rail transport.

Despite this extended scope of application, a conflict between the CIM and either the sea carriage regimes or the CMNI is unlikely to ensue. This is because the expansion of the application of the CIM rules to sea or international inland waterway carriage is only effectuated when the said carriage is performed on services included on a very limited list.⁹⁹ Conflict between the CMR and the CIM seems more feasi-

⁹⁹ This list of services can be found at www.otif.org.

ble, however. According to the explanatory report on the CIM 1999, the fact that the carriage in question is to ‘supplement’ the transfrontier carriage by rail means that the principal subject-matter of the contract of carriage must be transfrontier carriage by rail.¹⁰⁰ It has therefore been suggested that, in order to avoid conflict with the CMR, internal road transport that is ‘supplemental’ to the rail carriage must be considered to be of a completely subsidiary character and as such ‘absorbed’ by the rail carriage.¹⁰¹ This seems an untenable position, however, as the ordinary meaning of the word ‘supplementary’ is ‘something provided in addition to something else in order to improve or complete it’, which suggests a separate entity, not something to be absorbed.¹⁰² As a result conflicts with the CMR may occur on occasion. Article 2 CMR also may cause conflict between the CMR and the CIM in relation to the rail stage of a ro-ro transport; Article 1(3) CIM would have the same effect concerning any internal road stages.

Besides the potential for conflicts, the annexation of domestic transport stages by the CIM has the potential to cause further mayhem. A less warranted side-effect of the pursuit of uniformity by those drafting the CIM is that it causes recourse gaps. If, for instance, damage or loss occurs during supplemental domestic road carriage that fulfils the requirements of Article 1(3) CIM, the multimodal carrier will be liable to the cargo interests up to the amount of 17 SDR per kilogram based on the CIM. The subcarrier, who may actually have performed the road carriage, is on the other hand not bound by the CIM, but rather by the applicable national regime. If this is Dutch law this means that the multimodal carrier will receive no more than EUR 3.40 per kilogram in compensation from the subcarrier, which leaves him to cope with a loss of approximately EUR 15.30 per lost or damaged kilogram.¹⁰³

¹⁰⁰ Explanatory report COTIF-CIM, www.otif.org, p. 12.

¹⁰¹ Koller 2007, p. 1746.

¹⁰² Oxford Advanced Learners Dictionary, www.oxfordadvancedlearnersdictionary.com.

¹⁰³ For the SDR EUR exchange rate see www.imf.org.

6 The ‘multimodal’ scope of the Montreal Convention

The Montreal Convention’s initial attempt to demarcate its scope of application can be found in Article 1 MC. The scope of the instrument is not solely restricted to the transport of goods: the regime governs passenger transport as well, as can be derived from Article 1(1) MC, which determines that its regulations apply to all international carriage of persons, baggage or cargo performed by aircraft for reward. If gratuitous carriage by aircraft is performed by an air transport undertaking, however, the reward condition is waived.

In Article 1(2) MC the explanation of what is meant by ‘international carriage’ shows that, although this is not explicitly mentioned in Article 1(1) MC, the convention presupposes the existence of an agreement, a contract of sorts, on which the carriage is based.¹⁰⁴ As Mance LJ commented in *Western Digital v British Airways*: “*While it is clear that in certain respects the Convention scheme provides general rules rather than merely statutory contractual terms, it is also clear that the draughtsmen had very much in mind as a premise to its application the existence of a relevant contract of carriage*”.¹⁰⁵

Thus, the most prominent conditions for the application of the air carriage convention in Article 1 of the convention are: (a) the existence of an agreement; which concerns (b) international carriage; of (c) cargo (or persons or baggage); and which (d) is to be performed by aircraft.

¹⁰⁴ Koning 2007, p. 60; Giemulla & Schmid *Warschauer Abkommen*, Article 1 WC, No. 27.

¹⁰⁵ Comment by Mance LJ in *Western Digital Corporation v British Airways plc*, [2000] 2 *Lloyd’s Rep.* 142, par. 42. Mance made a similar comment in the *Quantum* appeal (*Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another*, [2002] 2 *Lloyd’s Rep.* 25, *ETL* 2004, pp. 535-560): “*...it is worth noting that the Warsaw Convention also contemplates an agreement: see in particular art. 1(2) (whereby ‘the expression international carriage means any carriage in which, according to the agreement between the parties...’) and art. 5(2) (whereby the absence, etc. of an air waybill ‘does not affect the existence or validity of the contract of carriage which shall (...) be none the less governed by the rules of this Convention’)...*”

Besides the basic scope-of-application provision in Article 1 MC there are two more provisions that influence the multimodal scope of application of the Montreal Treaty. The first is Article 38 MC, which prescribes the use of the network system, at least for the international air stages in carriage contracts. The article states that in the 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, provided that the carriage by air falls within the terms of Article 1 MC. As the provision itself also states that it is subject to Article 18(4) MC, the exact period of the carriage by air is demarcated by that provision. It is this last provision that is the second factor worthy of mention in relation to the Montreal Convention's multimodal footprint. The result is that the rules of the air carriage convention do not apply to any stage of a combined carriage contract that does not fulfil the conditions of Article 1 MC.¹⁰⁶ In principle, it excludes carriage by all means of transportation other than aircraft and all carriage not by air.

6.1 The period of the carriage by air

Based on Article 18(4) MC, however, 'carriage by air' under the convention extends beyond actual carriage by air – and sometimes even beyond carriage by aircraft.

The first sentence of the provision starts off somewhat conservatively by stating that the period of the carriage by air – which demarcates the boundaries of the Montreal regime according to Article 38 MC – does not extend to any carriage by land, sea or inland waterway performed outside an airport. Procedures and activities incidental to movement, such as the period of waiting within the confines of the airport before an aircraft can take off, are generally accepted as carriage by air, and probably would have been even without the words of Article 18(4) MC.¹⁰⁷ The second and third sentences of Article 18 (4) MC contain certain

¹⁰⁶ Ramming 1999, p. 328.

¹⁰⁷ Carriage by air thus includes slightly more than the actual flight: it also includes activities that are closely linked to the flight, such as taxiing *etc.*

exceptions to this rule and extend the period of carriage by air even beyond the airport's boundaries in special circumstances. It is these exceptions, and the fact that the first sentence only excludes non-air carriage outside an airport, that cause the 'period of the carriage by air' to extend beyond actual air carriage by aircraft. Thus Article 18(4) MC extends the scope of application of the Montreal Convention.¹⁰⁸

6.1.1 Unlocalised loss: loading, delivery and transhipment

The first alleged expansion results from the second sentence of Article 18(4) MC,¹⁰⁹ which reads: "If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, 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 presumption is meant to relieve the party that suffered damage or loss from the onerous task of having to prove that the damage was caused by an event which occurred during the carriage by air and not by an event which occurred before or after the air carriage.¹¹⁰ The text

¹⁰⁸ If the condition that the carriage is to be performed by aircraft in Article 1 MC could not be mitigated, the texts of Articles 1, 38 and 18 would be inconsistent and Article 18(4) MC would serve no purpose other than to confuse. It is therefore reasonable to assume that, in the situations mentioned by Article 18(4) MC, the use of aircraft is not a necessity. This is supported by Article 18(2) of the original Warsaw Convention, and Article 18(4) WCHP MP4, which both determine that carriage by air is not necessarily always by aircraft, as it comprises the period during which the luggage or goods are in the charge of the carrier, '*whether in an aerodrome or on board an aircraft*'. This paragraph literally states that the Warsaw rules should apply in an aerodrome or on board an aircraft. In other words, these circumstances do not have to coincide for the Convention to apply. In addition the jurisprudence clearly indicates that the purpose of the last two paragraphs of Article 18 WC and MC is to expand the period during which the carrier is liable for damage sustained to the goods beyond the period of actual flight. *Clarke v Royal Aviation* (1997) 34 Ord. (3d) 481, as cited in Clarke & Yates 2004, p. 320; OLG Frankfurt 21 April 1998, *TranspR* 1999, pp. 24-27; BGH 21 September 2000, *TranspR* 2001, pp. 29-34.

¹⁰⁹ In reality it is quite impossible to establish whether the Convention's scope is actually expanded by this provision or not, since it pertains to unlocalised loss. Because it is unknown where the loss or damage occurred, it could just as easily have been during the air carriage.

¹¹⁰ Giemulla & Schmid *Montreal Convention*, Article 18 MC, No. 92.

shows that effectuation of the presumption extending the scope of application of the convention's rules is subject to three conditions: (a) the carriage must take place during the performance of a contract for carriage by air; (b) the carriage must involve loading, delivery or transhipment outside an airport; and (c) there must be no proof that the damage occurred elsewhere. Since Article 38(2) MC states that the parties may insert conditions relating to other modes of carriage into the document of 'air carriage', the document relating to the entire transport remains an air carriage document even if the transport as a whole is multimodal. This indicates that the reference to a contract for 'air carriage' as meant in Article 18(4) MC includes multimodal contracts which provide for an international air stage.

Whether the carriage supplementing the actual air carriage can be categorised as loading, delivery or transhipment is sometimes difficult to determine. The terms themselves indicate that certain restrictions apply; the carriage involved can be no more than accessory.

Transhipment seems to be the easiest to demarcate. Only those transports that cause the goods to be carried between flights, from one airport to another are covered. Transhipment is generally thought to be limited to surface transport between two airports, and two air stages which are part of a single movement of goods, where the link cannot be made by air.¹¹¹

Loading and delivery, on the other hand, are more difficult to distinguish. In Germany these terms are deemed to cover only the pre- and end-haulage to and from the nearest airport suitable for the carriage of

¹¹¹ Clarke 2002 *Contracts of carriage by air*, p. 119; OLG Hamburg 11 January 1996, *TranspR* 1997, pp. 267-270 at p. 269. It seems somewhat arbitrary that the presumption applies to a transhipment between two airports if there is no scheduled air service between these airports, but does not apply to exactly the same carriage if there is a scheduled service. Perhaps a reason for this can be found in the existence of choice: in the first situation there is no choice but to carry by some other mode of carriage, but in the second situation the carrier could have decided to carry by air and deliberately decided not to do so.

the goods in question.¹¹² English and Dutch opinion can at least be said to recognise that such carriage as was performed by road in *Quantum* was too extensive to count as either loading or delivery.¹¹³

6.1.2 Unsanctioned substitution

The final extension of the period of carriage by air is found in the third sentence of Article 18(4) MC. 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. Like the unlocalised loss provision, however, this might not in reality be an actual extension of the Montreal regime. Based on the adage '*pacta sunt servanda*', the Montreal regime should in any case be applied to carriage that is substituted for the agreed air carriage without the consent of the consignor or consignee.¹¹⁴ Since a contract of carriage is a consensual contract, the content of the contract has generally been deemed decisive when it comes to the determination of the applicable legal rules.¹¹⁵

¹¹² OLG Karlsruhe 21 February 2006, *TranspR* 2007, pp. 203-209; Kirchhof 2007, p. 134; Giemulla & Schmid *Montreal Convention*, Article 18 MC, No. 88. OLG Düsseldorf 12 March 2008, I-18 U 160/07, www.justiz.nrw.de. The coverage of the Montreal Convention was not extended to the unlocalised loss of a shipment of metal bucket-like containers through Article 18(4) MC. The OLG applied German national law instead of the Montreal Convention based on its belief that the road carriage stages – the goods were carried first from groupage facilities in Germany to a 'HUB' airport by road, were then carried by air to a 'HUB' airport in America, from which they were carried to the consignees – did not concern either loading, delivery or transhipment.

¹¹³ Hof Amsterdam 6 May 1993, *S&S* 1994, 110; *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another*, [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535. Nevertheless, since the loss was localised in *Quantum*, the judgment does not provide as much insight into the English views as one might hope.

¹¹⁴ Van Beelen 1996, p. 74; Müller-Rostin 1996, pp. 967-978.

¹¹⁵ Koning 2007, p. 122; Haak 2007. For a different view see BGH 17 May 1989, *TranspR* 1990, pp. 19-20, *NJW* 1990, pp. 639-640, *ETL* 1990, pp. 76-80. Under the Warsaw regime the BGH decided that the '*Meistbegünstigungsprinzip*' should be applied: the air carrier was held liable for the damage based on the regime of one of the modes used in the carriage, namely the regime that was most beneficial to the claimant.

On the positive side, the clearly stated consequences of unsanctioned substitution promote legal certainty: there can be no misunderstanding as to the applicable legal regime. It seems correct for the carrier to be held accountable on the basis of the contracted-for regime, as this is the regime the shipper expected and on which he based his preparations, such as taking out insurance.¹¹⁶ There are situations, however, in which a carrier would profit from a breach of contract. The substituted carriage might, for instance, be cheaper, but also riskier for the cargo. In such a situation the cargo interests would in fact be worse off than if the carrier had adhered to the contract.¹¹⁷

7 The consequences of the Rotterdam Rules

The most prominent current sea carriage conventions, the Hague and Hague-Visby Rules, do not refer to multimodal transport in any way. Whether they apply to the maritime parts of a multimodal contract if a bill of lading is issued therefore remains unclear. The third sea carriage convention currently in effect, the Hamburg Rules, specifies that its rules apply strictly to the international sea carriage stage of a contract that also provides for non-maritime carriage. Although the Hamburg Rules have never equalled the success of the two Hague and Hague-Visby Rules, the regimes do exist alongside each other. The result is uncertainty as to the applicable law for sea carriage contracts. To remedy this situation UNCITRAL's Working Group III on transport law created the Convention on Contracts for the International Carriage of Goods

¹¹⁶ Kirchhof 2007, p. 138.

¹¹⁷ Added to this is the fact that the unbreakable Montreal liability limit may be reason to abuse this rule. If a carrier is, for instance, aware of the untrustworthiness of some of his employees, or perhaps suspects that the subcontractors he intends to employ are not completely reliable, he may decide to contract for air carriage with a shipper even if he in fact intends to carry by road or rail. If it then happens that one of his employees or his subcontractors steals the cargo, the carrier will be protected by the Montreal regime's unbreakable limit of 17 SDR per kilogram, instead of being forced to compensate the shipper for the entire loss as per the CMR.

Wholly or Partly by Sea, also known as the Rotterdam Rules. These Rules are intended to supplant the existing maritime regimes and aim to create a modern and uniform law concerning international carriage of goods that includes an international sea leg, but which is not limited to port-to-port carriage. The new rules are a 'maritime plus' instrument with a decidedly maritime liability regime.¹¹⁸ Although modern times seem to demand such a door-to-door regime, it also represents a risky endeavour. None of the past attempts either to extend the application of a sea carriage regime beyond the antiquated scope of 'tackle-to-tackle' or to implement a multimodal transport regime has been very successful thus far.¹¹⁹

Originally, the purpose of the new convention was to regulate, besides the international sea carriage leg, all parts of a multimodal transport that were not subject to an international mandatory regime of their own.¹²⁰ This latter objective was not wholly achieved, however. As it stands now, the convention also regulates parts of 'wet' multimodal transports that are already subject to mandatory regimes of uniform law.¹²¹ As a result, some of the drafters feared that its scope might conflict with existing unimodal regimes, particularly with the CMR and the COTIF/CIM.¹²² Therefore certain exceptions from the instrument's overall uniform regime were considered necessary.

These exceptions are incorporated into the new regime by an arrangement that is described as a 'minimal (or limited) network system'. This network arrangement is described as minimal with good reason, since it is limited to the subjects of the carrier's liability, limitation of liability and time for suit. In all other areas covered by the Rules their provisions apply irrespective of any differing provisions in other potentially applicable conventions, barring some exceptions.¹²³

¹¹⁸ Faghfouri 2006, p. 107.

¹¹⁹ Diamond 2008, p. 135.

¹²⁰ A/CN.9/WG.III/WP.21, Article 4.2.1 and A/CN.9/510, p. 9, www.uncitral.org.

¹²¹ Haak & Hoeks 2004, p. 433.

¹²² M. F. Sturley, 'Scope of coverage under the UNCITRAL Draft Instrument', *JIML*, 2004-2, p. 146.

¹²³ A/CN.9/WG.III/WP.29, p. 21, par 72, www.uncitral.org.

In the early stages of drafting, the network provision caused the new Rules to give way to ‘provisions of an international convention’, ‘which according to their terms apply’.¹²⁴ This would have allowed the differing interpretations mentioned above concerning the scope of the CMR to continue to work their mischief. Since it would thus not have been the Rotterdam Rules that would have determined whether the relevant unimodal convention would have applied to a certain non-maritime part of the carriage, but the scope-of-application rules of the unimodal convention in question, the diversity of opinion as regards the law applicable to the road stages would have endured.¹²⁵ As a remedy, the part of the article which read ‘according to their terms apply’ was adapted.

7.1 The ‘minimal network’ of Article 26 RR

The current version of the minimal network system can be found in Article 26 RR, which states:

Article 26. Carriage preceding or subsequent to sea carriage

When loss of or damage to goods, or an event or circumstances causing a delay in their delivery, occurs during the carrier’s period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

- (a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier’s activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

¹²⁴ A/CN.9/WG.III/WP.56, www.uncitral.org. Circa 2005.

¹²⁵ Hoeks 2008, p. 269.

- (b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and
- (c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

The text of subparagraph (a) now contains a fiction that ensures that the operation of the new Rules takes place independently of the scope-of-application provisions of other transport conventions.¹²⁶ The revision of the network provision is a step in the right direction compared to the previous versions, albeit a small one. Because of the fiction contained in the article, a small amount of uniformity has been created where before there was none. Under the final version of the new regime, the rules on carrier liability, limitation of liability and time for suit of the existing transport conventions are to supersede the rules of the 'maritime plus' instrument regardless of how their scope-of-application rules are interpreted in relation to multimodal carriage.

Unfortunately, the problem endures regarding the conflict between the provisions of the unimodal conventions that do not deal with the carrier's liability, limitation of liability, or time for suit and those of the new Rules. Whenever the loss can be localised and there is another mandatory international regime applicable to the transport stage that is the subject of dispute, the provisions dealing with liability, limitation of liability and time for suit of this international regime will apply to the claim for compensation, together with the remaining provisions of the Rotterdam Rules. In relation to the CMR, this means that if the court addressed deems the CMR applicable *ex proprio vigore* to road carriage

¹²⁶ There is a striking resemblance between the fiction in Article 26(a) RR and parts of Article 452 HGB, which is part of the German legislation on multimodal carriage. Article 452 HGB determines that if carriage of goods is performed by various modes of transport on the basis of a single contract of carriage, and if at least two of the (hypothetical) contracts would have been subject to different legal rules if "*separate contracts had been concluded between the parties for each part of the carriage which involved one mode of transport*", then the provisions of the German national law on affreightment in general will apply to the contract, unless the special provisions following after Article 452 or applicable international conventions provide otherwise.

under a multimodal transport contract, there is still room for conflict between the Rules and the CMR, as the CMR regulates a greater number of issues on a mandatory basis than the liability of the carrier, the limitation of liability, or time for suit alone, as do the Rotterdam Rules.¹²⁷

As a result an obscure patchwork of regimes that were not designed to complement each other, and which may very well conflict at times, will apply to the claim. This creates much room for confusion and it seems rather likely that the courts in different states, or even courts within the same state, will differ in opinion as to its operation. The results of Article 26 RR would therefore seem rather unpredictable.¹²⁸

An additional 'flaw' in the network approach of Article 26 RR is the clause that restricts its operation to damage to or loss of or delay of the goods that has occurred '*solely before their loading onto the ship or solely after their discharge from the ship*'. These words have the effect that damage that occurs during more than one stage of the transport is governed entirely by the Rotterdam Rules. Although this dilutes the 'purity' of the network approach even further, it is debatable whether this 'flaw' should be considered detrimental. Under the current legal framework, situations involving damage that occurs or was caused during multiple stages of a transport may cause the application of more than one carriage regime, at least if the damage cannot be divided up, or the different aspects of it cannot all be allocated to one specific transport segment. If the Rotterdam Rules can establish some uniformity and legal security in these often complicated situations by taking precedence, this solution may have some merit. Still, granting precedence to the new regime does not prevent one, or very likely more than one, of the existing carriage regimes from applying equally under these circumstances. Thus conflicts between the conventions are even more likely to occur when the damage or loss has occurred during more than one transport stage. Under these circumstances the limited network

¹²⁷ For one, both the CMR and the Draft contain rules on jurisdiction. For other examples see A/CN.9/WG.III/WP.29, www.uncitral.org, paras. 72-105.

¹²⁸ UNCTAD/SDTE/TLB/4, 13 March 2002, UNCTAD commentary on the Draft Instrument on Transport Law, www.unctad.org, p. 19.

approach does not grant precedence to even the rules on carrier liability, limitation of liability or time for suit of the other applicable conventions, which causes all of the mandatory rules of the other conventions to become sources of potential conflict.

An added uncertainty is that if the damage occurs during more than one stage of the transport, but the stages to which the damage can be ascribed are all non-maritime stages, the limited network approach will most likely cause the rules relating to these types of transport to take precedence over the Rotterdam Rules. This can be said to be 'most likely', but is by no means a certainty, as the text of the provision potentially granting precedence seems to be focused on only one set of rules. This is because sub-paragraph (a) of the article refers to '*such international instrument*' in the singular. As a result, Article 26 RR either fails to operate at all or merely adds to the confusion under these circumstances.

7.2 An attempt to prevent a conflict of conventions: Article 82 RR

Because there was acknowledgement during the drafting process of the Rotterdam Rules that all of the existing non-maritime carriage conventions expand their scope to include specific types of multimodal carriage, and therefore potentially conflict with the new Rules in these areas, Article 82 RR was drafted. Article 82 RR is intended to accommodate the continued application of the 'normally applicable inland conventions for the carriage of goods', and to avoid conflicts such as those that the drafters of the Rules thought possible.¹²⁹ The article grants priority to any convention that according to its provisions applies to any part of the contract of carriage involving the named types of transport. To this purpose the article contains the following text:

Article 82. International conventions governing the carriage of

¹²⁹ A/CN.9/526, p. 68; A/CN.9/WG.III/WP.78, pp. 5-6; A/CN.9/510, p. 11, www.uncitral.org.

goods by other modes of transport

Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:

- (a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;
- (b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;
- (c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or
- (d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.

Thus, Article 82 confers precedence instead of claiming it for itself, which is a rather elegant solution.¹³⁰ In this it follows the line set out by Article 26 RR.

¹³⁰ An example of a provision which confers precedence on the instrument it is part of is Article 103 of the UN Charter which stipulates that: *“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”* Yusuf 2004. Compared to clauses claiming priority, the effects of conflict clauses conferring priority on other treaties are admitted with less difficulty, since these target the treaty containing the clause. Only the effect of conflict clauses of this type is confirmed in Article 30(2) VC which provides that *“When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.”*

Regrettably, the article is in danger of failing to fulfil its full potential due to its somewhat less than precise wording. An example can be found in the second part of the article, in sub-paragraph (b), which pertains to ferry transport to which the CMR applies by means of Article 2 CMR. It may be that the provision is intended to refer to the whole of a ro-ro carriage of goods that is subject to the CMR. As Diamond establishes, however, the words of the provision do not refer to the whole of any carriage but only to "*the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship*".¹³¹ The result is that its scope is restricted to ro-ro carriage in the strict sense only. If interpreted thus, the provision causes the Rotterdam Rules to take a back seat to the CMR only for the period while the vehicle onto which the goods are loaded is actually being carried by a ship. This means that any claims for compensation resulting from, for instance, the misdelivery of a consignment of shoes trucked from Alicante in Spain to London in the United Kingdom are governed by the Rotterdam Rules, but also by the CMR.¹³² The damage would after all not have occurred during the period of time when the 'maritime plus' convention grants all the rules of the CMR precedence. Of course the rules on the carrier's liability, limitation of liability or time for suit of the CMR may prevail on the basis of Article 26 CMR if the road stage in question is international in nature. Yet the rules relating to other subjects found in both systems, such as rules on jurisdiction, would still lead to conflict. This seems an unwarranted consequence, as it aggravates an already complex situation instead of alleviating it.

Therefore, although Article 82 prevents some of the considerable list of conflicts that may ensue from the application of the Rotterdam Rules, it is not even close to providing an adequate remedy. It does not solve the potential conflicts that Article 26 RR fails to prevent, and, more importantly, also does not prevent the potential conflicts that the drafters of the new Rules intended to avoid by creating the provision, such

¹³¹ Diamond 2008, p.142-143.

¹³² *Laceys Footwear (Wholesale) Ltd. v Bowler International Freight Ltd. and Another* [1997] 2 *Lloyd's Rep.* 369.

as the potential conflict regarding ferry transport.

Despite all their flaws, however, the Rotterdam Rules may still be our best bet. The tide is running so high that even an imperfect solution is better than none at all. Therefore, even though the rules of the new ‘maritime plus’ regime may lead to conflicts between the conventions, or to differing interpretations, and perhaps even confusion, it seems that the Rules are still the best possible – if incomplete – solution to the quandary in relation to the law applicable to multimodal transport contracts at this point in time. The reality is that no other new international regime on multimodal transport will be drafted in the near future, so the choice is either to seek to effectuate the Rotterdam Rules or to remain in the current impasse.

8 The influence of secondary EU law: Article 25 Rome I Regulation

If the Rotterdam Rules were to enter into force, however, the quandary mentioned in the introduction to this article concerning their status in relation the Rome I Regulation would come to the surface. The difficulty here is that Article 25 Rome I does not grant priority to all international conventions. Concerning the regulation’s relationship to existing treaties, Article 25(1) Rome I states:

“This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.”

Scenes reminiscent of the impossible constructions depicted by the Dutch artist Escher would unfold if the Rome I Regulation were to take precedence over the new Rotterdam Rules on the basis of this article, while simultaneously – and on the basis of the same article – granting

precedence to the provisions of the CMR.¹³³ One might even need to practise some Orwellian ‘doublethink’ in order fully to grasp the consequences of such a situation.¹³⁴

In short, conferring precedence on the Rome I Regulation would create the following situation: in a transport from New York in the USA to Antwerp in Belgium by sea and thence to Venlo in the Netherlands by road, the Rotterdam Rules would apply to the road stage, but would, based on Article 26 RR, confer precedence to the rules of the CMR on carrier liability, limitation of liability and time for suit. According to the Rotterdam Rules, the other provisions of the CMR should not be applied, at least not insofar as they are contrary to the provisions of the ‘maritime plus’ regime. This would mean, for instance, that the applicable provisions on the right of control would be those of the Rotterdam Rules.

If the Rome I Regulation were to take precedence, however, although the Rotterdam Rules might have been ratified by the EU Member State where the court addressed was situated, the court in question would not be allowed to apply them, even though it was obliged to do so by international law. The reason for this is that Article 25 Rome I would not grant the newer Rotterdam Rules priority, but would cede to the CMR, because this convention is older than the Regulation. As a result, the above-mentioned right of control would be governed by CMR provisions, even though the State involved was also party to the newer Rotter-

¹³³ M.C. Escher, graphic artist, 1898-1972.

¹³⁴ ‘Doublethink’ was to be practised by government functionaries in Orwell’s *1984*. It was the *act of simultaneously accepting as correct two mutually contradictory beliefs*. According to Orwell it is: “*To know and not to know, to be conscious of complete truthfulness while telling carefully constructed lies, to hold simultaneously two opinions which cancelled out, knowing them to be contradictory and believing in both of them, to use logic against logic, to repudiate morality while laying claim to it, to believe that democracy was impossible and that the Party was the guardian of democracy, to forget, whatever it was necessary to forget, then to draw it back into memory again at the moment when it was needed, and then promptly to forget it again, and above all, to apply the same process to the process itself-- that was the ultimate subtlety; consciously to induce unconsciousness, and then, once again, to become unconscious of the act of hypnosis you had just performed. Even to understand the word ‘doublethink’ involved the use of doublethink.*” Orwell 1949, part 1, chapter 3.

dam Rules, to which it most likely ought to grant precedence based on the rule of international public law *lex posterior derogat legi priori* found in Article 30 VC.¹³⁵ Of course, a conflict would only occur in this situation if the court addressed was of the opinion that the CMR applied to international road carriage irrespective of whether the contract involved other modes of transport or not.

If the transport involved ro-ro transport from Felixstowe in England to Rotterdam and road carriage from Rotterdam to Krefeld in Germany, however, any court would have to apply the CMR instead of the Rotterdam Rules if Article 25 Rome I caused the Regulation to have precedence over the Rotterdam Rules.

In the case of an EU Member State ratifying the Rotterdam Rules, this would obviously not be the intended result.¹³⁶

Thus we are faced with two questions. The first is whether the scope-of-application rules of the carriage conventions are indeed ‘conflict-of-law rules’ within the meaning of Article 25 Rome I. If they are, then the only scenario that would prevent the cat-and-mouse game of the CMR and the Rotterdam Rules outlined above would be one where it was accepted that international conventions that were not part of the body of EU law would take priority at least over secondary EU law, such as the Rome I Regulation. Since the scope-of-application rules of treaties are also referred to as ‘unilateral conflict rules’, there is a very real chance that these rules should be considered as constituting ‘conflict-of-law rules’ of the type to which Article 25(1) Rome I refers.¹³⁷ This seems all the more likely since Article 25 Rome I is the successor to Article 21

¹³⁵ The Vienna Convention on the law of treaties, concluded at Vienna on 23 May 1969. Article 30 VC regulates the hierarchy of successive treaties relating to the same subject-matter.

¹³⁶ If the drafters of the Rotterdam Rules had deemed that Article 25 Rome I would have this result, they would probably not have made the effort to draft and include Article 82(b) RR concerning the precedence of another convention in situations involving ro-ro transport. If Article 25 Rome I caused the Regulation to have precedence over the Rotterdam Rules, this paragraph would only extremely rarely be relevant, since almost all of the CMR Member States are also Member States of the EU and bound by the Rome I Regulation.

¹³⁷ Clarke 2003 *International carriage of goods by road*, p. 41; Basedow 1997, p. 913.

Rome Convention, which regulated the convention's relationship with other international conventions.¹³⁸

Then again, if scope-of-application rules are not deemed to constitute 'conflict-of-law rules', the above-mentioned illogical situations concerning the CMR and the Rotterdam Rules will not arise. But even then the problem would endure, albeit in a somewhat different form.

If Article 25(1) Rome I does not relate to scope-of-application rules, then the second question concerning the relationship between Rome I, or secondary EU law, and treaty law which is not EU law still needs to be answered in order to know which one takes precedence. If the answer is secondary EU law, however, the harmonising purpose of international treaty law would be compromised. If treaties could only be applied by means of the national law that was appointed by the Rome I Regulation, or perhaps as 'overriding mandatory provisions' within the meaning of Article 9 Rome I, their international authority would diminish and they would probably be considered more akin to national rules and thus be hampered in achieving their harmonising goals.

All in all, it seems that this second question needs answering, whatever the answer turns out to be to the first. Unfortunately, the literature does not supply an unequivocal answer as regards the status of international treaties, such as the CMR, to which the EU is not a contracting party.¹³⁹

The relationship between such treaties and primary EU law appears to be clear. In *Commission v Finland* the ECJ determined that international treaty law which is not part of the legal order of the EU is subject to enforced conformity to primary EU law on the basis of Article 351

¹³⁸ The Giuliano-Lagarde Report specifically states that Article 21 RC is intended to ensure that the Rome Convention does "not prejudice the application of any other international agreement, present or future, to which a Contracting State is or becomes party, for example, to Conventions relating to carriage." Giuliano-Lagarde Report, Article 21.

¹³⁹ Tietje 2008.

TFEU, the second sentence.¹⁴⁰ This implies the supremacy of primary EU law over international agreements.¹⁴¹ The relationship between treaties that are not part of the ‘*acquis communautaire*’ and secondary EU law, such as regulations and directives, is somewhat more obscure, however. The first sentence of Article 351 TFEU seems to indicate, at least in the case of ‘anterior treaties’ (i.e., treaties concluded by EU Member States before joining the EC), that the older international law should be granted precedence: “The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.” Nevertheless, when read in conjunction with the last sentence of the article and taking into account the existing case law, it must be concluded that although the article protects anterior treaties in the abstract, the ECJ often finds reasons not to apply this provision in a case actually before it.¹⁴² Article 351 TFEU is apparently not intended to mean that public international law obligations prevail over EU law. Rather, it is intended to imply the reverse, according to the Commission.

When it comes to ‘posterior’ treaties (i.e., treaties or conventions that have been concluded by EU Member States during their EU membership, The ECJ’s stance in this matter seems crystal clear, however, as is illustrated by the 1971 decision in *ERTA*:

¹⁴⁰ The second sentence of Article 351 TFEU, formerly Article 307(2) EC, states that: “To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established.” ECJ 19 November 2009, case C-118/07 (*Commission v Finland*). The object of the proceedings was the *failure to adopt appropriate steps to eliminate incompatibilities between the bilateral agreements concluded with third countries prior to accession of the Member State to the European Union and the EC Treaty*. See also Bungenberg 2010, p. 141.

¹⁴¹ A. Epiny, B. Hofstötter & M. Wyssling, ‘The status of ‘Europeanized’ international law in Austria, Switzerland and Liechtenstein’, in: J. Wouters, A. Nollkaemper & E. de Wet (eds.), *The Europeanisation of international law: the status of international law in the EU and its Member States*, The Hague: T.M.C. Asser Press 2008, pp. 137-159, at p.142.

¹⁴² Klabbers 2009, p. 148.

“In particular, each time the community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form they may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules or alter their scope.”¹⁴³

Thus, if the term ‘conflict-of-law rules’ in Article 25(1) Rome I also includes the scope-of-application provisions of treaties such as the Rotterdam Rules, any Member State is pre-empted from becoming a member of any new convention that regulates contracts, since such a new convention will always include scope-of-application provisions and the EU has an exclusive external competence concerning the law applicable to contractual obligations, as it has taken internal measures concerning this issue in the form of the Rome I Regulation.¹⁴⁴ Since the European Parliament called on Member States on 5 May 2010 “*speedily to sign, ratify and implement the (...) Rotterdam Rules*”, it would seem unlikely that any of the Rotterdam Rules conflict with EU law, however.¹⁴⁵

Yet, if scope-of-application rules are not ‘conflict-of-law’ rules as per Article 25(1) Rome I, uncertainty still remains concerning the hierarchy of a new carriage convention such as the Rotterdam Rules and the Rome I Regulation.

Of course, if secondary EU law should have priority, there is a silver lining. In that case the difference in views on the scope of the CMR in

¹⁴³ ECJ 31 March 1971, case C-22/70, *ERTA*. The decision was confirmed in *Open Skies* in 2002. ECJ 5 November 2002, case C-469/98, *Commission v Finland*, popularly known as *Open Skies*. In *Open Skies* the ECJ emphasised that, even if the Community’s external competence in the field of air transport might arise by implication from provisions of the Treaty, this case did not involve a situation in which the Community’s internal competence could effectively be exercised only at the same time as its external competence and, therefore, the Community could not validly claim that there was an exclusive external competence to conclude an air transport agreement with the U.S.A.

¹⁴⁴ Klabbers 2009, pp. 187-188.

¹⁴⁵ European Parliament, Brussels 5 May 2010, *Strategic goals and recommendations for the EU’s maritime transport policy until 2018*, (2009/2095(INI)), www.europarl.europa.eu.

Germany on the one hand and in the Netherlands and England on the other may no longer be as consequential. The German BGH and German legal scholars are already of the opinion that the CMR can only apply to a road stage of a multimodal transport contract by means of the applicable national law. Should the Rome I Regulation take precedence over non-EU binding treaty law such as the CMR, and should 'conflict-of-law rules' not encompass scope-of-application rules, then the Netherlands and England would be forced to adopt an approach to the CMR that is rather similar to the German one. This is because if scope-of-application rules in conventions are not considered to constitute 'conflict-of-law rules' as referred to in Article 25 Rome I, and if the Rome I Regulation takes precedence over conventions such as the CMR, courts of law bound by Rome I could no longer apply the CMR *ex proprio vigore* merely because the forum State is party to the CMR. Pursuant to Rome I, such a court would have to grant precedence to the national law applicable to the contract in question and would only then be able to determine whether this domestic law allowed for the application of the CMR to the road carriage provided for in the contract.

The result of this would be that the mandatory rules on carrier liability that are generally found in the international carriage conventions could be circumvented quite easily, for instance by choosing a national regime based on Article 4 Rome I as the law applicable to the contract that does not allow for the indirect application of such a convention. A Dutch carrier and consignor party to a contract for carriage by road from the Netherlands to Germany, for instance, could then choose to have their agreement governed by Canadian law, thus effectively setting aside the CMR (to which both Germany and the Netherlands are party). This seems a less than desirable outcome. Luckily, however, there are a lot of 'ifs' to overcome before this outcome could become a reality.

8.1 A solution?

Although the relationship between conventions that are not part of the law of the EU and secondary EU law remains unclear, it is clear that the

law of international treaties to which the EU is a party supersedes both primary and secondary EU law.¹⁴⁶ This means that the problems mentioned – except the conflicting obligations under public international law stemming from membership of both of these not ‘entirely compatible’ carriage conventions – could be resolved if the EU were to become a party to both the CMR as well as the Rotterdam Rules.

Vis-à-vis the CMR this would promote legal uniformity, because the ECJ would then be authorised to adjudicate on the content of the CMR and, as a result, on its scope of application in relation to multimodal transport.¹⁴⁷ Although not all of the CMR Member States are EU Member States, this would at the very least diminish the current diversity of opinions. The question is whether the EU is willing and, for that matter, able to accede to the CMR.

The Rotterdam Rules meanwhile have done their utmost to attract the patronage of the EU. With Article 93 RR stating that regional economic integration organisations that are constituted by sovereign States and have competence over certain matters governed by the convention may similarly sign, ratify, accept, approve or accede to the Rules, there

¹⁴⁶ Tietje 2008, p. 57. For the primacy of the Montreal Convention as regards secondary EC law see ECJ 10 January 2006, case C-344/04 (*The Queen ex parte International Air Transport Association, European Low Fares Airline Association v. Department for Transport*), Jur. 2005, p. I-00403 or NJ 2006, 372.

¹⁴⁷ This is currently not possible. “*It is settled case-law that the power, as resulting from that provision, to provide interpretations by way of preliminary rulings extends only to rules which are part of European Union law (see to this effect, inter alia, Case C-130/95 Giloy [1997] ECR I-4291, paragraph 21; Case C-222/04 Cassa di Risparmio di Firenze and Others [2006] ECR I-289, paragraph 63; and Case C-453/04 innoven-tif [2006] ECR I-4929, paragraph 29). In the case of international agreements, it is settled that such agreements concluded by the European Union form an integral part of its legal order and can therefore be the subject of a request for a preliminary ruling (see to this effect, inter alia, Case 181/73 Haegeman [1974] ECR 449, paragraphs 4 to 6; Case 12/86 Demirel [1987] ECR 3719, paragraph 7; and Case C-431/05 Merck Genéricos – Produtos Farmacêuticos [2006] ECR I-7001, paragraph 31). On the other hand, the Court does not, in principle, have jurisdiction to interpret, in preliminary ruling proceedings, international agreements concluded between Member States and non-member countries (see, to this effect, Case 130/73 Vandeweghe and Others [1973] ECR 1329, paragraph 2; order in Case C-162/98 Hartmann [1998] ECR I-7083, paragraph 9; and Bogiatzi, paragraph 24).*” ECJ 4 May 2010, case C-533/08 (TNT Express Nederland BV v AXA Versicherung AG)

certainly seems no impediment on that account. That there is no impediment in that area does not mean that the EU will ratify, however, as there seems to be some dissension on the desirability of the Rotterdam Rules between the EU Member States. Nevertheless, the European Parliament has recently made its stance clear as was already mentioned above, calling “*on Member States speedily to sign, ratify and implement the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, known as the “Rotterdam Rules”, establishing the new maritime liability system.*”¹⁴⁸

9 Diagnosis

When confronted with a dispute involving a multimodal transport contract it is rather difficult, to say the least, to determine which law should be applied. This is not a new problem, as the ‘multimodal’ scope of application of the existing carriage conventions has been the subject of international disagreement for decades. This has been copiously illustrated in the first part of this article in respect of the CMR. Recently, however, a few complicating factors have surfaced.

The first is the possible entry into force of the new ‘maritime plus’ convention, the Rotterdam Rules. Because these Rules govern all multimodal contracts that include a sea stage, an extra ingredient has been added to the already obscure ‘multimodal muddle’.¹⁴⁹ In addition to potentially conflicting with the existing carriage conventions, this ingredient also contains a none-too-transparent ‘limited network’ system in Article 26 and a conflict-of-conventions provision in Article 82 of a highly bureaucratic nature: it seems to redirect you at every turn.

The second complicating factor is the influence of EU law. The Rome I Regulation, which replaces the Rome Convention on the law applicable

¹⁴⁸ European Parliament resolution of 5 May 2010 on strategic goals and recommendations for the EU’s maritime transport policy until 2018 (2009/2095(INI)), www.unictral.org.

¹⁴⁹ The term ‘multimodal muddle’ is borrowed from Glass. *Glass 2006*.

to contractual obligations, seems rather less tolerant regarding conflicting international conventions than was its predecessor. Where the Rome Convention conferred precedence on all conflicting international conventions to which a Contracting State was, or became, a party, the Rome I Regulation only does so concerning conventions that already existed at the time the Regulation was adopted.¹⁵⁰ The Regulation also adds that the convention in question needs to lay down conflict-of-law rules relating to contractual obligations. As a result even more questions have to be answered when determining the law applicable to a multimodal carriage contract than in the past. Due to the Regulation, clarity is now required on what can be considered a ‘conflict-of-law rule’ and whether the convention in question existed before adoption of the Regulation or not. Yet, the most important question to be answered as a result of the extra layer of law that has been added is the one concerning the status of international agreements and EU law. Although the hierarchy is clear regarding such agreements that have become EU law because the EU is party to them, it is far from apparent concerning those international agreements that the EU is not party to.

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¹⁵⁰ Article 21 RC and Article 25 Rome I Regulation.

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