

## *Multimodal carriage with a pinch of sea salt: door to door under the UNCITRAL Draft instrument\**

### **The current situation**

The last few decades the sophistication and efficiency of the international carriage of goods have increased rapidly due to the augmented use of the container. The container provided the flexibility to focus more on an integrated movement of goods rather than movement specifically associated with a certain mode of transport. Unfortunately, this technical flexibility is accompanied by a severe rigidity in the legal arena. Although the transferral of goods from one mode of transportation to another has been greatly facilitated by the container revolution, the developments in international transport law have not kept pace.

The current framework of international carriage law is made up of a collection of conventions, all of which deal with the carriage of goods by only one specific mode of transport, while a carriage convention which deals with multimodal carriage is still lacking. Various attempts have been made to create an international legal instrument to regulate this type of carriage, but political and economical discord prevented success in this area.

The lack of a multimodal convention is most sorely felt when trying to determine the legal regime applicable to a multimodal contract in situations involving unlocalized loss<sup>1</sup>. For these situations solutions have been incorporated in national legislation; examples are the articles 8:40 through 8:48 of the Dutch Civil Code<sup>2</sup> and the articles 452 through 452d of the German Commercial Code<sup>3</sup>. These solutions do not necessarily offer the same outcome in identical cases however and thus do not generate sufficient legal certainty from an international perspective<sup>4</sup>.

Failing an international instrument, carriers can not always be certain as to which liability regimes apply to their operations, not even in the relatively 'simple' cases concerning localized loss<sup>5</sup>. Ascertaining the applicable regime is not an unnecessary luxury however since the existing regimes differ greatly when it comes to the basis of carrier liability or the extent thereof. The most striking differences are of course the variations in the height of the liability limitations a carrier can invoke if there has been no 'conscious recklessness' or 'wilful misconduct', which range from 2 to 17 SDR per kilogram of

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<sup>1</sup>The core problem of multimodal carriage is said to have always been the liability of the carrier in cases of unlocalized loss. D. Rabe, 'Auswirkungen des neuen Frachtrechts auf das Seefrachtrecht', *TranspR* 1998, p. 429-439, at p. 432. Loss is deemed to be unlocalized when the exact location where the fact leading to the damage to or loss of the cargo has arisen can not be established.

<sup>2</sup> The 'Burgerlijk Wetboek' (BW).

<sup>3</sup> The 'Handelsgesetzbuch' (HGB).

<sup>4</sup> The German system declares a certain part of the German national legislation on carriage applicable in cases of unlocalized loss (art. 452 HGB), whereas the system used in The Netherlands applies the regime that is most favourable to the cargo interests under such circumstances (art. 8:43 BW).

<sup>5</sup> Cases involving localized loss are cases in which the place where the loss of or damage to the goods was caused can be determined.

damaged or lost cargo. But there are other variations in the assorted unimodal regimes as well. Differences are found in which kinds of damage qualify for redress, which parties are entitled to claim damages under the regime, whether the basis of liability is strict or rather fault-based, whether the carrier is liable for his servants, agents and other persons and to what extent, time bars vary from 9 months up to 3 years, etcetera<sup>6</sup>.

With the new Draft instrument, which was originally intended to become no more than a 'port-to-port' instrument, the CMI and UNCITRAL are trying to fill the international multimodal gap. That is to say, at least insofar as it concerns 'wet' multimodal carriage. The drafters recognized the reality that when goods are to be carried by sea the contract of carriage that is concluded is very likely to incorporate the modes of carriage that are to be used before and/or after the sea carriage as well<sup>7</sup>. In other words, 'door-to-door' or multimodal carriage contracts have become the norm instead of port-port contracts. As a result it was decided at an early stage in the drafting process that the new instrument had to be 'unimodal plus' if it was to succeed in dethroning the existing sea carriage conventions and create international uniformity. This means in practical terms that the new Draft instrument is intended to regulate the whole of a contract of carriage which comprises a sea leg, including those stages that are to be performed by road, rail, air and inland waterway.

*In the following*

It is not difficult to imagine that the expansion of the scope of application of the Draft to virtually all modes of transport may cause it to conflict with the existing unimodal carriage conventions under certain circumstances<sup>8</sup>. In order to examine what these circumstances are exactly and to what extent the UNCITRAL Draft will affect the current status quo first an overview will be given of the mandatory rules that currently regulate international multimodal carriage. In this overview it will be touched upon that due to the large number of sources of multimodal transport law the rules applicable to any given multimodal contract may overlap and sometimes even conflict.

After this sketch of the existing legal situation and some of the ensuing conflict situations a closer look will be had at the Draft instrument and its implications regarding multimodal carriage. This proposed partial multimodal regime which is likely to have quite an impact on the current state of multimodal affairs if it enters into force, will be considered from a conflict of laws – or treaties – perspective. The question whether the Draft will cause conflicts with the existing conventions will be addressed and if so, what the consequences of these conflicts will be.

The pro's and con's of the new regime will be held against the backdrop of the already existing legal framework and some recommendations will be done to improve the Draft's chances of peaceful coexistence with the present rules on multimodal transport.

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<sup>6</sup> UNECE TRANS/WP.24/2000/2, 'Possibilities for reconciliation and harmonization of civil liability regimes governing combined transport, overview of provisions in existing civil liability regimes covering the international transport of goods', Note by the secretariat, 2 February 2000.

<sup>7</sup> UNCITRAL A/CN.9/510, p. 10. The UNCITRAL documents can be found at <http://www.uncitral.org>.

<sup>8</sup> K.F. Haak & M.A.I.H Hoeks, 'Arrangements of intermodal transport in the field of conflicting conventions', JIML 2004, p. 422-433.

## **Multimodal transport under the contemporary unimodal conventions**

Even though contemporary international trade makes frequent use of door-to-door contracts, it is clear that the current legal framework fails to appropriately reflect these developments. The carriage conventions do however, here and there, contain some rules that relate to multimodal carriage. These rules can be roughly divided into two categories; some of them expand the scope of application of the convention in question to include carriage by other modes of transport, whereas others intend no more than to create clarity on the exact scope of the convention when a multimodal carriage contract is at stake.

Both of these types of provisions determine if, and if so to what extent, a carriage convention is called upon when the mode of transport that is the convention's main focus is part of a multimodal contract.

### *The carriage of goods by air*

When looking at multimodal carriage from a maritime point of view the air carriage conventions may not seem all that important. After all, air and sea carriage will not normally be mixed in the same contract of carriage. As a result a conflict of conventions between the Warsaw<sup>9</sup> and Montreal<sup>10</sup> Conventions and a carriage convention concerning 'wet' carriage is not likely to occur. Because the air carriage conventions include both of the abovementioned types of rules concerning multimodal carriage however, and because they contain very specific provisions on multimodal carriage in relation to their application scope, it is a worthwhile exercise to include them in an overview such as this, even if the general emphasis is on 'wet' multimodal carriage.

The regulations on multimodal carriage in the Warsaw and Montreal Conventions are generally very similar. Both article 31 of the Warsaw Convention and article 38 paragraph 1 of the Montreal Convention state that in case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of the conventions apply only to the period of the carriage by air. The international regimes on air carriage thus prescribe the use of what is called the 'network'-system, which means that an international air leg which is included in a multimodal contract will always be regulated by the rules of one of the air carriage conventions<sup>11</sup>. To prevent misunderstanding, the mentioned articles add to this in a second paragraph that the parties are allowed in cases concerning combined carriage to insert conditions relating to other modes of carriage in the document of air carriage, provided that the provisions of the Convention are observed as regards the carriage by air.

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<sup>9</sup> Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 as amended by the Hague Protocol to the Warsaw Convention of 1955, the Additional Protocol No. 4 to the Warsaw Convention signed at Montreal in 1975 and supplemented by the Guadalajara Convention of 1961.

<sup>10</sup> Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 28 May 1999.

<sup>11</sup> R. Herber, 'Neue Entwicklungen im Recht des Multimodaltransports', *TranspR* 2006, p. 435-439 at p. 439.

Furthermore, the first sentences of the articles 18 paragraph 5 WC and article 18 paragraph 4 MC explain that the period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. Contemporary airports are large however and there are more and more road movements within the commercial area of the airport, to which the air regime can apply<sup>12</sup>.

The second part of these same paragraphs extends the scope of application of the air regimes even further by inserting the presumption that if such carriage takes place in the performance of a contract for carriage by air for the purpose of loading, delivery or transshipment, any damage is, subject to proof to the contrary, the result of an event which took place during the carriage by air. Roughly speaking this means that in case of unlocalized loss, the rules of the conventions equally apply to other transport modes, although only if the purpose the accessory carriage was loading, delivery or transshipment and there is no proof that the damage is the result of an event which took place during the accessory carriage<sup>13</sup>.

A divergence between the two conventions is noticeable only in article 18 MC. As opposed to its predecessor the Montreal Convention has an additional provision in article 18 which reads:

*“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.”*

Thus all modes of carriage are deemed to have been performed by air, and therefore covered by the Montreal Convention, if the contract of carriage reflects no more than intended movement by air. If an agreement between parties concerns air transport and lacks any indication that the consignor has consented to the (possible) use of alternative modes of transportation the Montreal Convention applies to the whole transport, even if the carrier decides to substitute the air carriage by road carriage<sup>14</sup>.

For example, if one contracts for an air transport from Rotterdam to New York any ocean or road links are considered to be air moves, and are thus covered by the Montreal Convention, even if the actual airport of departure is London, Heathrow. All that will be required for this result is that the air waybill did not mention any road or ocean links.

Although this extension of its scope of application to other modes of transport by attaching consequences to the wording of the contract of carriage may seem like a quirk which is exclusively found in the Montreal Convention, in actual fact it is not. Because contracts for the carriage of goods are consensual by nature, the prevailing opinion is that the applicable legal regime is determined by the content of the contract that is

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<sup>12</sup> Rolls-Royce v Heavylift Volla [2000] 1 Lloyd's Rep. 653; M. A. Clarke, 'Carriers' Liability in Cross-Border Air Cargo Substitute Transportation', *TranspR* 2005, p. 182-185 at p. 183.

<sup>13</sup> K.F. Haak, The harmonization of intermodal liability arrangements, *ETL* 2005, p. 11-51 at p. 22; I. Koning, "Trucking onder Warschau en Montreal", *NTHR* 2004, p. 93-101 at p. 94-95.

<sup>14</sup> As a result of which he defaults on his agreement.

concluded<sup>15</sup>. The other carriage conventions therefore generate a similar effect to that of the air carriage regime. Apparently these other conventions do however leave some room for discussion due to their lack of provisions in this area<sup>16</sup>, whereas the Montreal Convention prevents ambiguity on this subject by being explicit.

#### *The carriage of goods by road*

Since the CMR<sup>17</sup> does not contain the clear and almost indisputable wording of the air regimes but does mention multimodal transport, the extent of the CMR conditions is subjected to ample discussion<sup>18</sup>. The focus of this discussion is the question as to whether the CMR can apply to road carriage which is part of a larger multimodal contract, while the articles 1 and 2 of the Convention which determine the convention's scope are the ammunition that is used. The main issue which causes dissent is the interpretation of the words "*contract for the carriage of goods by road*" in paragraph 1 of article 1 CMR, which reads:

*"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."*

The prevailing view seems to be that this article does not literally require that the whole voyage is performed by road, merely that the contract includes a road stage. One of the many examples in which this outlook was applied is the judgement of the English Court of Appeal in the Quantum case<sup>19</sup>. The case was concerned with the loss of a consignment of hard disks, which were to be flown from Singapore to Paris by Air France and then transported by road pursuant to a subcontract with Plane Trucking from Paris to Dublin. The goods had been lost as a result of a purported hijacking involving certain of Plane Trucking's employees. The Court of Appeal reversed the judgement given by the Commercial Court<sup>20</sup> and declared that the carriage by road from Paris to Dublin was covered by the CMR Convention and that in general the Convention was applicable to the road leg of a larger contract in circumstances where (a) there was an

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<sup>15</sup>A. van Beelen, *Multimodaal vervoer, Het kameleonsysteem van Boek 8 BW*, Leiden, Zwolle: Tjeenk Willink 1996, p. 73; W.D. Müller-Rostin, 'Der vertragswidrige Luftfrachtersatzverkehr', in: W. Erdmann, W. Gloy & R. Herber (ed.), *Festschrift für Henning Piper*, München: Beck 1996, p. 967-978.

<sup>16</sup>I. Koller, 'Die Haftung beim Transport mit vertragswidrigen Beförderungsmitteln', *VersR* 1988, p. 432-439.

<sup>17</sup>Convention on the Contract for the International Carriage of Goods by Road, Geneva, 19 May 1956.

<sup>18</sup>See K.F. Haak and M.A.I.H. Hoeks, "Intermodal transport under unimodal arrangements", *TranspR*, 2005, p. 95-97.

<sup>19</sup>CA 27 March 2002, *Quantum Corp Inc v Plane Trucking Ltd*, [2002] 2 Lloyd's Rep. 25. Other examples which support this view are: CA 29 November 2005, *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, p. 248-249; Rb Rotterdam 11 April 2007, 231066 / HA ZA 05-124, [www.rechtspraak.nl](http://www.rechtspraak.nl) LJN: BA6218. Even the German BGH once supported this view: BGH 24 June 1987, *TranspR* 1987-11/12, p. 447-454.

<sup>20</sup>CommC 10 April 2001, *Quantum Corp Inc v Plane Trucking Ltd*, [2001] 2 Lloyd's Rep. 133.

unconditional promise to carry by road; (b) there was an unconditional promise to carry by road but the carrier reserved the right to opt for an alternative means of carriage for all or part of the way; (c) the mode of transport was left open in circumstances where at least one of the potential options was carriage by road and even under the circumstances that (d) the carrier may have undertaken to carry by some other means, but reserved either a general or a limited option to carry by road.

Those opposed to this ‘extensive’ interpretation of article 1 use – among other arguments – article 2 of the Convention to support their restricted view of the CMR scope. Their main argument is that article 2 CMR was taken up by the drafters to define the exact extent of the scope of the Convention concerning other modes of transport<sup>21</sup>. It was to cover ‘*transport superposé*’<sup>22</sup>, but nothing more than that. It has been suggested however, based on the – still unpublished – *travaux préparatoires* of the CMR, that article 2 was merely proposed out of practical considerations by the British delegation. It was designed to extend the application of the CMR to those cases in which the means of transport is itself the object of carriage for part of the journey, as the British were of the opinion that without such a provision the Convention would be of little use to them; without article 2 the CMR would never apply to road transport in Great Britain<sup>23</sup>. It is therefore unlikely that it was meant to influence the scope of the CMR as covered by article 1.

In addition one could argue that while article 2 extends the scope of the Convention to cover – what is mostly – sea and rail carriage, applying the CMR via article 1 to a road leg of a multimodal transport does not extend the Convention to other modes of transport, it merely applies the road carriage regime to road transport.

Article 2 CMR, especially paragraph 1 which regulates a specific type of multimodal carriage known as roll on-roll off carriage, has been called ‘*indigeste*’, ‘*embrouillé*’, ‘rather puzzling’ and even ‘notoriously difficult’<sup>24</sup>. The gist of this article is that, barring the mentioned exceptions, in cases of roll on-roll off transport where a truck is put on a ship with goods and all after – or before – a stage of road carriage in that same truck, the CMR rules apply not only to the road stage(s), but to the whole journey including the sea, inland waterway, rail or air stage of the journey. Thus the CMR creates a uniform liability system for this type of transport.

### *The carriage of goods by inland waterway*

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<sup>21</sup> A number of authors do not even consider article 2 carriage to be multimodal, but the majority does. P. Bydlinski in: *Münchener Kommentar zum Handelsgesetzbuch*, München: Verlag C.H. Beck und Verlag Vahlen 1997, p. 358; R. de Wit, *Multimodal transport*, London: Lloyd’s of London Press 1995, p. 184; A. Messent & D.A. Glass, *Hill & Messent, CMR: Contracts for the international carriage of goods by road*, London: LLP 1995, p. 33; J. Basedow, ‘Internationale multimodale Gütertransporte’, in: R. Lagoni & M. Paschke (ed.), *Seehandelsrecht und Seerecht*, Hamburg: LIT 1999, p. 15-45 at p. 35.

<sup>22</sup> Also known as ‘mode on mode’ carriage, ‘huckepack’ transport, ‘kangoeroe vervoer’ etc.

<sup>23</sup> K.F. Haak, *The liability of the carrier under the CMR*, (diss. Utrecht), The Hague: Stichting Vervoeradres 1986, p. 94.

<sup>24</sup> Q.v. K.F. Haak, *The liability of the carrier under the CMR*, (diss. Utrecht), The Hague: Stichting Vervoeradres 1986, footnote 33 and M.A. Clarke, ‘Harmonization of the Regulation of Carriage of Goods in Europe’, *TranspR* 2002, p. 428-434 at 428.

The CMNI Convention's<sup>25</sup> main focus is the regulation of inland waterway transport contracts. The combination of article 1 paragraph 1 and article 2 paragraph 1 CMNI tell us as much. In wording not unlike that of the CMR these articles determine that the Convention 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 of which at least one is a state party to this Convention, while a contract of carriage is specified as any contract, of any kind, whereby a carrier undertakes against payment of freight to carry goods by inland waterway. Because of the likeness between the scope rules of the CMR and those of the CMNI the opinion exists that the CMNI does not apply to inland waterway carriage which is part of a multimodal contract<sup>26</sup>. This opinion is, so it seems, mostly held by German writers and is presumably influenced by considerations of domestic German law on the nature of the multimodal contract. Considerations which result in the opinion that the international unimodal carriage conventions will only apply to part of a multimodal contract if their scope rules expressly mention this, like the air carriage conventions do. An alternative approach which does result in the application of the CMNI to transfrontier inland waterway carriage based on a multimodal contract also exists<sup>27</sup>. For what it is worth, the Dutch government acceded to the CMNI *inter alia* to remove legal obstacles to the development of inland waterway transport harmonisation and to foster the growth and integration of inland waterway transport into the multimodal transport system. It was thought that this would enable the inland waterway sector to contribute to the reduction of congestion – especially in road transport – and to ultimately make the transport sector compatible with sustainable development<sup>28</sup>.

There is one provision in the scope rules of the CMNI that mentions a specific type of multimodal carriage. Article 2 paragraph 2 extends the Convention's scope of application to contracts of carriage whose purpose is the carriage of goods, without transshipment, both on inland waterways and in waters where maritime regulations apply, unless a maritime bill of lading has been issued in accordance with the maritime law applicable, or the distance to be travelled in waters to which the maritime regulations apply is the greater. This is only a minor extension of applicability; the cargo remains in the same vessel during the whole journey and the sea leg has to be subordinate to the inland shipping part of the journey.

This increase of the CMNI's 'playground' however, may generate conflicts in the future. A foreseeable problem is for instance a clash with the scope of application of the Hamburg Rules or the upcoming UNCITRAL Draft.

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<sup>25</sup> Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway.

<sup>26</sup> B. Czerwenka, 'Das Budapester Übereinkommen (CMNI)', *TranspR* 2001, p. 277-284 at p. 278; K. Ramming, 'Die CMNI – erste Fragen der Rechtsanwendung', *TranspR* 2006, p. 373-380 at p. 376-377.

<sup>27</sup> It is most likely, considering the parallels between the CMNI and the CMR, that the position held in by the Court of Appeal in *Quantum* regarding the CMR would be held regarding the CMNI as well in the UK had the UK ratified the CMNI, see: M.A. Clarke, 'Carriers' Liability in Cross-Border Air Cargo Substitute Transportation', *TranspR* 2005, p. 182-185 at p. 183.

<sup>28</sup> See section I under I and J in conjunction with section II number 15 of the Declaration adopted by the Pan-European conference on inland waterway transport held in Rotterdam at 5-6 September 2001.

### *The carriage of goods by rail*

According to article 2 of the COTIF<sup>29</sup> the aim of the OTIF<sup>30</sup> is establishing systems of uniform law concerning the contract of international carriage of passengers and goods in international through traffic by rail, including complementary carriage by other modes of transport subject to a single contract. While creating the Vilnius Protocol which modified the old COTIF of 1980 both this aim and the objective to achieve harmonisation with the transport law applicable to other modes of transport such as the CMR were used as a guideline<sup>31</sup>.

The result, pertaining to the carriage of goods at least, can be found in article 1 of the CIM<sup>32</sup> appendix to the contemporary COTIF Convention. Not only does the current COTIF/CIM apply to all contracts of carriage of goods by rail for reward according to article 1, it also applies to carriage by road or inland waterway in internal traffic of a member state which supplements transfrontier carriage by rail where both are part of a single contract. This extension of the scope of application to road and inland waterway transport is expressly limited to non-international carriage in order to avoid creating conflicts between the COTIF/CIM and the CMR and CMNI Conventions. The scope of the COTIF/CIM does however cover international carriage by sea or inland waterway which supplements carriage by rail if such carriage by sea or inland waterway is performed on services included in a certain list<sup>33</sup>. As the consignment note which confirms the contract of carriage does not have effect as a bill of lading based on article 6 paragraph 5 COTIF/CIM and the list of services that is mentioned has a severely restricted amount of entries however<sup>34</sup>, the chance of a conflict between the COTIF/CIM and the contemporary sea carriage conventions or the CMNI is relatively small. Conflict situations between the COTIF/CIM and the Draft instrument regime are more likely to occur however.

### *The carriage of goods by sea*

While the Hamburg Rules<sup>35</sup> are currently in force in about thirty-two countries, The Hague Rules<sup>36</sup> or the Hague/Visby Rules<sup>37</sup> are presently in force in most of the world's shipping nations. The Hague and Hague/Visby Rules do not mention the possibility of multimodal carriage nor do they extend their scope of application beyond international transport by sea under a bill of lading<sup>38</sup>. Neither has their scope of application given

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<sup>29</sup> Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 in the version of the Protocol of Modification of 3 June 1999.

<sup>30</sup> The Intergovernmental Organisation for International Carriage by Rail

<sup>31</sup> Explanatory Report to the Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM), p. 5.

<sup>32</sup> Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM - Appendix B to the COTIF Convention).

<sup>33</sup> See art. 24 section 1 COTIF. The lists can be found at [www.otif.org](http://www.otif.org).

<sup>34</sup> In 2006 11 countries had listed 20 lines in total.

<sup>35</sup> The United Nations Convention on the Carriage of Goods by Sea, Hamburg 31 March 1978.

<sup>36</sup> International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels 19 August 1924.

<sup>37</sup> The Hague Rules as Amended by the Brussels Protocol 1968.

<sup>38</sup> The Hague and Hague/Visby Rules apply to the period between the moment when the goods are loaded on to the ship and the moment when they are discharged from the ship if the goods are carried under a



much cause to be the subject of discussion in relation to multimodal carriage in recent years<sup>39</sup>. Therefore they will not be considered in the following.

The Hamburg Rules on the other hand do refer to multimodal carriage. These Rules came into existence with the intent to replace the Hague Rules of 1924. To achieve this aim they contained a clause obliging new member States to renounce their membership in the Hague Rules. Because they did however not gain the large following they aspired to - the group of nations adhering to the Hamburg Rules remained relatively small - the ensuing result was that a dual regime of law concerning the carriage of goods by sea was created. The Hamburg Rules apply when a contract is formed between two parties concerning the international carriage of goods by sea. When the nature of such a contract is multimodal article 1 paragraph 6 determines that:

*“...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 this Convention only in so far as it relates to the carriage by sea.”*

With these words the Hamburg Rules recognize the reality of door-to-door transport in a manner comparable to the Warsaw and Montreal Conventions. The Rules are even more explicit than the air carriage conventions however, since they acknowledge that a contract of carriage by sea can also involve carriage by some other means while still remaining a contract of carriage by sea. In other words; the terms multimodal contract and contract of carriage by sea are not deemed mutually exclusive<sup>40</sup>. The sea carriage contract is merely one of the parts of which the larger multimodal contract consists. Therefore the only consequence of incorporating other means of transport in the contract is that the Rules do not apply to the whole of the contract but are restricted to the international sea stage. This is underlined by the first paragraph of article 4 of the Hamburg Rules which defines the period of responsibility of the carrier for the goods under the Convention to be restricted to the period during which the carrier is in charge of the goods starting at the port of loading and ending at the port of discharge.

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combined transport bill, such as the P&O Nedlloyd Bill. N. Gaskell, R. Asariotis & Y. Baatz, *Bills of Lading: Law and Contracts*, London: LLP 2000, p. 311.

<sup>39</sup> Considering however that the through bill of lading is deemed to be a ‘similar document’, it is clear that at least some thought was given to multimodal carriage in the past.

<sup>40</sup> Although the general consensus is that the air carriage conventions do require a contract of carriage in order to apply they do not explicitly mention this prerequisite. I. Koning, *Aansprakelijkheid in het luchtvervoer. Goederenvervoer onder de verdragen van Warschau en Montreal* (Diss. Rotterdam), Paris: Zutphen 2007, p. 61. This deficiency enabled the argument to rise that the terms ‘contract for carriage by air’ and ‘multimodal carriage contract’ are mutually exclusive. Therefore, it has been argued, the expansion of the scope of the convention found in the second sentence of article 18 section 4 MC should be seen as pertaining to *accessory* carriage by land, sea, rail or inland waterway exclusively, and thus does not extend to these types of carriage based on multimodal contracts. G. Kirchhof, ‘Der Luftfrachtvertrag als multimodaler Vertrag im Rahmen des Montrealer Übereinkommens’, *TranspR* 2007, p. 133-141 at p. 134.

In the early stages of the drafting process of the new convention on carriage of goods by sea, which is currently named the Draft convention on the carriage of goods [wholly or partly] [by sea]<sup>41</sup>, a CMI-subcommittee noted that although bills of lading are still used, especially where a negotiable document is required, the actual carriage of goods by sea frequently represents only a relatively short leg of an international transport of goods. In the container trade, even port-to-port bills of lading often involve the receipt and delivery of goods which is not directly connected with the loading onto or discharge from the ocean vessel<sup>42</sup>. To accommodate this reality of ‘multimodalism’ it was decided that the Draft instrument should regulate more than just port-to-port carriage<sup>43</sup>. That the words ‘wholly or partly’ and ‘by sea’ are still placed between brackets is perhaps a reminder that the creation of a new unimodal maritime convention was the actual starting point for the deliberations. At this point the scope of the instrument encompasses all carriage contracts which include international sea carriage, regardless of whether such contracts are multi- or unimodal. Simply put it regulates, besides the international sea transport leg, all parts of a multimodal transport which are not subjected to an international mandatory regime of their own<sup>44</sup>.

The extensive scope of application of the Draft instrument – only the restriction that the contract has to involve international sea carriage prevents it from being a regime covering all multimodal carriage – instigated the concern that the Draft would conflict in certain situations with the existing unimodal regimes, particularly with the CMR, and the COTIF/CIM<sup>45</sup>. Therefore, certain exceptions from the overall uniform regime of the Draft instrument were considered necessary.

These exceptions are incorporated in the Draft by an arrangement that is described as a ‘minimal network system’<sup>46</sup>. This network arrangement is called 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 Draft instrument it determines that its provisions apply irrespective of any differing provisions in other – possibly equally applicable – conventions<sup>47</sup>.

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<sup>41</sup> UNCITRAL A/CN.9/WG.III/WP.81.

<sup>42</sup> UNCITRAL A/CN.9/497, p. 4.

<sup>43</sup> This is not a completely new concept; it is common practice in the transport industry to try to extend the scope of the Hague and Hague-Visby Rules beyond sea carriage by entering paramount clauses in the bill of lading.

<sup>44</sup> Problem is that the Draft as it is now also regulates parts of such a transport that is subjected to an international mandatory regime of its own. K.F. Haak & M.A.I.H Hoeks, ‘Arrangements of intermodal transport in the field of conflicting conventions’, *JIML* 2004, p. 422-433 (433).

<sup>45</sup> M. F. Sturley, “Scope of coverage under the UNCITRAL Draft Instrument”, *JIML*, 2004-2, p. 146.

<sup>46</sup> Which can be found in article 4 of the Draft version of 2002 (UNCITRAL A/CN.9/WG.III/WP.21), in article 8 of the Draft version of 2003 (UNCITRAL A/CN.9/WG.III/WP.32) and in article 27 of the Draft version of 2005 (A/CN.9/WG.III/WP.56). The network system was chosen based on the success of contractual regimes such as the UNCTAD/ICC Rules for Multimodal Transport Documents and the BIMCO COMBICONBILL Combined Transport Bill of Lading, see UNCITRAL A/CN.9/526. The limited network principle was intended as a practical approach to gain as much support for the Draft as possible. UNCITRAL A/CN.9/526, p. 69.

<sup>47</sup> UNCITRAL A/CN.9/WG.III/WP.29, p. 21, par 72.

*The limited network system in previous Drafts*

During the drafting process various changes have been made in the article of the Draft containing the limited network system. In the WP.56 (2005) version of the Draft it was incorporated in the Draft instrument by means of the following text<sup>48</sup>:

*“1. When a claim or dispute arises out of loss of or damage to goods or delay occurring solely during the carrier’s period of responsibility but:*

*(a) Before the time of their loading on to the ship;*

*(b) After their discharge from the ship to the time of their delivery to the consignee;*

*and, at the time of such loss, damage or delay, provisions of an international convention [or national law]:*

*(i) according to their terms apply to all or any of the carrier's activities under the contract of carriage during that period, [irrespective whether the issuance of any particular document is needed in order to make such international convention applicable], and*

*(ii) specifically provide for carrier's liability, limitation of liability, or time for suit, and*

*(iii) cannot be departed from by private contract either at all or to the detriment of the shipper,*

*such provisions, to the extent that they are mandatory as indicated in (iii) above, prevail over the provisions of this Convention.”*

Strangely enough, its own wording prohibits this version of the minimal network provision to have the effect it was designed to generate<sup>49</sup>. In order for the provisions of another international convention to prevail over the ones in the Draft instrument it requires that, “there are provisions of an international convention [or national law] that *according to their terms apply* to all or any of the carrier’s activities under the contract of carriage”. In this manner this version redirects the focus of attention to the scope rules of the relevant convention. Not the Draft determines whether the relevant unimodal convention applies to a certain non-maritime part of the carriage, but the unimodal convention in question does. The manner in which the scope of application rules of the other convention are interpreted is decisive as to whether its provisions prevail over those of the Draft instrument or not.

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<sup>48</sup> UNCITRAL A/CN.9/WG.III/WP.56, article 27.

<sup>49</sup> K.F. Haak & M.A.I.H. Hoeks, ‘Intermodal transport under unimodal arrangements’, *TranspR* 2005, p. 89-102 at p. 97.

If applied to the CMR for example, this means that if the CMR does not in and of itself apply to a road leg of a multimodal transport according to the addressed court, neither will its provisions on the carrier's liability, limitation of liability and time for suit apply by means of the limited network provision in the Draft instrument. If, however, the CMR is considered applicable autonomously, *ergo ex proprio vigore*, the limited network provision of this Draft version nevertheless declares that only its mandatory provisions covering the carrier's liability, limitation of liability and time for suit prevail over those in the Draft instrument. This then causes the CMR to conflict with the Draft as the CMR - and the other unimodal carriage conventions for that matter - regulate many more subjects on a mandatory basis than the liability of the carrier alone, as does the Draft instrument<sup>50</sup>.

Thus the limited network provision found in article 27 of the WP.56 Draft version of 2005 does not have any real effect; it does not achieve its aim of extending some range of action to the CMR and/or CIM/COTIF that was not already there and it does not prevent any conflicts between the Draft instrument and other conventions.

As a remedy it was suggested to adapt the part of the article which read "according to their terms apply"<sup>51</sup>.

#### *The network system in the current Draft version*

The latest version of the Draft instrument, WP.81 (2007), shows that, for the former problem at least, a solution has been found. Since April of this year the Draft instrument deals with carriage preceding or subsequent to sea carriage in paragraph 1 of article 26, which is a rewritten version of the aforementioned network system<sup>52</sup>:

*"1. 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<sup>53</sup>;*

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<sup>50</sup> For one, both the CMR and the Draft contain rules on jurisdiction. For other examples see A/CN.9/WG.III/WP.29, paras. 72-105.

<sup>51</sup> UNCITRAL A/CN.9/616, p. 52; K.F. Haak & M.A.I.H. Hoeks, 'Intermodal transport under unimodal arrangements', *TranspR* 2005, p. 89-102 at p. 97.

<sup>52</sup> This is the text of article 26 of the Draft version of 2007 (A/CN.9/WG.III/WP.81) as amended by the decisions made by the Working Group according to A/CN.9/621, p. 47.

<sup>53</sup> There is a striking resemblance between the fiction in the text of section 1 subparagraph a of Draft article 26 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

*(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 paragraph 1 subparagraph a, which is the only relevant change in effect wrought by the revision of the article, was thought to be clearer and more likely to be interpreted accurately than the other variant being considered which read<sup>54</sup>: "*Pursuant to the provisions of such international instrument [or national law] apply to all or any of the carrier's activities under the contract of carriage during that period*". The fiction was deemed preferable because it ensures that the operation of the Draft instrument takes place independently of the scope provisions of other transport conventions<sup>55</sup>.

This revision of the network provision is a small step up when compared to the previous versions as the scope of application of the Draft instrument has been curtailed somewhat to the benefit of conventions such as the CMR and the COTIF/CIM. Because of the fiction in the article, uniformity has even been created where before there was none. Under the current Draft the existing transport conventions are to apply regardless of how their scope rules are interpreted pertaining to multimodal carriage.

Unfortunately however, the problem 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 Draft instrument remains. At first glance the new article may appear to have incorporated a 'complete' network system, but after closer scrutiny the provisions of the Draft instrument merely "*do not prevail over those provisions of another international instrument that ... Specifically provide for the carrier's liability, limitation of liability, or time for suit.*" Thus the network system remains limited which was the aim of the secretariat; its intent was to redraft the provision without changing its content<sup>56</sup>.

The proposal made by the French delegation in the spring of 2007 to consolidate all provisions which deal with the linkage between the UNCITRAL Draft and the other transport conventions<sup>57</sup> does however not suffer this handicap. In view of the close connection between these provisions, and in order to make the text more reader friendly the French recommended to merge the provisions which deal with this linkage to form a

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single contract of carriage, and if, "*separate contracts had been concluded between the parties for each part of the carriage which involved one mode of transport*", at least two of these contracts would have been subject to different legal rules, the provisions of the German national law on affreightment in general apply to the contract, unless the special provisions following after article 452 or applicable international conventions provide otherwise.

<sup>54</sup> UNCITRAL A/CN.9/WG.III/WP.81, Variant A of subparagraph a.

<sup>55</sup> UNCITRAL A/CN.9/621, p. 46-47.

<sup>56</sup> UNCITRAL A/CN.9/WG.III/WP.81, p. 24 footnote 87.

<sup>57</sup> UNCITRAL A/CN.9/WG.III/WP.89.

single article<sup>58</sup>. The proposed article is made up out of three parts; a network provision, a provision dealing with unlocalized loss and a conflict of conventions provision. The first paragraph contains the proposed network system and reads as follows:

*“When a claim or dispute arises out of loss of, damage to or delay in goods, and the cause of such loss, damage or delay occurs during the carrier’s period of responsibility, but only before the time of their loading on to the ship or only after their discharge from the ship, the provisions of this Convention shall not prevail over the provisions of another international convention [or national law] which, at the time of such loss, damage or delay, apply mandatorily, according to their terms, to all or any of the carrier’s activities under the contract of carriage during that period”*

As the reference to the triptych of carrier’s liability, limitation of liability, or time for suit has been omitted, this is a complete network system. Although such a solution may lead to a less uniform regime it does prevent the conflicts between conventions that the limited network system generates.

However, this proposal still incorporates the drawback that was eradicated by the new network provision in the Draft instrument. It leaves the operation of the Draft instrument dependent on the interpretation of the scope provisions of other transport conventions such as the CMR. Therefore a combination of both may be the solution. The text of a network provision that combines both options could for instance be as follows:

*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 and the provisions of another international instrument, which:*

*(a) at the time of such loss, damage or event or circumstance causing delay applies to all or any of the carrier’s activities pursuant to the provisions of this international instrument, or*

*(b) would have applied pursuant to the provisions of this international instrument 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,*

*then the provisions of this international instrument that cannot be departed from by contract either at all or to the detriment of the shipper under that instrument prevail over the provisions of this Convention.*

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<sup>58</sup> The articles which deal with the linkage between the Draft and the other carriage conventions are distributed among various articles in different chapters (In UNCITRAL A/CN.9/WG.III/WP.56 this were the articles 27, 64 section 2, 89 and 90 in chapters 3, 13 and 19).

## Overlap between the Draft instrument and the existing transport conventions

Over time a number of situations in which the Draft instrument conflicts with the existing transport regimes have been pointed out. When for instance the carrier undertakes to carry goods by a truck and by a sea-going vessel whereby the goods remain on the truck during the carriage by sea, a conflict with the CMR may arise since both the CMR, according to article 2 CMR, as well as the Draft instrument will then require application. Conflicts between the CMR and the Draft instrument also occur when a court of law interprets the scope of the CMR differently than the designers of the Draft instrument do. Evidently the limited network system of the Draft instrument is based on the concept that the CMR, besides via article 2 CMR, cannot apply to door-to-door carriage autonomously<sup>59</sup>. If one holds this to be true, a conflict with this convention will not come about. One has to realise though, that the opposite view has at least as much, if not more, support in Europe<sup>60</sup>, which was established in the section on the carriage of goods by road in the above.

Apart from the CMR, other conventions also run the risk of coming into conflict with the Draft instrument. A conflict could for instance also occur between the Draft and the Montreal Convention if a carrier performs a contract of carriage by sea and by air since the Montreal Convention, according to article 18 paragraph 4, as well as the Draft instrument will require application when the loss remains unlocalized<sup>61</sup>.

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<sup>59</sup> The drafters are of the opinion that road carriage performed under a multimodal carriage contract would not fulfil the prerequisites mentioned in the scope articles of the CMR. They hold the same view concerning both the COTIF/CIM and the CMNI. Only the Montreal and Warsaw Conventions are deemed to include multimodal transport to such an extent that a conflict between those conventions and the draft convention is inevitable. UNCITRAL A/CN.9/621, p. 50; UNCITRAL A/CN.9/616, p. 54. Adherants to the same view regarding the CMR are mostly found in Germany and Italy: I. Koller, 'Quantum Corporation Inc. v. Plane Trucking Limited und die Anwendbarkeit der CMR auf die Beförderung mit verschiedenartigen Transportmitteln', *TranspR* 2003, p. 45-50 at p. 45; B. Czerwenka, 'Scope of Application and Rules on Multimodal Transport Contracts', *TranspR* 7/8-2004 p. 297-303 at p. 302; F. Berlingieri, 'Door-to-door transport of goods: Can uniformity be achieved?', in: Liber Americum Roger Roland, Brussels: De Boeck & Larcier N.V. 2003, p. 42; J. Spiegel & G.J.H. de Vos, Multimodaal vervoer en de toepasselijkheid van de CMR, in: CMR: Internationaal vervoer van goederen over de weg, Zutphen: Paris 2005, p. 57-80.

<sup>60</sup> At least in England, Wales, The Netherlands, Belgium, France etc. M.A. Clarke, *International carriage of goods by road: CMR*, London: Lloyd's of London Press 2003, p. 46-46 and 'A conflict of conventions: The UNCITRAL/CMI draft transport instrument on your doorstep', *JIML* 2003, p. 28-39; K.F. Haak, *The liability of the carrier under the CMR*, (diss. Utrecht), The Hague: Stichting Vervoeradres 1986, p. 98-99; A. Messent & D.A. Glass, *Hill & Messent, CMR: Contracts for the international Carriage of Goods by Road*, London: Lloyd's of London Press 2000, p. 45; A. van Beelen, 'CMR en overlading', in *Vergelijkend Zeerecht* (Liber Americum R.E. Japikse), Leiden 1994, p. 35-50; K. Thume (K. Demuth a.o. ed.), *Kommentar zur CMR*, Heidelberg: Verlag Recht und Wirtschaft 1994, p. 92; J. Putzeys, *Le contrat de transport routier de marchandises*, Brussels: Bruylant 1981, p. 103-104; R. Asariotis *et al*, *Intermodal transportation and carrier liability*, study for the European Commission June 1999. For judgements expressing this view cf. footnote 18.

<sup>61</sup>B. Czerwenka, 'Scope of Application and Rules on Multimodal Transport Contracts', *TranspR* 2004 p. 297-303 at p. 302. There are those who would disagree however cf. footnote 40. The last sentence of article 18 paragraph 4 MC does not generate conflicts as the Draft will not apply; the Draft only applies to

Another, more recent, addition to the list of conventions that can conflict with the Draft instrument is the CMNI, as conflict ensues when a carrier carries goods, without transshipment, both on inland waterways and in waters to which maritime regulations apply, when no maritime bill of lading has been issued and the distance to be travelled in waters to which maritime regulations apply is the smaller. In those situations both the CMNI and the Draft require application to the whole transport<sup>62</sup>.

Even the COTIF/CIM deserves a place on this list, albeit somewhere near the bottom, because a multimodal carriage which combines rail carriage and sea carriage is also in some danger of being the subject of conflict. As we have seen in the above the scope of the COTIF/CIM covers international carriage by sea which supplements carriage by rail if such carriage by sea is performed on services included in a certain list. This list however is not a very long one<sup>63</sup>.

When considering the above it becomes clear that the limited network system of the Draft instrument will very likely generate complicated practical problems as it creates obscurity rather than clarity concerning which rules apply to a multimodal carriage contract involving a sea leg. As a defence against the criticism concerning the practical operation of the limited network system of the Draft instrument one of the objections raised by the UNCITRAL secretariat was that this approach is also employed in the BIMCO COMBICONBILL<sup>64</sup>. And indeed, this combined transport bill incorporates a similar system. Under the COMBICONBILL the liability of the carrier is governed by the provisions contained in any international convention or national law, which provisions cannot be departed from by private contract to the detriment of the claimant and would have applied if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of transport where the loss or damage occurred. The relevant difference between this system and that of the Draft instrument is however that the BIMCO rules are no more than contractual provisions and therefore subject to any mandatory applicable rules of either national or international law. They are merely meant to act as a supplement to the existing legal framework. When the rules of the bill and the mandatory national or international rules are not compatible the latter will always prevail.

#### *The Draft instrument's conflict of convention provisions*

Another manner in which the drafters of the instrument attempted to appease the critics of the limited network system of the Draft instrument was the drafting of what were named 'conflict of conventions' provisions. These articles were intended to accommodate the continued application of the 'normally applicable inland conventions for the carriage of goods'<sup>65</sup>, and to avoid conflicts such as the drafters thought possible. The first of these

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contracts which provide for carriage by sea according to article 1 and 2 of the Draft (UNCITRAL A/CN.9/WG.III/WP.81).

<sup>62</sup> Although the Draft's provisions would not prevail over those of the CMNI's provisions which mandatory regulate the carrier's liability, limitation of liability, or time for suit when the loss has occurred during the inland waterway carriage.

<sup>63</sup> Of the 20 lines that had been entered by 2006 only 16 concerned international sea lanes.

<sup>64</sup> UNCITRAL A/CN.9/WG.III/WP.78, p. 8-9.

<sup>65</sup> UNCITRAL A/CN.9/526, p. 68; UNCITRAL A/CN.9/WG.III/WP.78, p. 5-6; UNCITRAL A/CN.9/510, p. 11.



articles determined that nothing contained in the Draft prevents a contracting state from applying any other international instrument which entered into force before the Draft and which applies on a mandatory basis to contracts for the carriage of goods primarily by a mode of transport other than by sea. In the second article however, the Draft instrument stated that it prevails between its parties over the provisions of earlier conventions to which they may be parties that are incompatible with those of the Draft instrument<sup>66</sup>. These somewhat contradictory articles were deleted later on despite substantial support for the retention of the first article. This article affected the scope of application of the Draft instrument in such a way that it rendered the preceding network article – which at that point did not contain the currently incorporated fiction – practically ineffective. Whenever a court of law were to come across a conflict between another carriage convention and the Draft instrument the other convention would take precedence. In the end however it was considered to be too general a provision to fulfil the role envisioned for it of filling any potential gaps left by the application of network article. To assuage any remaining concerns regarding the clarity of the application of limited network article as a conflict of convention provision, additional clarifying provisions were to be considered but these were to be restricted to the Montreal and Warsaw Conventions. Reason for this restriction was the fact that these conventions were considered unique in their intention to include multimodal transport to such an extent that a conflict between those conventions and the Draft instrument was inevitable<sup>67</sup>. A strange assumption as most of the abovementioned possible conflict situations had by that time already been brought to the attention of the drafters more than once<sup>68</sup>.

The result was an article that closely resembled the first of the earlier 'conflict of conventions' articles but which only awarded precedence to the air carriage conventions instead of to all mandatory applicable transport conventions<sup>69</sup>. Thus, of the possible conflict situations mentioned in the above, only the conflicts concerning the combination of air and sea carriage have been solved. Common sense however suggests that this is a rather uncommon combination<sup>70</sup>. So, in all conflict situations not involving air carriage the question which convention shall have priority remains.

### **The consequences of conflict**

It may be so that the drafters have left open the possibilities for conflict on purpose. Obviously they do not want the Draft to give way too much as this decreases the uniformity that is generated by the instrument. Perhaps they are of the opinion that in practice, the remaining conflict situations will not cause that much commotion as the three main issues in carriage law are 'networked' into the Draft and the remaining issues play only a minor part in litigation in general. And even if these 'secondary issues' are

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<sup>66</sup> UNCITRAL A/CN.9/WG.III/WP.56, article 89 and 90.

<sup>67</sup> UNCITRAL A/CN.9/621, p. 50.

<sup>68</sup> UNCITRAL A/CN.9/WG.III/WP.78, p. 4.

<sup>69</sup> UNCITRAL A/CN.9/WG.III/WP.81, article 84.

<sup>70</sup> Uncommon but not altogether non-existent; in the Far East apparently containers are sometimes unstuffed at the port and the goods then palletized for the air movement. D. Glass, 'Meddling in the multimodal muddle?', *LMCLQ* 2006, p. 307-334 at p. 309.

the focus of a dispute, research into the matter may very well point out that the Draft Instrument does indeed take precedence over the older carriage conventions.

The prevailing opinion in international law is that there is no hierarchy between treaties. The granting of precedence of one convention over another by a court of law is on the whole not something to be desired as it violates one of the basic principles of contract law; *pacta sunt servanda*. Every treaty in force in a state is binding upon the parties to it and should be performed by them in good faith. If a state has entered into more than one agreement and the agreements are not compatible it is however impossible for a state to fulfill both obligations.

Under those circumstances article 30 VC, which determines the rights and obligations of states that are party to successive treaties relating to the same subject-matter, supplies guidelines as to which treaty is to have priority. That is to say, if we assume that article 30 VC equally applies when the subject matter of the successive treaties overlaps only partly.

The most likely scenario is that the remaining conflict situations between the Draft and the other carriage conventions are covered by paragraph four of article 30 VC. It should after all be safe to assume that not all parties to all the existing carriage conventions will immediately ratify the Draft. The fourth paragraph of article 30 VC determines that when the parties to the later treaty do not include all the parties to the earlier one that (a) between states party to both treaties the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty, and (b) as between a state party to both treaties and a state party to only one of the treaties, the treaty to which both states are parties governs their mutual rights and obligations. The states involved are the state where the claimant has residence and the state where the addressed party has residence, which can of course be the same state.

Thus, the Draft will have precedence in situations where both states are party to it, and the conflicting rules of the elder carriage convention apply when only one of the states is party to the Draft but both states are party to the elder convention, such as the COTIF/CIM or the CMR.

In situations where there is no convention that the states in question are both party to however, the Vienna Convention does not provide an answer. Which regime is applied then largely depends on which jurisdiction is chosen by the claimant. If the forum state is party to the Draft it will apply the Draft and if it is party to another applicable convention and not to the Draft it will apply the other convention.

When seen in this manner, it is conceivable that the Drafters did not consider the conflicts generated by the Draft to be insurmountable in practice. After all, the Warsaw and Montreal regimes also seem to operate on a similar conflicting basis without this causing much of an outcry. And of course there is the example of the overlap between the jurisdiction article of the CMR, article 31 and article 21 of the Brussels I Regulation which also fails to evoke much protest<sup>71</sup>.

The possibilities for conflict are there however, and it is by no means certain that they will be the subject of court proceedings only rarely or not at all. Additionally, the litigants

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<sup>71</sup> K.F. Haak, "Jurisdictionperikelen in het internationaal wegvervoer: het einde van het sprookje van de verklaring voor recht?", *ETL* 2004, p. 137-149.

that are confronted with them in a court of law are not likely to deem them minor as large amounts of money may be at stake. And then there is of course also the fact that conflicts between conventions are not to be tolerated on an international law level. One of the basic principles in law is that obligations once taken on should be met. Therefore, states should certainly not be stimulated to fail to fulfill the obligations laid upon them by a convention that they are party to. As a result the drafting of conventions necessitates the utmost care regarding the prevention of the possibility of conflict, more care than is currently displayed by those designing the Draft instrument.

### **Non-localized loss or damage under the Draft instrument**

The analysis of the Draft instrument's minimal network system in the above shows that this system can only be applied in circumstances where it is possible to determine when the loss of or damage to goods, or an event or circumstances causing a delay in their delivery has occurred, *id est* when the loss can be localized. One of the principal problems when dealing with multimodal carriage however is the determination of the applicable legal regime when the loss remains unlocalized. A situation that is not uncommon in container carriage<sup>72</sup>. The early drafts did not contain any provisions on unlocalized loss and thus, due the scope of application of the Draft instrument, it acted as a kind of trawl net; in situations of unlocalized loss the provisions of the Draft instrument automatically applied.

The current version of the Draft instrument however, contains a rule which causes the limit of liability to be a variable factor if: "*the carrier cannot establish whether the goods were lost or damaged [or whether the delay in delivery was caused] during the sea carriage or during the carriage preceding or subsequent to the sea carriage*"<sup>73</sup>. It is very likely that this rule will be deleted from the Draft instrument in the future as it is deemed unnecessary by most of the drafters. The majority recommends its elimination based on the argument that the Draft instrument is an international convention that focuses mainly on maritime transport; deviation from the Draft regime should be as limited as possible. Furthermore, limitation of liability is not an isolated issue, but is instead closely related to such issues as the basis of liability and the conditions for the loss of the limitation of liability. It was not thought to be advisable to introduce more foreign limitation of liability rules into the Draft regime than was absolutely necessary<sup>74</sup>.

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<sup>72</sup> H. Honka, 'The Legislative Future of Carriage of Goods by Sea. Could It Not Be the UNCITRAL Draft? An Academic's View', *www.folk.uio.no*, p. 11.

<sup>73</sup> Article 62 paragraph 2 (UNCITRAL A/CN.9/WG.III/WP.81) momentarily contains two versions of which variant B displays a lot of similarities with article 8:43 of the Dutch Civil Code. Article 8:43 CC contains the following text: "If the combined carrier is liable for the damage resulting from damage, total or partial loss, delay or any other damaging fact, and if it has not been ascertained where the fact leading hereto has arisen, his liability shall be determined according to the regime which applies to that stage or to those stages of the transport where this fact may have arisen and from which the highest amount of damages results.

<sup>74</sup> UNCITRAL A/CN.9/WG.III/WP.72, p. 6. Another – although less influential - argument was raised regarding the United Nations Convention on International Multimodal Transport of Goods of 1980. The 1980 MT Convention, which did incorporate some form of a limited network solution concerning localized

If the provision is deleted the previous situation in which the rules of the Draft instrument are to apply in circumstances involving unlocalized loss revives. This is probably less appealing to the cargo claimant than the currently proposed systems because the limits of liability in sea carriage regimes have always been the lowest of the spectrum<sup>75</sup>.

### **Closing statements; tying up loose ends**

The geographical reach of the Draft instrument is quite substantial. All that is required for the Draft's provisions to apply is, geographically speaking, that according to the contract of carriage the place of receipt, the port of loading, the place of delivery or the port of discharge is located in a contracting state. Thus, the Draft instrument gains quite an extensive range of operation as only one of these four places has to have a connection with the Draft. Other carriage conventions such as the Montreal Convention on air carriage have a modest reach in comparison. The scope of this air carriage convention is restricted to carriage by air where the place of departure and the place of destination are situated within the territories of *two* states that are party to the Convention<sup>76</sup>. The extensive geographical scope of application of the Draft instrument stimulates uniformity, something which is deemed to have a positive effect on trade.

The urge to create uniformity has however not only led to an extensive geographical reach for the Draft instrument but also to an extensive material reach. And it is in this area that problems may arise. The expansion of the Draft's scope to include contracts of carriage which may provide for carriage by other modes of transport in addition to the sea carriage creates the possibility of conflicts between the Draft instrument and the existing framework of carriage conventions. The 'conflict of conventions' provision currently incorporated in the Draft instrument is thought to be the solution to this problem by the drafters. Unfortunately this provision is restricted to the relation between the Draft instrument and the air carriage conventions and is therefore insufficient to solve the problem. So, although the Draft may solve some practical issues, it will also create new conflict situations which will cause problems on an international law level. Where conflict situations occur states are forced to commit unwarranted breaches of treaty obligations. Up until now, these breaches are apparently often disregarded by treaty makers and judiciary alike<sup>77</sup>.

To be fair, the Draft does seem to have some positive sides as well. A difficulty that would be solved by the Draft instrument for instance is the predicament regarding the determination of the applicable legal regime when the loss or damage cannot be localized. Whether the current Draft provision on the subject is maintained or not, the gap

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loss in keeping with the Draft system, did not include any provision for non-localized loss or damage. The 1980 MT Convention never entered into force due to the lack of sufficient ratifications.

<sup>75</sup> As of yet no liability limit has been set for the Draft, but The Hague, The Hague/Visby and the Hamburg rules have relatively low limits of 2 respectively 2,5 SDR per kilogram.

<sup>76</sup> Or within the territory of a single State which is party to the Convention if there is an agreed stopping place within the territory of another state, even if that state is not party to the Convention. Article 1 paragraph 2 Montreal Convention.

<sup>77</sup> B. Cheng, 'A new era in the law of international carriage by air: from warsaw (1929) to Montreal (1999)', *ICLQ* 2004, p. 833-859 at p. 858-859.

in the legal system pertaining to this issue will be a thing of the past if the Draft instrument comes into force. As a result, the Draft in its current form may be of some practical use in multimodal carriage, particularly in situations where the cause of the loss of or damage to the cargo can not be localized.

If the Draft instrument were to enter into force in its current form it will function as a double edged blade rather than as Pullman's subtle knife which Clarke recommends for solving the multimodal quandary<sup>78</sup>. On the one hand it will generate some uniformity in the areas of both international sea carriage and, albeit in a lesser degree, multimodal transport if enough states are prepared to ratify the instrument. Especially in the latter area uniformity will be increased by the Draft instrument in relation to unlocalized loss. On the other hand however, although uniformity is something to strive for, such a goal can not justify all means. Especially not since the Draft regime will only generate a partial uniformity.

Because of the conflicts generated by the Draft instrument between it and the existing conventions complicated questions regarding precedence will arise<sup>79</sup>. In order to avoid these conflicts the Draft should expand its limited network system to a complete network regime, 'networking' all the rules of other mandatory carriage conventions instead of only three subjects. The reference to the triptych of carrier's liability, limitation of liability, or time for suit should therefore be omitted to turn the Draft's arrangement, even if this results in a somewhat less uniform regime.

Another dilemma, the reality that the current coverage of the Draft may preclude its member states from ratifying a future regime that is specifically tailored to regulate all varieties of multimodal carriage<sup>80</sup>, could also be solved by expanding the scope of application of the Draft. An increase of the radius of action of the Draft to include all multimodal carriage could fix this predicament.

It should be noted here however that this solution, and solutions and changes proposed in this paper, have been presented strictly in order to solve the problems the Draft may generate in the area of the conflict of laws. They obviously do not influence the suitability of the other rules of the Draft for multimodal transport<sup>81</sup>.

As it is, the current version of the Draft instrument does effectively embrace door-to-door transport. Its entry into force will however not bring about further harmonization of

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<sup>78</sup> M.A. Clarke, 'A conflict of conventions: The UNCITRAL/CMI draft transport instrument on your doorstep', *JIML* 2003, p. 28-39 at p. 39.

<sup>79</sup> For an elaborate analysis of this issue see the 2006 report of the Study Group of the International Law Commission A/CN.4/L.682, which can be found at <http://untreaty.un.org>.

<sup>80</sup> An effective and universal multimodal (or intermodal) transport convention can be considered to be the 'Holy Grail'; the ultimate object seen as the means of salvation for the ills of international transportation. M.A. Clarke, 'Carriers' Liability in Cross-Border Air Cargo Substitute Transportation', *TranspR* 2005, p. 182-185 at p. 185.

<sup>81</sup> For an evaluation of the suitability of some of the content of the Draft for multimodal carriage see: M. Faghfour, 'International Regulation of Liability for Multimodal Transport - In Search of Uniformity', *WMU Journal of Maritime Affairs* 2006-5, p. 95-114.

transport law. Whereas it might re-unify carriage of goods by sea, it will only add yet another regime to the multimodal muddle - that of multimodal transport with a sea leg<sup>82</sup>.

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<sup>82</sup> R. de Wit, 'Remarks by Prof. Dr. Ralph de Wit, to the ABLM at Istanbul on the UNCITRAL-CMI Draft Instrument', [www.forwarderlaw.com](http://www.forwarderlaw.com) 2002.