MULTIMODAL TRANSPORT LAW

The law applicable to the multimodal contract for the carriage of goods

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MULTIMODAAL VERVOERRECHT

Het toepasselijke recht op de multimodale overeenkomst voor goederenvervoer

Proefschrift

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Marian Hoeks
Breda, October 2009

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ABBREVIATIONS

JOURNALS

AA:	Ars Aequi
AC:	Law Reports, Appeal Cases
AJCL:	The American Journal of Comparative Law
AJIL:	The American Journal of International Law
All ER :	All English Law Reports
AMLR:	Antwerp Maritime Law Reports
BACC:	Bulletin des Arrêts de la Cour de Cassation
BGHZ:	Bundesgerichtshof Zeitung
CJELO:	Columbia Journal of European Law Online
DM:	Il Diritto Marittimo
EJPL:	European Journal of Private Law
ELR:	European Law Review
ERPL:	European Review of Private Law
ETL:	European Transport Law
EWCA:	England and Wales Court of Appeal
EWHC:	High Court of England and Wales
FD:	Financieel Dagblad
GWILR :	George Washington International Law Review
ICLQ:	International and Comparative Law Quarterly
IML:	International Maritime Law
I ZR:	German case law, can be found at www.bundesgerichtshof.de
JIML:	Journal of International Maritime Law
JMLC:	Journal of Maritime and Commercial Law
LJN:	Landelijk Jurisprudentie Nummer, can be found at www.rechtspraak.nl
Lloyd's Rep.:	Lloyd's Law Reports
LQR :	Law Quarterly Review
McGill L.J.:	McGill Law Journal
MLAANZ :	Maritime Law Association of Australia and New Zealand
MLR :	Michigan Law Review
MPM:	Maritime Policy & Management
MqJBL:	Macquarie Journal of Business Law
MRI:	Maritime Risk International
NJ:	Nederlandse Jurisprudentie
NJW(-RR):	Neue Juristische Wochenschrift (-Rechtsprechungs-Report Zivilrecht)
NTHR:	Nederlands Tijdschrift voor Handelsrecht
RCDIP:	Revue Critique de Droit International Privé
RDILC:	Revue de Droit International et de Législation Comparée
RDU:	Revue de Droit Uniforme
RIW:	Recht der Internationalen Wirtschaft
S.Ct.:	West's Supreme Court Reporter
S&TLI:	Shipping & Transport Lawyer International
TBHR:	Tijdschrift voor Belgisch Handelsrecht
T&D:	Transportation & Distribution
Term Rep. :	Durnford & East's Term Reports
TLR:	Tulane Law Review
TranspR:	Transportrecht
TRR:	Transportation Research Record

TVR:	Tijdschrift Vervoer & Recht
ULR:	Uniform Law Review
URLR:	University of Richmond Law Review
VUWLR:	Victoria University of Wellington Law Review
WLR:	The Weekly Law Reports
WMU JMA:	WMU Journal of Maritime Affairs
WUGSLR:	Washington University Global Studies Law Review
WPNR:	Weekblad voor Privaatrecht, Notariaat en Registratie
ZVR:	Zeitschrift für vergleichende Rechtswissenschaft

CONVENTIONS AND PROTOCOLS

CMNI:	The Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway of 22 June 2001
CMR:	Convention on the Contract for the International Carriage of Goods by Road, done at Geneva 19 May 1956
COTIF-CIM:	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)
HP:	1955 Hague Protocol; Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, done at The Hague on 28 September 1955
HR:	The Hague Rules; The Brussels Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924
HVR:	The Hague-Visby Rules; the Hague Rules as Amended by the Brussels Protocol of 23 February 1968
MC:	Montreal Convention; Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on 28 May 1999
MP4:	Montreal Protocol No. 4 of 1998; Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the Protocol done at The Hague on 28 September 1955
MTC:	Multimodal Transport Convention; United Nations Convention on the Multimodal Transportation of Goods, concluded on 24 May 1980
RR:	The Rotterdam Rules; United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, signed at Rotterdam on 23 September 2009
VC:	Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969
WC:	The Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929

OTHER

AG:	Advocate General (provides the Hoge Raad with preliminary legal opinions)
AGBG:	Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen
BGB:	Bürgerliches Gesetzbuch (German Civil Code)
BGH:	Bundesgerichtshof (German Supreme Court)
BW:	Burgerlijk Wetboek (Dutch Civil Code)
EGBGB:	Einführungsgesetz zum Bürgerlichen Gesetzbuch
EGHGB:	Einführungsgesetz zum Handelsgesetzbuch

EU:	European Union
GG:	Grundgesetz (German Constitution)
HGB:	Handelsgesetzbuch (German Commercial Code)
Hof:	Hof (Dutch Court of Appeal)
HR:	Hoge Raad (Dutch Supreme Court)
J:	Justice
LG:	Landesgericht (German District Court)
LJ:	Lord Justice
OLG:	Oberlandesgericht (German Court of Appeal)
Rb:	Rechtbank (Dutch District Court)
TEU:	Twenty feet Equivalent Unit (a 20 feet container equals 1 TEU))
TRG:	Transportreformgesetz
WvK:	Wetboek van Koophandel (Dutch Commercial Code)

1 THE CONTEMPORARY SITUATION AND ITS PITFALLS

1.1 Introduction

We only have to look around us on the road while we travel to work or home, or to use our eyes at a railway station to know that the transport of goods takes up a lot of the room our modern day infrastructures provide. Sometimes perhaps a little too much; nowadays congestion seems to be the rule rather than the exception. This is an uncomfortable side effect of the explosive growth freight transport has experienced the last few decades[1].

Modern day transport offers a considerable array of possibilities; possibilities that are – for the most part – taken for granted by the general public that enjoys their benefits. The average European would not be surprised to learn that the fruit on offer in the local supermarket originates from another continent for instance. The idea that most of the things we use in our daily routine stem from a distant source, such as a cell phone from Japan, a trendy pair of designer jeans made in China or a glass of Australian wine, seems completely natural to us.

Clearly the contemporary transport industry offers us a lot of benefits besides such discomforts as congestion and pollution. In earlier times, before machinery such as the steam engine had been invented it was hardly cost effective – or even feasible when it came to perishables – to carry goods halfway around the world if they were not at least valuable and extraordinary[2]. The limitations set on trade by the transport structures available did more however than simply curtail the range of affordable products on offer for the public. They also had a negative effect on the location of the industry, limited transport possibilities and forced production to take place near or in heavily populated areas to secure the necessary workforce and market possibilities. After all, industrial decentralisation is only feasible if there is an infrastructure capable of supporting a cost effective movement of goods and employees[3]. The transport possibilities our contemporary society offers make decentralisation feasible. Today's commercial actors use sophisticated systems weighing relevant factors such as storage costs, the placement of production facilities and transportation expenses against each other in order to generate the highest possible profits.

1.1.1 The rise of container transport

Without the intricate contemporary infrastructure and transport systems the world wide trade which caters to our needs would be quite impossible. Apparently the old adage 'transportation is the lifeblood of commerce' still rings true. Now maybe even more than ever before, as circumstances in the transport sector have vastly improved since the spice trading days of the '*Vereenigde Oost-indische Compagnie*'[4]. Especially the last few decades the sophistication and

[1] To feed our consumptive society the transport of goods has increased by about 35 percent between 1995 and 2006. Eurostat, 'Panorama of Transport', 25 May 2009, http://epp.eurostat.ec.europa.eu, p. 5. Before this it had already increased 70 percent since 1970. European Commission Communication COM (97) 243 Final 1997.

[2] As a result spices were the main commodity of the *Vereenigde Oost-Indische Compagnie* (VOC) for 200 years. The VOC existed between 1602 and 1798 in which period it had a monopoly on Dutch trade east of the Cape of Good Hope and west of the Strait of Magellan. From its headquarters at Batavia (founded 1619) the company subdued local rulers, drove the British and Portuguese from Indonesia, Malaya, and Ceylon (Sri Lanka), and appropriated the fabulous trade of the Spice Islands.

[3] Wang & Ruijgrok 1994, p. 10.

[4] The VOC, or United East India Company. See fn. 2.

efficiency of the international carriage of goods have increased rapidly. This is due, in part, to the augmented usage of the container[5]. In the 1950's shippers began using containers as they provided significant operational and economic advantages[6]. The introduction of the container enabled cargo handling processes to gain a high level of standardization and helped overcome many of the technical difficulties concerning the transhipment of goods. At the same time the use of containers lessened the occurrence of pilferage during cargo transferral and reduced loading and discharging time[7]. The container proved the means by which cargo could be transported by all modes with minimal adaptation of carrier technology. Thus the development of the container facilitated the emergence of operators that provide smooth 'door-to-door' transits.

Historically, cargo carried from an inland location on one continent, such as a manufacturing plant, to an inland location on another continent, such as a retailer's warehouse, would travel under three separate contracts of carriage most likely concluded with three separate carriers. As a result, it would be unloaded and reloaded between the different modes of transport used. The cargo would first travel by land under a consignment note from the manufacturing plant to the port of loading. It would then travel by sea under a bill of lading to the port of discharge. After this, the cargo would then complete its journey by land under yet another transport document. Each of these three contracts of carriage would be legally distinct and thus subject to its own legal regime[8]. At present much of this 'door-to-door transport' is performed on the basis of a single carriage contract, and more often than not, this carriage contract allows for the utilization of more than one mode of transportation. The cargo is still transhipped but generally remains in the container throughout the entire carriage.

Such door-to-door carriage has been designated multimodal carriage when the contract involves more than one mode of transport[9]. It should be noted here that although the container facilitated the emergence of multimodal carriage it is not a necessity. A contract involving carriage by more than one mode of transport is considered multimodal whether the cargo is stuffed in a container or not[10]. The cargo shipped under a multimodal contract is not always stuffed in a container, and a container plus contents may very well be carried by only a single mode of transportation. The connection between the container and multimodal transport is nonetheless obvious; it is undeniable that the ever increasing use of containers has created the

[5] Glass 2004, p. 1 fn. 2. A road hauler named Sea-Land appears to have started the container revolution as early as 1956 when it instituted a containership service between New York and Puerto Rico thereby stimulating other operators to follow suit. By the end of the 20th century containers were carrying over 95 percent of general cargoes moving between the continents and the percentage of other cargoes carried in containers was increasing as well. Donovan 2000, p. 336.

[6] Nasseri 1988, p. 232. Since the lorry had the smallest maximum carrying capacity of the various links or modes used in the transport chain the largest units that did not need to be broken up were limited to lorry size. When it turned out that too much space was lost even if only the trailer and not the most expensive part of the lorry, the truck, was sent overseas the wheels of the trailer were removed and the body itself was redesigned for stacking. Thus the container was born. Suykens 1978, p. 430.

[7] Indeed, pilferage rates have dropped significantly since the start of the container revolution. Our more shady fellow humans are nothing if not resilient however; as compensation they have started to steal whole containers instead.

[8] Sturley 2007.

[9] It is also known as a combined carriage contract which is a slightly less precise term, since this could also indicate transport combinations in the same mode. De Wit 1995, p. 4. Another – less than adequate – synonym is mixed carriage, see Schadee 1972, p. 1234. In the U.S. the term intermodal transport is in use, but this term does not entirely cover the same ground as the term multimodal transport, see Glass 2004, p. 3 fn. 9.

[10] Multimodal transport is a legal concept while container transport is a technical concept. De Wit 1995, p. 4; Van Beelen 1996, p. 9. As Schadee states it, a container is nothing more than a 'loading box'; Schadee 1966, p. 952 or Schadee 1972, p. 1234. The Court of Appeal in The Hague is of the same opinion and determines that a container is merely packaging; Hof Den Haag 30 August 2005*, S&S* 2005, 13. However, the Dutch Supreme Court, the *Hoge Raad*, has recently decided that a container may also be considered part of the vehicle if it is provided by the carrier. HR 1 February 2008, *S&S* 2008, 46.

opportunity for multimodal transport to blossom these last few decades. Since the container revolution in the 1950's multimodal carriage has increased dramatically. Evidence of the popularity of multimodal transport is the emergence and increase of multimodal terminals everywhere[11].

1.1.2 The benefits of multimodal transport

Choosing multimodal transport over unimodal transport has some very practical advantages. Not only does it in some situations save time – as many as ten transportation days can be saved on a cargo shipment from the Far East to New York by multimodal ship and transcontinental rail carriage, as opposed to an all-water route[12] – it may also save money and the environment[13]. On the whole multimodal transport costs less, offers the opportunity to incorporate less polluting modes of transport into the transport chain and may save time. Taylor claims that multimodal carriage, also known as intermodal carriage in American legal literature[14], is the key to increasing the productivity and competitiveness of the freight transport industry as a whole, while maintaining the environmental balance. This is because effective multimodal transport ensures the use of the most efficient mode of transport at each stage, thus reducing congestion, energy expenditure and pollution[15].

In addition to these practical benefits however, there are also several legal reasons that can be named as to why a shipper or a freight forwarder would opt to conclude a multimodal carriage contract instead of contracting with separate carriers for each transport stage. Firstly, contracting separately means more separate arrangements have to be made. Secondly, the shipper then has to arrange for the goods to be at the right place and at the right time for each of the contracted transport stages himself or by means of an ancillary. Thirdly, he has to arrange for the goods to be stored between the different segments of the transport if the segments do not fit seamlessly together. Under a multimodal transport contract it is the multimodal carrier who provides for the storage between stages. Since the multimodal carrier has more pull in these circles, is often better connected than the shipper and is able to influence the transport itinerary it is likely that the storage will thus be cheaper and more efficient. A fourth argument is that every carrier issues his own type of transport document. Whereas a bill of lading issued for a sea carriage segment is generally negotiable, the consignment notes issued by road carriers are not. These differences tend to create difficulties for the buyer of the cargo when he attempts to acquire a documentary credit from a bank[16]. And the fifth and last reason mentioned here is that the pool of individual counterparties the shipper has to deal with in unimodal carriage may cause

[11] The following increases that have been mentioned in the media are only the tip of the iceberg: the inland terminal Veghel will double its capacity before 2014 bringing its capacity to tranship to 200.000 TEU, www.portofrotterdam.com, 14 August 2009; in the Hungarian city Budapest the combiterminal is lengthened so it will be able to handle 250.000 TEUs per year instead of the current insufficient 150.000 TEUs, www.nieuwsbladtransport.nl, 7 March 2008; in Marseille a combiterminal was built in the port area in 2007, www.nieuwsbladtransport.nl, 15 November 2006; there are plans to expand the combiterminal of Ludwigshaven from 300.000 to 500.000 TEUs, www.portofrotterdam.com, 31 March 2008. Apparently the European railway sector limits the possible growth of multimodal transport somewhat for various reasons. Nevertheless its future is still bright since it yields better returns and is less sensitive to cyclical fluctuations than unimodal transport. In 2006 a thousand intermodal railway stages were performed a day and this number is steadily growing. Gossink 2008.

[12] Palmer & DeGiulio 1989, p. 285.

[13] Gossink 2008.

[14] It is submitted here that the preferable term is multimodal and not intermodal as 'multi' refers to more than one, while 'inter' means between. See also Sturley 2009, p. 5.

[15] Taylor 1993, p. 34.

[16] Van Beelen 1996, p. 11.

difficulties in case the cargo is damaged en route. Especially if it proves impossible to discover at which stage of the transport the damage occurred[17]. In such a case each carrier will be tempted to decline liability if he can, and the claimant or his insurer could well be left to bear the loss[18]. It is therefore useful to contract with a single multimodal carrier, since even if the exact stage where the loss occurred cannot be identified, at least it is clear which party can be held responsible under the contract of carriage[19].

Considering the variety of cultures, languages and commercial practices at both ends of a trade transaction and the resulting complexity of assembling such an international transport operation, it is likely to appear reasonable to a trader to let one qualified operator organize and be responsible and accountable for the entire transport chain. The carriers in turn have developed transport systems over the years in order to fulfil their customers' requirements, offering competitive services. They endeavour to make trade more efficient by offering multimodal transport services to their clients[20]. At present the carriage business seems to be a buyer's market; the form in which carriage contracts are moulded is evidently dominated by the demands of the shipper[21]. But not only the carriers saw themselves obligated to provide their customers with a different sort of contract, freight forwarders found themselves in the same position. The trend to provide a single contract for carriage by several transport modes coincides with the introduction of documents by freight forwarders which burdened them with the more onerous liability of a carrier instead of the liability of a freight forwarder. Market demands simply put more and more pressure on them to accept carrier liability for their services[22].

1.2 The concept of multimodal transport

Since the core question of this work is which – international – legal regimes may apply when it comes to the multimodal carriage of goods, a sketch of what the term multimodal transport involves may be in order. By reason of the envisioned dimension of the research, the topic of discussion will be limited to multimodal transport of an international nature and of European orientation.

Over the past decades a consensus seems to have developed defining international multimodal carriage – or transport as you like – as the carriage of goods, by at least two different modes of transport, on the basis of a single multimodal transport contract, from a place in one country where the goods are taken in charge by the carrier, to a place designated for delivery situated in a different country. This definition was shaped largely by the United Nations

[17] So-called 'unlocalized loss'. For more information see Section 1.3.2 of this Chapter on the problems generated by the lack of uniform multimodal carriage law.

[18] Racine 1982, p. 223-224. Depending on his insurance coverage this is either a problem for the shipper himself or for the insurance company that compensates him and is subrogated to his claim against the responsible parties. Subrogation of rights in this case means that the insurance company steps into the footsteps of the shipper and receives the rights the shipper had based on the carriage contract. Thus the insurance company can try to recover as much as it can to offset the insurance monies it has had to pay out. Since the insurance company's claim is limited to the claim the shipper could have brought however, and is subject to all the defences to which the shipper would have been exposed, this simply shifts the problem to another party. Nevertheless, an insurance company may be better equipped to deal with difficulties like these.

[19] Van Beelen 1996, p. 11; Rogert 2005, p. 17.

[20] Standing Committee on Developing Services Sectors: Fostering Competitive Services Sectors in Developing Countries: [Shipping], 3rd session (6-12 June 1995) Item 3: Fostering competitive multimodal transport services, *'Multimodal Transport'*, http://r0.unctad.org/en/subsites/multimod/mt2brf0.htm.

[21] Wang & Ruijgrok 1994, p. 8 and 12.

[22] Haak 1992, p. 13-14. Of course, the fact that operating under the responsibilities of a carrier is generally more profitable than earning a provision as a freight forwarder may also have been of influence.

Convention on International Multimodal Transport of Goods, signed in Geneva on 24 May 1980 (MT Convention or MTC) which failed to come into effect[23]. This way of defining multimodal transport emphasizes the fact that the carriage is based on a single contract concluded by a carrier or 'multimodal transport operator', endowing him with a carrier's liabilities. A contract which only provides for the linking of modes by combining contracts, which is typical of arrangements made by freight forwarders, falls outside the parameters of the multimodal carriage contract[24].
Since one of the objectives of this research is to examine the exact nature and boundaries of the multimodal carriage contract a more comprehensive definition will be given in the next Chapter[25].

Multimodal carriage is not the only term used for the combination of various modes of carriage for a single transport. Other terms that are used in legal literature are combined carriage, intermodal carriage, multimodalism and intermodalism. In this work these terms will all be considered synonyms of multimodal carriage although some authorities interpret them differently[26].

1.2.1 Subcontracting carriage

The subcontracting of carriage is common practice in multimodal transport, whereas the actual performance of carriage by more than one mode by one and the same carrier seems to be the exception. When a multimodal carrier subcontracts stages of the transport this means that he is the consignor in relation to the employed subcontracting carrier. The result is that it is common practice to have two – and sometimes even more – contract levels in multimodal carriage; one for the main contract, the contract between the original consignor and the multimodal carrier, and one or more for the subcontracts, the contracts between the multimodal carrier acting as consignor and the subcontracting carrier or carriers[27]. There are even carriers, known as non-vessel operating common carriers (NVOCCs) in the U.S. and as 'paper' carriers elsewhere, that do not have the capability to carry goods themselves at all[28]. These 'contractual' carriers – who are actually quite common in multimodal carriage – subcontract all stages of the carriage they have agreed to perform to other carriers. The subcontracting carriers that actually perform the carriage are sometimes referred to as actual carriers, sometimes as performing carriers.

[23] Although the Convention has failed to gain acceptance, after more than 25 years it is unlikely it will ever come into effect, it has clearly left its mark on the issue; the currently prevailing concept of multimodal transport resembles the one in Article 1 MTC very closely. See also De Wit 1995, p. 3.

[24] The definition used by Glass, being the linking of two or more transport modes under a contractual arrangement which either envisages or permits such a link, lacks such restriction and thus seems somewhat indiscriminate. See Glass 1994, p. 1.

[25] In Chapter 2, Section 2.3.1 to be exact.

[26] In a United Nations Economic Commission for Europe (UNECE) document listing the principal terms used in multimodal transport or related to it for instance, multimodal carriage is defined as the carriage of goods by two or more modes of transport, combined transport as intermodal transport where the major part of the European journey is by rail, inland waterways or sea and any initial and/or final legs carried out by road are as short as possible and intermodal transport is defined as the movement of goods in one and the same loading unit or road vehicle, which uses successively two or more modes of transport without handling the goods themselves in changing modes. By extension, the term intermodality is described as being a system of transport whereby two or more modes of transport are used to transport the same loading unit or truck in an integrated manner, without loading or unloading, in a door-to-door transport chain. European Commission Communication COM (97) 243 Final 1997.

[27] Van Beelen 1996, p. 14.

[28] Such carriers are called paper carriers in Europe as they are carriers on paper only; they do not perform any of the actual carriage but they do shoulder the liability of a carrier.

Schematically, completely subcontracted carriage looks as follows:

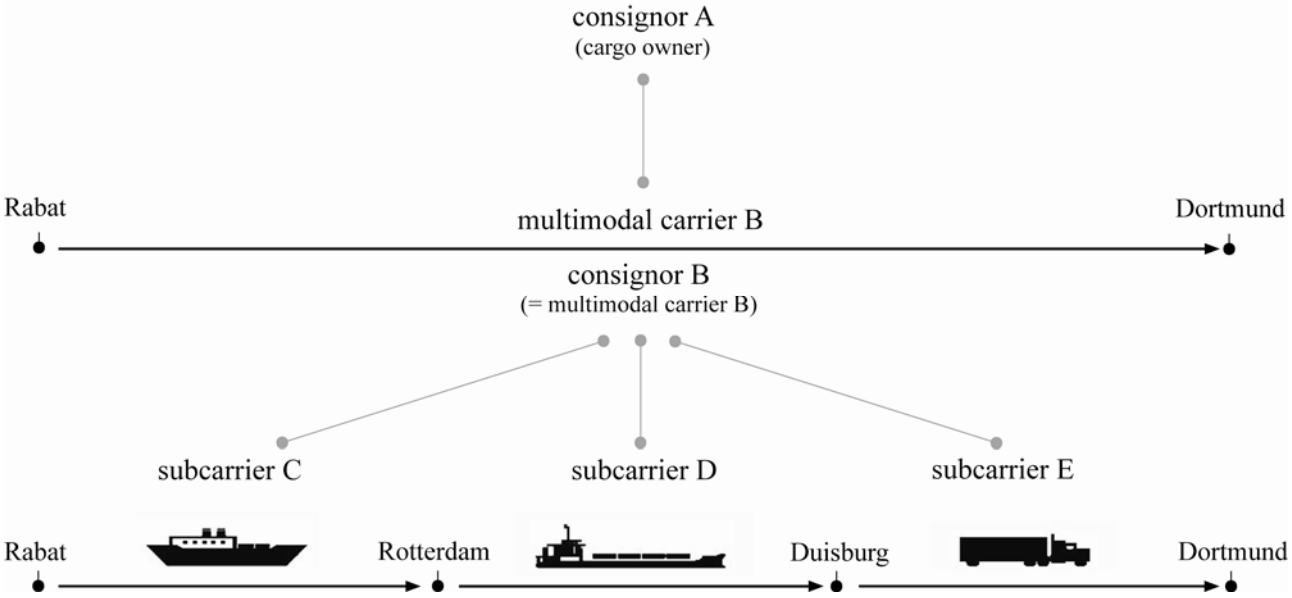

Figure 1.1: Subcontracted carriage
Between the consignor A and the carrier B a multimodal contract of carriage has been concluded concerning the carriage of goods from Rabat to Dortmund. The multimodal carrier promises to carry but actually subcontracts the various stages of the carriage; he concludes unimodal contracts of carriage with sea carrier C, inland waterway carrier D and with road carrier E, with himself (B) as the consignor.

Subcontracting carriage is generally induced by economical and practical reasons. As was already mentioned, it is for instance possible that the carrier who has taken on the entire transport is an NVOC or paper carrier, in which case he is forced to subcontract all stages of the carriage. It may also be that he is only able to perform part of the transport himself because he is a sea carrier and thus only has ships at his disposal. For any preceding or subsequent inland carriage he is then forced to employ subcontractors such as road, rail or inland waterway carriers.

When the structure of a multimodal transport as sketched in figure 1.1 is taken into account the question arises as to what influence the different transport stages have on the law applicable to the multimodal contract between the original consignor and the multimodal carrier. The contracts between the multimodal carrier as consignor and subcontracting carriers C, D and E are all likely to be governed by international conventions since they involve international carriage. Due to the need for uniformity of law in the trade sector it seems a shame not to let the original consignor and the multimodal carrier profit from the protection and security these carriage regimes bring, simply because the multimodal contract involves more than one mode of transport. However, since the subcarriage contracts and the main multimodal carriage contract are separate legal entities, the uniform carriage conventions that apply to the subcarriage contracts between the multimodal carrier and carrier C, D and E do not as a matter of course make their way into the multimodal contract. These regimes of uniform law only apply to the multimodal carriage contract insofar as their own scope of application rules cause them to

govern such a contract, or perhaps part of such a contract. In general it does appear however that these regimes should be accorded some regard.

One of the reasons carriers generally plead for the rules applicable to the subcontract to be applied to the corresponding stage of the multimodal contract as well is known as the recourse problem. In cases where damage, loss or delay occurs during a stage of the carriage which the multimodal carrier did not actually perform himself he may be able to seek recourse from the actual carrier that did perform this stage of the carriage. The multimodal carrier may be burdened with carrier liability as regards the consignor or consignee for the entire transport, but in relation to the actual carrier he is the consignor and thus able to seek redress for damage or loss. Such a recourse action does not always provide the multimodal carrier with the desired amount of compensation however. The two layers of contracts may very well be subject to different legal regimes and may lead to different levels of liability for the multimodal and the actual carrier.

The worst case scenario for the multimodal carrier is that he is held liable for a larger amount than he may regain from the actual carrier in a recourse action. An example of such an occurrence is a case brought before the *Rechtbank* Arnhem in 1996[29]. The contract of carriage provided for the carriage of pregnant heifers by Van de Wetering from Herwijnen in The Netherlands to Dundalk in Ireland. The animals were loaded on to a trailer specifically tailored for cattle transport which was driven to the port area. Once there the trailer, heifers and all, was loaded on to the lower deck of a Stena Line ferry for transport to Harwich in the United Kingdom. When the heifers arrived in Harwich however, a large number of them was dead. The cargo interests claimed damages from Van de Wetering for the loss of the heifers, and Van de Wetering in turn addressed Stena Line. Unfortunately for multimodal carrier Van de Wetering, Stena Line had legitimately entered an exoneration clause relating to the carriage of live animals into the sea carriage contract. Such a clause is allowed under the applicable Articles of Dutch sea carriage law – which is based on the Hague-Visby Rules – and caused Stena Line to escape liability[30]. Van de Wetering on the other hand was not so lucky. Based on the contract he concluded for road and roll-on, roll-off, or ro-ro, carriage from Herwijnen to Dundalk the loss was governed by Article 2 of the Convention on the Contract for the International Carriage of Goods by Road (CMR)[31]. This Article expands the scope of application of the CMR to roll-on, roll-off carriage. If loss or damage occurs during the ro-ro stage and there are mandatory conditions prescribed by (uniform) law regulating this stage, then the CMR takes a step back and lets these rules determine the liability of the carrier. The rules which would have covered the sea stage if the CMR would not have applied were not 'rules prescribed by law' however. The liability rules concerning the carriage of live animals by sea are not compulsory and thus the liability regime of the CMR applied to the contract between Van de Wetering and the cargo interests. This forced Van de Wetering to compensate the cargo interests – albeit for only 8,33 SDR per kilogram – while his recourse action against Stena Line did not avail him anything.

1.3 The status quo: the lack of uniform multimodal carriage law

Given the disjunction between the various modes of transport before the container revolution, freight transportation had, up until then, always been described in terms of the separate modes employed. The transport sector is however rapidly transforming itself into a highly integrated

[29] Rb Arnhem 18 July 1996, *S&S* 1997, 33.
[30] The relevant Articles are 8:381 and 8:382 of the *Burgerlijk Wetboek* (BW), the Dutch Civil Code.
[31] Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva, 19 May 1956).

whole. During most of the previous century the different modes of transport carried goods largely on their own terms. Shipping lines for instance, requested that the goods to be carried were left at a dockside warehouse or on the dock. The cargo was then taken aboard and transported to the port of destination where it was unloaded to the dock or a warehouse to await pick-up, all according to rates and conditions specified in a separate transport document[32]. The large increase of multimodal carriage contracts has profoundly changed this manner of conduct. 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[33]. Unfortunately, this flexibility the container generated regarding the technical aspects of the transport of goods has found its antagonist in the rigidity of the legal regimes regulating international carriage. Although the transferral of goods from one mode of transportation to another may have been greatly facilitated by the container revolution, the developments in international transport law have not kept pace.

None of the attempts to create uniform law for multimodal carriage have as yet met with success, and there have been many. Due to the absence of a truly international regime on multimodal carrier liability, regional, subregional and national laws have been created. The Andean Community, the Latin American Integration Association (ALADI), the Southern Common Market (MERCOSUR) and the Association of South-East Asian Nations (ASEAN) have resorted to these types of solutions[34]. The Middle East seems to be working on a regional solution of its own as well[35]. Besides these regional regimes there are also national regimes on multimodal carriage in vigour in The Netherlands, Germany, China, Mexico, India, Argentina and Brazil[36].

While some of these regimes are based on the MT Convention and the International Chamber of Commerce (ICC) Rules there are significant differences between the various regimes on points such as the basis of carrier liability, time bars and limitation of liability[37]. The result is a rather inconsistent patchwork; the liability framework thus created is fragmented and complex and causes uncertainty as to what regime is applicable in a given situation.

[32] Donovan 2000, p. 336 and 338-339.

[33] Glass 2001, p. 6.

[34] Andean Community Decision 331 of 4 March 1993 as Modified by Decision 393 of 9 July 1996: "International Multimodal Transport"; MERCOSUR Partial Agreement for the Facilitation of Multimodal Transport of Goods, 27 April 1995; ALADI Agreement on International Multimodal Transport, 1996; ASEAN Draft Framework Agreement on Multimodal Transport (final draft, as of 19-20 March 2001). For details on these regimes see the comparative table (UNCTAD/SDTE/TLB/2/Add. 1) summarizing the information contained in document UNCTAD/SDTE/TLB/2 of 27 June 2001. The table can be found at www.unctad.org.

[35] In 2000 the United Nations Economic and Social Commission for Western Asia (UN-ESCWA) put together a draft agreement on international multimodal transport of goods in the Arab Mashreq. The convention should be open for signature by the members of the UN-ESCWA at the United Nations headquarters in New York until 31 December 2009. ESCWA is composed of 13 Members (Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Oman, Palestine, Qatar, Saudi Arabia, Syria, UAE and Yemen) and is one of the five regional commissions which report to the Economic and Social Council of the United Nations. J.-M. Moriniere, 'A Multimodal Transport Convention for the Middle East?', www.forwarderlaw.com.

[36] Germany: §§ 452-452d *Handelsgezetsbuch* (HGB); India: Multimodal Transportation of Goods Act, 1993 (No. 28 of 1993); Mexico: Regulation on International Multimodal Transport, 6 July 1989; The Netherlands: Civil Code, book 8, title 2, Section 2, Articles 8:40-52 BW; Argentina: Law No. 24.921: Multimodal Transport of Goods, Official Bulletin 12 January 1998; Brazil: Law No. 9.61 of 19 February 1998 on Multimodal Transport of Goods; China: Maritime Code, 1993, Chap. IV, Sec. 8: Special Provisions Regarding Multimodal Transport Contract; Regulation Governing International Multimodal Transport of Goods by Containers, 1997; Contract Law, 1999, Chap. 17, Sec. 4: Contracts for Multimodal Transportation. For details on these regimes see the comparative table (UNCTAD/SDTE/TLB/2/Add. 1) summarizing the information contained in document UNCTAD/SDTE/TLB/2 of 27 June 2001. The table can be found at www.unctad.org.

[37] Faghfouri 2006, p. 100.

1.3.1 A unimodal framework

From a European perspective the only uniform law relevant to multimodal carriage at this point in time is the framework of international carriage conventions. All of these conventions deal with the carriage of goods by only one specific mode of transport, also labelled unimodal transport. There are the truly international treaties like the Warsaw Convention (WC) and Montreal Convention (MC) to cover air carriage[38], the Hague Rules (HR)[39], Hague-Visby Rules (HVR)[40] and Hamburg Rules[41] that deal with the carriage of goods by sea, and there are the arrangements that are regional instead of global, such as the various versions of the COTIF-CIM[42] for transport by rail, the CMNI[43] to regulate the carriage of goods by inland waterway and last, but certainly not least, the CMR Convention regulating road carriage[44]. Almost all of these treaties originated in the early part of the last century[45] and have for historical reasons each developed their own different rules of law and procedures[46]. Although most of them have been updated recently, an international convention that provides for liability when a contract of carriage involves two or more of the transport modes covered by the various unimodal conventions is still missing[47].

The result of the combination of this unimodal international framework, the regional, subregional and national laws and the various standard term contracts created by the industry to fill the gap is that the applicable liability rules vary greatly from case to case and give rise to uncertainty as to the extent of a multimodal carrier's liability in a given situation[48]. Currently, the fate of the multimodal carrier mostly depends on the portion of the multimodal transport where

[38] The Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 (Warsaw Convention of 12 October 1929 as amended in The Hague in 1955, in Guatemala City in 1971, by Protocol No. 4 in Montreal in 1975 and supplemented by the Guadalajara Convention supplementary of 1961) and the Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on 28 May 1999 (Montreal Convention). The texts of the Conventions can be found at www.icao.int.

[39] The Brussels Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924. The text of the Convention can be found at www.admiraltylawguide.com.

[40] The Hague-Visby Rules; the Hague Rules as Amended by the Brussels Protocol of 23 February 1968. The text of the Convention can be found at www.admiraltylawguide.com.

[41] The United Nations Convention on the Carriage of Goods by Sea of 31 March 1978. The text of the Convention can be found at www.uncitral.org.

[42] 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). The text of the Convention can be found at www.unece.org.

[43] The Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway of 22 June 2001. The text of the Convention can be found at www.unece.org.

[44] For technical reasons, carriage by road to other continents is not of any great importance. Loewe *Commentary on the CMR* 1975, p. 14. Mainly the ro-ro or roll-on, roll-off carriage of Article 2 CMR causes the CMR to apply to carriage to other continents but this type of carriage is not often used for long sea stages. As a result the CMR is unlikely to be of import concerning carriage from Europe to other continents than Africa or Asia.

[45] The Hague Rules stem from 1924 (but were amended by the Visby Protocol (VP) of 1968), the Warsaw Convention from 1929 (but was amended in 1955 and 1976), the CMR from 1956 and the COTIF has its origins in the late 19th century (1890). Apparently in the 19th century all three conditions for the harmonization of transport law were fulfilled. Due to the development of new means of transport new legislation became necessary, international transport had become quite important in relation to the economy and these reasons for harmonization had arisen in numerous States. Mutz 2003, p. 289.

[46] Hill 1975, p. 600.

[47] The COTIF-CIM was updated by the Vilnius Protocol of 1999, the Warsaw regime is to be replaced by the Montreal Convention of 1999 and the Hague, Hague-Visby and Hamburg regimes are meant to be replaced by the Rotterdam Rules (RR), the new UNCITRAL Convention on the Carriage of Goods Wholly or Partly by Sea of 2009.

[48] International MultiModal Transport Association (IMMTA) submission to the UNCITRAL Working Group on Transport Law, 19th Session, New York, 16-27 April 2007.

the damage, loss or delay occurred[49]. Courts of law are known to attempt to find the applicable rules to claims relating to multimodal carrier liability by examining the scope of application rules of the unimodal convention – or the applicable national law – matching the leg of the occurrence. Dividing the transport in stages based on the mode of transport involved and attaching liability rules depending on during which leg of the journey damage or loss occurs like this is known as the network approach. Under the network system, a carriage convention applies only to the period of time during which the carrier is deemed to be in charge of the goods in relation to the mode of transport covered by the convention.

An example of the results this has regarding the applicable law is that during a transport for instance from Birmingham in the United Kingdom to Enschede in The Netherlands via Felixtowe and Rotterdam a number of different legal regimes may apply to the various segments of the transit. If the carriage preceding and subsequent to the sea carriage is performed by road, these road stages are not regulated by a carriage convention at all. They are regulated by the national regime applicable to the contract, since in that case both road stages are domestic[50]. The sea stage on the other hand is covered by the Hague-Visby Rules if a bill of lading is issued. If no such document is issued however this stage of the transit is also subject to the rules of the applicable national law. When on the other hand the cargo remains on a trailer during the carriage by sea the transport concerns ro-ro carriage and is as a result covered by the rules of the CMR. In such a case, depending on among other things where the damage or loss occurs and the type of cargo that is carried, either the rules of the CMR or the provisions of the Hague-Visby Rules apply.

Whether the mode of transport in question is covered by a convention or not is determined by the convention's scope of application rules. Since the carriage conventions are regimes of uniform law which, as such, have a higher status in most legal regimes than the rules of national law it is their scope of application rules that provide the network approach with legitimacy[51]. If the scope rules of a convention determine that a stage of a carriage contract is covered by the convention whether the contract involves more than just the mode of carriage primarily targeted by the convention or not it is, or should be, impossible for non-uniform influences, such as national laws or national views, to gainsay this. Due to the lack of a uniform multimodal regime and the generally accepted view that the multimodal contract is a mixed contract the network approach is therefore the only legitimate approach when it comes to the applicability of the existing carriage conventions[52]. Nevertheless, a possible future multimodal convention may incorporate other approaches such as the uniform or the modified methods. Since these last mentioned approaches are likely to give precedence to other rules of law than those found in the possible equally applicable unimodal carriage conventions these methods of determining the applicable law can only be legitimately applied if they are based on a regime of uniform law themselves, such as a new convention[53].

[49] Nasseri 1988, p. 233.

[50] Under Dutch law it is possible to contractually choose to apply the rules of the CMR to such domestic carriage. Such a choice of law causes the rules of the CMR to set aside any of the conflicting rules of the applicable Dutch law based on Article 8:1102 BW. For more information on the possibilities of contractual choice of law see Chapter 10, Sections 10.3.2 and 10.3.3 on the freedom of choice.

[51] For more information on the workings of scope of application rules see Chapter 3, Section 3.4 on the scope of application rules of the carriage conventions.

[52] For more information on the nature of the multimodal contract see Chapter 2, Section 2.3.

[53] More information on the network, uniform and modified approach can be found in Section 1.5 of this Chapter while more information on the status of international law versus national law and the workings of precedence among international regimes can be found in Chapter 3, Section 3.1 and Chapter 9 on the possibility and consequences of conflicts between conventions.

1.3.2 The problems generated by the lack of uniform multimodal carriage law

Because of the lack of an international convention on multimodal carrier liability it is difficult to determine at the outset of a multimodal transport what – international and/or national – law will apply to the contract as a whole or to its various parts. Which regime is deemed applicable depends on a myriad of factors; the nature and the extent of the multimodal contract, which modes of transport have been accounted for in the contract and in what way, what documents have been drawn up, the addressed court's views on the scope of possibly applicable unimodal conventions, *et cetera*.

In shipping this unpredictability may lead to unfair results due to 'inequality of arms', a possible difference in bargaining power of the contracting parties. Where it is unclear which rules apply, standard term contracts – which are on the whole drawn up and issued by the carrier and are thus often favourable to the carrier – potentially gain more leeway. While consignors of large quantities of cargo can negotiate their terms of contract with the carrier, this is not the case for small or medium sized parties. Standard term contracts, which are not subject to negotiation, are obviously prone to abuse by the drafter and as such they raise public policy considerations. Over the past century, mandatory minimum standards of liability were gradually introduced in the form of international conventions governing unimodal transport. Such safeguards are missing in multimodal transport however, since no such agreed international minimum standards are currently in force[54]. Nevertheless, the network approach may cause one or more of the unimodal carriage conventions including compulsory minimum standards of liability to apply to part of the contract.

1.3.2.1 Differing liability regimes

The main problem concerning the unpredictability of the applicable legal regime when it comes to multimodal carriage is financial in nature. Due to the uncertainty as to the applicable law the cargo claimant and the carrier are unable to anticipate the amount of compensation, if any, to be paid in a given situation. Under these circumstances insurance costs tend to double as the same loss is insured via cargo insurance by the consignor or consignee and via liability insurance by the carrier. Obviously these so-called friction costs are deemed undesirable by both parties[55].

The differences in compensation to be paid between one liability regime and another can be staggering. The reason for these variations lies in the fact that carriage law has developed per mode of transport, nationally as well as internationally. Each mode of transport was regulated by its own set of rules from the beginning, but since not all modes of transport evolved at the same time the accompanying legal regimes did not either. Nevertheless, all carriage regimes seem to adhere to certain basic concepts. Examples are the fact that since a carrier promises a certain result he is automatically liable if he fails to deliver this result, unless he can prove there was *force majeure*, and that a carrier who has wilfully misconducted himself or has caused the damage or loss of the cargo with intent is not entitled to invoke the liability limit each of the carriage regimes entails. These carrier liability limits differ per mode of transport, since they are

[54] UNCTAD 2003, p. 10.
[55] For more details on friction costs see Section 1.3.2.2.

specifically tailored to each mode's demands and risks[56]. These monetary limitations were developed in the course of history with the intent to lighten the carrier's burden of risk regarding loss of or damage to the goods given into his care[57]. Because the liability limits reflect the average value of the goods shipped per mode of transport the differences between the various regimes are quite substantial. The limit for road carriage is only half that of rail or air carriage, while in maritime regulations the limits are even up to 8 to 9 times lower than those found in the air or rail transport regimes.

SEA			**INLAND WATERWAY**	**ROAD**	**RAIL**	**AIR**
Hague Rules	Hague-Visby Rules	Hamburg Rules	CMNI	CMR	COTIF-CIM	Warsaw Convention/ Montreal Convention
£ 100/pkg	2 SDR/kg or 666,67 SDR/pkg	2,5 SDR/kg or 835 SDR/pkg	2 SDR/kg or 666,67 SDR/collo	8,33 SDR/kg	17 SDR/kg	17 SDR/kg

Figure 1.2: Overview of liability limits categorized by mode of transport and the international unimodal convention

The carrier liability limitations are not the only area in which there are differences between the modalities. Other differences between the regimes are found in the time bars on protest and litigation, which damages qualify for redress, which court has jurisdiction, rules on carriage documentation, the liability of the carrier for subcontractors and so on. Under the Hague and the Hague-Visby Rules for instance carriers enjoy a far wider array of exonerations than carriers who are bound by the international rules on rail, road or air carriage. The most controversial of the Hague(-Visby) exonerations with respect to carriage by sea is the 'nautical fault'. If the master of the ship or the pilot errs while navigating the vessel and damage to the cargo ensues the sea carrier cannot be held liable. A road carrier on the other hand is liable for any errant steering by the driver of the truck that causes the carried goods to be damaged.

[56] Under most of the current uniform carriage law regimes the carrier is only obligated to compensate the consignor for the entirety of his loss when the carrier intentionally caused the damage or loss or the loss or damage was caused due to wilful misconduct on the carrier's part.

[57] Because the freight rate for valuable cargo was, and still is, higher than that of less valuable goods, since the carrier is exposed to more risk during the transport of valuable cargo, shippers often failed to declare the true value of the goods that were to be carried. If the goods were damaged or lost during the transport this withholding of information was penalized by the obligation for the shipper to pay a fine in the form of the evaded freight and the extinction of his rights to claim compensation for his loss. In order to prevent such a steep penalty a shipper was therefore well advised to limit his claims for compensation to the declared value of the cargo. Due to the ever increasing volumes of cargo to be shipped this declared value was at some point abstracted from the actual value of the cargo. For a more detailed description of the development of the carrier liability limits see Basedow 1987, p. 408 *et seq*.

1.3.2.2 Friction costs

The current fragmented and complex legal framework creates uncertainty, which in turn generates friction costs. From a legal perspective only those friction costs are relevant that would have been avoided had the law been optimal. Concerning multimodal carriage these costs entail unnecessarily high insurance premiums, doubled up insurance and comparatively high litigation costs resulting from extended and complicated legal proceedings[58]. For developing countries, and for small and medium size transport users particularly, the concern generated by the mentioned friction costs is considerable. Without a predictable legal framework, equitable access to markets and participation in international trade is much harder for small or medium players[59].

It has been said that the balance between cargo insurance and carrier liability insurance is the key factor in maintaining a workable system in a setting in which such uncertainty flourishes. In international multimodal transport it is common for both the shipper as well as the carrier to insure the risk of cargo damage or loss. Shipper's insurance is typical in international multimodal transport partly because of the uncertainties and lacunae in the recovery options. In case the carrier can be held liable it is therefore generally the shipper's insurance company that attempts to regain the funds it has paid to compensate the shipper from the carrier instead of the shipper himself. Where the liability of the carrier is in dispute or uncertain the resolution of financial responsibility for damage or loss normally becomes a matter for negotiation and settlement between the underwriters of both contracting parties[60]. According to the European Commission the harmonization of conditions such as a uniform liability limit for all modes could yield savings in friction costs of up to 50 million Euros per annum[61].

The reality is that, according to a survey held by the UNCTAD in 2003, most parties involved in the transport industry do not consider the existing legal framework for multimodal transportation to be satisfactory or even cost-effective[62].

1.3.2.3 Unlocalized loss

Unlocalized loss is a problem typical for multimodal transport. When the term 'loss' is used in the terms 'localized loss' or 'non-localized loss' it refers to the actual loss of the goods as well as to damage to the cargo or even just to its delay. It is at times used as a generic term for any diminution of the value of the carried goods[63]. Such loss is unlocalized when the stage where it was caused cannot be determined. The occurrence of unlocalized loss severely complicates the

[58] Although the representatives of the insurance industry confirmed that difficulties in obtaining liability cover for multimodal transport operators (MTOs) usually do not exist, this situation appears to be quite different for transport operations to and from developing countries and regions without any or clear legislation in this field. Uncertainty with regard to the applicable legal rules in these cases seems to lead to higher transport prices as a result of higher insurance premiums. UNECE, Inland Transport Committee, Working Party on Combined Transport, "Possibilities for reconciliation and harmonization of civil liability regimes governing combined transport", results of two expert group meetings ("hearings") on civil liability regimes for multimodal transport, Thirty-fourth session, 4-6 September 2000, agenda item 8, p. 5.

[59] UNCTAD 2003, p. 10.

[60] Driscoll & Larsen 1982, p. 198.

[61] EC, 'The economic impact of carrier liability on intermodal freight transport', London: IM Technologies 2001, the document can be found at ec.europa.eu.

[62] UNCTAD 2003, p. 10.

[63] It is also known as non-localized loss, concealed loss or unattributed loss. The term concealed loss is used in Selvig *et al.* 1980 and in Glass 2004. The term unattributed loss is used in Kindred & Brooks 1997.

determination of the applicable legal regime. When tackling the difficulties engendered by unlocalized loss the lack of fitting international regulation concerning carrier liability under a multimodal carriage contract becomes obvious. Liability varies in terms of incidence and extent depending on the applicable regime, and which regime that is depends, in turn, on during which stage of the transport the loss was caused. Thus, if the loss cannot be attributed to one of the transport stages none of the unimodal carriage conventions will govern the ensuing claim for redress, except under a few very specific circumstances[64]. If no uniform law applies then the national law applicable needs to be determined. This is generally the national law applicable to the contract[65]. Not many national regimes contain rules on multimodal transport however. In Europe only the Dutch and German legislations include rules specifically designed for multimodal carriage[66], and even if either German or Dutch law applies to the contract this does not mean that everything is easily resolved. In March of 2006 for example the *Bundesgerichtshof* (BGH), the German Federal Supreme Court, judged a case involving 13 different incidents of unlocalized loss[67]. Every time the goods, mostly computer parts, were carried by road from the carrier's depot in Germany to the airport in Brussels, from where they were subsequently shipped to the United Kingdom or other destinations overseas. To three of these incidents the old law of before the '*Transportreformgesetz*' (TRG) which introduced rules on multimodal carriage into the German legislation applied, which meant they were governed by the CMR since the CMR, of all possibly applicable regimes, entailed the strictest liability regime[68]. The other 10 incidents occurred under nearly identical circumstances but were governed by §§ 407 through 450 of the German Commercial Code, the *Handelgesetzbuch* (HGB) instead, since these apply according to the current legislation – § 452 HGB to be specific – to situations involving unlocalized loss.

It hardly needs explaining that in situations which involve localized loss the parties are far better able to predict which legal regime the court addressed will deem applicable and the consequences this regime has in store for them regarding the liability of the carrier.

1.3.2.4 Prescription

One of the characteristics of carriage law is that claims are generally time barred after a relatively short period. Because of this brevity – prescription periods vary approximately from 9 months in some popular contractual standard terms to 3 years in certain uniform carriage regimes – it is important to determine at which point in time said period starts[69]. This is not always easy

[64] When the carriage contract involves both road and air carriage, an air carriage convention may apply even in situations of unlocalized loss based on Article 18(3) WC or Article 18(4) MC. For more details see Chapter 5, Section 5.3.3.1 on unlocalized loss under the air carriage conventions. Otherwise a choice of law clause in the contract may cause a convention to apply indirectly or perhaps the national law applicable to the contract refers to a convention.

[65] Rb Rotterdam 3 May 2006, *S&S* 2007, 114; OLG Hamburg 16 May 2002, *TranspR* 2002, p. 355-357; BGH 29 June 2006, *TranspR* 2006, 466-468; BGH 22 February 2001, *TranspR* 2001, p. 372-375.

[66]The Dutch rules can be found in Articles 8:40 through 8:48 BW and the German rules are found in §§ 452 through 452d HGB. More detailed information on these regimes can be found in Chapter 10, Sections 10.4.1 and 10.4.2.

[67] BGH 30 March 2006, *TranspR* 2006, p. 250-254.

[68] The TRG entered into force on 25 June 1998.

[69] For a more detailed description of the problems generated by the prescription periods in each of the carriage conventions see Chapter 4, Section 4.1.2.5 on the place of taking over and the place of delivery under the CMR, Chapter 5, Section 5.5.1 on timely notice and prescription under the air carriage conventions, Chapter 7, Section 7.2 on the difficulties in applying the CMNI to multimodal contracts and Chapter 8, Sections 8.1.3 and 8.2.3 on the time bar on actions under the current sea carriage conventions.

when the carriage resulting in the loss was multimodal. An example of questions that may arise in this area is given by the *Rechtbank* Haarlem in 1999 concerning the carriage by road and air of fresh flowers from Miami (USA) via London (United Kingdom) to Amsterdam (The Netherlands)[70]. Because it was unclear where the heat that damaged the flowers had been generated the *Rechtbank* determined concerning the applicable time bar that:

> "*Since neither the CMR, which applies directly to the road carriage between London and Schiphol, nor the Warsaw Convention provides for the situation in which more than one time bar may potentially be applicable, Article 8:1722 BW which does provide for such situations applies as Dutch law applies to the rest of the contract.*"[71]

Since the loss was unlocalized in this instance, Article 8:1722 BW – or *Burgerlijk Wetboek*, the Dutch Civil Code – would have applied as part of the (Dutch) law applicable to the contract by any means, simply because neither the Warsaw Convention nor the CMR could apply to the unattributed loss[72]. When the loss can be localized however this is not an end to the problems pertaining to the prescription period. If for instance the Warsaw Convention had applied to the claim for compensation brought before the *Rechtbank* Haarlem, there would still be the question as to when the prescription period had started. Should it have started after the air carriage stage was completed? Or did it commence only after the entire multimodal carriage ended? Our sense of justice may determine the latter as the consignee can only establish whether the goods are in such a condition that a claim for recompense is warranted after the entire transport has ended. As a result another question needs to be answered, which is whether or not the prescription rules of the Warsaw Convention, or those of the other carriage conventions, allow for such a reasonable approach.

1.3.2.5 Conflicts between applicable regimes

Problems also arise when two legal regimes apply concurrently. Due to the many provisions in the uniform carriage conventions which regulate special types of multimodal carriage such as Article 2 CMR, Article 2 CMNI, Article 1(3) and (4) COTIF-CIM and Article 18(4) MC, the concurrence of more than one system of uniform law is by no means unlikely in multimodal carriage. As there are no rules tailored to multimodal carriage that establish which of the applicable uniform regimes should be granted precedence, these situations have the potential to become legally challenging[73].

1.4 Past attempts to regulate international multimodal transport

Because freight forwarders began to take on the responsibilities of carriers more and more frequently the framework of unimodal carriage conventions caused the need for uniform

[70] Rb Haarlem 6 July 1999, *S&S* 2000, 88. The judgement is also considered in Chapter 10, Section 10.1.2 in relation to the gaps in uniform carriage law.

[71] "*Aangezien noch de CMR, die ingevolge art. 1 lid 1 CMR rechtstreekse werking heeft op het wegvervoer over het traject Londen-Schiphol, noch het Verdrag van Warschau een regeling geven voor het geval bij gecombineerd vervoer meer verjaringstermijnen voor toepassing in aanmerking komen, geldt, nu op de vervoerovereenkomst overigens Nederlands recht van toepassing is, art. 8:1722 BW, dat zulk een regeling wél kent.*"

[72] Book 8 of the Dutch Civil Code encompasses all Dutch transport legislation.

[73] For a more detailed analysis of this problem and its consequences see Chapter 9.

legislation on multimodal transport to be felt at the onset of the previous century. A need that was enhanced by the container revolution of the 1960's, but not created by it[74]. The oncoming reality of multimodal carriage led to a desire to simplify transport documents in order to make them usable for more than one mode of transport and to ensure that the shipper or consignee could pursue a claim against one responsible party rather than against the several actual carriers that were involved in the performance of the carriage[75].

During its 1911 and 1913 conferences the *Comité Maritime International* (CMI) devoted some attention to the subject of through carriage. These resulted in the *Code international d'affrètement* which regulated multimodal carriage insofar as it included a sea leg. This proposal was rejected however on the basis that it would lead to a total eclipse of through transport if the last carrier were to be burdened with the liability for the entire transport[76].

After a short period of calm the *Institut international pour l'unification du droit privé* (UNIDROIT)[77] started work on a multimodal regime in the 1930's but legislation in this area was not really considered a priority until after the introduction of container transport on a large scale. The result of UNIDROIT's work were the Bagge Draft in 1948 and a draft containing a pure network system in 1961 inspired by the CMR which, with some modifications, was transformed into the UNIDROIT Draft in 1965. In its wake the CMI decided to start a thorough investigation into the legal problems surrounding multimodal carriage. Based on the replies to a questionnaire a series of draft conventions were designed, which ultimately resolved into the Genoa Draft Convention in 1967 and the Tokyo Rules in 1969. Although they were only a few years apart in the making the UNIDROIT's 1965 Draft and the CMI's 1969 Tokyo Rules differed in many respects. While the UNIDROIT Draft was based on the international road carriage law of the CMR and governed combined transport of goods by containers, the Tokyo Rules followed the maritime liability regime of the Hague Rules and again governed only combined transport involving a sea leg[78]. Both the CMI's Tokyo Rules and the UNIDROIT Draft were considered during a round table meeting convened by UNIDROIT in 1970 which resulted in the adoption of a reconciliation of both regimes named the Draft Convention on the International Combined Transport of Goods, or the Rome Draft of 1970. The 1970 draft in turn was the subject of discussions and negotiations at joint meetings of the ECE and IMCO, which resulted in yet another draft convention; the TCM Convention of 1972. In spite of long years of preparatory work this draft suffered the same fate as its many predecessors as it failed to mature beyond the proposal stage. This failure has been attributed to the fact that the TCM Draft contained dispositive law and failed to express a consensus as to which liability regime should be the basis of the future convention since it contained both a proposal for a network approach as well as a proposition for a uniform liability system. Nevertheless, the largest problem seemed to be the opposition of developing countries[79].

[74] For an overview of the development of the container see Mercogliano 2006. See also Broeze 1998.
[75] Faghfouri 2006, p. 96.
[76] De Wit 1995, p. 148. For a detailed overview of the attempts to create uniform multimodal carriage law, information on the contents of the various drafts and the reasons for their failure, see De Wit p. 147-183.
[77] The International Institute for the Unification of Private Law.
[78] Faghfouri 2006, p. 96.
[79] Loewe *ETL* 1975, p. 591.

1.4.1 The United Nations Convention on the Multimodal Transportation of Goods

Although set back for a while due to the failure of the TCM Draft the attempts to create a convention on multimodal carriage resumed in fairly short order. The developing countries opposing the TCM regime were invited to express their objections and further studies on several aspects of multimodal transport were to be carried out by the UNCTAD in order to continue the efforts on the multimodal plane[80]. Several more years of negotiations for a new instrument within an International Preparatory Group created by UNCTAD ensued. Only when the Hamburg Rules were concluded in 1978 did the drafting process take a turn for the better. The Hamburg Rules were used as a template from which the multimodal regime only deviated where it was necessary to include specific provisions for multimodal transport[81]. The resulting convention concluded on 24 May 1980 was named the United Nations Convention on the Multimodal Transportation of Goods, or the MT Convention (MTC). Although this Convention – like all previous efforts – never made it to the finishing line, at least it came very close.

The MT Convention entails a mandatory uniform carrier liability system which envisages the issuance of one transport document for the entire transport and for the liability of the MTO, the multimodal transport operator, to cover the whole period during which he is in charge of the goods. But even though the deliberations on the Convention were attended by representatives of more than 80 States, 15 specialized agencies and intergovernmental organizations and 11 non-governmental organizations, and the Final Act of the Conference was signed by approximately 70 States, including many of the major shipping countries, it still failed to enter into force due to an insufficient number of ratifications[82].

One of the reasons for this turn of events could be that the required number of needed ratifications for its entry into force, which was 30, was particularly high. Another reason for the identified lack of support, especially from the industrialized western countries, is the fact that the convention is closely associated with the Hamburg Rules, which were not considered especially carrier friendly. In particular, three factors can be highlighted as giving rise to concern among the carrier interests in lieu of their liability. The first of these is the basis of liability of the MT Convention, which is modelled after the Hamburg Rules, rather than after the Hague-Visby Rules[83]. The second inhibiting factor was the monetary limitation of liability offered, which was considered too high by some[84]. Under the MT Convention, the liability of the MTO is uniform for both localized and non-localized loss, but, in cases of localized loss the liability limitation is determined by reference to any applicable international convention or mandatory national law which provides a higher limit of liability than that of the MT Convention according to Article 19 MTC. The basic limits of liability set out in the MT Convention are 2.75 SDR per kilogram of damaged or lost cargo, or 920 SDR per package. Yet, for contracts which do not include carriage of goods by sea or inland waterway, the CMR limit of liability of 8.33 per kilogram was adopted[85]. The third factor alleged to have contributed to the failure of the MTC concerned the uniform liability of the Convention. This approach gave rise to concerns in relation to recourse actions by the MTO against a subcontracting unimodal carrier and to introduce mandatory

[80] The UNCTAD promotes the development-friendly integration of developing countries into the world economy. See www.unctad.org.
[81] De Wit 1995, p. 164.
[82] Faghfouri 2006, p. 97.
[83] Both the sufficiently ratified CMR and COTIF-CIM Conventions have similar liability bases.
[84] It was considered too high despite the fact that it was only 2,75 SDR/kg instead of the 2 SDR/kg of the Hague and Hague-Visby Rules if the transport included a sea or inland waterway leg.
[85] UNCTAD 2003, p. 18.

liability levels in relation to transports otherwise not subject to mandatory law (for instance road and rail transport not covered by the CMR or COTIF-CIM Conventions).

On the other hand, a much simpler reason for the failing of the Convention can also be pointed out. It may just have been the fact that almost 30 years ago the market share of multimodal transport was much less significant than it is currently and that therefore the timing of the MT Convention was somewhat unfortunate. All in all, it seemed the shippers were uncertain as to the benefits the Convention might offer them, while the maritime industry offered resistance and resorted to adverse lobbying, neither of which heightened the chances of the Convention.

1.4.2 The Rotterdam Rules

The most recent addition to the list of uniform multimodal carriage regimes is the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, also known as the Rotterdam Rules (RR), which was signed in Rotterdam on 23 September 2009. This Convention started out as a draft meant to uniformize the legal aspects of sea transport. But although it may originally have been an attempt to unify no more than sea carriage, it currently encompasses contracts for multimodal carriage as well, provided that one of the stages of the transport concerns carriage by sea. The concept of dealing with multimodal carriage from a maritime point of view is not a new one; the CMI offered proposals to this end before. This is hardly surprising as the multimodal quandary particularly rears its ugly head when it comes to sea carriage. Sea carriage by itself is generally not suited to transport goods from door-to-door. Most destinations simply cannot be reached by sea, so the goods are often transferred to another means of transport when they reach the port to complete the carriage. As a result a significant part of the contemporary sea carriage is performed under multimodal transport contracts[86].

The Convention's carrier liability is in principle a uniform one; all carriage is to be governed by the maritime regime of the Convention, unless the carriage stage in question falls within the range of one of the exceptions. This system of exceptions is qualified as the 'limited network' approach. The result is that non-sea carriage stages may partly be governed by the rules of conventions that provide mandatory rules on carrier liability specifically tailored to the type of non-sea carriage of the transport stage in question.

Due to its 'maritime plus' nature the new regime is likely to offer some difficulties fitting in with the existing uniform carriage law. Because the scopes of the existing unimodal carriage conventions cause them to apply to – certain parts of – multimodal carriage contracts as well conflicts may ensue if the Rotterdam Rules enter into force. The Rules contain a number of Articles intended to prevent such conflicts, one of which is the Article embodying the limited network approach, but the question is whether these are sufficient.

[86] By May 2008, the world containership fleet had reached approximately 13.3 million twenty-foot equivalent units (TEUs), of which 11.3 million TEUs were on fully cellular containerships. This fleet included 54 containerships of 9,000 TEUs and above, which were operated by five companies: CMA-CGM (France), COSCON and CSCL (both from China), Maersk (Denmark) and MSC (Switzerland). World container port throughput grew by an estimated 11.7% to reach 485 million TEUs in 2007. Chinese ports accounted for about 28.4% of total world container port throughput. *UNCTAD Review of Maritime Transport,* 2008. It is estimated that most containerized cargo involves transportation by more than one mode before reaching its final destination. In particular the first and the last leg of any door-to-door transaction usually involve transportation by another mode, such as road or, to a lesser extent, rail. See UNCTAD 2003, p. 4.

1.4.3 UNCTAD/ICC Rules for Multimodal Transport Documents (URM)

Since no international uniform law regime has been able to make it to operant status, contractual standard rules, such as the ICC Uniform Rules for a combined transport document (URC), have flourished. This set of contractual standard rules is based on the Tokyo Rules and the TCM Convention. They have gained worldwide recognition and have been incorporated in several widely used standard transport documents such as the FIATA combined transport bill of lading and the BIMCO/INSA Combidoc[87]. In 1992 they were replaced by another set of successful contractual provisions for multimodal transport documents; the UNCTAD/ICC Rules, which are based on the Hague Rules and the Hague-Visby Rules as well as existing documents such as the FBL and the ICC Uniform Rules. The UNCTAD/ICC Rules can be said to be a merger between the URC and the MT Convention. The URM demonstrate a remarkable change of heart by the ICC however, since the URC were based on a network system, whereas the new amalgamated URM are uniform[88]. This standard set of contract rules attempts to fill the gap in the field of international multimodal transport liability legislation that was to have been filled by the MT Convention. They have also been incorporated in widely used multimodal transport documents, amongst which the FIATA FBL 1992 and the BIMCO Multidoc 95.

Although these Rules give the impression of simplicity they lack the stature of mandatory international legislation. They cannot set aside the compulsory rules of international conventions. The result is remaining uncertainty in terms of liability and legal position[89]. The Rules apply when they are incorporated into a contract of carriage, in whatever form this is made, in writing, orally or otherwise, by reference to the 'UNCTAD/ICC Rules for multimodal transport documents'. Whether this is a unimodal or a multimodal transport contract or whether a document has been issued or not is of no consequence. The Rules only cover part of the customary contents of a multimodal transport contract. Thus, a multimodal carrier wishing to use the Rules as a basis for his multimodal transport contract would have to add other clauses dealing with matters such as jurisdiction, arbitration and applicable law, to satisfy his particular needs. Such additions could, of course, also be made with respect to matters covered by the Rules, but only to the extent that they are not contradictory thereto[90]. This flows from Rule 1.2 which reads:

> "*Whenever such a reference is made, the parties agree that these Rules shall supersede any additional terms of the multimodal transport contract which are in conflict with these Rules, except insofar as they increase the responsibility or obligations of the multimodal transport operator.*"

Similar to the MT Convention, specific provisions on limitation of the liability of the multimodal carrier are included for cases of localized loss. In such a situation the limits of liability are determined according to Rule 6.4, by reference to any applicable international Convention or mandatory national law, which would have provided a different limit of liability, had a contract

[87] FIATA is the acronym for the International Federation of Freight Forwarders Associations and BIMCO is the acronym for the Baltic and International Maritime Council.

[88] The UNCTAD did not have a change of heart; the MT Convention made use of a uniform liability system.

[89] UNECE, Inland Transport Committee, Working Party on Combined Transport, "Possibilities for reconciliation and harmonization of civil liability regimes governing combined transport", study of the economic impact of carrier liability on intermodal freight transport, executive summary transmitted by the European Commission, Thirty-seventh session, 18-19 April 2002, agenda item 9, p. 6.

[90] The UNCTAD/ICC Rules for Multimodal Transport Documents can be found at www.forwarderlaw.com.

been made separately for that particular stage of transport. The limits of liability set out in the UNCTAD/ICC Rules correspond to those in the Hague-Visby Rules (as amended in 1979), being 2 SDR per kilogram or 666.67 SDR per package, but for contracts, which do not include carriage of goods by sea or inland waterway, the CMR limit of 8.33 per kilogram has been adopted. As such these limits are lower than those of the MT Convention. In relation to carriage which includes a sea or inland waterway stage, the carrier is also entitled to rely on certain liability exceptions which have been modelled after the Hague-Visby Rules.

As long as there is no international regime regulating multimodal transport the transport sector will make use of these kinds of contracts to negate as much of the uncertainty concerning the applicable legal regime as possible. That this system seems to be working to a large extent can be deduced from the fact that there are some experts who suggest that there is no need for a new regulatory system, since the existing private law arrangements are satisfactory[91]. Logic tells us however, that a new system would be more effective since contractual rules such as the UNCTAD/ICC Rules do not set aside any mandatory arrangements and thus the uncertainty regarding the legal regime that applies is not lifted entirely. What is more, contractual provisions such as paramount clauses choosing a certain regime as the law applicable to the contract may even enhance the confusion.

1.5 The possible forms of a new regime

The past attempts to create an international instrument regulating multimodal transport incorporated different means to fit in with the existing profusion of international and national transport arrangements. The two main alternatives are known as the network approach and the uniform approach. Due to the extremity of the consequences when these opposites are implemented in their pure form, most of the past efforts to create a treaty contained a compromise[92]. This compromise is appropriately called the modified approach.

1.5.1 The uniform system

The objective of any new international convention should be to unify or harmonize and simplify the existing law on the subject it intends to regulate. Had there been no international framework of unimodal carriage conventions in existence, this objective would undisputedly have been best served by a uniform liability regime where multimodal transport is concerned[93]. A uniform liability system subjects the entire multimodal transport contract to the same rules of liability, irrespective of the modes of transport that are actually used to perform the carriage. In a pure uniform liability system, the same set of rules applies irrespective of the stage of transport during

[91] UNECE, Inland Transport Committee, Working Party on Combined Transport, '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, Thirty-third session, 10-11 April 2000, agenda item 11, p. 9.

[92] Just about all regimes that have been devised over the years, whether they were implemented or not, are of a modified nature. In some systems the emphasis is on the uniform characteristics, like in the MT Convention, and in some, such as the Dutch national multimodal regime, the network approach is more prominent, but in essence most systems are a combination of both. The denomination modified system covers the whole range of possibilities between a pure uniform and a pure network approach.

[93] De Wit 1995, p. 143.

which loss, damage or delay occurs[94]. The result is that unlocalized loss is equally governed by such a system.

As an example of a largely uniform approach the Genoa Rules of 1967 can be cited. Other attempts at regulation that have a uniform basis such as the MT Convention all incorporate one or more network oriented provisions. It has been said of the MT Convention that it has a 'modified' uniform basis since Article 19 MTC applies the network approach, but only in relation to the monetary liability limitations[95].

The most prominent advantage of this type of liability system is its simplicity and transparency, as the applicable liability rules are predictable from the outset and do not depend on identifying the modal stage where a loss occurs[96]. A regime for multimodal carriage based on the uniform approach would thus contribute greatly towards the harmonization of the field of international carriage law if it were feasible. However, due to the fragmented nature of the field of international carriage law, such a uniform regime – whatever its contents – would encounter a serious impediment in the form of the existing legal framework. The existing transport regimes have, thus far, proven to form an insurmountable obstacle. A uniform system will unavoidably collide with them[97]. Such a conflict of conventions, which occurs when two conventions are both compulsorily applicable to a certain loss and this leads to irreconcilable results, is rather undesirable. Resolving which convention should be given precedence under these circumstances is difficult, plus defaulting on the obligations presented by one of the regimes becomes inevitable.

Furthermore, in view of the continued existence of the diversity of unimodal liability regimes which contain different rules pertaining to the basis of a carrier's liability and the extent thereof, two main concerns may rise from the point of view of the multimodal carrier. First, there is the concern that a carrier's liability exposure would increase in comparison with the current situation. If uniform rules apply irrespective of the transport stage during which loss of or damage to the carried goods occurs, a carrier would no longer be able to take advantage of potentially less burdensome liability rules which may otherwise apply to the particular mode of transport during which the cargo problem occurs.

Secondly, there is the problem of the recourse gap. Where the multimodal carrier would be held accountable by the cargo claimant under the uniform rules applicable to the multimodal contract between them, any subcontracting carrier actually performing the stage of the transport where the loss occurred is bound only by the unimodal rules applicable to the (sub)contract between him and the multimodal carrier. This regime applicable to the contract between the multimodal carrier and the performing subcontracting carrier may very well be less onerous than the uniform regime the multimodal carrier is bound by. Consequently, the multimodal carrier would be liable for a higher amount of damages than he can recover from the subcontracting carrier. This creates what is called a recourse gap[98]. Therefore the uniform liability system, while potentially best suited to the needs of the transport user, tends to meet with resistance from the transport industry. Any debate considering the adoption of a uniform liability system would need

[94] Haak 'harmonization' *ETL* 2004, p. 41.
[95] Van Beelen 1996, p. 39 and fn. 59.
[96] UNCTAD 2003, p. 16-17.
[97] Koppenol-Laforce (ed.) 1996, p. 236.
[98] Due to the existence of liability insurance the carrier is not necessarily the party burdened with the entire recourse gap. However, not all liability insurance contracts cover the recourse gap. See Claringbould *Weg en wagen* 2005.

to address potentially conflicting interests by formulating mutually acceptable rules on liability and limitation of liability[99].

Another side effect of the uniform liability system is that it establishes a difference of treatment which is unavoidable – one could even say that it is the system's main objective; to serve as an alternative to the diversity of the unimodal regimes – but nonetheless it is somewhat illogical. According to whether the goods have been carried under the banner of a multimodal contract or a unimodal one, compensation for their loss would be governed by different regimes[100]. The remarkable result of the application of a uniform liability regime for multimodal carriage contracts would be that although identical losses may be suffered under a multimodal as well as under a unimodal carriage contract in nearly identical circumstances, the losses would be subject to different liability regimes, simply because the scope of the transport agreements concluded is different. Thus, loss which occurs during rail carriage from Milan in Italy to Stuttgart in Germany would be governed by the rules of the COTIF-CIM if the contract were unimodal, but if the goods were meant to be carried by road from there to Gerlingen in Germany under the same contract the uniform multimodal transport rules would apply to the loss.

1.5.2 The network system

Due to the vacuum in uniform law concerning the multimodal transport contract, courts of law currently tend to determine the liability of the multimodal carrier based on the international or national unimodal liability rules relevant to the stage of the transport to which a particular loss can be attributed[101]. This system is called the network liability system. This system 'knits' different liability regimes together, which creates a colourful patchwork in a variety of legal hues[102]. The operative consensus seems to be that, unlike the uniform system, the pure form of this system can be applied without an international multimodal carriage convention being needed to provide it with legitimacy[103]. The reason for this is that under the pure network system only those regimes are applied that according to their own scope of application apply to the loss[104].

A network system is not a structure which provides substantive or 'material' rules of its own; it merely links existing sets of substantive rules. Under a network based regime the multimodal transport agreement is divided into parts, one part per transport mode incorporated in the contract. The law applicable to each separate stage is determined as if it were a separate contract, concerning only that type of transport. Thus the multimodal contract becomes a chain of different regimes. In other words, different regimes may apply to the separate parts of the journey as if the involved parties had drawn up separate contracts for each of them. As a result no recourse gaps ensue; when loss can be attributed to a certain stage of the contract, the same

[99] Extracts from the UNCTAD Report on Multimodal Transport, 3 March 2003, www.forwarderlaw.com.

[100] Racine 1982, p. 223-224.

[101] Van Beelen 1996, p. 35; Clarke *JIML* 2003; Xerri 1980, p. 139-140.

[102] The network system is also known as the '*sytème réseau*' or the 'chameleon' system. The term chameleon perfectly describes the changing of the applicable legal regime depending on the environment the transported goods are in. The term 'network' was coined by Kaj Pineus, Chairman of the CMI working group that drafted the Genoa Rules. See Van Beelen 1996, p. 34.

[103] De Wit 1995; Haak 'harmonization' *ETL* 2004, p. 41. See also Koller 2003, p. 45-50; Van Beelen 1996; Glass 2004; Asariotis *et al.* 1999; Diamond 1988.

[104] A derivative of the pure network system is the network approach in which the rules are applied to the loss that would have applied to the stage of carriage where the loss occurred if a contract had been concluded for that stage of the carriage alone. Such a fictional contract as the basis for the rules that are to be applied in multimodal carriage can be found in the German legislation on multimodal transport (§ 452a HGB) and in the new Rotterdam Rules (Article 26).

rules apply to the loss under the multimodal contract between the consignor and the multimodal carrier as under the subcontract between the multimodal carrier and the subcontracting actual carrier. Consequently, the amount of compensation for which the multimodal carrier is liable does not exceed that for which he is able to exercise a right of recourse against a subcontracting actual carrier.

When a new convention is fitted with a pure network system there is no need to go through the extensive deliberations and lobbying required to attain consensus on a liability regime. In such a convention it will suffice to declare that the appropriate regulations regarding the modes of carriage employed are applicable[105]. By refraining to introduce an entirely new liability regime possible conflicts with the existing legal framework are avoided[106]. An added benefit is that in this manner no mandatory regime is created for those areas that have enjoyed freedom of contract until now[107]. While another of its positive points is the flexibility of the network system; if one of the existing unimodal regimes is amended there is no need to change the operative network system for the amendments to come into force *vis-à-vis* multimodal contracts[108]. Other minor positive aspects of such a regime might be that a pure network system would not generate new risks for insurance companies to cover and should not engender extra litigation expenses concerning disputed interpretations of the new system.

Regrettably, the network system also includes shortcomings besides the mentioned virtues. One of these drawbacks is the multicoloured and somewhat disordered image the variation of the applicable regimes engenders. Between the assorted unimodal regimes there are not only differences concerning the carrier's liability or the extent thereof, but there is also differentiation between other issues such as the time bars for litigation, compensation for delay of the goods and so on. As a result it becomes quite important to determine during which stage of the carriage the loss has occurred, and who is burdened with the onus of proof in this matter. A pure network system is not equipped to regulate situations in which the transport stage where the loss of or damage to the goods occurred cannot be identified. As has already been mentioned above, these cases of unlocalized loss are plentiful under multimodal contracts. They seem to be a natural consequence of the use of containers. How can one be sure when and where a loss occurred if the container is stuffed, closed and sealed at the starting point of the journey and is only opened up again at the time and place of the final delivery? Ascertaining where the loss came about is often a laborious process involving expertise, contra-expertise and the deposition of witnesses.

Other situations that make it difficult to establish the applicable legal regime under the auspices of the pure network system are those where the damage to the goods has occurred gradually, spread over more than one transport mode. But still the problems do not end there. The transition areas, the places where the regimes are stitched together, cause difficulties as well. When exactly for instance does the sea stage end? Is storage in the port area accessory to the carriage, is it in other words absorbed by the carriage contract, or is it perhaps a part of the contract that is not covered by transport law at all[109]? And what to think of the unfortunate court of law that is charged with the task of determining the appropriate legal regime when the damage to the cargo has been caused by one subcontracting carrier but has been aggravated by another

[105] For an example see Article 8:41 of the Dutch Civil Code which determines that*:* "*Bij een overeenkomst van gecombineerd goederenvervoer gelden voor ieder deel van het vervoer de op dat deel toepasselijke rechtsregelen.*" Which translates as: "In a contract of multimodal carriage, each stage of the carriage is governed by the legal rules applicable to that stage".

[106] Van Beelen 1996, p. 36.

[107] Schadee 1970, p. 540.

[108] Van Beelen 1996, p. 36.

[109] Drews 2004; Herber 2005.

subcontractor during a different transport stage? Cumulative damage – damage with subsequent causes – can thus create the dilemma of two or possibly even more regimes applying compulsorily to the same loss[110]. The key to sorting out these challenging circumstances may be found in the determination of what amount of the total damage was caused at which stage. If this can be established it may be possible to treat the 'portions' of the loss separately, each according to the regime relevant to the transport stage where it originated. Nevertheless, if the loss in question was not merely of a cumulative nature but was caused by collaborating conditions originating in different stages of the transport matters become rather more complex[111].

The last downside of the network system to be mentioned here is the fact that although the 'chameleon' system changes legal 'colour' with every transport stage there are issues that are better tied to the entire agreement than to a single stage. Examples are the time bar for actions and the time bar on the notice of damage. If these are attached to the stage where the goods were damaged and this was not the last stage of the carriage then the already brief period the cargo interests have to give notice of damage or start legal proceedings is unfairly and unreasonably shortened even more. The question is whether the legal regimes that may apply to the stage where the damage occurred allow that these time bars commence at the end of the entire transport instead of at the end of the transport stage they govern.

Thus, the application of a pure network system evidently leads to an assortment of problems, as is evidenced by the accumulated amount of case law dealing with these matters. Unfortunately this case law does not provide us with consistent answers to the questions the pure network leaves open; decisions concerning identical situations vary, not only between courts in different States but sometimes even between courts within the same country[112].

1.5.3 The modified system

The modified system is a compromise between the uniform and the network system which tries to combine the best elements of both. A modified liability system essentially seeks to provide a middle-way between the uniform and the network approach. Various arrangements are possible, making a system more uniform or more network oriented. In practice a great deal of use is being made of this kind of system in the form of contractual standard rules like the UNCTAD/ICC Rules.

The potential advantage of the modified approach is that it may effectively provide a workable consensus, taking into account conflicting views and interests. In addition, a well-drafted modified system could at the very least alleviate the problems concerning unlocalized loss inherent to a pure-network approach, for instance by incorporating a provision such as Article 8:43 BW, which causes whichever of the possible regimes to grant the highest amount compensation to govern the carrier's liability.

The potential disadvantage of a modified system on the other hand, is that application of its provisions may be complex and that it may fail to appeal widely, as it provides neither the full benefits of a uniform system, nor fully alleviates the concerns of those who favour a network

[110] Racine 1982, p. 223-224.

[111] For an elaboration on the subject of collaborating causes see Van Huizen 1998.

[112] For example Rb Rotterdam 28 October 1999, *S&S* 2000, 35 (*Resolution Bay*) and Rb Maastricht 28 May 2003, *S&S* 2004, 57. These courts differed in opinion on what can be considered the place of taking over of the goods under a multimodal contract of carriage. For a more detailed discussion on this subject see Chapter 4, Section 4.1.2.5, Chapter 5, Section 5.1.1.1 and Chapter 7, Section 7.1.2.

system[113]. Also, it will inevitably incorporate a portion of the drawbacks of both systems, but in all probability not the majority of their advantages. The uniform provisions will most likely still conflict with their mandatory counterparts attempting to regulate the identical subjects in the already existing conventions and the provisions with a network type approach will still lead to confusion in cases of cumulative or collaborating causes of damage.

1.6 Quantum, *a* prima facie *case*

A noteworthy example of the existing confusion surrounding multimodal contracts and the manner in which courts handle this legal jungle are the two instances of the English case known as *Quantum*[114].

In September 1998 an air waybill was issued by carrier by Air France to the claimants, Quantum Corporation. This air waybill provided for the carriage of hard disk drives from Singapore to Dublin by air. However, since the air waybill allowed trucking, parts of the air transport could and were substituted by road transport. Thus, the carriage from Singapore to Paris was performed by air and the carriage from Paris to Dublin was to be performed by road and roll-on roll-off carriage. The waybill ensured that such carriage fell within the terms of the contract by stating on its face:

> "*All goods may be carried by any other means including road or another carrier unless specific contrary instructions are given hereon by the shipper, and shipper agrees that the shipment may be carried via intermediate stopping places which the carrier deems appropriate.*"

It further identified both an Air France flight from Singapore to Charles de Gaulle airport and a trucking service used by Air France to carry goods from Charles de Gaulle to Dublin airport. This shows that the trucking stage was planned by Air France from the beginning.

The trucking leg was performed by Plane Trucking, a regular contractor of Air France. A large number of similar consignments involving the same parties had been carried in the same manner in the past. The goods reached Charles de Gaulle airport in Paris without incident. They were then loaded on to a trailer operated by Plane Trucking for carriage to Ireland. The trailer was shipped across the Channel to England. Unfortunately, during the course of the carriage to Holyhead, the consignment was lost in what transpired to be a fake "hi-jack" in which the truck driver was implicated. The hauler subsequently went into liquidation and its underwriters refused to provide liability cover. Air France admitted liability for the loss, but also argued that the carriage by air subject to the Warsaw Convention ended at Charles de Gaulle airport and that, thereafter, its liability was to be determined by reference to its own terms and conditions. These contained a limit of liability of 17 SDR per kilogram which was more generous than the basic CMR limit of 8,33 SDR per kilogram, but no provision such as Article 29 of the CMR disentitling Air France from relying on that limit in the event of wilful misconduct.

The claimants on the other hand contended that, although there was only one contract of carriage, Air France had contracted not only for the carriage of goods by air to Charles de Gaulle

[113] Extracts from the UNCTAD Report on Multimodal Transport, 3 March 2003, can be found at www.forwarderlaw.com.

[114] *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535-560, with a remark by P. Laurijssen, p. 561-570. For another remark see Koller 2003, p. 45-50. For the initial judgement see *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2001] 2 *Lloyd's Rep.* 133.

airport, but also for their carriage by truck to Dublin, and since Air France's conditions were contractual in nature they were expressly subject to any applicable convention. In this case the claimants considered the CMR to be applicable. Under CMR rules, Air France's liability would – most likely – be unlimited on account of the wilful misconduct of the driver employed by their subcontractor Plane Trucking[115].

In this localized loss scenario the prime question is one of scope; does or does the CMR not apply to a road stage as performed under the contract as concluded by the shipper and the carrier in question? Or looking at the bigger picture, does the application scope of the CMR as mentioned in Article 1 CMR cover stages of international road carriage performed under – or provided for in – a multimodal contract, a contract including other modes of transport besides the road carriage?

This seems an obvious question to start with, since the CMR – like the majority of the international carriage conventions – has no need for intercession by national law to apply to a carriage contract. The CMR's rules are mandatory and it sets aside any inconsistent provisions in the contract or even any incompatible national regulations that may apply. Tomlinson J of the Queen's Bench at first instance determined, when addressing the question whether the CMR applied in the outlined situation, that:

> "*It is a feature of the CMR Convention that, as its full title suggests and as art. 1.1 provides, it attaches to contracts rather than to carriage. (...) Is the contract to which Air France is party a contract for the carriage of goods by road? (...) I propose to address the issue on the basis that this is a single contract for carriage from Singapore to Dublin, that carriage by road from Paris to Dublin was the intended mode of performance when the contract of carriage was made, as evidenced by the manner in which the air waybill was made out, but that Air France was not contractually obliged to carry the goods in that manner, and might if they had so wished have carried the goods on that leg by air. 19. The first question therefore is whether a contract having these characteristics can properly be described as a contract for the carriage of goods by road. In my judgment it cannot. It is a contract predominantly for carriage by air. This conclusion is underpinned by the circumstance that the place of taking over of the goods specified in this contract can only be Singapore. (...) It seems to me that either the whole of the carriage envisaged by the contract must be governed by CMR, or none of it. That as it seems to me is the logic which informs art. 2 of CMR.*"

A very straightforward decision it seems. When asked for their assessment however, the Court of Appeal most decidedly did not agree with Tomlinson's views on the scope of application of the CMR. Mance LJ phrased the Court of Appeal's ideas as follows:

> "*The basic issue that we have to address is, therefore, what constitutes a 'contract for the carriage of goods by road in vehicles for reward' within the meaning of art. 1(1). (...) Two questions present themselves when considering art. 1. The first is to what extent the application of the Convention depends upon a carrier having obliged itself contractually to carry by road (and by no other means). (...) I see no difficulty therefore in concluding that the determination whether there exists a contract for the carriage of goods by road within art. 1 should take into account the actual operation of the contract under its terms. (...) But standardization would be incomplete and potentially capricious, if the application of CMR depended upon whether the carrier could be said to have contracted unconditionally and at the very outset to carry by road. (...) I do not think that either the drafters of CMR or*

[115] See Article 3 CMR; the carrier is responsible for the acts of omissions of his agents and servants and of any other persons of whose services he makes use for the performance of the carriage.

> *participants in the international carriage of goods would regard it as sensible that rights and responsibilities for the long international trucking legs in such cases should depend upon whether a carrier by road does or does not undertake the final sea leg, or, if it does undertake it, upon whether or not it transports the goods on their trailer during it. (…) Thus far, therefore, I see both attraction and force in a conclusion that art. 1 may be read as applying CMR to the international road carriage element of a 'mixed' or 'multimodal' contract providing for two different means of carriage.*"

In support of his views Mance LJ cited various decisions, some of English origin, some hailing from other CMR Member States and several academic writers. The result was apparently convincing to such an extent that both other law Lords, Latham LJ and Aldous LJ, agreed with without further comment.

In The Netherlands, courts of law would also agree with this decision[116]. This is different in Germany however. Although the Court of Appeal cited a decision by the BGH for support, it seems that in Germany the decision by Tomlinson J is currently deemed the more correct point of view.

1.6.1 BGH 17 July 2008

In the summer of 2008, the BGH passed a judgement in a case of which the key issues were very similar to those deliberated in *Quantum*[117]. The question to be answered by the BGH was whether the CMR applied to an international road carriage transport between Rotterdam and Mönchengladbach. If this had been the only carriage contracted for, the answer would have been affirmative. As it was however, the contracted carriage commenced in Tokyo where the shipment of 24 containers stuffed with copiers was loaded on to an ocean going vessel and carried by sea to Rotterdam before the road carriage even started. After the goods were loaded on to trailers for transport to Mönchengladbach in the port of Rotterdam, one of the drivers made an unsuccessful left turn which toppled the trailer and severely damaged one of the containers. Because the waybill 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 Japanese law as the law applicable to the contract, only the applicability of the mandatory rules of the CMR could grant the German court which had been addressed jurisdiction. To this end the *Oberlandesgericht* (OLG) Düsseldorf determined that Article 31(1) CMR granted it jurisdiction since the CMR applies to such claims:

> "*Based on the scope of application of the CMR, which was deliberately chosen to be quite extensive by the Member States of the Convention, the CMR applies to all contracts of carriage when such contracts aim at the carriage of goods by road in vehicles which traverse at least one border and either the place of taking over of the goods or the place designated for delivery, as specified in the contract, are situated in a contracting country.*
> *The defendant and his support rightfully raise the question – supported by the difference of opinion in the literature and the case law of the OLG's – whether Article 1 CMR strictly applies to unimodal contracts which would cause the CMR to be inapplicable when the carriage of goods by road in vehicles which traverse at least one border which was contracted for – as in the case currently addressed by this Court – concerns only one of the stages of a multimodal contract of carriage.*

[116] See Chapter 4 Section 4.1.1 on the applicability of the CMR to road carriage under a multimodal contract.
[117] BGH 17 July 2008, *TranspR* 2008, p. 365-368.

> *The OLG has answered this question in its 18 U 38/00 decision by establishing that the CMR also encompasses such border crossing road transport which embodies only a part of a multimodal carriage contract. In this opinion the OLG persists despite the salient arguments to the contrary made by Koller in TranspR 2003, 45 ff.*"[118]

The BGH, in contrast, was not of the same mind as the OLG. In spite of the rather extensive argumentation of the OLG, the BGH determined that:

> "*This decision cannot remain intact after revision. There is no jurisdiction for German courts under these circumstances since the CMR does as a matter of principle not apply to multimodal contracts of carriage.*"[119]

It seems crystal clear that differences in opinion such as these between the German, Dutch and English courts of law, and even between the courts of these countries among themselves, underline that the law which is applied to a multimodal contract is uncertain at the outset; it depends on which court is addressed and how the scope of application rules of the potentially applicable regimes are interpreted by said court.

A thorough investigation of the existing framework of carriage law, the rules of private international law and the options provided by choice of law based on a contractual condition such as a paramount clause could perhaps bring some clarity in the murky multimodal waters. Thereto these subjects, as well as the exact nature of the international multimodal carriage contract, will be analyzed in the following Chapters of this work.

1.7 Definition of the research problem

1.7.1 Problem statement

After the overview presented above it is obvious that the multimodal carriage contract gives rise to much speculation, especially when it comes to the law applicable to the contract or to the claims resulting from it. Multimodal transport may be very profitable in general, since it reduces transport costs and enhances efficiency, but the current legal framework does not complement the technical progress made in this area. Modern day transport law has no adequate means to create certainty as to the legal consequences of any loss, damage or delay resulting from

[118] "*Nach dem hierin von den Vertragsparteien der CMR festgelegten, bewusst extensiv gewählten territorialen Anwendungsbereich ist die CMR auf alle Beförderungsverträge anzuwenden, wenn der Vertrag auf eine grenzüberschreitende Beförderung von Gütern auf der Straße mittels Fahrzeugen abzielt und entweder der im Vertrag vorgesehene Ort der Übernahme oder der im Vertrag vorgesehene Ort der Ablieferung in einem Vertragsstaat liegt. Die Beklagte und die Streithelferin werfen jedoch – gestützt auf den in Literatur und in der obergerichtlichen Rechtsprechung kontrovers geführten Meinungsstreit – zu Recht die Frage auf, ob Art. 1 CMR nur auf unimodale Transportverträge anzuwenden ist und daher die CMR nicht einschlägig ist, sobald der im Beförderungsvertrag vereinbarte grenzüberschreitende Gütertransport mittels Fahrzeugen auf der Straße – wie im vorliegenden Fall – lediglich eine Teilstrecke aus einem multimodalen Beförderungsvertrag betrifft. Der Senat hat diese Frage in seinem Urteil im Verfahren 18 U 38/00 dahin beantwortet, dass die CMR auch den grenzüberschreitenden Straßentransport erfasst, der lediglich eine Teilstrecke eines multimodalen Frachtvertrages ist. An dieser Auffassung hält der Senat trotz der von Koller in TranspR 2003, 45 ff mit beachtenswerten Argumenten vertretenen gegenteiligen Auffassung fest.*" OLG Düsseldorf 28 September 2005, I-18 U 165/02, www.justiz.nrw.de.

[119] "*2. Diese Beurteilung hält den Angriffen der Revisionen nicht stand. Eine Zuständigkeit der deutschen Gerichte für die Entscheidung des Rechtsstreits besteht nicht, weil die CMR grundsätzlich nicht auf multimodale Frachtverträge anwendbar ist.*" BGH 17 July 2008, *TranspR* 2008, p. 365-368.

multimodal carriage when contracting parties are entering into a multimodal transport agreement. Nor does it seem to offer much clarity after loss has occurred. This is obviously not a desirable trait for a an area of trade law, which is meant to support and stimulate commerce by creating leg certainty. A lower court of law may decide one way, only to have its decision reversed by a higher court causing – perhaps unnecessarily – high legal costs[120]. In addition courts in different countries may have dissimilar ideas and thus come to differing decisions. It is such differences, especially regarding the interpretation of conventions, which stimulate forum shopping, a phenomenon that may also drive up the costs of the legal proceedings.

Thus the core problem tackled by this study is the lack of certainty as to the law applicable to the multimodal contract of carriage. This problem will be addressed by means of an analysis of the current legal framework in relation to multimodal carriage and an assessment of how within this framework the law applicable to a multimodal contract may be uncovered.

1.7.2 Demarcation of the area of research

Although in general the parties involved in the everyday practice of international trade are not half as much interested in justice as they are in the economical certainty which legal predictability will provide them, both these objectives are served with an in depth survey of when which rules apply to international multimodal transport contracts. In order to keep the research within workable limits the survey focuses on international contracts in a more or less European setting. It assesses the ideas, legislation and case law on multimodal carriage in three legal systems, the civil law systems of Germany and The Netherlands, and the English common law system. The reason for the choice of these countries is that of the existing national legislation on transport in Europe only the German and the Dutch Civil Codes regulate the multimodal carriage contract in a comprehensive manner. The comparison with English common law is added to broaden the horizon somewhat, and because the English Court of Appeal passed judgement on the rather significant *Quantum* claim only a few years ago. When of import or interest, academic writings or case law from other legal systems are also referred to.

1.8 Of things to come…

A brief sketch has been made above of the difficulties surrounding the determination of the legal regime applicable to international multimodal carriage contracts. The multihued tapestry of the current international legislation on transport was touched upon, the reason for the lack of a more suitable regime was rendered and the problems resulting from this state of affairs were illustrated by the example of the *Quantum* and BGH proceedings.

This prelude reveals that in order to improve matters in this area two issues need to be analyzed and elucidated. The preliminary issue concerns the exact nature of the contract. Before the law applicable to a contract can be found the contract itself needs to be defined and demarcated. Questions raised in this context are for instance how such a contract is different from other contracts such as freight forwarding contracts or even unimodal carriage contracts, whether the modes of transport to be used may be left open by the contract and what it is exactly that makes a contract international. These questions are answered in Chapter 2 which starts with a concise summary of the legal history of the carriage contract and the development of

[120] Boonk 1998, p. 6-7.

multimodal transport in order to provide some insight into the nature of the (multimodal) contract of carriage. The main part of the Chapter is taken up by the endeavour to uncover a clear cut definition of what an international multimodal carriage contract entails and by the demarcation of the range of this definition when it is established.

After this groundwork is completed the core issue of this research is addressed. The focus of Chapters 3 through 10 is to find an answer to the question which rules may govern international multimodal contracts for the carriage of goods and under what conditions they will do so.

Chapters 3 through 9 focus on the international carriage conventions, since they are obviously the most prominent of the potentially applicable legal regimes. Chapter 3 thereto introduces matters which may influence which law is applied, such as rules on jurisdiction and the resulting forum shopping practice, after which the rules of private international law of the Rome I Regulation – which lead more or less directly to the scope of application rules of the international carriage conventions – are discussed briefly[121]. Because of the importance of these scope of application rules in light of the quest for the applicable law the last part of Chapter 3 addresses the need for uniform interpretation of these rules and the role the Vienna Convention on the Law of Treaties (VC) plays in this regard[122].

Following this, Chapters 4 through 8 demarcate the scope of application of the existing unimodal conventions in relation to multimodal transport. These Chapters also include an analysis of the predicaments that ensue from the application of these unimodal conventions to multimodal contracts. The road carriage convention, the CMR, is discussed in Chapter 4, the Warsaw and Montreal air carriage conventions are dealt with in Chapter 5, the 1999 Vilnius version of the rail carriage convention the COTIF-CIM in Chapter 6, the CMNI which regulates inland waterway carriage in Chapter 7 and the maritime conventions in Chapter 8.

Since the carriage conventions all contain provisions on specific types of multimodal carriage which cause them to apply beyond the mode of carriage that is their focus, it is possible that more than one of these conventions applies to a certain part of a multimodal carriage contract. Chapter 9 therefore provides an overview of the instances in which such overlaps occur and discusses the consequences of such overlaps if the concurring regimes are incompatible.

Chapter 10 recounts the procedure to be followed when searching for the applicable law when none of the existing uniform carriage regimes applies. It starts off with a description of the circumstances in which the uniform regimes lack application scope and how to manage these. After this the influence of the rules on legal procedure are explained, which is followed by a detailed account of how the private international law procedures of the Rome Convention and the Rome I Regulation lead to the applicable regime of national law. The last part of Chapter 10 contains an outline of the only two European national multimodal carriage regimes, the rules on multimodal carriage in the Dutch Civil Code and those in the German Commercial Code.

The last Chapter, Chapter 11, is the tailpiece of this work and as such contains the inevitable conclusions and considerations for the multimodal future. It provides a short digest of the previous Chapters, a review of the various drafts and propositions that have been on offer during the last few years and a proposal for a set of multimodal transport rules to alleviate the difficulties that currently plague this area of carriage law.

[121] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) replaces the Rome Convention, the EC Convention on the Law Applicable to Contractual Obligations (Rome 1980), in the Member States of the European Community to which the Regulation applies as of 17 December 2009.

[122] Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entered into force on 27 January 1980, United Nations, *Treaty Series*, Vol. 1155, p. 331.

2 THE INTERNATIONAL MULTIMODAL CONTRACT FOR THE CARRIAGE OF GOODS

2.1 History and origins of the contract for the carriage of goods

The history of the carriage of goods is a long one. From a legal perspective however, things did not get interesting until the ever expanding business of trade started demanding more efficient manners of transport. Only when goods were starting to be carried by professionals as a service for which they were paid by their owner, usually the merchant, legal issues like liability became worthy of note[1]. Currently, many codifications include a description specifically for such ventures, which we now call contracts for the carriage of goods. This is a term which describes a legal figure exclusively tailored to the circumstances in which one party agrees to carry goods – or persons – for another. However, such a specific legal description of carriage is a fairly recent phenomenon. Although the economic act of carriage has been around for centuries, its juridical consequences were dealt with in earlier times by making use of legal concepts designed to regulate a much wider variety of arrangements than transport alone. This manner of handling the juridical aspects of carriage can be traced back to the days the edict of the Roman praetor held sway. The days when the carriage of goods was seen as only one of the many forms of conduct within the province of the contract of *locatio-conductio*[2]. The jurists interpreting Roman law after its reception on the Continent took this state of affairs as their starting point[3]. Their next step was to divide the *locatio-conductio* into three categories of letting and hiring[4], the *locatio-conductio in rei*, the letting and hiring of things, the *locatio-conductio operarum*, the letting and hiring of services and the *locatio-conductio operis*, the letting and hiring of work[5]. The carriage of goods was thought to be a form of the contract of the *locatio-conductio operis*[6].

The *locatio-conductio operis,* like the other two forms of the *locatio-conductio,* was burdened with a liability regime based on the duty of *custodia*, the obligation to preserve the goods placed in your custody. Since in early Roman times *nautae, caupones* and *stabularii*, or as we know them maritime carriers, innkeepers and stable masters were seen as rather untrustworthy trading partners however[7], at some point a judicious praetor concluded that the

[1] Only then did the contours of the legal concept of the contract of carriage start to take shape. The legal separation of the carriage of goods and passengers for instance occurred as late as the 19th century. Basedow 1987, p. 87.

[2] The *locatio-conductio* is named after the actions the participants take, '*locare*' meaning to put at the disposal of someone and '*conducere*' meaning to carry along. These terms were not always meant in a literal sense; clearly the terms were used metaphorically when it came to contracts concerning the hiring of an immovable property among other things; it would take an exorbitantly strong person to carry along one of those.

[3] The examination of Roman law is not only useful for those studying civil law – it is generally accepted that Roman law provided most of the essential foundations of the 'civilian' tradition – it is also valuable for those studying common law, because the assumption that the common law completely escaped Roman influences is a misconception. The history of the common law (like that of the English language) is rooted deeply into that of the Continent. More specifically it had some of its roots in the French law tradition; the official language in courts was 'law French' for centuries until its official abolishment in the year 1733 and Henry II, the English king that has been named the spiritual father of the common law, was a continental French monarch.

[4] This tripartite division of the *locatio-conductio* was not made by the Roman jurists themselves, who were quite uninterested in abstract categorization and approached each case on an individual basis. Nevertheless, their casuistry does provide the foundation for the threefold classification used by the modern student of Roman law.

[5] See Feenstra 1990, p. 217, who points towards the Dutchman Johannes Voet (Voet 1698*)* as the *auctor intellectualis* of this very successful tripartite division.

[6] The wide range of subjects covered by the *locatio-conductio* can be explained by the fact that in Roman times the focus was more on the manner in which the agreement was concluded than on its content. Basedow 1987, p. 86.

[7] They were known to succumb to the lure of the profits to be made by thievery, and larceny of the goods placed in their care was not an uncommon, although unwelcome, occurrence. Although not as criminal, but almost equally

liability regime of the *custodia,* which made the receiver of the goods answerable for loss only in case he was guilty of *culpa*[8]*,* might not be strict enough for agreements involving these characters. It was decided that an additional legal figure was needed. Thus the *receptum nautarum, stabulariorum vel cauponum*[9], also known as the *receptum*, was invented[10]. It constituted a guarantee[11] made by the carrier, the innkeeper or the stable master that all of the received goods would stay whole and undamaged[12]. In this manner certain specific contracts, including the contract that was the forebear of our current contract of carriage, became burdened with a rigorous liability regime[13].

During the process of codification in Napoleon's time the question arose in which category the contract of carriage was to be placed. At first, it was considered a '*contrat mixte, qui participe de la nature du contrat de louage et celui de dépôt*'[14]. In the end however '*louage*' was chosen and the transport contract was given a place after Article 1708 *Code Civil et seq.* on '*louage d'ouvrage et d'industrie*'[15]. The liability of the carrier remained what it had been under praetorian law however; he escaped liability only if he could prove the existence of '*un cas fortuit ou force majeure*'[16]. As a result the discussion concerning the nature of the contract of carriage and the obligations it burdened the carrier with did not end with the *Code Civil*[17]. The debate continued all throughout the 19th century, as the different elements discerned in the contract of carriage, such as letting and hiring, lending for use and *depositum*[18] incited many a writer to dispute another's outlook. Gradually, the concept that the contract of carriage should be seen as *sui generis*[19]*,* as a unique new whole took hold[20]. The Prussian General Land law of 1794 for instance, incorporated provisions on contracts of carriage divided in land and sea transport in the 19th century[21]. In The Netherlands the Commercial Code of 1838 only mentioned the contract of carriage of affreightment of a ship. From the explanatory notes of the Commercial Code it can be deduced that the legislator still considered this to be a special type of rental agreement[22]. This continental concept, which corresponded with the opinion on the subject in the *Code de Commerce* at the time[23], was rejected by writers such as Diephuis[24] and Molengraaff at the end of the 19th century. Molengraaff did not hesitate in his '*Études sur le contrat d'affrètement*'[25] to follow Diephuis and to conclude that the contract of affreightment was not a rental agreement but in fact a contract *sui generis*. This opinion corresponded with the

unpleasant for the shipper was the frequently occurring delivery of damaged goods at the end of the journey by the carrier, due to improper or careless handling on his part.

[8] Long 1875.

[9] Ulpian, Digests 4.9.1 "*Ait Praetor: nautae, caupones, stabularii quod cujusque salvum fore receperint nisi restituent, in eos judicium dabo*". Loosely translated this means: "Against maritime carriers, innkeepers and stable masters who receive goods in good condition but do not return them, I provide an action."

[10] Persille 1877, p. 1-5.

[11] Kaser 1971, p. 584; Zimmermann 1992, p. 514.

[12] In time, the conclusion was drawn by Labeo that this liability was too extensive and the *exceptio labeoniana* was born; an exception the carrier could invoke when he was the victim of for instance an attack by pirates. See Lab./Ulp. D. 4.9.3.1.

[13] Smeele 1998, p. 32.

[14] Wachter 1959, p. 96.

[15] A part of the *Code Civil* which encompassed rather more than just the contemporary letting and hiring of work.

[16] Korthals Altes & Wiarda 1980, p. 24. The Latin term for *force majeure* is *vis maior*.

[17] Dorrestein 1971.

[18] Cleton 1994, p. 105.

[19] *Sui generis*: Latin expression, literally meaning 'of its own kind or genus' or 'unique in its characteristics'.

[20] Korthals Altes & Wiarda 1980, p. 25-26 and Dorrestein 1971, p. 342.

[21] Basedow 1987, p. 87.

[22] Van de Laarschot 1996, p. 28.

[23] Napoleon's *Code de Commerce* survived as law in The Netherlands until the year 1838.

[24] Diephuis 1866, p. 131.

[25] Molengraaff 1882, p. 39-62 and 257-284.

Anglo-American notions of that time[26]. Richter and Richter-Hannes suggest that the view which holds the contract for the carriage of goods to be an independent type of contract has gained the upper hand because the contract of carriage is unique due to the special legal status it – commonly – confers on a specific third party[27], the consignee[28]. The consignee derives his right to demand delivery of the goods from the carrier from the carriage contract, even though he is not one of the initial contracting parties[29].

2.2 The contract for the carriage of goods

2.2.1 The contract for the carriage of goods in legislation

At present, the carriage of goods is no longer seen as a mere assortment of services provided by the carrier in most jurisdictions. Of course, there are those aspects of carriage that have much in common with the concepts behind the letting and hiring of things, and the legal model of the instruction may for example still seem to fit. Nevertheless, most legal systems have recognized that the contract of carriage should be construed as a special kind of contract, in need of its own specific rules. In order to unearth the characteristics commonly ascribed to the contract of carriage, some of the current national and international rules on this subject will be considered in the following Sections.

2.2.1.1 Definitions in the international carriage conventions

Some of the international carriage conventions contain a specific definition of the contract of carriage. Such a definition is usually placed in one the first few Articles, since a convention's definition of the contract of carriage may affect its scope of application. They usually define the contract of carriage by describing the obligations the carrier and/or the consignee take upon themselves when entering into such a contract. As a first example of this, Article 1(6) of the Hamburg Rules will serve. This Article defines a contract of carriage as:

> "*...any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another...*"

The second example, the CMNI which regulates the carriage of goods by inland waterway, is somewhat more cryptic in its description. Article 1(1) of this Convention asserts the following:

> "*Contract of carriage means any contract, of any kind, whereby a carrier undertakes against payment of freight to carry goods by inland waterway.*"

The third and last example to provide some insight in this matter is the COTIF-CIM on rail carriage, which states in Article 6(1):

[26] Van de Laarschot 1996, p. 35-37.
[27] In Dutch law this third party, the consignee, becomes party to the contract at some point and thus ceases to be a third party. Oostwouder 1997, p. 52; Smeele 'bill of lading' 2009, p. 273; Du Perron 1999, p. 43.
[28] Richter-Hannes & Richter 1978, p. 8-9; Smeele 'bill of lading' 2009, p. 253.
[29] As a rule the contracting parties are the sender/shipper/consignor and the carrier.

> "*By the contract of carriage, the carrier shall undertake to carry the goods for reward to the place of destination and to deliver them there to the consignee.*"

Common factors in these international definitions are the consensual nature of the contract as the carrier 'undertakes' to carry, the movement of goods and the payment of freight or some other kind of reward. That movement is fairly essential in carriage obviously does not need elaborate clarification[30]. Whether the obligation to pay freight or a reward is an indispensable element of the contract of carriage however, remains open for debate[31].

Unlike those of the Hamburg Rules, the CMNI and the COTIF-CIM, the drafters of the other conventions on the international carriage of goods did not define the contract of carriage. Haak observes that even if a definition had been provided in the CMR, it would probably have been nothing more than the rather colourless platitude that one is thereby to understand the contract by which the carrier assumes the obligation to transport goods or to have goods transported[32]. A definition which would likely cause confusion since a freight forwarding contract equally entails the obligation to have goods transported. The difference between this contract and the contract of carriage will be explained in Section 2.2.4.1 on the freight forwarding contract.

2.2.1.2 Codified national definitions

The German legal definition of the '*Frachtvertrag*', the contract for the carriage of goods, resembles that of the conventions but is not identical. It does not exactly define the contract of carriage but rather sums up the obligations resulting from such a contract. It is codified in § 407(1) HGB. In line with the international carriage conventions the payment of freight is also mentioned:

> "*1. The contract for the carriage of goods obligates the carrier to transport the goods to the agreed upon destination and to deliver them there to the consignee.*
> *2. The consignor is obligated to pay the agreed upon freight.*"

Basedow's definition is in accordance with the codified version; he considers a contract of carriage to be a contract that obligates the carrier to carry persons or goods under his own responsibility against the payment of the agreed upon reward. Yet he does not label this reward as one of the two essential attributes of the contract, which in his opinion are the movement of goods (or persons) and the responsibility the carrier takes for this movement[33].

Unlike the division of the German HGB including §§ 407 *et seq.*, which regulates not only rail, but also road, inland waterway and air carriage (but not carriage by sea, which is governed by §§ 556 HGB *et seq.*), the Dutch transport legislation in Book 8 BW contains a separate division for each mode of transport[34]. Each of these divisions contains a specific

[30] The fact that the goods have not been moved does however not mean that carriage law does not apply. In Rb Rotterdam 3 May 2006, *S&S* 2007, 114, the Court determined that although the goods had most likely not been moved by air as they had probably been stolen during the preceding road carriage stage, air carriage law still applied.

[31] Van de Laarschot 1996.

[32] Haak 1986, p. 57.

[33] Basedow 1987, p. 34.

[34] Title 5 of Book 8 BW regulates sea carriage contracts, Title10 regulates inland waterway carriage contracts, Title 13 regulates road carriage contracts, Title 16 regulates air carriage contracts and Title 18 regulates rail carriage

definition of the contract of carriage involved[35]. There is also a division which relates to carriage in general, which is of a supplementary nature since it only applies if none of the *legi speciali* in the other divisions regulate the contract of carriage in question. This general division contains Article 8:20 BW which defines the (general) contract of carriage as follows:

> "*... the contract whereby one party (the carrier) takes upon himself the obligation to carry things*[36] *for another party (the consignor).*"[37]

Equally unlike its German counterpart this general Dutch definition abstains from mentioning any obligation to pay freight. The Dutch and the German system do have similarities however, as indeed do most of the national carriage codifications when it comes to this. They elaborate on the aspects of the contract of carriage concerned in the Sections and Articles or Paragraphs following the definition. Article 8:21 and 8:22 BW determine for example that the carrier is obligated to deliver the goods at the agreed upon destination in the same state as he received them in and without delay, same as § 423 HGB.

English law on the other hand, has no codification specifically concerning domestic contracts of carriage, as this subject is for the most part regulated by common law[38]. Clarke defines the contract of carriage in general as a contract whereby one party, the carrier, agrees for reward to effect the carriage of goods from one place to another[39]. When it comes to international carriage however, there is English legislation which contains definitions of the contract of carriage. There are several Acts which incorporate international carriage conventions into the national legislation; the Hague-Visby Rules are contained in the Carriage of Goods by Sea Act 1971, the CMR in the Carriage of Goods by Road Act 1965, the COTIF Convention is incorporated by the International Transport Conventions Act 1983[40] and the Montreal Convention by (revision of) the Carriage by Air Act 1961[41]. Generally speaking, the English concept of the contract of carriage should more or less conform to the international standards[42].

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contracts. All of these divisions, except Title 18 on rail carriage, contain subdivisions for the carriage of goods and the carriage of persons.

[35] The Dutch definition of multimodal carriage can be found in Article 8:40 BW, of sea carriage in Article 8:370 BW, of inland waterway carriage in Article 8:890 BW and of road carriage in Article 8:1081 BW. The definitions of rail carriage and air carriage have as yet not been entered in Book 8 BW.

[36] Things, not goods, since the literal translation of the word 'goods' in Dutch is '*goederen*' which includes both tangible things and claims.

[37] The original Dutch text is: "*De overeenkomst van goederenvervoer is de overeenkomst, waarbij de ene partij (de vervoerder) zich tegenover de andere partij (de afzender) verbindt zaken te vervoeren.*"

[38] *L. Harris (Harella) Ltd. v Continental Express Ltd.,* [1961] 1 *Lloyd's Rep*. 251; *Gillespie Bros. & Co. Ltd. v Roy Bowles Transport Ltd.*, [1973] 1 *Lloyd's Rep*. 10; *Gefco v Mason*, [1998] 2 *Lloyd's Rep*. 585; *Ulster Swift Ltd v Taunton Meat Haulage Ltd*., [1977] 1 *Lloyd's Rep*. 346.

[39] Clarke *CMR* 2003, p. 18.

[40] The Railways (Convention on International Carriage by Rail) Regulations 2005 modified the International Transport Conventions Act 1983 to accommodate the Vilnius Protocol of 1999.

[41] Initially, these Acts were intended to merely incorporate international rules on carriage into the English legal sphere. Currently, the international air carriage rules do a little more than that however. The Carriage by Air Acts (Application of Provisions) Order 2001 extended the scope of the Montreal Convention in England to domestic air carriage.

[42] For an overview which confirms this general consistency of ideas on what constitutes a contract of carriage see Rodière (ed.) 1977, p. 10 *et seq*. The overview compares France, Belgium, Italy, Germany, The Netherlands, Denmark and the United Kingdom.

2.2.2 Characteristics of the contract for the carriage of goods

The contemporary contract for the carriage of goods is a consensual contract, a contract that is concluded, as is suggested by the name, through mere consensus of the parties (*ex nudo consensu*), without the necessity of observing certain forms such as the handing over of goods or the drawing up of transport documents[43]. It can be defined as the commitment of one party (the carrier) to carry goods for another party (the sender). The principal obligations of the carrier resulting from the assumption of this responsibility are:

I the obligation to physically move goods from one place to another (to the agreed destination);
II the obligation to deliver the goods in the proper state;[44]
III the obligation to do so within a limited period of time.

Of these three, the movement of goods should be seen as the main purpose of a contract of carriage[45]; when entering into a contract the carrier commits himself to transport goods from one place to another[46]. Rodière concurs that the displacement of goods is the principal aim of the contract for the carriage of goods, and if it is not, then the contract simply is not a contract of carriage in his opinion[47].

Another characteristic of the contract of carriage that results from the obligations mentioned above is the stringent responsibility of the contracting carrier for the carriage; in all three of the obligations, the responsibility of the carrier for the contracted carriage is immanent. By concluding a contract of carriage the carrier makes himself – and himself alone – responsible for the successful performance of the carriage. Even so, the contract of carriage is not a personal contract. It is not like the engagement of a painter for the painting of a portrait. A carrier is allowed to employ subcarriers to perform the actual carriage for him[48]. In practice, carriers make frequent use of this possibility, some even to the extent that they themselves do not perform any actual carriage at all. As was explained above, these carriers, popularly named 'paper' carriers, often do not even own or operate any means of transport[49]. Logically, employing subcontractors to carry for you is especially popular in multimodal carriage. Sea carriers who have contracted for door-to-door carriage for instance, generally hire a road carrier to perform the pre- and end

[43] The counterparts of the consensual contract are the real contract, which does require the handing over of something and the verbal and literal contracts which presuppose the observation of a certain form. Meyer-Spasche 2002, p. 10.

[44] Dorrestein 1971.

[45] Although the agreement to move is a *conditio sine qua non* for carriage, the distance between the place the goods are taken over and the place of delivery can be minimal. Koller for instance, argues that even the transhipment of goods can, under certain circumstances, be qualified as an independent contract of carriage, if it has been contracted for separately. If the transhipment is not separately contracted for with a stevedore but is instead performed based on a freight forwarding contract encompassing a variety of services, it is deemed to be of an accessory nature in case of doubt. Koller 2007, p. 32, § 407 HGB, No. 10. The distance between the place of taking over and the place of delivery may under certain contracts of carriage even be non-existent. This is so in case of round trips for instance ('*hoefijzervervoer*' – which means horseshoe transport when literally translated) which are common in air carriage, but are also used in road transport to circumvent high customs duties. See Hof Den Haag 29 September 1998, *S&S* 1999, 33; *Haldimann v Delta Airlines Inc*., 168 *F.3d* 1324 (D.C.Cir. 1999).

[46] Parlementaire geschiedenis Boek 8, p. 62, Richter-Hannes & Richter 1978, p. 9.

[47] Rodière (ed.) 1977, p. 53. "*L'obligation principale,…, c'est celle de transporter la chose d'un lieu à un autre.*" Rodière 1977, p. 262. See likewise Basedow 1987, p. 34-35.

[48] Basedow 1987, p. 35.

[49] Clarke *CMR* 2003, p. 20.

haulage by truck for them, because they themselves do not have the means to carry by land at their disposal.

2.2.2.1 'Obligation de résultat'

The stringent responsibility of the carrier is rooted in the fact that the main obligations resulting from the contract of carriage as summed up above are so-called *obligations de résultat*, obligations to deliver a certain result[50]. The originally French distinction between what are called obligations of conduct (*obligations de moyens*) and obligations of result is not a familiar distinction for common law scholars. However, it is a classical differentiation for those trained in the civil law tradition and worthy of a little scrutiny for those of both backgrounds, because of its impact on the distribution of the burden of proof[51]. Even if the distinction is not as sharp in practice as it is in theory, and in spite of the fact that there are those, even in the civil law tradition, who deny the validity of the distinction[52].

The alternative of an *obligation de résultat* is an obligation of conduct, an *obligation de moyens*[53], which is an obligation to attempt to realize a certain outcome[54]. This is a type of obligation that is far more common in practice. An example of such a contract is the teaching agreement between you and your daughter's ballet instructor; he fulfils this agreement by striving to teach your child the steps and the grace of the art, but he does not promise that he will mould her into a prima ballerina. So, by simply making an effort to teach your – perhaps less than talented – offspring, the ballet teacher will have fulfilled his obligations, even if the child's ballet performance at the end of the course leaves a lot to be desired. A breach of contract exists only when he has not exerted himself enough, which you as the claimant will have to prove.

A pure obligation of conduct however, is a rare thing, as is illustrated by the example of the ballet instruction agreement. For in order to be able to teach a pupil anything, a ballet teacher has to be physically present as a rule, preferably in some sort of dancing studio. Thus the teaching contract does obligate the teacher to provide a certain result, namely his presence. Obviously, many contracts will incorporate both obligations of conduct and obligations of result, depending on the specific contents.

The obligation of result in contrast, as it is commonly understood, imposes an obligation to attain a certain result[55]; the mere attempt to provide the result in question is not enough to fulfil the contract. This means that if the promised result is not achieved, a breach of contract is assumed. When a contract of carriage is concluded, the carrier has taken upon himself the obligation to actually deliver the goods at the agreed upon destination in the same state he received them in, not merely to try to do so. This has extensive consequences regarding the burden of proof when compensation is sought from the carrier. Since the contract of carriage entails the promise of a certain result, the owner of the goods can suffice with proving that the promised result has not materialized in order to prove that the carrier is in breach of contract. The cargo claimant merely has to prove that the loss or damage occurred while the goods were in

[50] Cleton 1994, p. 132; Parlementaire geschiedenis Boek 8, p. 67; Korthals Altes & Wiarda 1980, p. 73; Oostwouder 1997, p. 53.
[51] Den Tonkelaar 1982, p. 81-82; Brunner & De Jong 1999, p. 44.
[52] Schoordijk 1969, p. 65 *et seq.*; Schoordijk 1979, p. 182 *et seq.*
[53] This is also known as an *obligation de s'efforcer.*
[54] C. Zeben, Reehuis & Slob 1990, p. 264; Hartkamp 2004, no. 184.
[55] Dupuy 1999, p. 375.

the charge of the carrier[56]. Obviously this is far easier than proving the absence of due diligence, which one would have to do to prove breach of contract in the cases involving an obligation of conduct.

This shift of the burden of proof in the direction of the carrier seems fitting when it comes to the contract of carriage, as the owner of the goods is – usually – hard pressed to gain insight in what may have caused the damage or disappearance of the goods during transit. The carrier is deemed to be better able to bring the cause to light since the carriage was performed by him or under his supervision. After the claimant has proven that the promised outcome has not ensued, and breach of contract is assumed, it is the carrier's turn. At that point in the proceedings he can try to establish before the court that there was *force majeure*. If the carrier succeeds in proving the existence of *force majeure*, then he will not be held accountable for the damage despite of the breach of contract.

This procedure bears likeness to the one resulting from the common law strict liability standard. Under a regime of strict liability the carrier bears all the risks, which sounds more like the situation in which a carrier has burdened himself with a guarantee, but in practice this is never the case since all regimes of strict liability excuse the carrier for a few uncontrollable causes such as *force majeure* (also known as Act of God)[57].

By and large, the procedure concerning the presentation of proof as described pertaining to carriage claims above is also prescribed by the international carriage conventions[58]. Even the common law based Hague, and Hague-Visby Rules follow this system[59], although they are not as plain about the distribution of the burden of proof as some of the other conventions. The precise distribution of the onus of proof does tend to vary a little between the different conventions on international transport. Most of them sum up certain circumstances, which could be described as 'special risks' that relieve the carrier of liability when the carrier establishes that they could have been the cause of the damage or loss[60]. Naturally the claimant subsequently has the right to produce evidence to the contrary.

2.2.2.2 Mandatory regimes

Beyond the fact that the contract of carriage implies the obligation for the carrier to deliver a certain result, the need for criteria by which to distinguish the contract of carriage is induced by the reality that the liability of a carrier operating under a contract of carriage is in all essential matters governed by mandatory law. The liability of parties operating under other types of contracts such as the freight forwarding agreement however, generally is not[61]. It is problematic that the difference between the two contracts is sometimes difficult to ascertain[62].

Under the contemporary carriage regimes the carrier is generally not allowed to depart from the provisions regulating his liability to the detriment of the cargo owner[63]. The primary

[56] He can do this by proving that the goods were received by the carrier in good condition, and that they were missing or damaged on outturn at the destination. Clarke1988, p. 64-65.

[57] Kindred & Brooks 1997, p. 3.

[58] Article 17(1) CMR, Article 23(1) COTIF-CIM, Article 18(1) MC, Articles 3(1) and 16(1) CMNI, Article 4 Hamburg Rules.

[59] Clarke1988, p. 64-65.

[60] Article 17(4) CMR, Article 23(3) COTIF-CIM, Article 4 Hague-Visby Rules, Article 18 CMNI, Article 18(2) MC.

[61] Haak 1986, p. 55.

[62] See Section 2.2.4.1 of this Chapter on the freight forwarding contract.

[63] Under the Hague-Visby Rules however, the carrier is allowed to increase his liability.

purpose behind the introduction of mandatory legislation in this area was the protection of the consignor, who was deemed to be the economically weaker party in need of safeguarding from the contractual exonerations dictated by the carrier[64]. As contemporary consignors are frequently powerful multinational companies with substantial bargaining power *vis-à-vis* the carrier it can be argued that this basis for mandatory regulations may possibly be somewhat outdated. The promotion of international uniformity and deterrence of forum shopping are not however; due to its mandatory nature this sort of legislation will not be superseded by differing contractual terms or trade practices, thus generating legal transparency.

2.2.2.3 Reward?

Certain legal systems, such as the German HGB[65], consider the obligation to pay freight to be one of the essential characteristics of the contract for the carriage of goods. Without reward, they argue, a contract cannot be considered a carriage contract. The arguments that are presented to justify this train of thought are generally based on (historical) doctrine[66] or on the concept that it would be unfair to tie someone who is prepared to transport goods free of charge to the relatively severe liability rules of carriage law[67]. The drafters of the CMR appear to have been swayed by this argument and thus restricted the CMR's scope of application to: "…*every contract for the carriage of goods by road in vehicles for reward*…"[68]. When closely scrutinized however, it has to be noted that this manner of phrasing could very well mean that the CMR drafters did not think remuneration to be one of the characteristics of the contract for the carriage of goods[69]. Since if they had, would not the words 'for reward' have been superfluous? Another argument to support the view that the reward is not a *conditio sine qua non* for the contract of carriage is the existence of carriage regimes like the Dutch system[70] and the Warsaw and Montreal Conventions, which do not require that the transport contract stipulates a reward for their application[71]. Practically speaking however, whether or not remuneration is a prerequisite for a contract to be considered a contract of carriage can remain open for question, as the number of contracts for the gratuitous carriage of goods is pretty much negligible.

A well-balanced blend of both paths can be found in the Dutch rules on the carriage of goods by rail in Title 8.18 BW. This Title, which is an edited version of the 1999 COTIF-CIM, applies to both gratuitous carriage of goods by rail as well as to carriage for reward. The distinction between the two is that the parties contracting for free carriage may depart from the

[64] An early example of such protection can be found in the (American) Harter Act of 1893. Although the mandatory nature of the law was always justified in the light of public policy, it is well established that the Harter Act was a law aimed at protecting the American industry (at that time mainly shippers) – which was considered the economically weaker party – from the English shipping industry. CMI Yearbook 2001, p. 524, summarizing a paper by the Swiss delegation to the CMI.

[65] § 407(2) HGB. See also Richter-Hannes & Richter 1978, p. 9.

[66] The *locatio conductio*, the legal figure which regulated the contract of carriage in Roman times (see Section 2.1 of this Chapter) was considered to include a reward. Basedow 1987, p. 36.

[67] Van de Laarschot 1996, p. 58.

[68] Article 1(1) CMR. The COTIF-CIM does the same in Article 1(1) and (2), the Hamburg Rules in Article 1(6) and the CMNI in Article 1(1).

[69] The drafters of the CMR were not successful in determining the content of the transport contract. As a result, the CMR does not contain a definition of the contract for the carriage of goods. Haak 1986, p. 57.

[70] Article 8:20 BW *et seq*.

[71] It should be noted here however that the air carriage conventions do not mention the contract as a prerequisite for application either.

rules in Title 8.18 BW, while the rules are mandatory for those agreeing to the payment of freight or any other such reward.

2.2.3 The contracting parties

Traditionally the parties to a contract of carriage are called the consignor and the carrier[72]. As regards the identification of the carrier, it often happens that the party that contracts to carry goods for another does not carry them itself but arranges for a third party to do so[73]. Nonetheless, whether or not a party performs the carriage itself, any party which concludes a multimodal transport contract as a principal – not as an agent for the consignor or for the carriers participating in the multimodal transport operations – and which assumes responsibility for the performance of the contract, is considered the contractual carrier[74]. Despite this clarification some hurdles may yet remain[75]. For one, Dicey and Morris point out that the identity of the contractual carrier can still be somewhat unclear in situations involving charter contracts[76], especially when a 'demise clause'[77] or an 'identity of carrier clause'[78] is involved.

The identification of the consignor on the other hand, should under normal circumstances not pose many problems if one follows Dicey and Morris' explanation that the consignor is the original co-contracting party of the carrier. This is the person that entered into the contract with the carrier, and not, as is assumed in some legal systems, also the person who actually delivers the goods to the carrier[79].

Besides the contracting carrier and the consignor, the original parties to the contract, there is also the possibility that a third party accedes to the carriage contract. This can be the consignee[80] who 'gains all rights of suit as if he had been a party to the contract'[81], but this can

[72] Basedow 1987, p. 59.

[73] See Chapter 1, Section 1.2.1 on subcontracting.

[74] Rb Rotterdam 2 January 1976, *S&S* 1977, 66; Rb Rotterdam 19 March 1998, *S&S* 1999, 42. See also Giuliano & Lagarde 1980, Article 4, No. 5.

[75] Indeed, the subject has been the topic of elaborate studies, see for instance Smeele 1998.

[76] Is for instance the time-charterer or the owner of the vessel considered to be the carrier? Or maybe both? A so-called 'demise clause', in the bill of lading defining the carrier as the owner of the vessel so as to secure the protection of limited liability generated by the international conventions on maritime carriage for this party may create a lot of difficulties when resolving this problem. Because the validity of such a clause is to be determined based on the legal regime applicable to the contract which in turn depends on the identity of the carrier in many a case, this makes for an inextricable circle. A solution can perchance be sought in Article 10 of the Rome I Regulation under which the validity of such a clause is determined by the law which would govern it under the convention if the clause were indeed valid. Dicey & Morris 2006, p. 1772-1773. Furthermore, under Dutch law carriage under a bill of lading can produce more than one party that is to be considered to be the contractual carrier according to Articles 8:461 and 8:462 BW.

[77] The clause intends to relieve the time or voyage charterer of a ship from his obligations as the carrier under the bill of lading under the Hague or Hague-Visby Rules, by simply declaring that the charterer is only an agent of the ship owner or demise charterer, who should be deemed the sole carrier under the bill of lading, and this even where the time or voyage charterer in fact issues the bill of lading, collects the freight and performs most or all of the duties of a carrier under the contract of carriage evidenced by the bill. The validity of such a clause is contested. Tetley 'The Demise of the Demise Clause' 1999.

[78] Rb Rotterdam 18 July 1996, *S&S* 1997, 51.

[79] Dicey & Morris 2006, p. 1774-1775.

[80] The moment the third party, the consignee, accedes to the contract, the contract becomes a three way contract under Dutch law. Hof Den Haag 1 July 2003, *S&S* 2006, 18; HR 29 November 2002, *S&S* 2003, 62; HR 4 October 2002, *S&S* 2003, 39; HR 22 September 2000, *S&S* 2001, 37; Hof Den Haag 19 September 1995, *S&S* 1996, 32. See also Smeele 'bill of lading' 2009; Du Perron 1999, p. 43.

[81] Article 2(1) of the English Carriage of Goods by Sea Act of 1992. Under Dutch law, the third party actually accedes to the contract, based on Article 6:254 BW, and under German law the third party consignee is treated as though he were party to the contract. Zwitser 2000, p. 36-37 and Zwitser 2002. Richter-Hannes and Richter provide

also be a successive carrier. Some of the international carriage conventions contain rules to regulate the liability of the carriers in case of successive carriage[82]. Both the CMR and the COTIF-CIM stipulate that each of the carriers shall be responsible for the performance of the whole operation. The air carriage conventions on the other hand, determine that each carrier who accepts passengers, baggage or cargo is subject to the rules set out in the Convention and is deemed to be one of the parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.

2.2.4 Carriage or not carriage (that is the question)

As was pointed out above, the distinction between the existing types of contracts used in the transport sector is easier in theory than in practice. In order to facilitate this process the various parties which conclude contracts that are closely related to the carriage contract will be summarily reviewed in the following Sections. The contracts in question will also be compared to the contract of carriage, thus highlighting their differences in substance as well as consequences. The first and foremost of the transport operators to be reviewed is the freight forwarder, followed by a number of other auxiliaries. These others are in some cases only a *species* of the *genus* freight forwarder, like the French *commissionaire de transport* which has its own set of rules in the French legislation, while in other cases they are considered carriers operating under a different name.

2.2.4.1 The freight forwarder

In his analysis of the CMR Clarke explains that traditionally, the freight forwarder – also called a forwarding agent – was not deemed a carrier as he does not obtain possession of the goods and he does not undertake their delivery at the other end[83]. Typically, he does not perform the transport. All that he does is act as an agent for the owner of the goods by making the arrangements with the parties who do carry and by making arrangements so far as they may be necessary for the immediate step between the ship and the rail, the customs and so forth[84]. A somewhat more economical description of freight forwarding is given by Glass. He describes freight forwarding activities as 'the linking of two or more transport modes under a contractual arrangement which either envisages or permits such a link'[85]. This means that in practice a consignor can either contract with a freight forwarder to carry his goods somewhere, in which case the freight forwarder actually is the carrier[86], or to *arrange* for his goods to be carried by

that although the consignee does not become party to the contract the contract of carriage grants him the independent right to demand delivery and, depending on the circumstances, certain rights pertaining to the cargo before the cargo has reached its destination. Richter-Hannes & Richter 1978, p. 9. For a more recent comparison of the issue under German, Dutch and French law see Smeele 'bill of lading' 2009.

[82] Article 34 CMR, Article 26 COTIF-CIM, Article 36 MC and Article 30 WC.

[83] The scope of this study does not allow for an extensive review of all the various facets of the freight forwarding contract. For more information on this legal concept see Hill 1972; Glass 2004; Van Beukering-Rosmuller 1992.

[84] Clarke *CMR* 2003, p. 18-19.

[85] Glass 2004, p. 1.

[86] An example of this can be found in the Standard Conditions (1992) governing the FIATA Multimodal Transport Bill of Lading. The first definition in the document describes the freight forwarder as: "[*T*]*he Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract as a carrier*".

another party, in which case the freight forwarder may act as a freight forwarder, as a principal, or as a forwarding agent.

Originally, the role of a forwarder was limited to a performance as the consignor's agent; the forwarder made all the necessary arrangements for the carriage of goods by others from one place or country to another[87]. As he concluded carriage contracts in the name of the cargo interests instead of in his own, this service was seen as agency, which is reflected in the fact that originally reference was made to a 'forwarding agent' rather than a 'freight forwarder'[88]. This is illustrated by the decision in the English case of *Jones v European General Express* of 1920, where the judge described forwarders as parties:

> "*willing to forward goods for you … to the uttermost ends of the world. They do not undertake to carry you, and they are not undertaking to do it either themselves or by their agent. They are simply undertaking to get somebody to do the work, and as long as they exercise reasonable care in choosing the person to do the work they have performed their contract.*" [89]

Later on, depending on the possibilities of national regime applicable to the freight forwarding contract and the agreements made, freight forwarders started acting as principals[90]. As a principal a freight forwarder can either contract for the carriage of his client's goods with a carrier in his own name, thus becoming party to the contract of carriage as consignor[91], while still acting for the client's account, or he can assume the role of carrier in relation to his client, which comes with the inherent carrier liability[92]. This last option gained more and more ground over the years; the freight forwarder appeared more and more frequently as an operator of the transport rather than a mere connecting link. Due to his flexible nature the freight forwarder was able to appropriate more and more activities that traditionally belonged to the terrain of the carrier over time. This resulted in an inclusion of carriage in the freight forwarder's bundle of possible duties. According to the current FIATA Model Rules for Freight Forwarding Services a freight forwarder is the party who concludes a contract with a customer involving services of any kind relating to the carriage, consolidation, storage, handling, packing or distribution of the goods as well as ancillary and advisory services in connection therewith, including but not limited to customs and fiscal matters, declaring the goods for official purposes, procuring insurance of the goods and collecting or procuring payment or documents relating to the goods[93]. A broad description, which evidently also includes carriage.

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[87] *Inco Europe Ltd & Another v First Choice Distribution & other*, [1998] *EWCA Civ* 1461, www.bailii.org.

[88] Ramberg 1998.

[89] *Jones v European General Express*, [1920] 4 *Lloyd's Rep.* 127.

[90] Not all national regimes leave both options open, see De Wit 1995, p. 20. Under German law it would be possible for the freight forwarder in his capacity as a 'commission agent' to avoid carrier liability by assigning to his customer his rights under the contract which he has concluded in his own name (the so-called *Abtretungserklärung*). This, however, is not possible where the freight forwarder would have qualified as a carrier (*Frachtführer*) subject to mandatory carrier liability. However, in Anglo-American law the so-called 'intermediate stage' between agent and principal known as 'commission agent', where the freight forwarder contracts in his own name but on account of his principal, is looked upon differently and would be treated under the concept of 'undisclosed principal'. See Ramberg 1998.

[91] In the continental legal systems the forwarder is normally considered to contract under contract of commission, and unlike other agents the forwarder contracts with the carrier in his own name and does not create privity of contract between his customer and the carrier. Messent & Glass 2000, p. 34. *Cf.* Hof Amsterdam 5 June 2003, *S&S* 2007, 14.

[92] It is also possible that a freight forwarder acts as a principal in respect of one segment of a multimodal transport and as an agent in respect of another segment. This is referred to as 'through transport', see Section 2.3.3.4 of this Chapter for more details on this subject. When the forwarder fulfils the forwarding contract by appointing himself as carrier this is called '*selbsteintritt*'. See § 458 HGB and Article 8:61(1) BW.

[93] The FIATA Model Rules for Freight Forwarding Services are available at www.forwarderlaw.com.

Nowadays a freight forwarder often voluntarily accepts the liability that accompanies a role as carrier[94]. In air carriage for instance it is usual for freight forwarders to take over the goods to be carried and issue a house air waybill. This waybill generally names the forwarder as carrier. The forwarder then delivers the goods to an airline which issues a master air waybill which designates the forwarder as consignor and the airline as carrier[95]. The reason why the freight forwarder accepts the increased responsibility inherent to carriage is of course financial. As an agent he earns a commission calculated over the freight charged by the carrier, whereas as a carrier he earns the freight himself. As a result, the modern day freight forwarder is not as limited in his choice of roles as his predecessors were.

As was said, the theoretical distinction between a contract of carriage and a freight forwarding contract is not problematic. A contract for carriage obligates the carrier to carry goods[96], while the freight forwarding contract obligates the forwarder to *arrange* for the carriage of goods. In practice however, transport documents frequently include characteristics of both, or, if the transport document provides a clear indication, other circumstances of the case give rise to uncertainty concerning the nature of the contract[97]. Situations in which the freight forwarder acting as carrier actually performs the carriage himself do not tend to lead to much misapprehension. It is the situations in which the freight forwarder finds other carriers to perform the actual carriage that induce great amounts of case law, since depending on subtle differences in the actual circumstances, the relationship between the parties may either be that of consignor-carrier or that of client-freight forwarder[98].

The distinction between the two is immensely important *in actu*, since the position of a forwarding agent is not regulated by mandatory law as he does not shoulder the responsibility for the performance of the contract of carriage and is thus not liable for any loss or damage resulting from the transit. He therefore enjoys a considerable amount of contractual freedom, which allows him to restrict his liability contractually to a much further extent than a carrier can[99]. The contractual clauses used by the freight forwarder to limit his liability usually are the model rules of the national freight forwarders association of which he is a member. The well-known sets of model rules are, besides the above-mentioned FIATA Model Rules[100], the AdSp[101], those of the FENEX[102], CIFFA[103], BIFA[104], NCBFAA[105] and the NSAB[106]. The forwarder as a rule attempts

[94] Haak 1986, p. 60.
[95] See Rb Haarlem 23 September 1986, *S&S* 1988, 108. Koning 2007, p. 97.
[96] Court of Appeal, *Ulster-Swift Ltd. v Taunton Meat Haulage Ltd*., [1977] 1 *Lloyd's Rep*. 346: "*In our judgment, a person who contracts to carry goods is a 'carrier' even if he sub-contracts the actual performance of the whole of the carriage to someone else.*" See Messent & Glass 2000, p. 24.
[97] A document may for instance denominate the contractor as acting as a freight forwarder only while on the other hand stipulating an all in price, see *Tetroc Ltd. v Cross-Con (International) Ltd.,* [1981] 1 *Lloyd's Rep*. 192.
[98] Hof Amsterdam 12 April 1985, *S&S* 1985, 113; Rb Roermond 27 November 1986, *S&S* 1988, 97; Hof Den Bosch 8 June 2004, *S&S* 2004, 692; Hof Amsterdam 27 March 2007, *S&S* 2008, 74; BGH 25 October 1962, *BGHZ* 38, 150; BGH 14 June 1982, *BGHZ* 84, 257; BGH 10 February 1982, *BGHZ* 83, 96.
[99] De Wit 1995, p. 21.
[100] Besides its Model Rules concerning freight forwarding services the FIATA also has other sets of contractual standard rules such as those in the FBL. To prevent confusion concerning the role of the freight forwarder, the FBL indicates that by using this form of bill the forwarder assumes the role of carrier and therefore contracts as a principal.
[101] *Allgemeine Deutsche Spediteurbedingungen*.
[102] The Dutch Association for Forwarding and Logistics.
[103] The Canadian International Freight Forwarders Association.
[104] The British International Freight Association.
[105] The National Customs Brokers & Forwarders Association of America.
[106] The Nordic Association of Freight Forwarders.

to clarify which role he thinks to take on by making use of these model clauses[107], although such an indication is generally seen as only one of the circumstances that have to be taken into account by the judicature. The specification that the forwarder contracts as forwarding agent only for instance, is not regarded as conclusive in and of itself, but where printed conditions clearly indicate that only an agency service is offered this may take effect more readily[108]. When there is room for doubt the tendency in Germany and The Netherlands is to characterize the contract as a carriage contract[109]. When the actual circumstances of the case do not conclusively prove the contract in question to be either a freight forwarding contract or a contract of carriage the burden of proof concerning the capacity in which it has acted is on the party claiming to have acted as freight forwarder[110].

Decisive is the content of the contract, not how the carriage is actually performed[111]. As distinguishing between the freight forwarding contract and the contract of carriage is therefore in essence a problem of construction, it stands to reason that guidelines may be distilled from past cases as to which circumstances are of import[112]. If incorporated in the contract Chapter 5 on interpretation of the PECL, the Principles of European Contract Law, may also be of use. For Dutch law a basic guideline concerning the interpretation of contracts in general can be found in the *Haviltex* case[113]. The formula used in this decision, which has been widely followed in Dutch jurisprudence ever since[114], states that the nature of the relationship between the contracting parties depends upon the meaning these parties could under the circumstances, in all reasonableness adhere to the conditions of the contract, and upon the expectations they could have of each other in this context. However, when discerning between a freight forwarding and a carriage contract it seems more specialized indicators would be preferable. A number of these factors are set out in *Aqualon v Vallana Shipping*[115]. The list of factors specified in this judgement names the terms of the particular contract[116], any description used or adopted by the parties themselves in relation to the contracting party's role, the course of any previous business

[107] An example of clauses regarding the role of the forwarder and the accompanying liability can be found in *Inco Europe Ltd & Another v First Choice Distribution & other*, [1998] *EWCA Civ* 1461, www.bailii.org. The judgement can be found at www.bailii.org. The contract the nature of which was in dispute in this case contained the FENEX conditions, which state in Article 11(8): "*Even where all-in or fixed rates, as the case may be, have been agreed, the forwarder, who is not a carrier, shall be liable under the present conditions and not as a carrier*". According to the judge this signified that: "*The tenor of these clauses is therefore that the forwarder is primarily an agent carrying out the duties of an agent including making contracts on behalf of his principal and is not, other things being equal, acting as a carrier but if he does act as a carrier, he is liable as a carrier.*"

[108] *Harris (Harella) Ltd. v Continental Express Ltd*., [1961] 1 *Lloyd's Rep*. 251; *Victoria Fur Traders Ltd. v Roadline (U.K.) Ltd.*, [1981] 1 *Lloyd's Rep*. 570, see Messent & Glass 2000, p. 23 fn. 51.

[109] Clarke *CMR* 2003, p. 19; Basedow 1997, Article 1 CMR, No. 3; Haak 1986, p. 67; Basedow 1987, p. 52-53. In air carriage for instance a forwarder which issues a house air waybill that fails to indicate that the forwarder acts as agent only is considered to be a carrier. See Rb Haarlem 23 September 1986, *S&S* 1988, 108. Koning 2007, p. 97.

[110] Basedow 1997, Article 1 CMR, No. 3. Rb Rotterdam 2 May 2002, *S&S* 2008, 53; Rb Rotterdam 2 February 2005, *S&S* 2008, 33; Rb Rotterdam 16 February 2005, *S&S* 2007, 102; Rb Rotterdam 19 July 2006, *S&S* 2007, 52. For a different perspective see Hof Leeuwarden 25 April 2007, *S&S* 2008, 99; Rb Amsterdam 14 May 2003, *S&S* 2006, 15; Rb Haarlem 1 December 2004, *S&S* 2007, 98; United States Court of Appeals for the Second Circuit, 24 August 2000, *ETL* 2001, p. 352-357.

[111] Basedow 1997, Article 1 CMR, No. 3; Clarke *CMR* 2003, p. 20. Hof Amsterdam 29 March 2007, *S&S* 2008, 74.

[112] *Hair & Skin Trading Co. Ltd. v Norman Air Freight Carriers and World Transport Agencies Ltd.,* [1974] 1 *Lloyd's Rep*. 443, 445.

[113] HR 13 March 1981, *NJ* 1981, 635.

[114] See *e.g.* Rb Amsterdam 14 May 2003, *S&S* 2006, 15.

[115] *Aqualon (U.K.) Ltd & another v Vallana Shipping Corporation and others*, [1994] 1 *Lloyd's Rep.* 669. The Court of Appeal approved of these factors in *Lukoil - Kaliningradmorneft plc v Tata Ltd & Global Marine Transportation Inc*., [1999] 2 *Lloyd's Rep.* 129.

[116] This includes the nature of the instructions given.

dealings[117], the nature and basis of charging[118] and the nature and terms of any (consignment) note issued[119].

Based on the *Haviltex* formula these factors can be supplemented by the expectations raised by the previous dealings of the parties, which can also provide legitimate intimations regarding the current situation. The questions to ask in this regard are whether they have traded before – maybe even on a regular basis – and if so, what functions they performed[120].

2.2.4.2 The commissionaire de transport

A '*commissionaire de transport'* or 'a (transport) agent on commission' is a typically French legal figure which has its own legal regime in the *Code de Commerce*[121]. The *commissionaire* is in essence a freight forwarder who acts in his own name, or under a company name, for the account of a principal[122], known as a *commettant*[123]. Just as a carrier does, the *commissionaire de transport* takes an obligation of result upon himself, according to Article L132-4 of the *Code de Commerce*:

> "*They shall act as guarantor for the arrival of the commodities and bills within the period specified by the bill of lading, except in cases of legally recorded* force majeure*.*"

Although liability for the transport is imposed on the *commissionaire* by law[124], he generally does not perform it himself[125]. Since he guarantees successful transport, subject to *force majeure*, he is internationally seen as a contractual carrier and thus – possibly – is subject to the international transport conventions[126]. This is different in France, since the French legal system considers only those who deploy their own means of transport carriers[127], the *commissionaire* is not considered a carrier in France, even though he would be so classified in any other country[128].

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[117] Included is the manner of performance, at least insofar as it throws light on the way in which the parties understood their relationship.

[118] In particular, the factor whether an all-in fee was charged, leaving the contracting party to make such profit as he could from the margin between it and the costs incurred, or a commission was earned instead. See also BGH 14 February 2008, *TranspR* 2008, p. 323-327;BGH 18 June 2009, *I ZR* 140/06; BGH 2 April 2009, *I ZR* 61/06. In these cases the contract in question was deemed to be a carriage contract since a fixed price had been agreed and in the first-mentioned case the 'freight forwarder' was also identified as the carrier in the consignment note.

[119] For a somewhat more detailed review on how to distinguish between a contract of carriage and a freight forwarding contract see Messent & Glass 2000, p. 22 *et seq.* and Haak 1986, p. 58-60 (the freight forwarding contract in general) and 63-75 (the specific national views in Belgium, The Netherlands, Germany and England).

[120] Haak, Zwitser & Blom 2006, p. 128.

[121] Article L132-3 up to and including Article L132-9 *Code de Commerce*. For a survey on the subject of the *commissionaire de transport* and similar legal figures that are found in various (European) national regimes, see Haak 1986, p. 61 *et seq*.

[122] "*La mission du commissionaire de transport … consiste essentiellement à passer des actes juridiques pour le compte de son client*." Peyrefitte 1978, p. 7.

[123] Article L132-1 Code de Commerce.

[124] Peyrefitte 1978, p. 7; Godin 2005, p. 350.

[125] Haak 1986, p. 62. It has been argued that the *commissionaire* ought to bear the same liability as a carrier but, in the past this has been consistently denied by the French judiciary based on statute and doctrine. Haak criticizes this denial since it narrows the scope of the CMR in a manner which is not conducive to international legal uniformity. The scope of the international carriage conventions should not, and indeed does in general not, depend on distinctions based on national law.

[126] Putzeys 1981, p. 35; De Wit 1995, p. 21-23; Schneider & Laukemann 1999, p. 383; *Royal & Sun Alliance Insurance Plc v MK Digital FZE (Cyprus) Ltd.,* [2006] 2 *Lloyd's Rep*. 110.

[127] Peyrefitte 1978, p. 8 and 9; Basedow 1987, p. 51.

[128] Even if the *commissionaire* does perform part of the carriage himself he is still not considered a carrier by the French judiciary if the *commissionaire* activities and the transport cannot be separated and the transport activities are

Furthermore, the *commissionaire de transport* is responsible for his own actions and liable for the actions of the carriers and possible other intermediaries he uses to perform the transport.

The French judiciary is quite liberal in applying the label '*commissionaire de transport*', the average activities of a freight forwarder are for the most part enough to cause him to be qualified as such whenever French law is applicable. Much as concerning the discernment of freight forwarding contracts discussed above, an imposing amount of case law has accumulated on this subject over the years, resulting in a variety of criteria. One of these criteria is that a *commissionaire* usually promises the client to organize the carriage '*de bout en bout*', from start to finish. Another is that he enters into a contract with the actual carrier, without disclosing his client's name. And finally, he has to have the authority to independently decide the route the transport will take and the mode of transportation to be used.

The figure of the agent on commission for transport is also known in Italy where the figure is called the *spedizioniere-vettore*, an entity occupying the legal space between the *spedizioniere*[129], the freight forwarder, and the *vettore*, the carrier[130]. The *spedizioniere-vettore* is considered a carrier by the Italian judiciary when it comes to the application of conventions like the CMR. In that, a parallel can be drawn between the Italian *spedizioniere-vettore* and the Dutch doctrinal concept of the transport operator. The Dutch Civil Code does not include provisions on the transport operator because the legislator saw no need for them; his actions would either make him out to be a freight forwarder or a carrier, both of which are regulated by the Dutch Civil Code.

2.2.4.3 The NVOCC

Non vessel operating common carriers (NVOCCs) act in the maritime sphere and do not generally own or operate any tangible means of transport. As a result, they are incapable of physically performing the carriage themselves, which would cause the French judiciary to characterize them as '*commissionaires de transport'*. They do however accept liability for the carriage contracted out by them to the 'actual' carriers, and thus they are regarded as what are called 'indirect' or 'paper' carriers. Due to *groupage* operations – consolidation of smaller shipments into full container loads (FCL) – an NVOCC can offer consignors of less-than-container load (LCL) shipments lower transport rates. The label NVOCC has no defined legal meaning outside of the U.S. where the figure is regulated by statute[131], especially not in the civil law systems of Europe. The inclusion of the expression 'common carrier' discloses this since the civil law systems do not differentiate between the 'common' and the 'private' carrier as the common law systems do. Common carriers carry goods for reward without reserving the right to refuse the goods tendered, while private carriers only carry goods for certain parties. The distinction has lost its importance in English law due to case law and legislation according to De Wit, but is still of significance in other common law systems[132]. NVOCCs are true common

clearly subordinate. The fact that the rules on liability of the *commissionaire* concerning the loss, damage or delay of the goods are rather similar to those a carrier has to contend with lessens the difference between the French and other systems somewhat. Schneider & Laukemann 1999, p. 382.

[129] For case law on the difference between the *spedizioniere-vettore* and the *spedizioniere* see *DM* 2004, *giurisprudenza statunitense*.

[130] Haak 1986, p. 63.

[131] In the Shipping Act of 1984, Congress made the NVOCC definition statutory law, codifying the Federal Maritime Commission's longstanding adjudicatory and regulatory determination that NVOCCs are common carriers to the same extent as are vessel operating common carriers.

[132] De Wit 1995, p. 23-24 and 29 fn. 108.

carrier transportation service providers. They publish sailing and service schedules, and furnish complete service to a final destination under their own care and custody, pursuant to their own bills of lading.

2.2.4.4 The transitaire

A *transitaire* is an intermediary who has limited his functions to services ancillary to carriage. The designation *transitaire* is no more than the French denomination of the internationally known figure of the freight forwarding agent[133]. A *transitaire* is not a carrier, he merely is an auxiliary whose activities relate to the transit of goods, and who acts in the name of a disclosed principal[134]. The *transitaire's* main focus is the transhipment of goods from one mode of transport to another. '*Sa mission est d'organiser la liaison entre les différents transporteurs et d'assurer ainsi la continuité du transport',* according to French sources[135]. The *transitaire* does not have to bear the heavier burden imparted by the *'obligation de résultat'* as described above, he merely shoulders an '*obligation de moyens*' – an obligation of conduct. Even though the contract concluded with a *transitaire* is not often mistaken for a contract of carriage, the contracts and circumstances of individual cases are habitually thoroughly examined by the judiciary in order to determine whether a freight forwarder was acting as a *commissionaire de transport* or as a mere *transitaire*.

2.2.4.5 The charterer

Charter parties are generally contracts for the use of a ship, but can also involve another means of transport such as an airplane. The charterer does not always act as a carrier, since the three main varieties of the charter party are not all considered to embody contracts of carriage. An important division in this respect as regards charter parties is the one into charter parties by way of demise, such as the bareboat charter party and those not by way of demise such as the voyage charter party and the time charter party. The bareboat charter party is a charter party by which a vessel is let by demise, and under which the charterer has the possession of the ship for the appointed time and the control of all matters relating to the navigation and operation of the vessel including employment of the master and crew. The bareboat charterer temporarily takes over the position normally held by the ship owner. Such a charter party is not technically considered to embody a contract of carriage, as it does not have the movement of goods as its objective, but rather the letting of the vessel[136]. The other two main types of charter on the other hand, the time and the voyage charter party, are considered to embody contracts of carriage[137]. Whether a charter party is merely a contract for letting of a ship or whether it is also a contract of carriage depends on the circumstances; the fact that the master and the crew are to be appointed by the charterer is not necessarily decisive, for the fact that they have been appointed by the charterer does not preclude them from being the servants of the ship owner. Nor does the fact

[133] Ramberg 1998.
[134] De Wit 1995, p. 22.
[135] www.cargomaritimes.com; www.faq-logistique.com.
[136] Todd 2001, p. 168.
[137] Articles 8:373 and 8:892 BW; Haak, Zwitser & Blom 2006, p. 140; Todd 2001, p. 19 and 168.

that the ship owner pays the master and the crew mean that there can be no bareboat charter party[138].

Although the time and voyage charter party are both considered to be contracts of carriage, this does not result in the applicability of mandatory carriage law. On the international level this is the result of the scope of application of the Hague Rules, the Hague-Visby Rules and the Hamburg Rules; the scope of application of the first two regimes is restricted to carriage by sea under a bill of lading, while the last expressly mentions the exclusion of charter parties.

2.2.5 The mixed contract

In the hectic transport sector a multitude of transactions is concluded every day. As is shown above, the contracts may sometimes exhibit only subtle practical differences, but these subtleties often make a world of difference regarding the legal consequences of the concluded agreement. Yet the proceedings in the transport sector are – as is common practice in just about all trade transactions – aimed at making profit, and not specifically at conforming to the law. Carriers tend to carry: they drive, navigate and fly, leaving the legal 'details' for the jurists and insurance companies to work out. Why worry about the general transport conditions to be used when it is already difficult enough to get your vehicle to the customer on time in order to take over the goods?[139] Only when things go wrong does the characterization of the contract and the determination of the applicable legal regime become important. Once started however, the process of establishing the applicable law frequently brings to light that the contract concluded cannot be said to be merely a contract of carriage, or merely a freight forwarding contract. Because carriers regularly perform other necessary tasks besides the actual carriage of the goods – such as temporary storage and the like – without drawing up separate contracts for these tasks, a contract may meet the requirements of two or more contracts regulated by law. When more than one purpose is incorporated in a contract in such a manner that it meets the conditions of two or more special contracts regulated by law completely, the contract is a so-called mixed contract[140]. Mixed contracts are quite common in the transport sector. The through transport contract for instance, is a mixed contract: it is partly a contract of carriage and partly a forwarding contract[141]. As is shown by the structure of the through transport contract, the different parts of the mixed contract possess a certain amount of independence[142]. The exact amount of autonomy required is an important factor; too large an amount may lead the court to the decision that there are in fact two or more separate contracts, whereas too little will lead to the decision that the contract is not mixed, but rather consists of one main obligation flanked by

[138] D'Arcy 1992, p. 175-176.

[139] Claringbould *TVR* 2005, p. 175.

[140] HR 22 January 1993, *S&S* 1993, 58 consideration 3.3; Stoffels 2001, p. 35; Grotius 1625, Chapter 12 '*on contracts*': "*Acts are of a mixed character, either in their essential elements or through the association of another act. Thus if I promise money to a jeweller for making rings for me out of his own gold, the transaction will be partly purchase, partly hiring. Furthermore, a loan on things at sea is a mixed contract, which consists of a contract for a loan and an insurance against loss*".

[141] Various writers caution that a contract should not too easily be judged to be mixed based on elements of bailment inherent to all contracts of carriage (evidently carriage is not possible without giving the goods over into the care of the carrier), or even based on short periods of bailment before or after the carriage. Nonetheless, exceptions do occur. HR 22 January 1993, *S&S* 1993, 58, considerations by AG Hartkamp under 9. Cleveringa 1961, p. 401-402; Dorrestein 1977, p. 38-41; Korthals Altes & Wiarda 1980, p. 22-23; Haak 1986, p. 86-87.

[142] For more details on the through carriage contract see Section 2.3.3.4 on through transport contracts.

one or more minor, ancillary ones[143]. When the minor obligations are excessively dependent on the main obligation, the main obligation 'absorbs' the secondary ones, causing the legal regime of the main obligation to apply to the whole contract[144].

The multimodal contract for the carriage of goods is generally considered to be a mixed contract[145]. It is thought that the different aspects of the multimodal contract fulfil the conditions set by law – either codified or non-codified – regarding specific contracts of unimodal carriage, or that they would have, had they been contracted for separately.

When it comes to the main subject of this work, the question as to which rules are to be applied to the multimodal contract for the carriage of goods, the classification of the multimodal carriage contract as a mixed contract provides a useful starting point[146]. Although the classification of the multimodal contract as mixed in itself does not lead to the applicability of specific legislation, it is the foundation on which the various existing theories on how to establish the applicable regime(s) are built. The details of these theories will be considered below[147]. They are preceded by a description of the particulars of the multimodal contract, its demarcation and followed by an account of what causes a contract to be international[148].

2.3 The multimodal contract for the carriage of goods

2.3.1 Definition and main characteristics

In the first Chapter, in Section 1.2 on the concept of multimodal transport, a basic outline of the definition of multimodal carriage was given to provide some insight in the matter at hand. This outline was based on the MT Convention which, as was said, has significantly influenced the manner in which such carriage is characterized today. According to Article 1 of the MT Convention, 'international multimodal transport' means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken over by the multimodal transport operator to a place designated for delivery situated in a different country[149]. Over the years many other, slightly varying, definitions of this type of carriage have been thought up by writers, courts and legislators[150]. However, to describe all forms of the multimodal carriage contract, it is submitted

[143] BGH 18 October 2007, *TranspR* 2007, p. 472-475; BGH 15 September 2005, *TranspR* 2006, p. 38-42; Rb Haarlem 1 December 2004, *S&S* 2007, 98; Hof Amsterdam 8 May 2003, *S&S* 2004, 67; HR 28 November 1997, *S&S* 1998, 33 (*General Vargas*); Rb Rotterdam 5 December 1995, *S&S* 1997, 78. See also Temme 2008.

[144] Hof Den Haag 15 June 1979, *S&S* 1980, 44; Rb Rotterdam 7 December 2000, *S&S* 2001, 141.

[145] "*Thus far, therefore, I see both attraction and force in a conclusion that Article 1 may be read as applying CMR to the international road carriage element of a 'mixed' or 'multimodal' contract providing for two different means of carriage*." Mance LJ under 33 in *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535-560; Koller 2004, p. 361; Herber 1996, p. 881; Koller 1989, p. 770; Thume 1994, p. 891, Anh. II, No. 207; Van Beelen 1996, p. 30. The multimodal contract is considered 'mixed' in American legal theory as well; contracts of carriage covering both land and sea elements are spoken of as 'mixed'. See Sturley 2007 and Sturley 2009, p. 5.

[146] "*Die Einordnung eines Frachtvertrages als unimodal oder multimodal ist also heute eine wichtige Vorfrage, die vielleicht nicht immer klar genug gesehen wird. Von ihr hängt nicht nur die Haftung bei unbekanntem Schadensort, sondern auch die Verteilung der Rechte und Pflichten der Parteien ab*". Herber 2006, p. 435.

[147] See Section 2.3.2 of this Chapter on the different theories on the nature of the multimodal contract.

[148] See Section 2.3 of this Chapter in which the multimodal contract is defined and demarcated and Section 2.4 of this Chapter in which the international aspect is discussed.

[149] The MT Convention adopted the definition of the ICC Rules of 1975, a set of contractual standard rules which are up to this day incorporated in multimodal transport documentation.

[150] Some speak of the need for different means of transport: Bydlinski 1997, p. 357: "*Multimodaler Transport bezeichnet die Güterbeförderung mit zumindestens zwei verschiedenartigen Transportmittel aufgrund eines einzigen*

here that the definition used by the MT Convention for multimodal carriage and the multimodal transport contract should be adapted ever so slightly. In order to capture all contracts that should be deemed multimodal it is of import to allow for the possibility that the contract becomes multimodal due to the actual performance of the carriage. When this is taken into account the resulting definition of the multimodal carriage contract is the following:

> A single contract of carriage whereby a single carrier promises a consignor to carry goods, which either:
> a. prescribes the use of at least two different modes of transport, or
> b. allows for the use of more than one mode of transport while two or more modes of transport are actually used during its performance.

This somewhat extended definition allows for the contemporary variety in multimodal carriage contracts. It specifically acknowledges that the actual performance of the carriage can in some situations influence the character of the contract and the corresponding carrier liability regime[151]. The part of the definition reading: '…or allows for the use of more than one mode of transport while two or more modes of transport are actually used during its performance', indicates that, although the contents of the contract play first violin, the actual performance of the carriage can, under certain circumstances, influence the characterization of a contract. This is of particular interest in relation to the current tendency to perform carriage based on contracts which do not clearly prescribe the mode or modes of transport to be used. These contracts leave this to the discretion of the carrier in some form or manner. Such contracts are sometimes referred to as 'unspecified' or 'optional carriage contracts'. This intriguing habit and its consequences will be elaborated upon later on in Section 2.3.3.1 on the consequences of the wording of the contract and its physical performance.

Besides this extension of the range of the definition beyond that of the MT Convention certain other, perhaps more subtle, differences are introduced. One of them is the deliberate omission of the term multimodal transport operator, as the term is not considered entirely appropriate. By using this expression the MT Convention fails to appreciate that a multimodal carriage contract is just that: a contract of carriage[152]. The term 'operator' places too much emphasis on the services a multimodal carrier may provide in addition to the carriage contracted for, such as providing storage facilities between transport stages. The writers that would like the

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entgeltlichen Vertrages"; Ebenroth, Fischer & Sorek 1988, p. 757: "…*multimodal transport is der Gütertransport unter Verwendung vom mehreren Transportmitteln aufgrund eines einheitlichen Vertrags*…"; Thume 1994, p. 863, Anh. II, No. 1: "…*den Transport von Gütern mit mehreren, zumindest aber mit zwei verschiedenartigen Beförderungsmitteln aufgrund eines einheitlichen Beförderungsvertrages (Durchfrachtvertrag) zur Erreichung eines einheitlichen Beförderungszwecks*"; Mance LJ in *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* 25, can also be found in *ETL* 2004, p. 535-560: a "*contract providing for two different means of carriage*". Whereas others focus on the difference of the modes of transport involved: Van Beelen 1996, p. 235: "*In one and the same agreement the carrier is bound to transport goods by various modes of transport*". This definition corresponds with the definition of the Dutch legislator found in Article 8:40 BW; De Wit 1995, p. 3: "*A contract for the multimodal carriage of goods contains an undertaking by a carrier, who is called the multimodal transport operator, to perform carriage of goods by at least two different modes of transport from the place where the goods are taken in charge to a place designated for delivery*"; Kiantou-Pampouki 2000, p. 6: "*a carriage of goods from one place to another, performed by at least two different modes of transport, under a single contract and document*".

[151] *Cf. Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535-560 under 11 and 20-21.

[152] Helm 1977, p. 683; Thume *Kommentar zur CMR* 1994, p. 889, Anh. II, No. 196; Bydlinski 1997, p. 358; Mankowski 'Transportverträge' 2004, p. 1211, No. 1663; Parlementaire geschiedenis Boek 8, p. 87; Kiantou-Pampouki 2000, p. 7; Ramming 1999, p. 326.

multimodal contract to be seen as a contract *sui generis* seem to have christened the multimodal carrier 'MTO', or multimodal transport operator, for precisely this reason[153].

In addition, the definition also fails to mention the taking over of the goods by the multimodal carrier. The motivation for this omission is the frequent deployment of subcontractors to perform the actual transport, in which case the multimodal carrier does not physically take over the goods himself.

2.3.1.1 A single contract

The definition of the multimodal carriage contract put forward above can be dissected into two specific conditions a contract has to meet for it to be considered multimodal. The first condition is that the carriage should be based on one single contract between a consignor and a carrier. When a multimodal carrier accepts a consignor's business, he agrees to be responsible for the complete movement of the goods even though in general it is unlikely that he will carry the goods with his own vehicle or vessel for more than one stage. Many multimodal services are offered by sea carriers who subcontract the other connecting activities of carriage and transhipment[154]. A schematic example of such a multimodal contract is shown in figure 2.1:

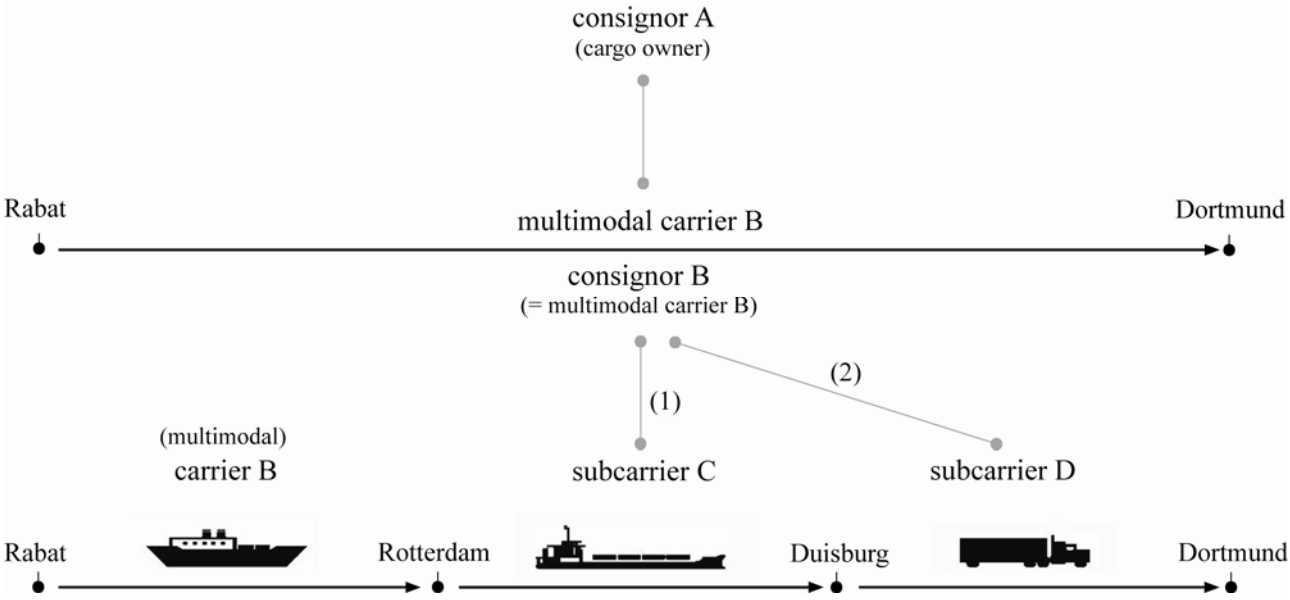

Figure 2.1: (partially) subcontracted multimodal transport
Between consignor A and carrier B a multimodal contract of carriage has been concluded concerning the carriage of goods from Rabat to Dortmund. Carrier B performs the sea carriage himself but subcontracts the other stages of the carriage; he concludes unimodal contracts of carriage (1) with inland waterway carrier C and (2) with road carrier D, with himself, carrier B, as the consignor.

[153] In a proposal for a new uniform multimodal regime Clarke, Herber, Lorenzon and Ramberg use the denomination 'transport integrator' instead of multimodal carrier. Clarke, Herber, Lorenzon & Ramberg 2005.
[154] Kindred & Brooks 1997, p. 5.

Defining the multimodal contract as above excludes non-carriage agreements such as freight forwarding contracts[155], but it also excludes transport based on several unimodal contracts, one for each subsequent stage of the journey, which is sometimes designated as 'broken' or 'segmented' transport[156]. The question whether one or more contracts are involved may often be rather difficult to answer however. Even the fact that several consignment notes have been issued does not necessarily mean that more than one contract has been concluded, although it is a factor to be taken into consideration. In this matter the decisive criterion must always be the intent of the contracting parties[157].

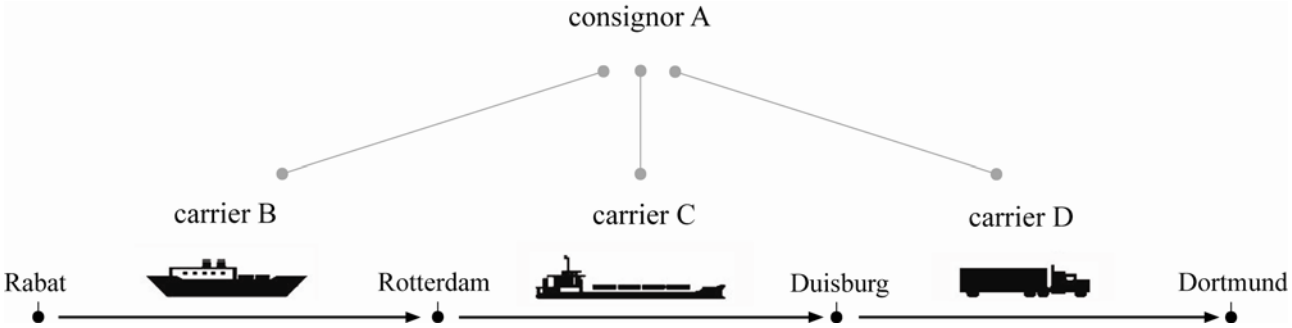

Figure 2.2: unimodal or 'segmented' transport

2.3.1.2 More than one mode of transport

The second essential characteristic of the multimodal contract of carriage is that it prescribes – or allows for – the use of more than one mode of transport in the performance of the contract[158]. Logically, the description of this trait of the multimodal contract for carriage leads us to the question what is to be understood by the terms 'mode of transport'. To begin with, it does not completely correspond with the term 'medium', as in the medium in which transportation can take place, such as air, land or water[159]. Both the medium land and the medium water cover two modes of

[155] See Section 2.2.4.1 of this Chapter on the freight forwarding contract.

[156] Molengraaff 1928, p. 243; Mankowski 'Transportverträge' 2004, p. 1212, No. 1664; Ebenroth, Fischer & Sorek 1988, p. 757-758; Van Beelen 1996, p. 6; Thume *Kommentar zur CMR* 1994, p. 871, Anh. II, No. 50; Ramming 1999, p. 326; Bydlinski 1997, p. 359; Puttfarken 1997, p. 175; Koller 1982, p. 1. The terminology 'segmented' transport used by Csoklich and the MT Convention (Article 3(2)) to describe this kind of transport is the better suited one however, since something that is broken was once whole, and the unimodal contracts of a 'broken transport' were never part of a single whole. Csoklich 2001, p. 701.

[157] Loewe *Commentary on the CMR* 1975, p. 16.

[158] "… [W]*here goods are transported by two or more methods of transportation successively*." Hill 1976. See also Article 1(2) Tokyo Rules; Article 1(2) TCM Draft Convention; Rule 2a ICC Uniform Rules for a Combined Transport Document; Article 1(1) MT Convention; Article 2(1) UNCTAD/ICC Rules for Multimodal Transport Documents. The Working Party on Facilitation of International Trade Procedures, a subsidiary body of the UNECE, defines 'mode of transport' in its code for modes of transport as being a method of transport used for the carriage of goods, while it defines 'means of transport' as a particular vehicle, vessel or other device used for transport of goods or persons. ECE/FAL Recommendation No. 19 "Code for Modes of Transport", which can be found at www.unece.org.

[159] According to Mankabady in his 1983 discourse on the MT Convention, the traditional modes of carriage were sea, air and inland transport, of which the last category seems to be a combination of road, rail and inland waterway. 'Means of transport' he took to mean the methods or the arrangements used for transport. The result was that he

transportation; rail and road transport take place on land and sea and inland waterway carriage on water. However, in general carriage by inland waterways, sea, road and rail are all deemed to be separate modes of transport. The Genoa Draft Convention on International Combined Transport of 1967 for example defined international combined transport as the "*transport of goods which according to the contract consists of at least two stages, one of which is by sea and the other(s) by air, road, rail or inland waterways, between two countries*". In addition, each and every one of these types of carriage is governed by its own uniform legal regime. From this given, De Wit infers that when the medium alone is taken into account this leads to incongruous results[160]. He draws the conclusion that whether a transport can be considered multimodal hinges upon a combination of the medium and the vehicles, crafts or vessels used, while the use of different means of transportation is the deciding factor[161]. In his view, the transport of goods by one medium is unimodal if the goods are not transhipped; if a transport consists of a sea stage and an inland waterway stage without a transferral of the goods between the two from the sea-going vessel to a barge (or some other inland waterway specific means of transportation) he considers it unimodal transport. Other writers, such as Haak and Van Beelen, are of the opinion that the means of transportation used does not carry that much significance[162]. Haak considers the medium that is used to be the decisive factor. Since he does not consider inland waterways to be the same medium as maritime waters he does not see transport by inland waterway and sea in one vessel as unimodal carriage, but rather as multimodal transport which is brought under a single regime by international law based on practical reasons. After all, if it were otherwise, provisions such as Article 2(2) of the CMNI would not have been necessary.

Nevertheless, this does not mean that no additional factors are needed in order to be able to distinguish the different modes of transportation. The Dutch legislator has tried to provide some clarity on the subject by summarizing the various modes of transportation in Article 8:40 BW with the term 'transportation techniques'. A disadvantage of this terminology is the strong and direct association it evokes with the vehicles, vessels or crafts used for the carriage. The use of a certain type of vehicle or craft cannot, in itself, serve as the criterion by which to differentiate between the various modes of transport. It is common knowledge that air transport can be performed by airplanes, but also by helicopters and hot air balloons.

Van Beelen offers the expression 'transportation infrastructure' to describe the term mode of transport. A description that, although cumbersome, seems to be quite accurate. It combines the significance of the medium with the needed additional infrastructural factors to differentiate between land based modes such as road and rail transport. It covers the differences between the various modes of transportation that have crystallized historically; road, rail, air, sea, and inland

deemed the container or a pallet a means of transport. Mankabady 1983, p. 125. Currently the term 'means of transport' is generally considered to designate the vehicles or vessels used for transport; a pallet or container are considered to be packaging or part of the means of transport used at most.

[160] It might then for instance seem doubtful whether transport by sea followed by transhipment and transport by inland waterway can be considered multimodal transport. De Wit 1995, p. 171.

[161] As does Kiantou-Pampouki. Kiantou-Pampouki 2000, p. 8. In § 452 HGB the German legislator seems to indicate that the means of transport used is decisive in combination with the law applicable to the various stages of the transport. German writers such as Ramming however, disagree with this sentiment. To them the means of transport used is not the most significant factor, but rather the place where the transport occurs geographically is. See Ramming 1999, p. 326.

[162] Haak, Zwitser & Blom 2006, p. 176. Van Beelen 1996, p. 16-18. Mankowski on the other hand establishes that multimodal transport is transport with at least two different *means of transport* based on a single contract, an opinion which he founds on writings by Dubischar and Koller. Mankowski 'Transportverträge' 2004, p. 1211, No. 1663.

waterway, which are categorized as such in both national as well as international transport regimes[163].

Nevertheless, areas of grey such as the transition between inland waterway and sea, are still distinguishable, even under Van Beelen's approach. The German legislator, who is inclined to consider the spatial aspect – which medium is used and where – of more import than the means of transportation involved, solved this problem by differentiating between sea and inland waterway based on the boundaries of maritime shipping given by the '*Flaggenrechtsverordnung*', the German flag law act[164]. Nevertheless, this does not mean that the means of transport is of no importance in the German regime. On the contrary, the performance of the contract of carriage by different means of transportation is one of the requisites imposed by the German national regime on multimodal transport for application. The part of the German HGB on multimodal carriage, §§ 452 through 452d HGB, is even entitled '*Beförderung mit verschiedenartigen Beförderungsmitteln*' which means 'carriage by different means of transport'.

One of the other conditions for application set by this regime once more shows the inclination of the German legislator to attach significance to the applicable law or in this case the law that would have been applicable[165]. The condition that is aimed at here is the proviso that for application of these rules at least two different legal regimes would have had to apply to parts of the carriage, had these parts been contracted for separately. A result of this requisite is the comparatively restricted scope of application of the regime. It is so restricted in fact, that it does not cover all types of multimodal carriage. As Ramming points out, the regime may not apply to the contract that allows for a combination of German domestic road, rail or air carriage as these parts of the carriage would all have been regulated by the same rules even if separate contracts had been concluded for each stage[166]. A regime that attaches that much significance to the applicability of differing rules of law should be considered to be too restricted to be used as a reliable guideline as to what can and what cannot be considered multimodal carriage contracts in general.

2.3.2 The theories on the nature of the multimodal contract

In the previous Sections we learned that the multimodal contract is generally considered to be a mixed contract in both Dutch as well as German literature[167]. The English view on the other hand

[163] The Dutch legislator has added transport by pipeline to this collection in Article 8:40 BW, but multimodal carriage of goods with a pipeline stage is apparently either very rare or very unproblematic since there is no case law or literature on the subject. Koller calls the road, air, rail, sea and inland waterway differentiation the '*traditionelle Betrachtungsweise*'. He is of the opinion however that the emphasis should be on the generally prevailing opinions on what is considered a mode of transport, which are revealed by the various transport law regimes. Koller *VersR* 2000, p. 1187.

[164] Ramming 1999, p. 326 and Ramming 2005, p. 138.

[165] According to Rabe this nearly became the only criterion for application of the regime. The prerequisite of the use of different means of transport was later added however after it had been decided that the regime should not apply when only identical vehicles or vessels are successively used. Rabe 1998, p. 431. The BGH had already put the need for different means of transportation into words in its judgement of 24 June 1987. BGH 24 June 1987, *TranspR* 1987, p. 447-454.

[166] Ramming 1999, p. 326. Koller on the other hand suggests that the German regime on multimodal carriage is not that restricted since a combination of for instance domestic road and inland waterway transport would be covered by two different sets of rules as in addition to §§ 407 *et seq.* HGB (*der ersten Unterabschnitt*) the inland waterway stage is also covered by the *Binnenschiffahrtsgesetz* (BinSchG). Koller 2007, p. 710, § 452 HGB, No. 18. For more details on the German legislation in this area see Chapter 10, Section 10.4.2.

[167] Van Beelen 1996, p. 2, 63; Bydlinski 1997, p. 361; Stoffels 2001, p. 35.

seems to be somewhat more pragmatic. Although the English also call the multimodal contract mixed[168], it appears as if they see the multimodal contract as nothing more than a chain of unimodal contracts. As the English seem to be of the opinion that opening up "*a prospect of metaphysical arguments about the essence of a multimodal contract*"[169] is best avoided[170] however, their precise ideas on the issue remain unclear. Nevertheless, English courts and writers do tend to refer to both Dutch and German case law when it comes to multimodal issues[171].

The consequences of the classification of the multimodal contract as mixed do not run completely parallel in the German and Dutch jurisdictions. Even within the German legal sphere itself opinions on what the exact consequences should be seem to vary; apparently the German rules on mixed contracts leave a lot of room for interpretation[172]. A number of prominent writers, among whom Basedow[173], Herber[174] and Koller[175], have in the past put forth their slightly differing views regarding this matter, which vary from the concept that the multimodal contract is a chain of '*einzelverträgen*' embedded in an encompassing multimodal contract (Basedow[176]) to the idea that the multimodal contract is an atypical contract, either because its parts have blended together in such a way they cannot be considered separately anymore (Koller) or because the combination of contract types creates a whole new type of contract, an *aliud*[177].

There seems to be much less dissension in Dutch legal literature, which may be caused by the codification of the mixed contract in Article 6:215 BW[178]:

> "*When an agreement fulfils the conditions of two or more agreements of a special kind which are regulated by law, the provisions relating to each of these special agreements apply alongside each other, but only insofar as these provisions are compatible and their*

[168] "*Thus far, therefore, I see both attraction and force in a conclusion that Article 1 may be read as applying CMR to the international road carriage element of a 'mixed' or 'multimodal' contract providing for two different means of carriage*". Mance LJ in *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535-560, under 33.

[169] *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535-560, under 62.

[170] Clarke *CMR* 2003, p. 30.

[171] *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535-560.

[172] Herber 1996, p. 881.

[173] Basedow 1987, p. 60-61.

[174] Herber 1996, p. 882.

[175] Koller 1989; Koller 1982; Koller 1995, p. 1027-1044. In the current edition of *Transportrecht* (edition 6, 2007) Koller only mentions that according to the '*Regierungsentwurf*' the multimodal contract is a contract of carriage and not a mixed contract nor a contract *sui generis*. Koller 2007, p. 699, § 452 HGB, No. 1.

[176] Basedow presented this view in 1987, but seems to have had a change of heart, since in more recent writings – after having been part of the committee responsible for drawing up the transport law reform – he declared the multimodal contract to be an *aliud* (See fn. 177). Basedow *TVR* 2000, p. 105. He did however observe in 1987 that the *aliud* construction makes the provisions dealing with multimodal carriage in the various carriage conventions rather difficult to explain. Basedow 1987, p. 59. In 1987 he considered the multimodal contract to be a bundle of '*einzelvertragen*'. He endowed the carrier with a dual capacity in relation to the shipper; the carrier is not merely the party with which the shipper concludes several unimodal carriage contracts in one breath, but at the same time he is also the shipper's co-contracting party as regards the multimodal contract in which the concluded unimodal contracts are embedded. Thus the multimodal contract is a necklace consisting of a strong piece of thread and some unimodal beads. The beads – the different stages of the transport – are covered by the relevant rules of unimodal carriage law whether it be national or international, while the left-over subjects are covered by whatever – national – regime applies to the thread that keeps the whole together. Practically, following Basedow's view means that the various unimodal carriage conventions can directly apply to the relationship between the shipper and the carrier.

[177] Ebenroth, Fischer & Sorek 1988, p. 760. '*Aliud*' is a Latin term meaning 'other' or 'something else', and is mostly used in German writings. See Basedow 1987, p. 59.

[178] Division 8.2.2 of Book 8 BW on multimodal carriage was initially named 'contract for the mixed carriage of goods'. Parlementaire geschiedenis Boek 8, p. 82.

tenor does not resist application in relation to the nature of the agreement."

Article 6:215 BW contains the codification of the combination doctrine[179], which is only one of the three possible approaches defended in Dutch legal literature. The other two options are the absorption approach and the *sui generis* approach, each of which has its own – small number of – supporters when it comes to the multimodal contract of carriage. They will be discussed in the Sections below alongside the combination approach.

2.3.2.1 Dutch theories on the multimodal contract

A mixed contract is a contract that incorporates the characteristic features of more than one special type of agreement designated by written or unwritten law[180]. Pertaining to the multimodal carriage contract specifically, this means that the different stages of the transport – different parts of the contract – have the characteristic features of certain special contracts which are regulated by their own provisions in the laws of many countries, such as the contracts for the carriage by sea, road, air, inland waterway or rail or even in international conventions. It is the combination of these parts, which would have amounted to a bundle of contracts named and regulated by law had they been contracted for separately, that makes the multimodal contract susceptible to conflicting views.

In Dutch legal literature three doctrines are known by means of which the proper law of a mixed contract can be found. There is the absorption doctrine, the combination doctrine and the *sui generis* doctrine[181]. Since the combination method is codified in Article 6:215 BW as the preferred approach, this approach is most commonly used by the judiciary. Article 6:215 BW aims to make all relevant rules of law equally applicable unless there is a good reason not to apply them. Thus, it fits right into the system of concurrence of legal provisions promulgated by the Dutch Civil Code in general[182].

At first glance this approach of combining all relevant rules seems to be straightforward enough. Nevertheless, the careful reader will perceive rather quickly that this provision is more of a rule of thumb than a precision instrument. By incorporating the proviso regarding the tenor of the rules in question and the nature of the contract, the legislator has given the judiciary some manoeuvrability. Just so, a court of law has the freedom to deviate from the combination approach and can apply either the absorption doctrine or the *sui generis* theory when it is deemed necessary.

In The Netherlands, the multimodal carriage contract has been regulated by law in Articles 8:40 through 8:52 BW. Since Article 8:41 BW merely resolves that the *appropriate* rules of law apply to each part of a carriage that is based on a contract for the multimodal carriage of goods, the above-mentioned doctrines to establish which rules are the appropriate ones are still needful. Article 8:41 BW does no more than indicate that the Dutch legislator characterizes the multimodal contract of carriage as a mixed contract[183], although between the

[179] According to Van Dunné however, the last part of the Article leaves the door open for the *sui generis* approach. Van Dunné 2001, p. 16.

[180] Haak & Zwitser 1999, p. 171. See also HR 22 January 1993, *NJ* 1993, 456; *S&S* 1993, 58 (*Van Loo/Wouters*); Haak 1998, p. 32 *et seq.*; Stoffels 2001, p. 35.

[181] De Baat 1920, p. 150.

[182] C. Zeben, Reehuis & Slob 1990, p. 1432.

[183] Van Beelen 1996, p. 29. The parliamentary history intimates this by stating: "*The actions mentioned here are of an accessory nature and as such do not furnish the contract with a mixed character. Should they under certain*

lines a preference for the combination doctrine can be read.

2.3.2.1.1 The absorption doctrine

Like the German doctrine of 'overall consideration' or *Gesamtbetrachtung*[184], the absorption doctrine[185] resolves that the predominant element of the contract determines which regime applies to the contract as a whole[186], while the other, subordinate aspects of the contract are 'absorbed' into this main element as it were. Consequently, this doctrine is meant to be used exclusively in situations where the elements of the mixed contract in question are not of equal weight.

A codified example of the absorption approach can be found in Article 1 of the MT Convention. The last sentence of Article 1(1) reads:

> "*The operations of pick-up and delivery of goods carried out in the performance of a unimodal transport contract, as defined in such contract, shall not be considered as international multimodal transport.*"

The drafters of the Convention clearly deemed the pick-up and delivery operations to be of minor importance compared to the main part of the contract, the unimodal transport. Therefore they chose to let the chief carriage element absorb the juridically less significant pre- and end haulage and caused the mixed contract to be seen as no more than a unimodal contract of

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circumstances not be of an accessory nature however, … the contract is a contract of mixed carriage…", Parlementaire geschiedenis Boek 8, p. 88.

[184] *Gesamtbetrachtung* means an overall consideration or examination of the contract. For an explanation and overview of case law on the *Gesamtbetrachtung* see Thume *Kommentar zur CMR* 1994, p. 895. According to Herber, the *Gesamtbetrachtung* is too crude an instrument to be applied to the multimodal contract. Herber 1996, p. 880. The BGH declared in 1987 that this theory had no application to cases where the subject of the transport was *a priori (i.e.* from the outset) the transport of goods using various means of transport (in the case before it, the carriage by truck and by ship of the container which became lost). Furthermore it stated that the same applies when different regulations on liability – for instance the CMR and the Warsaw Convention – are specified as mandatory with regard to the means of transport used for the various sections of the route. BGH 24 June 1987, *TranspR* 1987, p. 447-454. "*Auf den Gesichtspunkt der Gesamtbetrachtung hat der Senat im Bereich des innerstaatlichen und des grenzüberschreitenden Straßengüterverkehrs – im Bereich des ersteren bis zur Neufassung des § 26 GüKG durch das Zweite Gesetz zur Änderung des Güterkraftverkehrsgesetzes vom 9. Juli 1979 (BGBl I S. 960) und Einfügung des Absatzes 5 des § 1 KVO in die Kraftverkehrsordnung – in ständiger Rechtsprechung zurückgegriffen, wenn sich der Frachtführer bzw. der Spediteur-Frachtführer (§§ 412, 413 HGB), der einen Auftrag zur Beförderung im Güterfernverkehr mit Kraftfahrzeugen übernommen hatte, gegenüber der ihn nach § 26 GüKG a. E zwingend treffenden Haftung nach der Kraftverkehrsordnung bzw. gegenüber der ebenfalls zwingenden Haftung nach der CMR (Article 41 CMR) darauf berief, daß der Schaden im speditionellen Vor- oder Nachlauf oder sonst an einer Stelle eingetreten sei, hinsichtlich der die Frachtführerhaftung abdingbar sei (BGH Urt. vom 28. Mai 1971 -I ZR 149/69, VersR 1971,755; Urt. vom 3. März 1972-I ZR 55/70, NJW 1972,866 = VersR 1972,431; Urt. vom 4. Mai 1979- I ZR 51/78, LM HGB § 413 Nr. 8 = VersR 1979,811; Urt. vom 27. Januar 1982 – I ZR 33/80, NJW 1982, 1944 = VersR 1982,669; vgl. auch Helm aaO m. w. Nachw.). Maßgebend für diese Rechtsprechung war die Erwägung, daß der beauftragte Frachtführer und Spediteur die ihn aus dem übernommenen Auftrag unabdingbar treffende Haftung nicht dadurch sollte ausschließen oder mindern können, daß er die Beförderung entgegen dem ihm über die gesamte Strecke erteilten Auftrag ganz oder teilweise nicht im Güterfernverkehr ausführte.*" BGH 24 June 1987, *TranspR* 1987, p. 447-454.

[185] Van Beelen 1996, p. 28. See also HR 28 November 1997, *NJ* 1998, 706; *S&S* 1998, 33 (*General Vargas*); Haak 1998, p. 194 *et seq.*

[186] When the absorption approach is applied this means that the contract of carriage is not seen as multimodal, but rather as a carriage contract primarily focused on one specific mode of transport, which also includes minor, subordinate carriage of another type, such as drayage (pre- and end haulage by truck). In other words, such a contract is considered unimodal. *Cf.* OLG Celle 21 May 2004, 11 U 7/04, www.justiz.nrw.de; OLG Frankfurt 30 August 2004, 13 U 215/02, www.justiz.nrw.de.

carriage under these circumstances. A result of this application of the absorption doctrine is that the contract can no longer be considered multimodal; the dominant aspect of the contract takes over and transforms the mixed contract into a singular one. Therefore Articles 8:40 through 8:52 BW do not apply to a contract that has been 'absorbed' like this. *A contrario* this means that the absorption doctrine cannot be applied to a truly multimodal contract[187].

The Dutch *Hoge Raad*'s decision in *General Vargas* is an example of the application of the absorption doctrine. In this case, the owner of a shipment of aluminium ingots commissioned Steinweg to accept the delivery of his goods in the port of Rotterdam, to unload them from the ship and to store them subsequently[188]. Steinweg however, stored only half of the shipment in his warehouse situated on the quay where the ship moored. The other half is loaded on to an inland waterway vessel and sent to Steinweg's nearby premises at Spijkenisse for storage. During this journey the unfortunate vessel sinks. In order to receive compensation for his losses the owner of the shipment pursues Steinweg. Steinweg in turn invokes freight forwarding conditions stipulating that he is not liable for any damage whatsoever, unless the principal proves that the damage has been caused by fault or negligence on the part of the forwarder or the latter's servants[189]. The *Hoge Raad* was not impressed and established that – in this case – all other services rendered were subordinate and instrumental to the agreement of '*bewaargeving*', which is similar to bailment, contained in the contract. It applied the absorption doctrine and determined that the contract was a mere custody agreement, thus barring the freight forwarding conditions from application.

The absorption doctrine is not a doctrine that can be employed *vis-à-vis* all contracts which entail more than one stage of carriage or which have more than one aspect however. The dominant element cannot always be discerned without difficulty. Applying the absorption doctrine in such cases may lend the resulting decisions concerning which regime to apply an air of arbitrariness.

One of the standards that can be used to discern the dominant element of a contract, a standard that is especially enticing in relation to multimodal carriage contracts, is the distance that is to be covered by each mode of transport. This standard of geographical distance is used in Article 2(2) of the new inland waterway carriage convention, the CMNI[190], which is an example of regulated absorption. In it the CMNI determines that the convention does not apply to the carriage of goods, without transhipment, both on inland waterways and in waters to which maritime regulations apply when 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 maritime regulations apply is the greater. The general idea however, that one of the transport stages is more important than the others on the sole basis that it covers a larger part of the distance the contract has to span than the other stages, has been rejected by the Dutch legal literature[191]. Nevertheless, it can be of influence in the deliberation whether or not a certain part of the contract is of an accessory

[187] See BGH 24 June 1987, *TranspR* 1987, p. 447-454. Although it may be applied to parts of such a contract, see *Mayhew Foods Limited v Overseas Containers Ltd.,* [1984] 1 *Lloyd's Rep*. 317, where the preceding carriage by road was not absorbed by the sea carriage from Shoreham to Jeddah, but the storage and transhipment in Le Havre was absorbed and considered part of the carriage by sea.

[188] HR 28 November 1997, *S&S* 1998, 33.

[189] General conditions of the FENEX Article 11(2).

[190] Other, similar examples can be found in Articles 8:370(2) and 8:890(2) BW.

[191] Van Beelen 1996, p. 28-29.

nature[192]. In the end, the actual assessment can only be made based on the facts of the case at hand[193].

2.3.2.1.2 The combination doctrine

The combination doctrine as found in Article 6:215 BW, teaches that the regulations pertaining to each type of contract included in the mix should be applied alongside each other when a contract is of a mixed nature[194]. In the above-mentioned *General Vargas* case this would have meant that the regulations concerning freight forwarding would have applied side by side with those concerning the agreement of deposit. When applied to a contract for the multimodal carriage of goods entailing sea carriage from Rotterdam (The Netherlands) to Riga (Latvia) and from there by road to Moscow (Russia), this would make the Hague-Visby Rules apply alongside the CMR[195]; the Hague-Visby Rules would apply to the sea stage and the CMR to the road stage. As in this case the containers stuffed with boxes of butter meant for Moscow went missing on the road between Riga and their destination, the ensuing claim for compensation was covered by the rules of the CMR.

The combination approach is in essence identical to the network approach. Although they are labelled differently, both approaches dissect a contract into various sufficiently independent parts and then apply the rules of law whose requirements are met by these parts.

Based on Article 8:41 BW, which is a codification of the combination principle, each stage of the multimodal carriage is governed by the legal rules applicable to that particular stage. The parliamentary history on these Articles informs us that what is meant here is that the entire relationship between the contracting parties is regulated by the legal regime of the stage where the rights and obligations concerned have originated[196]. In other words, the regime of the stage where the damage or loss was caused applies to the entire relation between the consignor and the carrier. In the case of the butter transport from Rotterdam to Moscow, the relationship between the carrier and the cargo claimant was regulated by international road carriage law as the loss of the goods was caused during the road stage of the transport[197].

The combination doctrine does have a slight drawback to contend with. In situations where the loss or damage was caused during more than one transport stage the law applicable to the claim may prove somewhat difficult to determine. If it can be established which part of the damage can be attributed to each of the relevant transport stages the claim may perhaps be divided between the stages. If this is not possible however the law which is to be applied remains largely unpredictable.

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[192] Kirchhof 2007, p. 134.

[193] This seems even more necessary when considering that the application of the absorption doctrine can easily be misused. For one, when the absorption approach is applied to a multimodal carriage contract the outcome may show incongruous results; it can cause the application of a regime specifically meant for one sort of carriage to apply on damages caused by another sort of carriage. For another, the 'absorption' of all other aspects by the main element of the contract can be used as a way to circumvent rules of law which would otherwise have been mandatorily applicable.

[194] The combination doctrine is also known as the accumulation doctrine. Van Beelen 1996, p. 28. See for an application of the accumulation doctrine HR 22 January 1993, *S&S* 1993, 58, under 3.3: "*in those cases where the agreement matches the description given by the law of two or more agreements of a special sort entirely, the provisions regulating these agreements of a special sort apply alongside each other in principle*". Hof Amsterdam 8 May 2003, *S&S* 2004, 67; Arbitration 23 August 1977 and 19 September 1978, *S&S* 1981, 129.

[195] Rb Rotterdam 20 August 2003, *S&S* 2004, 125. See also Rb Rotterdam 3 May 2006, *S&S* 2007, 114.

[196] Parlementaire geschiedenis Boek 8, p. 91.

[197] Van Beelen 1996, p. 89.

A positive effect of the combination theory on the other hand, is that it provides a possibility which is very much needed in transport law; the possibility to separate certain elements contained in the contract from the element of carriage. Applying the strict regime meant for carriage to all additional activities provided for in a contract of carriage will not always lead to reasonable results. An example of such a situation is recorded in the CMR in Article 11(3), which states:

> "*The liability of the carrier for the consequences arising from the loss or incorrect use of the documents specified in and accompanying the consignment note or deposited with the carrier shall be that of an agent, provided that the compensation payable by the carrier shall not exceed that payable in the event of loss of the goods.*"

With this provision the CMR separates the supervision of customs clearance and the care for customs documentation from the contract of carriage, bestowing upon the carrier the liability of an agent for these services rather than the more taxing liability of a carrier[198]. With the help of the combination doctrine such a course is also possible in relation to other aspects of a contract of carriage that call for separate treatment.

2.3.2.1.3 The *sui generis* doctrine

Sui generis is a Latin term which means 'being the only example of its kind', or 'constituting a class of its own', 'unique'. Those who adhere to the *sui generis* doctrine pertaining to the multimodal contract[199] find justification for their views in the fact that the multimodal contract does not simply comprehend the agreement for carriage, but also the important additional services inherent to multimodal transport such as transferral and – frequently – storage. They do not consider it a mere contract for the carriage of goods. They deem it a contract which encompasses the complete organization of the transport chain, which results, in their view, in far more obligations for the multimodal carrier than a pure addition of the obligations of the unimodal carriers involved[200]. This larger burden of obligations is the reason why the supporters of this theory do not indicate the multimodal carrier simply as a carrier but as an 'MTO' or combined transport operator (CTO) instead[201]. The MTO takes it upon himself to perform various services which could all be the subject of separate contracts, but which are connected in such a manner that they form one undividable whole[202]. When the *sui generis* doctrine is applied to a mixed contract such as the multimodal contract, this contract is considered to be of a new type. It has become a contract with its own unique character, formed by combining several

[198] Korthals Altes & Wiarda 1980, p. 20.

[199] Although the *sui generis* doctrine is acknowledged in The Netherlands as being one of the alternatives for dealing with a mixed contract it does not have many Dutch supporters. Spiegel and De Vos seem to be an exception rather than the rule. Spiegel & De Vos 2005.

[200] Bydlinski 1997, p. 361; Driscoll & Larsen 1982, p. 198-199.

[201] Van Beelen 1996, p. 31. The terms MTO and CTO seem to have become somewhat more established however and are at this point in time also used by those that do not view the multimodal contract for carriage as a contract *sui generis*, see http://r0.unctad.org/en/subsites/multimod/mt2brf0.htm, in combination with http://r0.unctad.org/en /subsites/multimod/mt3duic1.htm.

[202] In BGH 22 February 2001, *TranspR* 2001, p. 372-375 at p. 373, the BGH clarifies that the *sui generis* doctrine is no longer followed by the German judiciary – if it ever was – by stating that the fact that a carrier has taken it upon himself to perform other tasks regarding the goods besides the carriage does not mean that there can be no contract of carriage.

contracts into a new whole[203]. It is has been argued that the result of the view that the multimodal contract is not made up of unimodal stages is that the existing bodies of mandatory law whose scope of application rules expressly mention certain international unimodal carriage contracts cannot apply to any part of the *sui generis* contract[204]. There is no international and almost no national law specifically regulating the multimodal contract[205] and thus it is subject to the general rules of contract law and/or transport law only[206], but not to the rules of law that would have applied if not one, but several separate unimodal contracts would have been concluded. Unaided the existing unimodal transport conventions, or even unimodal national regimes, should, according to the doctrine, not apply to a multimodal contract, leaving the contracting parties more or less free to define the aspects of their agreement contractually. A beneficial result of this approach is – one that should not be taken lightly – the absence of possible conflicts between a future treaty regulating international multimodal carriage on a uniform basis, and (most of) the existing transport conventions[207].

Applying the *sui generis* doctrine to the above-mentioned example concerning carriage from Rotterdam to Riga by sea and from there by road to Moscow should result in neither the CMR nor the Hague-Visby Rules being applicable. In their stead the contract is to be ruled by the general rules of carriage law, that is if there are any, of whatever national regime applies, supplemented by its rules of contract law[208]. Unless of course the court seized decides to apply the relevant international unimodal conventions by analogy[209].

In practice however, this ideal of complete avoidance of mandatory unimodal carriage law is unattainable. For one, it clashes with the provisions of the international conventions on unimodal carriage that explicitly declare themselves applicable to a certain mode of carriage, even if it is performed based on a contract that also includes other modes of transport such as Article 31 of the Warsaw Convention and Article 38 of the Montreal Convention[210]. Another example is the COTIF-CIM as amended by the 1999 Vilnius Protocol, which expands its scope of application to include several types of multimodal transport contracts in Article 1(3) and (4). In addition to applying to contracts for the carriage of goods by rail for reward it also covers international carriage being the subject of a single contract which includes carriage by road or inland waterway in internal traffic of a Member State as a supplement to transfrontier carriage by rail, and international carriage being the subject of a single contract of carriage which includes carriage by sea or transfrontier carriage by inland waterway as a supplement to carriage by rail, if

[203] Herber 1996, p. 886. See also Herber *Seehandelsrecht* 1999, p. 240-241 and Van Dunné 2001, p. 16. For more details on the German point of view regarding the nature of the multimodal contract see Section 2.3.2.2 of this Chapter.

[204] Unless of course such a convention expressly determines its applicability as the Warsaw and Montreal Conventions do in Articles 31 WC and 38 MC.

[205] States with rules on multimodal carriage in their national legislation currently are The Netherlands, Germany, China, Mexico, Chile, Argentina, Brazil, and India, while the MERCOSUR countries (Argentina, Brazil, Paraguay and Uruguay), the ALADI members (Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, Paraguay, Peru, Uruguay and Venezuela) and Andean community (Bolivia, Colombia, Ecuador, Peru and Venezuela) have joint legislation on the subject. UNCTAD 2001, p. 18-53.

[206] Whether this means that not even general rules of transport law of the applicable national regime are to apply is unclear as articles on this view sometimes do refer to the multimodal contract as a transport contract. See for instance Spiegel & De Vos 2005.

[207] This is probably why Clarke rather unexpectedly professed his support for this view in a recent proposal to the European Commission. Clarke, Herber, Lorenzon & Ramberg 2005.

[208] Bassenge *et al*. (eds.) 2004, p. 379.

[209] Herber 1996, p. 882.

[210] Article 31(1) WC asserts 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, provided that the carriage by air falls within the terms of Article 1. Article 38 MC is nearly identical.

the carriage by sea or inland waterway is performed on services included in a certain list[211]. As we shall see in the next Chapter, there is some discussion about the scope of application of the CMR in this respect[212]. One of the questions that was raised is whether a contract for the carriage of goods by road in vehicles for reward, which is a prerequisite for the application of the Convention according to Article 1 CMR, can also contain conditions relating to other modes of carriage. The phrasing of the COTIF-CIM which is almost identical – '*These Uniform Rules shall apply to every contract of carriage of goods by rail for reward*'– seems to suggest that this is entirely possible.

A second irregularity is that, should the *sui generis* view lead to complete avoidance of the existing mandatory unimodal carriage law, this leads to a peculiar and unwanted situation. A legal vacuum would then exist between the consignor and the multimodal carrier, whereas the contract between the multimodal carrier and the subcontracting carrier is controlled by the mandatory unimodal carriage regimes meant to protect the consignee[213]. The original consignee, usually the more vulnerable party in the carriage industry, would thus be at the mercy of whatever contractual conditions or general contract terms the multimodal carrier chooses to employ.

2.3.2.1.4 In practice

From the descriptions of the three doctrines above it can be deduced that none of them is suitable to be used on every one of the numerous – mixed – contracts the transport sector yields[214]. The combination approach should for instance not be followed when a carrier performs services for his customers that are of such minor importance that the application of this approach would generate inappropriate results. He should not be allowed to circumvent the mandatory carrier liability regimes merely because he stored the goods for a short period of time before or after the carriage based on the carriage contract[215]. Therefore the *Rechtbank* in Den Bosch decided that the carrier was liable for the theft of goods from a warehouse in Eindhoven in The Netherlands under the CMR regime since the contract determined that these goods were to have been carried from Eindhoven to various destinations in France[216]. The goods were only stored shortly for *groupage*. This case shows that even if the Dutch judiciary generally makes use of the combination doctrine as this is the primary option in Article 6:215 BW, the absorption doctrine is also used if appropriate. Nevertheless, the absorption theory is unusable when it is impossible to determine which characteristics of the contract are the predominant ones, which is often the case. And even when the principal features of a contract can be determined, this does not necessarily mean that these should repress the other aspects of the contract, especially not regarding facets that are typical for the other type of contract[217].

The *sui generis* doctrine on the other hand was rejected by the Dutch legislator[218]. This point of view is based on the fact that it only allows for the application of the provisions pertaining to the contract types involved by analogy. The application of provisions by analogy is not deemed suitable for mandatory rules in The Netherlands because it is thought that analogy compromises their compulsory nature. As a result the *sui generis* approach is side-stepped in

[211] The CIM list of maritime and inland waterway services mentioned in Article 24(1) COTIF.
[212] See Chapter 4.
[213] Basedow 1987, p. 59-60.
[214] Hartkamp 2004, no. 47 *et seq*.; Van Beelen 1996, p. 28; Haak & Zwitser 1999, p. 173.
[215] See Section 2.3.3.2.1 of this Chapter on the consequences of storage for the characterization of the contract.
[216] Rb Den Bosch 24 August 2005, *S&S* 2007, 19.
[217] Zeben, Reehuis & Slob 1990, p. 1432.
[218] Haak & Zwitser 1999, p. 174.

Dutch carriage law which abounds with mandatory rules. When one looks at the history and the development of the carriage contract however, it becomes clear that the *sui generis* approach was in fact applied in the 19th century to sublimate the legal figure that defines and regulates the contemporary contract of carriage[219].

2.3.2.2 German theories on the multimodal contract

> "*When one searches for the 'tenet on the upkeep of type mixed contracts' in the explanatory remarks or in academic writing, one will not find an unequivocal answer. Instead, one will find a myriad of ideas and proposals, but not a secure set of instruments.*"[220]

In the German legal doctrine mixed contracts are largely subdivided into three types according to Thume[221]. To begin with there are the '*Verträge mit untergeordneter andersartiger Nebenleistungen'*, which are contracts that also include disparate subordinate obligations. The leading German legal opinion indicates that in order to find the proper law of such a contract, the absorption doctrine is to be applied[222]. The second and third types of contract that are discerned merit a different kind of approach however. Both the *'Typenkombinationsverträge'* or 'type combination contracts' and the *'Typenversmelzungsverträge'* or 'type blended contracts' are subject to the combination doctrine when determining the law applicable to the contract. When a dispute arises under a '*typenkombinierten Vertrag*' therefore, such a dispute is governed by the law applicable to the obligation or '*Teilleistung*' that was not properly met. When a dispute arises under a *'typenverschmolzener Vertrag*' however, establishing the applicable law is somewhat more complicated[223]. The reason for this is that although these last two types of contracts are sometimes hard to distinguish since they are a lot alike, there is also a subtle difference between the two. A *'Typenkombinationsvertrag'* is a contract that includes more than one type of obligation whereby the different obligations are just about equal in importance. A *'Typenversmelzungsvertrag'* on the other hand merely contains elements of various types of obligations, which makes it an inseparable whole[224]. How the law applicable to a '*Typenversmelzungsvertrag'* is to be determined precisely seems as yet a matter of conjecture and assumption[225].

Before the TRG the German legislation failed to provide unambiguous rules for the mixed multimodal carriage contract[226]. There were no guidelines to help determine whether such a mixed contract was a '*Vertrag mit untergeordneter andersartiger Nebenleistungen'*, a *'Typenkombinationsvertrag'*, a *'Typenversmelzungsvertrag'* or perhaps even a unique contract,

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[219] See Section 2.1 of this Chapter on the history and origins of the contract for the carriage of goods.

[220] "*Sucht man nun in der Kommentierung oder in den Lehrbüchern nach der »Lehre über die Handhabung typengemischter Verträge« findet man erst einmal keine eindeutige Antwort. Stattdessen findet man eine Vielzahl von Ideen und Vorschlägen, aber kein gesichertes Instrumentarium.*" Temme 2008, p. 376.

[221] Thume *TranspR* 1994, at p. 383.

[222] In relation to multimodal carriage contracts, the concept that such a contract should be deemed a '*Vertrag mit untergeordneter andersartiger Nebenleistungen'* translated into the '*Schwerpunkttheorie*' or the '*Gesamtbetrachtung*'. '*Gesamtbetrachtung*' means that the law applicable to the most prominent stage of the multimodal transport is to be applied to the entire contract. In other words, the law of the subordinate stages was to be 'absorbed' by the law of the primary stage. This manner of characterizing the multimodal contract was rejected by the Austrian *Oberste Gerichtshof* (OGH) however. OGH Wien 19 January 1994, *TranspR* 1994, p. 437-439.

[223] Temme 2008, p. 380.

[224] Thume *TranspR* 1994, p. 383.

[225] Temme 2008, p. 380.

[226] In her dissertation Wulfmeyer states that the '*gemischten Vertrag*' has not been adequately regulated and thus legal certainty is not served by the view that the multimodal contract is mixed. Wulfmeyer 1996, p. 26.

an *'aliud'* or a contract *sui generis*[227]. Because of this failure to provide clarity on the consequences of the mixed contract, Koller asserted that the rules to apply to a multimodal carriage contract could only be established on a case by case basis, while being guided by the objective of the contract in question and the valid expectations of the contracting parties[228]. It is common knowledge however that case by case assessment such as this does not create legal certainty.

The confusion of the earlier stages of the discussion on the classification of the mixed multimodal carriage contract was at some point replaced by a more or less general consensus that such a contract is either an '*aliud*' or perhaps a '*Typenversmelzungsvertrag*' of which the parts have blended in such a manner that they cannot be considered separately[229].

Herber establishes that the prevailing opinion in Germany is that the idea that the label *sui generis* or *aliud* automatically means that no existing instrument of international law can apply is to be rejected[230]. In his view the multimodal transport contract is a contract of carriage, albeit a special one. He sees the multimodal transport contract as a mixed contract *sui generis*. Despite this view he propagates a sort of network approach in relation to the law applicable to the contract. He illustrates his approach by stating that sea carriage law applies to the claim if it can be proven that damage occurred during the sea stage of a multimodal transport. If the stage where the damage occurred cannot be proven however he deems general national transport law applicable which means under German law that §§ 407 *et seq*. HGB are to be applied[231]. At first glance this approach by Herber may seem odd, but it is easily explained when the legal figure of analogy is taken into account[232]. Herber may mean for the rules that would have applied to the various parts of the mixed *sui generis* contract if they had been contracted for separately to be applicable to the *sui generis* contract by analogy.

The TRG, which was intended to make an end to the confusion, was the result of the consensus reached by the drafting committee that the multimodal transport contract should be considered an '*aliud*' or perhaps a '*Typenversmelzungsvertrag*'. Koller is of the opinion that the '*Regierungsentwurf*' – which contains the explanatory text supplementing the new rules – clarifies that the multimodal carriage contract is indeed, as Herber states, a special contract of carriage, but a contract of carriage nonetheless[233]. Yet, he disagrees with Herber on the score that it should also be deemed a mixed contract or a contract *sui generis*[234]. Thus the doctrinal debate continues.

Since the TRG brought about the inclusion of §§ 452-452d – which are tailored to regulate (certain) multimodal carriage contracts – in the German Commercial Code, the issue of the true nature of the multimodal contract seems to have diminished in importance in German

[227] Ramming 1999, p. 332.
[228] Koller 1989, p. 770; Thume *TranspR* 1994, p. 385.
[229] Basedow for instance at first defended the idea that the multimodal contract is a chain of '*Einzelverträgen*' embedded in an encompassing multimodal contract. Later on in the discussion he changed his opinions to side with those who viewed the multimodal contract as an atypical contract. In recent writings Basedow declares the multimodal contract to be an *aliud*. Basedow *TVR* 2000, p. 105. He did however observe in 1987 that the *aliud* construction makes the provisions dealing with multimodal carriage in the various carriage conventions rather difficult to explain. Basedow 1987, p. 59.
[230] Herber 1996, p. 886.
[231] Herber *Seehandelsrecht* 1999, p. 240-241.
[232] Van Dunné 2001, p. 16.
[233] Koller 2007, p. 699, § 452 HGB, No. 1; Rogert 2005, p. 38-39; Bydlinski & Puttfarken 2000, p. 103.
[234] Rogert on the other hand rejects the *sui generis* approach in light of the TRG, but not the concept that the multimodal contract is a mixed contract, a mixed contract of carriage even. Regierungsentwurf des TRG, BT-Drucksache 13/8445, p. 99.

academic writing[235]. Where treatises tended to elaborate on the writer's views on the nature of the multimodal carriage contract before, the discourse has changed focus and currently concentrates on the exact meaning and consequences of the new German legislation instead.

2.3.3 Practical demarcation of the multimodal contract of carriage

Whether a contract of carriage is considered to be either multi- or unimodal can drastically affect the liability of the carrier who has entered into it. Because of the importance of being able to distinguish one from the other, the theoretical juridical framework of the multimodal transport contract has been defined in the preceding Sections. To recapitulate briefly, a multimodal contract of carriage is a single contract for the carriage of goods entailing, or allowing for, carriage by at least two different modes of transport based on which the actual carriage is to be performed by at least two different modes. The result of the marshalling of transport stages under one contract is that the complexities concerning carrier liability seem to have been somewhat simplified, at least as regards the search for the party to be addressed for compensation. Since the multimodal carrier is responsible for the whole transit of the goods under a multimodal contract, whether he performs the actual carriage himself or employs subcontractors to perform it for him, the consignor or consignee can always address him for compensation regarding damage to or loss of the goods as a result of the transit.

After the theoretical discourse held above, it is time for the more practical side of the issue. The next part of this Section will concern the material boundaries of the multimodal contract of carriage. Subjects like the influence of the wording of the contract will be studied, and to what extent the actual performance of the carriage can play a part in the characterization of the contract. The question will be raised when the obligation to store the cargo between, before or after transport stages taken on by the carrier should be deemed of such independence that it is not governed by carriage law, as well as the question when transhipment operations are deemed sufficiently independent to be considered individual transport stages. And finally, the nature of *transport superposé,* or mode-on-mode transport – such as regulated by Article 2 of the CMR for instance – will be the focus of scrutiny as will the phenomenon of through transport.

2.3.3.1 Wording of the contract and physical performance

2.3.3.1.1 Deviation

Because the multimodal contract for the carriage of goods is a consensual contract[236], its content is decisive when determining whether a certain contract is considered to be either unimodal or multimodal and which rules of law apply to it[237]. This consensus principle, the principle that that which is agreed determines the applicable law, is an old one. Van Beelen illustrates this with a decision of the *Hoge Raad* dating from 1940 in which the question whether to apply the rules for liner transportation or those for tramp shipping is answered based on the wording of the contract,

[235] "*Jedenfalls bis zum Inkrafttreten des Transportreformgesetzes herrschte über de Rechtsnatur des Vertrages über die multimodale Beförderung erhebliche Unsicherheit*." Ramming 1999, p. 332.
[236] Bydlinski 1997, p. 361.
[237] Mankowski 1993, p. 215 and 216.

and not on the fact that a liner transport vessel was used to perform the actual transport[238]. That this point of view has not changed since 1940 and is not restricted to The Netherlands is shown by the BGH in 1993. With this decision, which concerned a contract for the carriage of goods from The Netherlands to Teheran by road and inland waterway, the BGH established that the contents of the contract in principle prevail over the actual performance of the carriage when it comes to the rules of law that are to be applied[239]. The BGH established that when the contracting parties have clearly agreed that the last stage of the carriage between Russia and Teheran is to be performed by road but the carriage between Russia and Istanbul is in fact performed by rail, the CMR still applies to any damage or loss that occurs during said carriage. The general consensus in academic writing agrees with the *Hoge Raad* and the BGH on this[240]. Clarke for instance asserts that if a CMR carrier were to alter the mode of transport to be used from roll-on, roll-off carriage to lift-on, lift-off carriage without the assent of the customer, the contract remains subject to the CMR[241]. Hence, it is the intention and agreement of the parties that counts[242]. Article 18(4) of the Montreal Convention echoes these sentiments by stating that:

> "*If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.*"

The basic idea behind this provision is that the consignor, who is seen as the weaker party, should be able to rely on the liability regime that was agreed and on which he has based his cargo insurance cover. He should not have to contend with the possibility that a liability regime less favourable to him applies, merely because the carrier has unilaterally decided to change the manner in which to perform the carriage[243].

This generally accepted view seems to leave some room for what could be called misuse. A carrier could very easily elicit gain from diverging from the concluded carriage contract. He could achieve this by intentionally contracting for a certain mode of transport with a low liability limit like inland waterway navigation, while planning to use another mode like for instance

[238] Van Beelen 1996, p. 73. Other, more recent examples are OLG Bremen 11 January 2001, *TranspR* 2001, p. 166-169; Hof Den Haag 30 August 2005, *S&S* 2006, 24; *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep*. 25, *ETL* 2004, p. 535-560. For a different view see Federal Court of Canada 22 September 1999, *ETL* 2000, p. 516-522. Here the breach of contract was considered to be of such a serious nature that it constituted a fundamental breach and thus the carrier was no longer allowed to rely on the exonerations and limitations of liability in the contract.

[239] BGH 30 September 1993, *TranspR* 1994, p. 16-18. See for a similar approach *Mayhew Foods v Overseas Containers*, [1984] 1 *Lloyd's Rep*. 317. Although Mance LJ comments in *Quantum* that the language of Article 2 CMR positively suggests that the application of the CMR to roll-on, roll-off carriage on an agreed sea, rail, inland waterway or air leg does not depend on whether such roll-on, roll-off carriage was agreed upon from the outset, but upon whether it actually occurred under the contract, his explanation as to when the CMR applies to a contract of carriage shows that the rules of the CMR will not apply if the contract leaves no opening to perform – part of – the carriage by road. *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another*, [2002] 2 *Lloyd's Rep*. 25.

[240] Clarke *CMR* 2003, p. 31; Müller-Rostin *Festschrift für Henning Piper* 1996; Koller 1988; Wulfmeyer 1996, p. 74.

[241] OLG Bremen 11 January 2001, *TranspR* 2001, p. 166-169; OLG Düsseldorf 16 April 2008, I–18 U 82/07, www.justiz.nrw.de; Hof Den Haag 30 August 2005, *S&S* 2006, 24. Following the same train of thought see Rb Rotterdam 3 May 2006, *S&S* 2007, 114; OLG Nürnberg 27 November 1993, *TranspR* 1994, p. 154-156.

[242] Clarke *CMR* 2003, p. 31; Koller 2005, p. 179; Kirchhof 2007, p. 138. *Cf.* OLG Bremen 11 January 2001, *TranspR* 2001, p.166-169.

[243] Müller-Rostin *TranspR* 1996, at p. 220; Thume *Kommentar zur CMR* 1994, p. 122; OLG Düsseldorf 30 June 1983, *TranspR* 1984, p. 130 *et seq*.

carriage by rail[244]. To discourage this kind of unacceptable circumvention of mandatory rules, various means have been found. In common law countries unauthorized substitution, or deviation, is considered a serious breach of contract. So serious in fact, that it is penalized by depriving the offending carrier of his defences and is thus similar to the wilful misconduct of the original Warsaw Convention as well as the current text of Article 29 of the CMR in legal effect[245].

Under continental law substitution of the agreed mode of transport is dealt with differently[246]. The application of general legal principles such as *pacta sunt servanda*[247] and the consensus principle lead to the applicability of the legal regime resulting from the contract[248]. The regime associated with the mode of carriage agreed upon is to be applied regardless of whether the actual performance conforms to the agreement[249]. But, even though the carrier faces liability based on the regime of the means of transport that was agreed on in the contract, he may not be able to invoke the limitations to his liability the regime would normally offer. The reason for this is that the substitution can under certain circumstances be seen as conscious recklessness which is an equivalent of wilful misconduct[250]. Especially so when the carrier knew or it was apparent that by using the substituting mode of transport the risk of damage to or loss of the goods was increased and damage or loss ensued as a result[251].

Sometimes however, the strict adherence to a certain principle leads to unsatisfactory results, which is illustrated by a decision by the BGH dating from 1989[252]. The BGH's starting point was that the contracted for regime should apply in principle. Strict application of the consensus principle would however have led to an inappropriate advantage for the carrier in the BGH's opinion, and thus it made an exception. In this case an air carrier carried a cargo of electronic parts and semiconductors by road between Stuttgart and Frankfurt based on an air carriage contract entailing carriage from Stuttgart to Algiers. During the carriage by road the goods were lost to fire. Whether or not the substitution was permitted based on IATA Resolution 507b which may have been incorporated in the contract, the BGH left unanswered. The BGH was of the opinion that the German national rules on road carriage should apply either way, as

[244] Wulfmeyer 1996, p. 74.

[245] Clarke *TranspR* 2005, p. 182-183. Deviation automatically bars the carrier from relying on any term of the contract even if the deviation does not have any causative effect on the damage complained of. The reason for this is that deviation vitiates the cargo owner's goods' insurance which forces the carrier to assume the mantle of insurer. Baughen 2004, p. 102-103. See also *MRS Distribution Ltd. v DS Smith (U.K.) Ltd*. 2004 *SLT* 631. For more details on this issue under common law see Williams 2009.

[246] For an extensive account of the French, German and Belgian jurisprudence on this issue see De Wit 1995, p. 173-175.

[247] Van Beelen 1996, p. 74.

[248] According to Ramming § 450 HGB illustrates just this. "*Decisive is the agreed carriage, not whether it is actually performed and if so in what manner.*" Ramming 2005, p. 138.

[249] Koning 2007, p. 122; Haak 2007.

[250] OLG Hamburg, *VersR* 1985, p. 832; OLG Köln 8 March 2002, *TranspR* 2002, p. 239-243. This manner of handling the problem would appear to be the more elegant solution, as it gives the impression of following the consensus principle. Messent and Glass are of the opinion that resorting to the principle of deviation is only permissible if consistent with the proper interpretation of the provisions of the instrument of uniform law at hand. They agree with Clarke that uniform law should not be construed in the light of domestic concepts such as the principle of deviation. Messent & Glass 2000, p. 49.

[251] Koller 1988, p. 439. Decisive are the circumstances of each individual case. OLG Köln 8 March 2002, *TranspR* 2002, p. 239-243. Van Beelen asserts that unlimited liability should be reserved for those cases in which there was either intent or gross negligence. Van Beelen 1996, p. 76 fn. 66. Article 4(4) HVR illustrates that there may be justifications for deviation under special circumstances by stating that any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of the Hague-Visby Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting there from.

[252] BGH 17 May 1989, *TranspR* 1990, p. 19-20, *NJW* 1990, p. 639-640, *ETL* 1990, p. 76-80.

the Warsaw regime was more advantageous to the carrier and the BGH deemed it inappropriate that a carrier should benefit from a breach of contract such as this[253]. In addition, the consignor – as the weaker party – should not have to contend with the possibility of an applicable liability regime less favourable to him than that which is associated with the mode of transport contracted for. The BGH took the next step along this line thought and stated that when the regime of the actual mode of carriage used is more favourable to the cargo claimant, it is this regime that should be applied[254]. According to Müller-Rostin this means that the consignor gets to choose between the regime applicable to the contract and the regime that would have applied had the contract provided for the mode of transport that was actually used[255].

De Wit criticizes the BGH's *modus operandi,* by stating that the carrier does not really profit from his breach of contract. According to him, the carrier is no better off than when he would have performed the carriage by the mode of transport contracted for[256]. The question is whether this is really the case. If he does not benefit in any way by deviating from the contract, why would he deviate? Nevertheless, it is worthy of note that switching to a liability regime more favourable to the cargo claimant provides the latter with an advantage he could normally not expect, unless the carrier is deemed to be guilty of conscious recklessness or wilful misconduct because he changed the mode of transport[257]. On the whole, the legal picture has become less predictable by the introduction of this exception and as such it does not serve to promote legal certainty.

All things considered it is safe to say that in cases of '*vertragswidriger Transport'*, as the Germans call the unauthorized substitution of the agreed mode of transport, the influence of the actual performance of the carriage on the applicable legal regime appears negligible at first glance[258]. The BGH case shows however that sometimes exceptions may occur, although for the sake of legal certainty, restraint in their application seems preferable.

2.3.3.1.2 Unspecified and optional carriage contracts

The question as to what the effects are of a deviation by the carrier from the originally agreed mode of transport discussed in the previous Section is not one which specifically pertains to multimodal transport. Indeed, it is rather a general problem of transport law[259]. That which is in contrast a typically multimodal quandary, is an issue that is closely related to the discussed '*vertragswidriger Transport'*. It concerns the specification of the means of transport to be used in the performance of a contract of carriage. Since such a specification does – according to the general consensus – not seem to be considered an indispensable element of the contract of

[253] The liability regime normally attached to the mode of carriage the carrier actually used counts as a minimum in such a case according to the BGH. In 2007 the BGH confirms this point of view by establishing that the carriage by road from The Netherlands to Germany which substituted the agreed carriage by air was governed by the rules of the CMR whether the contract allowed for the substitution or not: BGH 13 September 2007, *TranspR* 2007, p. 466-469. *Cf.* HR 22 January 1993*, S&S* 1993, 58. Van Beelen agrees with the BGH on this issue. Van Beelen 1996, p. 76.

[254] In this case the German KVO contained a higher liability limit – 80 DM per kilogram whereas the air carriage rules would have led to a limit of 40 DM per kilogram – and was thus applied by the BGH. Koning 2007, p. 122.

[255] Müller-Rostin 1998, p. 234.

[256] Since the deviation from the contract may in some circumstances even be considered wilful misconduct his situation is most likely worse under the original liability regime than it would have been had he not deviated.

[257] De Wit 1995, p. 177.

[258] Ramming 'Zur BinSchLV' *TranspR* 2004, p. 345: "*Wie stets bei der Rechtsanwendung kommt es nur auf die Pflichten der Parteien an, wie sie im Frachtvertrag vorgesehen wurden und nicht auf die spätere tatsächliche Durchführung der Beförderung (oben vor 1).*"

[259] De Wit 1995, p. 171.

carriage, it is often left out[260]. A contract in which no mode of carriage is indicated is called an unspecified contract of carriage[261]. Such a contract customarily provides the carrier with the right to choose the means of transport to be used[262]. Has a means of transport been indicated however, logic dictates that the contract can no longer be deemed unspecified. When such a contract provides the carrier with the right to substitute the mode of transportation that was originally planned for the carriage of the goods that were entrusted to him with another type, the term 'optional contract of carriage' as suggested by Haak is more appropriate[263].

Both the unspecified and optional contracts usually offer the carrier the freedom to perform a concluded contract of carriage by the means of transport he deems appropriate. Whatever type of carriage is eventually chosen to perform the actual carriage determines which rules apply to the contract and thus depends largely upon the carrier's preferences[264]. As a result, the use of these types of contracts is very much widespread[265]. It is after all usually the carrier who drafts the carriage agreement[266].

According to Fremuth the multimodal contract of carriage is specifically characterized by this type of freedom; the built in freedom of the carrier to influence the applicable legal regime or regimes. The multimodal carrier concludes the carriage contract in his own name, but reserves for himself the freedom to choose not only the means of transport and the route to be taken but also which subcarriers to use[267]. This seems to place rather too much emphasis on the existence of the carrier's freedom to choose. As could be read above it is not one of the main characteristics of the multimodal contract of carriage and should not be treated as such[268]. On the contrary, a contract which specifically indicates which two or more modes of transport are to be used is a multimodal carriage contract without further ado, while an optional or unspecified carriage contract has not as yet fulfilled all the conditions necessary to earn that denomination. As Van Beelen states, both types of contract provide the carrier with a choice; he can choose to fulfil the contract using only one mode of transport, making it unimodal carriage or he can choose to use two or more modes making the contract multimodal[269]. Only when the carrier

[260] Therefore it is not mentioned in the overview of the essential characteristics of the contract of carriage given above. See Section 2.2.2 of this Chapter on the characteristics of the contract for the carriage of goods. De Wit 1995, p. 171; Basedow 1987, p. 39-40; Müller-Rostin *TranspR* 1996, p. 218; Rogert 2005, p. 59.

[261] Basedow 1987, p. 58. Diamond speaks of contracts that are not 'mode specific'. Diamond 2008, p. 140.

[262] OGH Wien 13 July 1994, *TranspR* 1995, p. 21-22; Rb Rotterdam 5 September 2007, *S&S* 2009, 41.

[263] Haak 2007. An inland navigation carrier often has the option to carry the goods by train in case of low water levels. Parlementaire geschiedenis Boek 8, p. 87-88. The FIATA Multimodal Transport Bill of Lading 1992 also offers such an option to its users in Article 11: "*Without notice to the Merchant, the Freight Forwarder has the liberty to carry the goods on or under deck and to choose or substitute the means, route and procedure to be followed in the handling, stowage, storage and transportation of the goods*".

[264] Koller 2007, p. 1150-1151, Article 1 CMR, No. 6; Parlementaire geschiedenis Boek 8, p. 86; Clarke *CMR* 2003, p. 31. Ramberg disagrees with this. He deems it unpalatable that the applicable rules are unknown at the time of contracting. Although he does not concur with the mentioned manner of determining the applicable rules of law he does not seem to be able to provide a better alternative. Ramberg 1987, p. 23-24.

[265] OLG Dresden 14 March 2002, *TranspR* 2002, p. 246, Rb Haarlem 6 June 1999*, S&S* 2000, 88. Many, if not most, carriage contracts contain options as to alternative modes of performance, whether general or related to specific emergencies according to Mance LJ in *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535-560; Rb Rotterdam 4 April 1996, *S&S* 1996, 93.

[266] Multimodal transport is typically conducted on the basis of standard term contracts, issued unilaterally by the carrier and, as a result, often favourable to the carrier. UNCTAD 2003, p. 10.

[267] Thume *Kommentar zur CMR* 1994, p. 866.

[268] See Section 2.3.1 of this Chapter on the definition and main characteristics of the multimodal carriage contract.

[269] Van Beelen 1996, p. 78. It is argued that even when nothing is agreed about the modes of transport to be used a contract can still be multimodal at the outset. This is the case when the geographical placement of the initial place of taking over and the place of final delivery compel the use of more than one mode of transport or if the carrier has agreed to such a short transit time that he is forced to use for instance a combination of road and air carriage. Rogert 2005, p. 59. This line of reasoning suggests that a carrier might be considered to breach the contract by choosing to

chooses to perform the carriage by at least two modes of transport does the optional or unspecified contract become a multimodal contract[270]. So, although it is not necessary that the contract specifically includes the agreement that more than one mode of transport is to be used from the start, it is necessary that this lack is compensated by the actual carriage in order for a contract to be considered multimodal[271].

A clear example of optional carriage that became multimodal carriage due to the choice of the carrier is embodied by *Quantum*. This case concerned – as was discussed in detail in Chapter 1 – the shipment of hard disk drives from Singapore to Dublin. Although the consignor contracted with Air France, an air carrier, the fact that the stage between Paris and Dublin was very likely to be performed by road and not by air was clear from the outset since prior shipments had been dealt with in the same way. In this case the specimen air waybill contained on its face an express liberty: "*all goods may be carried by any other means including road or another carrier unless specific contrary instructions are given hereon by the shipper*", which made it an optional contract.

In first instance Tomlinson J of the Queen's Bench Division had declared the contract in question to be a contract predominantly for carriage by air[272]. The Court of Appeal decided otherwise however, it established that the contract was multimodal in nature as the contract recorded in the air waybill was clearly for two stages, the first to be performed by air, the second by trucking, unless Air France elected to substitute some other means of transport as their conditions permitted[273].

The *Quantum* case shows that optional carriage is very much a reality in the carriage industry, particularly in the air carriage sector[274]. For obvious reasons, such as the lack of airport capacity, or simply the fact that a destination cannot be reached by air, the air carriage industry tends to make frequent use of optional carriage contracts. This has led to the result that on certain routes air carriage is substituted by road carriage to such an extent that actual air transport has

carry perishables such as flowers by sea instead of by air, even though the contract of carriage specified no mode of transport.

[270] Koller 1989, p. 769; Müller-Rostin *TranspR* 1996, p. 218; Spiegel & De Vos 2005, p. 58; Van Huizen 1988, p. 318; OLG Dresden 14 March 2002, *TranspR* 2002, p. 246; BGH 4 March 2004, *I ZR* 2000/01; OLG Hamburg 11 January 1996, *TranspR* 1997, p. 267-270.

[271] Erbe & Schlienger 2005, p. 422 fn. 9. The other side of this coin is of course that if the contract allows for more than one mode of transportation and the carrier decides to perform the whole of the carriage by one mode only, such a contract cannot be deemed multimodal, since the contract did not prescribe the use of more than one mode of transport per se, and the actual transport was unimodal. Thume *Kommentar zur CMR* 1994, p. 122-123.

[272] *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another*, [2001] 2 *Lloyd's Rep*. 133. Article 18(3) Warsaw Convention asserts: "*... such a carriage takes place in the performance of a contract for carriage by air*". This phrasing could be seen as to restrict the scope of the stipulation to exclude optional carriage contracts and may even be the reason behind Tomlinson J's idea that the carriage contract in the *Quantum* case was a contract predominantly for carriage by air. The contract did however permit substitution and since part of the carriage was performed by road this caused it to be more than a mere contract for carriage by air. It became a multimodal contract. A solution to the confusion may be found in changing the wording to: "…, such a carriage takes place in the performance of what was originally a contract for carriage by air".

[273] *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535-560. Trucking is the performance of (part of) an air carriage contract between two airports by road instead of by air. The carrier 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 which the agreement may or may not allow for. Koning 2007, p. 119-120.

[274] *Quantum Corp Inc v Plane Trucking Ltd.,* [2002] 2 *Lloyd's Rep*. 25, per Mance LJ: "*Taking first the question to what extent the application of the Convention depends upon a carrier having obliged itself contractually to carry by road (and by no other means), the Belgian and Dutch Courts have treated case (c) (described in par. 15 above) as falling within CMR in Atlas Assurance Co. Ltd. v Ocean Transport and Trading Ltd., (Antwerp Commercial Court; 23/9/75)* [*1976*] *11 E.T.L. 279, Atlas Assurance Co. Ltd. v P & O Steam Navigation (Osaka Bay), (Antwerp Commercial Court; Jan. 4, 1977* [*1977*] *12 E.T.L. 843 and International Marine Insurance Agency Ltd. v P & O Containers Ltd. (Resolution Bay), (Rotterdam Rechtbank; Oct. 28, 1999).*"

become almost rare[275]. In the maritime carriage sector the discussions surrounding the new Rotterdam Rules show just how commonplace optional and unspecified contracts have become. Several parties involved in the drafting process intended the new Convention to stay abreast of this development in the use of carriage contracts. It was therefore suggested that appropriate wording should be added to the proposed definition of the contract of carriage to the effect that, where the contract did not expressly or impliedly refer to a mode of transport and the voyage for which a given mode would be used, the contract of carriage would be covered by the new instrument where it could be shown that the goods had actually been carried by sea[276].

A different view

Clearly, and for obvious reasons, the freedom provided by the optional or specified contract is coveted by all types of carriers. Those in the international parcel delivery sector, who often combine various modes of transport to perform a single contract, are not an exception. UPS for instance, the world's largest package delivery company, contracts in its own name but reserves for itself the right to choose which mode or modes of transport it will use for the transport by means of general conditions. As, for that matter, does its competitor TNT.

In relation to a certain umbrella contract between TNT and Sony, the Belgian judiciary showed that it does not see eye to eye with the above-mentioned opinion on optional carriage contracts. Under the umbrella agreement Sony commissioned TNT to transport a shipment of computer products from Londerzeel (Belgium) to Belm (Germany). Because the goods were damaged during the carriage, Sony demanded to be compensated by TNT. In answer to this demand TNT invoked the liability limitations of the CMR. The *Vredegerecht* Overijse-Zaventem disallowed this defence however, based on its notion that, since no mode of transport was specified in the contract, the contract between the parties was in fact not a carriage contract at all. It was, according to the *Vredegerecht*, a contract *sui generis*, a contract of mandate[277]. The manner in which the actual carriage was performed was considered to be of no consequence. During TNT's appeal the *Hof van Cassatie*, the Supreme Court of Belgium, followed the line of the lower court and confirmed the judgement[278]. Both courts deemed the freedom of the delivery service to decide which mode or combination of modes of transport to use to be in shrill contrast with the contract for carriage by road. According to both courts the CMR demands that the parties have specifically agreed to carriage by road *ab initio*, and was thus clearly not applicable in this case[279].

[275] See also Koning 2004, p. 93.

[276] Czerwenka 2004, p. 299-300. In the end the provision was not adopted due to the less than convincing objection that thus the shipper would not be able to evaluate his risk as it would lie purely in the hands of the carrier to determine his liability. *Cf.* Report of Working Group III (Transport Law) on the work of its twelfth session (A/CN.9/544), p. 22. The conclusion that optional carriage leads to uncertainty for the shipper is also drawn by Koning. Koning 2004, p. 101.

[277] Vredegerecht Overijse-Zaventem 21 November 2002, http://vlex.be. Glass agrees with the *Vredegerecht* that an optional or unspecified carriage contract is a contract *sui generis*. Glass 2006, p. 314. In Germany and England however these types of contracts are generally considered contracts of carriage; *Datec Electronic Holdings Ltd v UPS Ltd.,* [2007] 1 *WLR* 1325; OLG Düsseldorf 16 June 2004, I-18 U 237/03, www.justiz.nrw.de; BGH 29 June 2006, *TranspR* 2006, p. 466-468; Malsch & Anderegg 2008, p. 45.

[278] Hof van Cassatie 8 November 2004, *TBHR* 2005, p. 512 with a critical note by M. Godfroid.

[279] Haak 2007; Haak *Hét congres van 2006,* p. 11.

These judgements seem contrary to the view followed beyond the Belgian borders[280]. A fact that is illustrated by the statement of the Court of Appeal in *Quantum* that the purpose of the CMR Convention is to standardize the conditions under which international carriage by road is undertaken. Standardization would however be incomplete and potentially capricious if the application of the CMR depended on whether the carrier could be said to have contracted unconditionally and at the very outset to carry by road[281]. In his critique Haak considers the deviating Belgian judgements to be fairly unsatisfactory[282]. He is of the opinion that the freedom the carrier is endowed with under optional or unspecified carriage contracts is not enough reason to make them outcasts. Completely removing the label carriage contract from such contracts would only cause consignors to become vulnerable to the general conditions of the carrier without having the protection offered by the mandatory carriage regimes that would otherwise have applied. Furthermore, there is also the fact that, in essence, these types of contracts are not contrary to the consensus principle at all, contrary to the opinion of the Belgian judiciary. From the fact that the consignor and the carrier have agreed that the carrier should be the one to decide which form the transport is to take can be deduced that the mode of transport that is actually used is used in accordance with the will of the consignor as well. This leaves the consensus principle intact.

In conclusion it can be stated that although the wording of the contract is in principle decisive when determining which regime or regimes apply to it due to its consensual nature, the actual performance of the carriage does influence the applicable legal regime or regimes when the contract fails to determine the mode(s) of transport to be used in advance. Although on the one side these unspecified or optional contracts provide the carrier with the opportunity to cater to events as they occur, giving him the advantage of flexibility, their downside is the legal uncertainty they tend to generate. But, even though the argument has been raised regarding this type of agreement that it is accompanied by uncertainty for the cargo claimant as to what compensation for damage to or loss of the carried goods he can expect, and that thus the optional or unspecified contract is undesirable from a jurists point of view, the fact of the matter is that these contracts are used on a large scale in just about every corner of the carriage sector and are not likely to disappear[283].

In addition, the unspecified or optional contract generates a very specific problem in case the agreed carriage is not actually performed. A problem which does not occur when the mode of transport to be used is laid down in the contract. If the mode of carriage to be used is specified it is the rules applicable to said mode of transport which are applied to any loss or damage that may have occurred as a result of the non-performance of the carriage[284]. When no mode of

[280] They are in harmony with judgements by the Brussels Commercial Court. Haak 2007. They do not seem to be in accord with the 1976 judgement by the Antwerp Commercial Court cited by Mance LJ in *Quantum* however. In *Quantum* Mance LJ determines the following concerning "*Atlas Assurance Co. Ltd. v. Ocean Transport and Trading Ltd*., (Antwerp Commercial Court; 23/9/75) [1976] 11 *E.T.L.* 279": "*40. In the first Belgian case, the combined transport bill of lading covered carriage from loading in Hong Kong to Antwerp, with the port of discharge being specified as Rotterdam, and no specification of the method of carriage between Rotterdam and Antwerp. As the report recites: The latter section of the combined transport could be done either by using another vessel calling at the port of Antwerp either by barge or lighter, or by road transport, or even by rail, the choice not being fixed and being left to the decision of the carrier. Ocean Trading and Transport had in fact chosen to carry by road, and the Court held that, since it had – . . .instituted a road transport from Rotterdam to Antwerp,* [*it*] *is, as far as this transport is concerned, and whether* [*it*] *likes it or not, subject to the mandatory regulations applicable in the matter. CMR was thus applied to the leg from Rotterdam to Antwerp.*"

[281] *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535-560.

[282] Haak *Hét congres van 2006,* p. 11.

[283] Van Beelen 1996, p. 79.

[284] Rb Rotterdam 3 May 2006, *S&S* 2007, 114.

transport is agreed however, or a choice between two or more modes was entered into the contract, finding the applicable law is more difficult. One could compare the situation that ensues with that in which the loss remains unlocalized under a multimodal carriage contract that has been performed. The court of law addressed could for instance determine that of the relevant carriage regimes – the rules attaching to the modes of carriage that might have been employed had the carriage actually taken place – the one that is most favourable to the cargo claimant is to be applied. This would be in line with the Dutch legislation on unlocalized loss in multimodal carriage and with the BGH judgement of 1989 concerning deviation discussed above[285]. It also seems possible that such a court of law would decide to let the law applicable to any ensuing damage or loss depend on whether one of the contracting parties can prove which mode of transport would have actually been used for the carriage. This is only speculation however.

2.3.3.2 'Teilstrecken'

Previously, the multimodal carriage contract was defined as a single contract of carriage whereby a single carrier promises a consignor to carry goods, which either prescribes the use of at least two different modes of transport, or allows for the use of more than one mode of transport while two or more modes of transport are actually used during its performance[286]. Thus whether a contract can be considered multimodal hinges on the intent of contracting parties to involve more than one mode of transport in the planned carriage, or at least to allow for it. Also above the conclusion was drawn that the term 'mode of transport' designates a combination of the infrastructure and the means of transport used for carriage which results in the generally accepted concept that there are at least 5 different modes of transport, consisting of road, rail, air, sea and inland waterway carriage[287].

When speaking of a multimodal contract of carriage the various trajectories that are to be performed by the different modes of transport are generally referred to as the stages of the transport or carriage, or, as they do in Germany, to the '*Teilstrecken*'. In practice however, it is not always easy to determine exactly where one stage ends and another begins, or even if the contract involves one or more transport stages. Reason for this last ambiguity is that a subordinate aspect of the contract or an insignificant intermediate transport operation may be absorbed by the more prominent aspects of the contract. According to the explanatory texts of the Dutch multimodal transport legislation this is very common, since transport stage does not only consist of the actual carriage, but also includes the storage before and after the carriage[288]. The question is whether any guidelines as to where one transport stage ends and another begins can be distilled from case law or legal literature.

In light of this quandary Clarke establishes that the mere transferral of goods from one road vehicle to another does not mean a new transport stage commences[289]. When the transferral occurs between two different modes of transport however, this is different. The question whether the sea stage had begun when damage occurred or whether the road stage had not ended yet was

[285] Article 8:43 BW; BGH 17 May 1989, *TranspR* 1990, p. 19-20, *NJW* 1990, p. 639-640, *ETL* 1990, p. 76-80.

[286] See Section 2.3.1 of this Chapter on the definition and main characteristics of the multimodal contract of carriage.

[287] See Section 2.3.1.2 of this Chapter which entails an analysis of the term 'mode of transport'. Pipeline transport has been pointed out as a sixth mode of transport, for instance by Article 8:40 BW, but since there is hardly any information on this type of transport from a legal point of view neither in academic writing nor in case law, this mode of transport is left out of the scope of this research.

[288] Parlementaire geschiedenis Boek 8, p. 91.

[289] Clarke *CMR* 2003, p. 31-42.

raised in *Thermo Engineers v Ferrymasters*[290]. Thermo Engineers had sold one of their heat exchangers to Anhydro of Copenhagen and Ferrymasters agreed to carry it there. The heat exchanger was to be transported on an open trailer from Aylesbury to Felixstowe by road and from there, while on the same trailer, by sea to Copenhagen. When the exchanger arrived in Felixstowe it was to be loaded on to the ship '*Orion*'. The trailer was taken to a space in the lower cargo deck but as the height between that deck and the second cargo deck was not sufficient, the top part of the exchanger struck the deck head at the lower end of the ramp. As the carriage contracted for was so-called roll-on, roll-off carriage under Article 2 CMR, the question arose whether the sea carriage as understood in the Hague Rules had begun or not at the time the damage to the heat exchanger occurred. To this end Neill J determined that it is the facts of the case at hand that are decisive when establishing where one stage ends and another begins:

> "*...I incline to the view that as a general rule the first condition of art. 2 will be satisfied where it is proved that sea carriage as understood in The Hague Rules has begun. I recognize, however, that there may be cases where the exact line between two successive means of transport will be difficult to draw. I must concern myself with the facts of the present case. Here I am satisfied that the damage occurred during the carriage by the other means of transport. At the relevant time the loading was well advanced, and, as can be seen from the sketch plan drawn by Mr. Clarke the trailer had already passed across the outboard ramp and across the line of the stern.*"

The BGH decided in a similar manner concerning the ending of the sea stage of the transport of a field laboratory from Tunis in Tunisia to Garbsen in Germany. The sea stage ended in Genoa according to the BGH at the time that the goods were loaded on to the road vehicle[291]. Thus, the whereabouts of the exact line dividing two successive transport stages is somewhat difficult to predict as this largely depends on the circumstances of the case.

Besides the actual transport stages the transhipment phase also involves movement of the goods. Although in general this movement is attributed to either the preceding or the subsequent transport stage it sometimes has such weight that it might be considered a separate commitment. The same applies to the storage before, between or after the various transport stages of the carriage. It is this phase between the actual transport stages in a transport, whether it is absorbed by the carriage or not, that is in practice the period during which the cargo is most likely to be stolen or damaged[292]. In this phase the cargo is not moved safely resting on or in a means of transport, no, it is unloaded by forklifts and cranes or other such apparatus and either stored or loaded on or in the next means of transport. It is obvious that during this process all sorts of mishaps may occur[293]. The period of storage is also an accident prone period it seems. Although during this time the goods are generally at rest, they are susceptible to theft or misplacement.

[290] *Thermo Engineers Ltd. and Anhydro A/S v Ferrymasters Ltd.,* [1981] 1 *Lloyd's Rep*. 200.

[291] "*Das Berufungsgericht hat mit Recht angenommen, daß die Seestrecke in Genua erst mit dem Verladen des Containers auf den Lkw geendet hat.*" BGH 3 November 2005, *TranspR* 2006, p. 35-37.

[292] Rogert 2005, p. 254.

[293] See for instance the case of the *'Iris'* in which a container was stacked in the wrong outgoing stack which caused it to be carried by sea to Hong Kong instead of to Hull. HR 24 March 1995, *S&S* 1995, 72 (*Iris*).

2.3.3.2.1 Storage

As a matter of course the attribution of the storage immediately before and after the carriage to said stage of the carriage invites the question how this works out if the storage after one stage is also the storage before the next stage of the transport. The answer to this query is somewhat confusing, to say the least. The explanatory texts of the Dutch multimodal transport legislation reveal that the storage should then be attributed to the stage of the transport performed by the carrier that actually stores the goods, or who contracts for the storage with a stevedore or some such subcontractor in his own name. If this is a subcontracting carrier performing only one stage of the contract this does not pose any problems, at least not under the Dutch regime[294]. However, if it is a subcontractor performing more than one mode or even the multimodal carrier himself, it is no longer a viable solution. As regards the law applicable to such last mentioned storage the explanatory texts merely mention that 'the law applicable to such storage then applies between the parties', without actually mentioning how to establish which law that is[295]. Only when the multimodal carrier performs more than one stage of the carriage himself and also stores the goods between these stages, do the explanatory texts offer a answer. Under those circumstances, the multimodal carrier has the choice between the law applicable to the carriage performed by him before the storage, or the law applicable to the carriage performed by him after the storage according to the texts. From a commercial perspective, it seems that presenting the carrier with a choice to be made according to his whim is less than desirable. It generates unnecessary legal uncertainty and grants a rather large advantage to one of the contracting parties, which is likely to throw their legal relationship out of kilter[296].

In 1995 the Dutch *Hoge Raad* passed a rather significant judgement in relation to this issue in a case involving the *'Iris'*. The judgement concerned the transport of a not refrigerated (non-reefer) container stuffed with deep-frozen butter which should have been carried from Tuitjenhorn in The Netherlands to Leek in the United Kingdom on board of the '*Iris'*. Instead, after being carried by road to Rotterdam, the container was placed in the wrong outgoing stack on the quayside and was shipped on board of the '*Cardigan Bay'* to Hong Kong. Upon arrival it was discovered that the butter had turned and had to be destroyed as a result. Since the cause of the loss was established to be the placement of the container in the wrong stack, the question became paramount whether the stacking should be attributed to the road stage or the sea stage[297]. In answer the *Hoge Raad* contemplated that[298]:

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[294] The Dutch legislation on multimodal carriage is discussed in Chapter 10, Section 10.4.1. Koller suggests a similar approach to attributing transhipment operations under German law. Koller 2007, p. 707, § 452 HGB, No. 15.

[295] Parlementaire geschiedenis Boek 8, p. 91.

[296] Van Beelen suggests that if the storage cannot clearly be attributed to the preceding or subsequent transport stage it should be attributed to the stage most favourable to the consignor so as to be in concordance with Article 8:43 BW which applies those rules of law to unlocalized loss that are most favourable to the consignor. She backs up this concept with the argument that situations involving unlocalized loss and those in which the storage cannot be attributed to a certain stage share a very strong kinship, which is rather convincing. Van Beelen 1996, p. 96.

[297] HR 24 March 1995, *S&S* 1995, 72 (*Iris*).

[298] "*Uit het destijds geldende art. 468 lid 2 K, voor zover hier van belang bepalende dat de zeevervoerder van het ogenblik der inontvangstneming tot dat der aflevering gehouden is voor een behoorlijke en zorgvuldige behandeling, bewaking en verzorging van het te vervoeren goed zorg te dragen, vloeit voort dat het zeevervoer een aanvang neemt bij de inontvangstneming van het goed door de vervoerder en niet eerst bij de inlading ervan in het schip. Ten aanzien van gecombineerd vervoer waarbij, zoals in het onderhavige geval is overeengekomen dat het goed eerst over de weg en vervolgens over zee wordt vervoerd, brengt dit mee dat het wegvervoer eindigt en het zeevervoer - waaronder hier te verstaan het gedeelte van het vervoer dat door het zeerecht wordt beheerst - aanvangt op het tijdstip waarop de vervoerder het goed als zeevervoerder onder zijn hoede krijgt. Wanneer dit tijdstip is gelegen, is afhankelijk van de omstandigheden van het geval.*"

> "*From the former Article 468(2) K, which determined, insofar as it is relevant here, that the sea carrier is obligated to properly and carefully handle, guard and care for the goods that are to be carried from the moment he takes them over to the moment of their delivery, can be derived that the sea carriage commences when the goods are taken over by the carrier, and not when they are loaded on board the vessel. In relation to combined carriage whereby, as in the case at hand, it is agreed that the goods are to be carried first by road and then by sea this means that the road carriage ends and the sea carriage – meaning in this case the part of the carriage governed by maritime law – begins the moment the carrier takes over the goods in his capacity as the sea carrier. The exact point in time this occurs is dependent on the circumstances of the case.*"

In this case the *Hoge Raad* determined that the sea carriage stage had commenced the moment the container was placed in the stack on the quayside. The *Hoge Raad* did not mention the possibility that the storage entailed such an independent part of the contract that it deserved to be governed by the rules that would normally govern a contract for the storage of goods[299]. The reason for this is obviously that the stacking of containers on the quayside is of such a subordinate nature that it is naturally absorbed by the sea carriage. In general short periods of storage are deemed inherent to carriage contracts and are therefore absorbed by the carriage commitment[300].

Sometimes the storage operations are of such weight they do not fade into the carriage obligation. In 1993, the *Hoge Raad* considered the storage of Wouters' goods by carrier Van Loo in Spain in preparation for their shipment to The Netherlands to be of such weight that Wouters' claim for compensation was governed by the Dutch rules on '*bewaargeving*' (handing over for storage), a form of bailment one might say, instead of by carriage law. His household goods had been destroyed by the fire that burned down the warehouse in Altea in September 1983 where they were stored. Although the parties had agreed in July 1983 that Van Loo was to carry the goods to The Netherlands and would store them there, and not in Spain, awaiting the completion of Wouters' new home in October, the *Hoge Raad* deemed the aspect of '*bewaargeving*' and not the carriage aspect of the contract to have the upper hand in relation to the damage. Especially the duration of the agreed storage – which amounted to several weeks whether in Spain or in The Netherlands – can be deemed a strong argument for the consideration of the storage as a separate commitment, equal to the agreed carriage[301].

[299] See also *Mayhew Foods Ltd. v Overseas Containers Ltd.,* [1984] 1 *Lloyd's Rep*. 317; Hof Amsterdam 22 June 2000, *S&S* 2001, 8; Rb Rotterdam 3 May 2006, *S&S* 2007, 114.

[300] In 2008 the OLG Hamburg also decided that the storage of goods for a few days or even weeks in the port area or the vicinity of the port is typical for sea carriage and was therefore absorbed by the sea carriage stage of the transport. OLG Hamburg 28 February 2008, *TranspR* 2008, p. 125-129. See also BGH 3 November 2005, *TranspR* 2006, p. 35-37. "*Unerheblich sei, wie lange eine Zwischenlagerung im Seehafen gedauert habe, wenn diese von den Dispositionen des Verfrachters abhängig gewesen sei. Entscheidend sei, dass der Umschlag von dem Verfrachter in Auftrag gegeben worden und der Umschlag für die Seebeförderung typisch sei.*" Koller 2008, p. 337; Koller 2007, p. 708-709, § 452 HGB, No. 16.

[301] Two days was not deemed sufficient for an independent '*bewaargeving*' commitment however, see Rb Rotterdam 3 May 1974, *S&S* 1974, 63, Rb Rotterdam 22 October 1993, *S&S* 1997, 19; Hof Den Bosch 2 November 2004, *S&S* 2006, 117 and Haak 1986, p. 86-87.

2.3.3.2.2 Transhipment

For a contract to be considered multimodal it has to involve at least two independent stages of transport, by at least two different modes of transport. But the question under which circumstances a stage is considered to be independent enough not to be absorbed by the 'main attraction' of the contract is not easily answered. When is carriage 'real' multimodal carriage and when is it considered to be merely unimodal plus some auxiliary services? The Genoa Rules of 1967 prove that this is not a new quandary, as they declare themselves applicable only when a contract of carriage consists of at least two stages, while the short range moving of goods of an auxiliary nature does not constitute a stage of transport[302]. The Genoa Rules were not an exception, the MT Convention also struggled with the differentiation and tried to clarify it by excluding operations of pick-up and delivery carried out in the performance of a unimodal transport contract, as defined in such a contract, in its very first Article[303]. According to Glass this provision of the MT Convention was shaped under pressure of the air carriage industry which desired no disruptions in established patterns of contracting built around the Warsaw regime[304]. Under the Warsaw regime, and currently also under the Montreal regime, any carriage by land, by sea or by river performed inside an aerodrome is deemed 'carriage by air' as these regimes mean it to be absorbed by the air carriage[305].

Both the Dutch and the German legislation fail to lay down guidelines as to when transhipment carriage is to be considered a separate commitment[306]. Both legislators deemed the circumstances of the case to be decisive and left it to the judiciary to decide on a case by case basis[307]. The Dutch government did draw up Articles 8:370(2) and 8:890(2) BW however, which mirror each other to the extent that they declare carriage by the same vessel over both inland waterway and sea – without transhipment of the goods – to be sea carriage if the inland waterway part is obviously subordinate to the sea part, and inland waterway carriage if it is the other way around. In this manner potentially large stretches of carriage are branded auxiliary, seemingly based on their relative distance[308].

In practice especially transhipment operations tend to give rise to assessment questions, since during transhipment the goods are moved from one vehicle or vessel to another, or perhaps to a storage facility nearby. Thus, besides storage operations the transhipment of the goods from one means of transport to another, for instance in port areas or within the confines of an airport, may also concern independent commitments. However, a significant difference between storage and the transhipment of goods is that an independent transhipment commitment may be deemed a separate transport stage. In 1995 for instance, the *Rechtbank* Rotterdam decided that the 2

[302] Article 1(a) Genoa Rules (CMI 1967): "*International Combined Transport means a transport of goods which according to the contract consists of at least two stages, one of which is by sea and the other(s) by air, road, rail or inland waterways, between two countries. Short range moving of goods of an auxiliary nature does not for the purpose of this Convention constitute a stage of transport.*"

[303] As van Beelen correctly states however, the addition of the words "as defined in such contract" may not have been the best choice, since it invites the contracting parties to avoid the application of the Convention. Van Beelen 1996, p. 67 fn. 31.

[304] Glass 1994, p. 273.

[305] Thus, a contract involving air carriage for which there is some auxiliary land transport to and from warehouses for instance within the confines of the airport area should still be deemed a unimodal carriage contract. Basedow 1999, p. 33.

[306] BGH 3 November 2005, *TranspR* 2006, p. 35-37.

[307] Parlementaire geschiedenis Boek 8, p. 88; Herber 2004, p. 405.

[308] This point of view seems to have some merit, since the transition between sea and inland waterway is a gradual one as opposed to the transitions between other modalities. Van Beelen 1996, p. 68 fn. 34.

kilometre multitrailer transport of two containers stuffed with aluminium sheets from ECT's barge terminal in Rotterdam to the ocean vessel that was meant to carry them to Yokohama in Japan was a separate stage of the transport, and thus it applied Dutch road carriage law to the claim for compensation[309]. In 1999 an apparently shorter trip of 22 cases of machine parts on flat rack trailers over the same terminal was not considered a separate transport stage however, but was absorbed by the sea carriage instead[310]. Neither was the transport of a trailer with boxes of frozen chicken products by Olau Line over its own terminal to a waiting ship considered a separate transport stage by the *Hof* Den Haag[311]. The *Hof* deemed it decisive whether the parties had intended a road carriage stage to be included in the contract or not, which, in this case, the circumstances of the case did not indicate.

As a result the question arises where the line is to be drawn exactly. Unlike under Articles 8:370 and 8:890 BW for the combination of sea and river carriage, differentiation based solely on distance is generally rejected[312]. The distance covered does influence matters as one of the circumstances of the case however, the longer the distance covered, the more chance the part of the carriage has to be considered an independent transport stage.

The issue was thoroughly debated recently in the German legal literature owing to a decision by the OLG Hamburg in 2004[313]. The case involved a transport of cased printing presses from Bremerhaven in Germany via Portsmouth, presumably in the U.S., to Durham, also presumably in the U.S.[314] The printing presses were transported by sea, Mafi trailer and all, from Bremerhaven to Portsmouth. In Portsmouth a tug master tugged the Mafi trailer a distance of 300 metres to a warehouse where the presses were to be loaded on a road vehicle for further transport to their destination Durham. When the Mafi trailer arrived at the warehouse, the security cables were removed, and one of the cases was loaded successfully on to the waiting truck. In order to enable the loading of the other case the Mafi trailer was shunted during which the unsecured remaining case fell off the trailer. The OLG considered that the transhipment within the port area was a separate road transport stage and as such subject to the general German transport law. The transport by Mafi trailer which covered a distance of no more than 300 metres was of sufficient individual relevance and could not be attributed to the discharge of the goods from the sea vessel. Accordingly, the defendant was not entitled to rely on the limitations and exclusions of liability provided for by maritime law.

When addressed, the BGH reversed the OLG's decision[315]. Although it had established in an earlier judgement concerning the transport of a field laboratory from Tunis in Tunisia to Garbsen in Germany that it generally considered transhipment operations in port areas to be accessory to the sea carriage transport, it did not attribute the 300 metres of Mafi movement to the sea carriage stage between Bremerhaven and Portsmouth[316]. Neither did the BGH consider this movement to have sufficient independence to be deemed a separate transport stage however, as it held that its 2005 decision clearly stated that such transhipment transport within the confines of the port should only be deemed independent under '*besonderen Umstände*'(special

[309] Rb Rotterdam 24 December 1993*, S&S* 1995, 116.
[310] Rb Rotterdam 26 August 1999, *S&S* 2000, 12.
[311] Hof Den Haag 17 October 1995, *S&S* 1996, 54 (*Salar*).
[312] Van Beelen 1996, p. 67. "*Any criterion based on distance (long, short, short sea, deep sea, territorial waters, et cetera) would add an arbitrary dimension to the Convention's criteria which cannot be correct*". Clarke *CMR* 2003, p. 30.
[313] OLG Hamburg 19 August 2004, *TranspR* 2004, p. 402-404. For the discussion in academic writing see Ramming 'Umschlag von Gut' *TranspR* 2004; Drews 2004; Herber 2005; Bartels 2005; Herber 2006, p. 435-439; Ramming 'Teilstrecken' *TranspR* 2007; Rabe 2008; Koller 2008.
[314] Carriage from Bremerhaven to Durham in the U.K. is more likely to be shipped via Hull than Portsmouth.
[315] BGH 18 October 2007, *TranspR* 2007, p. 472-475.
[316] BGH 3 November 2005, *TranspR* 2006, p. 35-37.

circumstances). Instead, the BGH attributed the Mafi transport to the road carriage stage from Portsmouth to Durham.

The attribution of the transhipment operations to the road stage seems somewhat arbitrary[317]. Especially after the BGH declared in 2005 that such operations are generally a feature specific to sea carriage and thus have a strong connection with the sea transport stage. Not to mention the fact that it established at that time, that not attributing such operations to the sea transport stage would result in a far-reaching exclusion of the maritime liability rules[318]. Apparently the BGH focused on the factual circumstance that the damage occurred only an instant before the case was to be loaded onto the road vehicle. One might be tempted to think that the BGH did so to circumvent having to assess whether the sea carriage had actually ended or not, which it would have had to do if it had attributed the Mafi transport to the sea stage. It would have been more in line with its previously voiced considerations if it had done so. The added bonus would have been that it would have made transhipment issues a little more predictable[319]. And even though Koller's assessment that the BGH merely attributed damage which occurred during the loading of the road vehicle to the road stage seems reasonable[320], this does not justify the attribution of the entire Mafi movement to the road transport stage. If the BGH was of the opinion that the damage should be attributed to the road stage since the road stage had already started, the focal point of the discourse would have been the question where the sea transport stage ended and where the road transport stage commenced, not whether the transhipment was to be considered an independent transport stage or to which stage of the transport it should be attributed if it was not.

Then again, a more or less positive consequence of attaching the transhipment stage to the road carriage segment instead of attributing it to the sea carriage is that any 'period of responsibility' clauses incorporated in the (multimodal) bill of lading exonerating the carrier from liability for these types of operations would not be admissable. These clauses may only affect the liability of the carrier if the transhipment operations are governed by the maritime regimes[321].

All in all, the decisions by the BGH may have clarified that transhipment operations within the port should only under special circumstances be considered independent transport stages, they have not provided any clarity regarding the transport stage such operations are to be attributed to. Neither has the question what exactly is meant by '*besonderen Umstände*' been

[317] Not to mention confusing. If carriage by Mafi trailer can be deemed road carriage, should then the carriage from Bremerhaven up to the moment the goods were loaded on board the truck in Portsmouth not be deemed Article 2 CMR carriage? The loaded Mafi trailer was on board during the sea carriage stage after all. The same question is discussed in Chapter 4, Section 4.2.1 where the meaning of the term 'vehicle' is analyzed in light of the scope of the CMR.

[318] "… [*D*]*aß das Ausladen vom Schiff und die Lagerung und etwaige Umlagerung im Hafengelände gerade charakteristisch für einen Seetransport mit bzw. in Containern sind und eine dementsprechend enge Verbindung zur Seestrecke aufweisen. Außerdem führte die gegenteilige Auffassung zu einer weitgehenden Ausschaltung der haftungsrechtlichen Vorschriften des Seehandelsrechts.*" BGH 3 November 2005, *TranspR* 2006, p. 35-37.

[319] The OLG did follow the reasoning voiced in the 2005 judgement and attributed the storage of cargo for a period of several weeks to the subsequent sea transport stage and not to the preceding road carriage segment of the contract. OLG Hamburg 28 February 2008, *TranspR* 2008, p. 125-129.

[320] Koller 2008, p. 337: "*In seinem Urteil vom 18. 10. 2007 referiert der BGH seine Argumente aus dem Urteil vom 3. 11. 2005 und kommt zu dem Ergebnis, dass es diese Gründe nicht rechtfertigten, auch das Beladen des der Seestrecke folgenden Beförderungsmittels der Teilstrecke »Seebeförderung« zuzuschlagen. Das mit dem Beladen des nachfolgenden Lkw verbundene Schadensrisiko sei der Teilstrecke »Lkw« zuzuordnen.*"

[321] *Cf.* Chapter 8, Section 8.1.2.2.1 on period of responsibility clauses.

answered, which means that the troublesome issue of the transhipment phase as an independent commitment has not been taken off the table yet[322].

2.3.3.3 'Transport superposé'

A contract of carriage involving *transport superposé*[323] allows for the use of more than one means – and often more than one mode – of transportation, but it does not allow for the transferral of the goods from the original means of transportation to another. It is carriage during which one means of transportation, including the goods it is carrying, is loaded on to another means of transportation. So for example, if cargo remains on the truck that performed a part of the carriage by road, and both goods and truck are loaded on to a ship[324], train[325] or barge for the next part of the journey, this is generally known as *transport superposé*[326]. As it tends to take up quite a lot of cargo space, this sort of carriage is mainly used for short distances. For the conveyance of goods between the European mainland and the United Kingdom or Scandinavia for instance, ro-ro transport, the most popular form of *transport superposé*, is extensively used[327].

A noteworthy characteristic of mode-on-mode transport is that, during the stage where the means of transport are piled on top of each other, two separate contracts of carriage can be discerned. The first one is the main contract of carriage, the contract between the main carrier and the consignor who entrusted him with goods. This contract has the objective to transport these goods. The second contract is the contract of carriage for the actual *transport superposé* between the main carrier – who is the consignor under this contract – and the subcarrier. This contract's objective is not merely to transport the goods, but rather to transport the truck *including* the goods[328].

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[322] There is also no consensus on this matter in the German legal literature, see for instance Koller 2007, p. 708 and Herber 2006, p. 435-439.

[323] Also known as '*stapelvervoer*' in The Netherlands which, literally translated, means stacked transport. In English it is known as mode-on-mode transport (as opposed to mode-to-mode transport); Clarke, *CMR* 2003, p. 33. Means-on-means transport could be considered to be a more accurate description. This sort of transport evidently cannot involve roads being carried by sea or rail, but rather involves motor vehicles (including the goods they are loaded with) being transported on board of ships, barges or trains. Sometimes it is referred to as combined transport, but this term is also used as a synonym for multimodal transport. The UNECE defines combined transport as: "*a combination of means of transport where one (passive) transport means is carried on another (active) means which provides traction and consumes energy*". ECE/FAL Recommendation No. 19, 'Code for Modes of Transport', www.unece.org.

[324] This is called roll on-roll off transport, or ro-ro transport, in case a motor vehicle is loaded on board of a ship, and lighter-aboard-ship transport, or lash-transport, when a lighter or floating container which has been pushed or tugged across inland waterways is loaded on board of a ship (U.S. Court of Appeals (5th Cir. 1976) 30 August 1976, *ETL* 1977, p. 722-733).

[325] This is called piggyback or *huckepack* transport.

[326] There is not much case law on piggyback or *huckepack* transport since this does not seem to be particularly popular (except perhaps in the region of the Alps, see Haak 1986, p. 96, or in the 'Chunnel', the Channel Tunnel), and as goods are normally transferred to the aircraft when the transport involves an air stage since including the truck would make the transport rather too expensive, this sort of mode-on-mode transport is unlikely to lead to much litigation.

[327] HR 29 June 1990, *S&S* 1990, 110; Rb Rotterdam 25 April 2002, *S&S* 2003, 71; Rb Arnhem 22 August 1991 and 12 November 1992, *S&S* 1994, 30; Hof Arnhem 4 November 1997, *S&S* 1998, 30, which is the follow-up of HR 14 June 1996, *S&S* 1996, 86; Rb Rotterdam 15 January 2003 and 11 August 2004, *S&S* 2006, 20; Rb Rotterdam 21 April 2004, *S&S* 2006, 35; Rb Rotterdam 10 April 1997, *S&S* 1999, 19.

[328] Van Beelen 1994, p. 37 fn. 6. The means of transport containing the cargo that is itself carried is not always a road vehicle. In LASH transport it is a barge which is taken aboard a ship.

Strictly speaking only the stage of the transport where the transport means are piled up can be described as *transport superposé*. However, when the terms *transport superposé*, mode-on-mode transport, *stapelvervoer et cetera* are used, what is usually meant is the mode-on-mode carriage plus the stages of the transport performed by the 'stacked' means of transport alone[329]. Considering this custom, the following will differentiate between *transport superposé* in the strict sense and *transport superposé* as used in the extensive sense.

When we examine the characteristics of *transport superposé* in the strict sense, we see that it cannot be considered multimodal; the transport stage which is actually performed with an accumulation of transport means rarely involves more than one mode of transportation[330]. *Transport superposé* in the extensive sense on the other hand, is generally multimodal in nature[331]. The carriage by road of loaded trucks on top of other motor vehicles, or the carriage of loaded trains by rail on other trains is a rare occurrence indeed[332]. As was mentioned briefly above, the most popular form of piling up transport means is ro-ro transport, a form of transport which is described by Article 2(1) CMR as carriage during which:

> "*... the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air, and ... the goods are not unloaded from the vehicle...*"

International ro-ro transport, *transport superposé* in the extensive sense that is, is covered by this Article, which is an extension of the CMR's scope of application as presented in Article 1 CMR. Whether Article 2 transport is multimodal in nature has been questioned. The *Rechtbank* Rotterdam did apparently not consider *transport superposé* in the extensive sense to be multimodal transport[333]. Regarding a transport of potatoes performed by road, train and again by road from Gameren to various destinations in Italy the *Rechtbank* reasoned:

> "*In the event that there was no* transport superposé*, but combined transport instead ...*"[334]

This statement indicates that the Court viewed Article 2 CMR transport as road transport, and not as combined or multimodal transport; the cargo remains 'on wheels' inside the road transport vehicle, and it stays – as it were – in the care of the road carrier[335]. Some writers, such as Haak[336], share the idea of the *Rechtbank* Rotterdam that Article 2 CMR transport does not constitute multimodal carriage. A view that is based on the reluctance to cause confusion and on the divergence of the objectives of the ro-ro contract and the 'true' multimodal contract. The difference being that the objective of the ro-ro contract, the part that constitutes *transport superposé* in the strict sense that is, concerns both the road vehicle and the goods, whereas the multimodal contract's objective concerns only the goods in their eyes[337].

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[329] Van Beelen 1994, p. 37. *Cf.* Clarke *CMR* 2003, p. 33.

[330] "*Thus, the situation described in Article 2 of the CMR does not constitute a multimodal transport operation, but a transport operation which is performed simultaneously at two different levels.*" Mankabady 1983, p. 136.

[331] Bydlinski 1997, p. 358; Basedow 1999, p. 35; Parlementaire geschiedenis Boek 8, p. 88; Rogert 2005, p. 105. For a different view see Erbe & Schlienger 2005, p. 422: "*Ebenfalls keine Multimodal-Beförderung liegt beim sog. Huckepackverkehr (kombinierter Verkehr) vor*".

[332] Of course the sight of a truck loaded with passenger cars is not an uncommon sight on the European motorways, but these passenger cars rarely carry any passengers or goods.

[333] Rb Rotterdam 5 June 1992, *S&S* 1993, 107.

[334] "*Indien er geen sprake is geweest van stapelvervoer, doch van gecombineerd vervoer...*" In The Netherlands the term combined transport is used as a synonym of multimodal transport, see Article 8:40 BW.

[335] Van Beelen 1997, p. 15-18.

[336] For more supporters of this view see De Wit 1995, p. 185 fn. 1224.

[337] Haak 1986, p. 92-93; Loewe *ETL* 1975, p. 593.

In other academic writings however, this distinction between multimodal transport and *transport superposé* based on differences in the contract of carriage between the consignor and the main carrier and that between the main carrier and the subcarrier is not deemed a valid one[338]. When determining whether a contract of carriage can be considered multimodal, that contract is the only relevant contract. In case of ro-ro transport this is the contract between the consignor and the (main) carrier. If this contract meets the conditions of the definition of multimodal transport as they are detailed above[339], then the label multimodal cannot be withheld from it. If and when the main carrier subcontracts for a part or even the whole carriage is irrelevant in this context.

The first argument by the *Rechtbank* Rotterdam also fails to convince. It is centred on the means of transport used, deeming ro-ro transport unimodal based on the fact that the goods do not leave the motor vehicle. That the goods stay in the keeping of the road carrier to some extent is true, but this does not prevent them from being exposed to specifically maritime dangers such as tempests, sinking *et cetera.* Furthermore, although the goods remain 'on wheels', it is not these wheels that are propelling them. As Glass says, the road vehicle becomes a mere container for the goods the moment it is parked aboard of the ferry[340]. Since the goods are situated in a 'container' aboard of a maritime vessel crossing an expanse of water instead of a road, one can only conclude that ro-ro transport in the extensive sense is multimodal in nature.

2.3.3.4 (False) through transport

When it is commercially inconvenient for a carrier to perform an entire transport himself, he can arrange for the goods to be transhipped at an intermediate place[341]. The through transport contract provides for such situations. From an economical point of view through transport may seem undistinguishable from multimodal transport. Like multimodal carriage contracts, through carriage contracts generally involve more than one mode of transport. This is not a requirement for through transport however; it is sufficient that more than one *means* of transport is to be used for the performance of the transport, the contract does not have to involve more than one *mode* of transport[342]. A contract allowing for two sea carriage stages can for instance be a contract for through transport, even if only a single mode of transport is to be used.

When considered from a legal perspective the multimodal transport contract and the contract for 'false' through transport differ in even more respects. Where the multimodal carriage contract involves the carriage of goods by more than one mode of transport under the responsibility of one single carrier, and the normal through transport contract involves carriage over at least two transport stages also under the responsibility of a single carrier, the 'false' through transport contract is different. Under the 'false' through transport contract the consignor's co-contractor functions as a carrier for only part of the transport to be performed. Under such a 'false' contract, part of the transport is performed by the consignor's co-contracting party – who is considered to be a carrier as regards that part of the contract – and another part is performed by a different carrier, who is contracted by the consignor's co-contracting party – who is considered a freight forwarder for that part of the contract – but not as his subcontractor. The

[338] Glass 2004, p. 273; De Wit 1995, p. 185; Hill 1975, p. 600; Hill 1976, p. 182-183; Helm 1975, p. 700.
[339] See Section. 2.3.1 of this Chapter which entails the definition and main characteristics of the multimodal carriage contract.
[340] Glass 2004, p. 273.
[341] Glass 2004, p. 208-209.
[342] Rogert 2005, p. 45.

other carrier is brought in on behalf of the consignor[343]. Hence a 'false' through transport contract is a mixed contract: it is partly a contract of carriage and partly a forwarding contract[344].

There seems to be some confusion concerning the proper use of the terms 'through transport' and 'false through transport'. Originally the term through transport was mainly used to describe transport by more than one (sea) carrier[345]. Currently however the term through transport is used rather loosely by some to describe all manner of transportation involving successive carriage, such as sea carriage in one or more stages with the carrier acting as freight forwarder for further land transport or even for actual multimodal carriage[346]. Others use it only if the contracting carrier acts as a freight forwarder for part of the transport[347]. Those of the first mentioned category tend to describe the contract under which the original carrier acts as a freight forwarder for part of the transport as 'false' through transport[348].

A typical example leading to through transport is a provision in a contract of carriage that the carrier only assumes responsibility for that part of the carriage that he carries out with means of transport under his own management. The result of such a provision is that during the parts of the carriage which are contracted out, the carrier will be responsible as a freight forwarder, not as a carrier. The consignor can sue the actual carrier under those parts of the contract only in bailment or tort, because there is no privity of contract between them[349].

Since there is no international convention to regulate freight forwarding, the freight forwarding aspects of the contract are covered by domestic laws, which may or may not entail compulsory liability rules. The stages of the transport which the consignor's co-contracting party does perform as a carrier are on the other hand generally covered by rules of compulsory international carriage law if they cross any borders. Above it has been pointed out that in practice the lines between a contract of carriage and a freight forwarding contract cannot always be drawn easily[350]. Since the 'false' through transport contract is a mixture of these two contracts it adds another complication to the characterization process of transport contracts which is already plagued by too many grey areas[351].

That the use of (false) through transport contracts is largely a maritime oriented affair is illustrated by a clause in the BIMCO Conlinebill which attaches freight forwarder's liability to the carriage before the cargo has reached the 'Vessel's Port of loading' and after it has departed from the 'Vessel's Port of discharge':

"*8. Liability for Pre- and On-Carriage.*

[343] A through transport contract is often laid down in a 'through bill of lading' when the through transport entails sea carriage.

[344] Thume *TranspR* 1994, p. 383. *Nota bene*: the carriage part of the 'false' through transport contract may amount to multimodal carriage by itself.

[345] Gaskell, Asariotis & Baatz 2000, p. 16.

[346] De Wit 1995, p. 295. De Wit himself sees the through transport contract as: "*encompassing more than one trajectory and possibly more than one carrier, but always in the same mode: e.g. successive carriage by sea or successive carriage by rail, under one document.*" In older writings Koller on the other hand has referred to multimodal transport contracts as '*durchfrachtverträge*', in other words through transport contracts. Koller 1982, p. 1.

[347] Gaskell, Asariotis & Baatz 2000, p. 16. Gaskell, Asariotis and Baatz are of the opinion that the term through transport should be reserved for transport where the carrier restricts his liability to his own stage of the transport and that the term combined transport should be used for the cases where the carrier assumes full responsibility throughout.

[348] Rogert 2005, p. 45; Thume *Kommentar zur CMR* 1994, p. 865 and 887; Jones 2001; Baughen 2004, p. 171.

[349] Baughen 2004, p. 171. This is different under the Dutch legislation on freight forwarding, see Article 8:63(2) BW.

[350] See Section 2.2.4.1 of this Chapter on the freight forwarding contract.

[351] See for instance Rb Rotterdam 5 January 2005, *S&S* 2005, 87.

When the Carrier arranges pre-carriage of the cargo from a place other than the Vessel's Port of loading or on-carriage of the cargo to a place other than the Vessel's Port of discharge, the Carrier shall contract as the Merchant's Agent only and the Carrier shall not be liable for any loss or damage arising during any part of the carriage other than between the Port of loading and the Port of discharge even though the freight for the whole carriage has been collected by him." [352]

2.4 The international multimodal contract for the carriage of goods

Since it is a small country, well over half of the contemporary rail carriage in The Netherlands is international rather than national[353]. This is seems indication that the bulk of present-day carriage of goods is internationally oriented. Therefore the subject of this work is not merely the multimodal contract but rather specifically the *international* multimodal contract and all its ramifications. And of these, there is an ample supply. When a multimodal contract of carriage touches upon more than one legal sphere, international conventions come to the fore, questions of private international law crop up, jurisdiction disputes arise and so on. Reason enough to compare the manner in which these quandaries are solved in The Netherlands, Germany and England, which will occur in the subsequent Chapters. At this point an account of when exactly a multimodal carriage contract can be considered international is given. In this last part of Chapter 2 the why and when of the international aspect will be explained.

2.4.1 Multimodal carriage equals international carriage

Since the transferral of goods from one means of transportation to another used to be a time consuming, expensive and relatively risky process, it was avoided whenever feasible in the past. During the transferral and the temporary storage that often accompanies it, cargo was, and still is, particularly vulnerable to all sorts of mishaps[354]. It can be damaged, lost, stolen and so forth[355]. Even now that the container revolution has greatly stimulated the use of multimodal carriage by significantly reducing the labour costs of transhipment, accelerating terminal operations to a great extent[356] and reducing the losses caused by congestion, delay and pilferage at ports[357], the benefits presented by multimodal transport do not always prevail over the risks inherent to transhipment. Especially not when the distance to be travelled is relatively short. Short distance transport contracts, such as for instance for the shipment of anticorrosive paint from Dordrecht (The Netherlands) to Ridderkerk (The Netherlands)[358], are usually unimodal in nature, based on reasons of cost effectiveness and risk diminishment. The transport of a consignment of

[352] BIMCO Conlinebill 2000, www.bimco.org.
[353] 70 percent of the present day rail carriage is international. Kamerstukken II 2005/06 30365 no. 6, p. 1.
[354] The goods are generally more at risk during handling than during the actual carriage. De Wit 1995, p. 386 fn. 297.
[355] Rb Rotterdam 15 October 2003, *S&S* 2004, 123; Hof Den Haag 29 June 2004, *S&S* 2004, 101; Rb Maastricht 28 May 2003, *S&S* 2004, 57; OLG Hamburg 19 August 2004, *TranspR* 2004, p. 402-406; OLG Hamburg 19 December 2002, *TranspR* 2003, p. 72-74; BGH 15 December 2005, *TranspR* 2006, p. 210-211; BGH 22 February 2001, *TranspR* 2001, p. 372-375; *Coopers Payen Limited and Another v Southampton Container Terminal Limited*, [2004] 1 *Lloyd's Rep*. 331.
[356] Basedow 'Globalization' 2000, p. 3.
[357] Carr 2000, p. 205.
[358] Hof Den Haag 22 February 2005, *S&S* 2005, 72.

calculators all the way from Bangkok (Thailand) to Moscow (Russia)[359] on the other hand, warrants multimodal carriage in the eyes of the industry. Since a large part of the distance can be covered by sea, a type of carriage that is relatively cheap, the cost reduction easily outweighs the drawbacks inherent to the transhipment of goods. And besides, the unimodal carriage of goods by truck may prove to be equally subject to risks during such long hauls. Road transports are often preyed upon by the less savoury elements of society[360]. As a result the majority of multimodal carriage operations consist of transports that cover relatively large distances and are thus predominantly international in nature[361].

2.4.2 The international contract: a foreign element

The crossing of borders, although common practice in the performance of a multimodal contract, is not the sole aspect that can provide a contract with an international glamour[362]. It can be endowed with an international aspect, which is also known as a 'foreign element', by several other means as well. But when exactly does a case contain such a 'foreign element', and what does it consist of? According to Dicey and Morris, a foreign element is basically a contact with some system of law other than the *lex fori*[363].

Such a foreign element can be present even when no borders are to be crossed[364]. It is there even when the contract was made[365], or to be performed wholly or partly in a foreign country, a country other than the forum State[366]. In addition, some characteristics of the contracting parties can be yet another cause for a foreign aspect to adhere to the contract. When for instance the contracting parties, either one or both, have residence or domicile[367] in a State foreign to the court before which the case has been brought, this provides the contract with a foreign trait[368]. Together the territorial aspect, the agreement to actually traverse one or more

[359] Hof Den Haag 30 October 2001, *S&S* 2006, 21.

[360] Theft or hijacking are examples of the mishaps that can befall a shipment carried by road. Some examples from the ample existing selection: HR 5 January 2001, *S&S* 2001, 62; Hof Den Haag 30 October 2001, *S&S* 2006, 21; Hof Den Bosch 15 May 2007, *S&S* 2009, 57; *Royal & Sun Alliance Insurance plc and another v MK Digital FZE (Cyprus) Ltd and others*, [2006] *EWCA Civ* 629, [2006] *All ER* 246; *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another*, [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535-560; BGH 4 March 2004, *TranspR* 2004, p. 460-464; BGH 18 January 2001, *TranspR* 2001, p. 369-372; BGH 13 April 2000, *NJW-RR* 2000, p. 633 *et seq*.

[361] In the year 2003, no less than 900.255.000 tons of goods were transported by sea, inland waterway, air, road and pipeline to and from The Netherlands. These and more statistics can be found at www.cbs.nl, the website of the Dutch bureau for statistics.

[362] It is however a prerequisite for the application of one (or more) of the international conventions on unimodal carriage. Mankowski 1993, p. 215.

[363] Dicey & Morris 2006, p. 3. In German law the foreign element is described as '*einer Verbindung zum Recht eines ausländischen Staates*' (Article 3 *Einführungsgesetz zum Bürgerlichen Gezetzbuch* (EGBGB)); Firsching & Von Hoffmann 1997, p. 2.

[364] Mankowski 1993, p. 216.

[365] Firsching and Von Hoffmann deem the mere fact that the contract has been concluded abroad not sufficient for it to have a foreign element. Firsching & Von Hoffmann 1997, p. 384.

[366] This may cause the *lex loci contractus* (the law of the State where the contract was concluded) or perhaps the *lex loci solutionis* (the law of the State where the contract was intended to be performed) to be applicable.

[367] Although a person may have many places of residence, he can only have one domicile. Domicile is a common law term approximately meaning permanent home; it is 'an idea of law', see Dicey & Morris 2006, p. 122 *et seq*. For an explanation of residence see p. 164 *et seq*. In Article 1(29) RR domicile is defined as: "*(a) a place where a company or other legal person or association of natural or legal persons has its (i) statutory seat or place of incorporation or central registered office, whichever is applicable, (ii) central administration or (iii) principal place of business, and (b) the habitual residence of a natural person*."

[368] The cabotage contract, which entails the agreement of a foreign carrier to transport goods or passengers between two points in the same country, is an example of a contract with such a foreign aspect.

borders during the carriage, and the possible foreign qualities of the contracting parties (jointly referred to as the geographical approach in private international law) are considered to be the most influential circumstances when determining whether a contract involving multimodal carriage is to be considered international[369].

Of these possibilities however, the simple crossing of borders remains the most common feature by far. The scope of application rules of the transport law treaties all set this as a requirement, whereas the nationalities of the contracting parties are generally considered to be of no relevance. Simplified, it can therefore be said that, according to uniform transport law, the contract of carriage is deemed international 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[370].

2.4.2.1 'As specified in the contract'

After the discourse on the subject in Section 2.3, we can appreciate that whether a contract can be termed multimodal is principally resolved by the contents of the contract due to its consensual nature, and not by its actual performance, unless of course the contract leaves room for this[371]. That which is agreed is paramount[372]. This same principle can be applied when determining whether or not a contract entails a territorial foreign element, or phrased differently, whether the carrier is to cross any borders during the performance of the contract. To illustrate this, imagine a contract for the carriage of goods by road from Innsbruck to Salzburg. While performing such a contract, the carrier will most likely drive his vehicle in part over German highways, since they constitute the shortest and most convenient route between these two Austrian cities. Of course, when the contract does not mention anything about the route to be taken, this is all right, it leaves the carrier free to fulfil his obligations in the manner of his choice and thus the actual performance of the carriage provides the contract legitimately with a foreign element so that the rules of private international law will have to be applied. If the parties involved are Austrian, this is likely to be Austrian law[373]. If the contract on the other hand specifically includes the agreement that the carriage is to take place by Austrian roads only, based perhaps on customs or safety considerations, and the carrier decides to save himself some time by taking the German '*Autobahn*' anyway, this does not make the contract international, it merely constitutes a breach of contract. As regards a contract such as this there is no need to consult private international law. In such a case Austrian law applies since there is no connection with a legal system other than the Austrian *lex fori*, even if the actual performance has partly taken place across the border in Germany. Thus an Austrian court will apply Austrian law under these circumstances, provided of course, that there are no other foreign elements attached to the contract.

However, strict adherence to the terms of the contract can under certain circumstances lead to curious results. The *Hof* Den Haag for instance deemed the carriage of a shipment of textile from Alphen to Alphen by road to be covered by Dutch road carriage law since the start

[369] Mostermans 1996, p. 42; Strikwerda 2005, p. 5.
[370] Mankowski 'Transportverträge' 2004, p. 1211, No. 1663.
[371] See Section 2.3.3.1 of this Chapter on the wording of the contract and the influence of the physical performance.
[372] Mankowski 1993, p. 216 and fns. 33 and 34.
[373] Since both the place of taking over of the goods and the place of their delivery are situated within a single country none of the carriage convention apply.

and endpoint were both situated in The Netherlands[374]. Curious was that the textile had in fact crossed the border several times. The actual agreement was for the carrier to transport the goods from Alphen in The Netherlands, to Como in Italy where they were cleared through customs, but not unloaded, and from there straight back to Alphen. This type of carriage is called '*hoefijzervervoer*' in The Netherlands which approximately translates into 'horseshoe transport'[375]. It begins and ends in the same place. Obviously this is an improper use of carriage as the cargo is not meant to be relocated. In the above-mentioned case the goal of the transport was not to leave the textile in Italy, but rather to have it enter the European common market in Italy instead of in The Netherlands, presumably for tax evasion purposes.

[374] Hof Den Haag 29 September 1998, *S&S* 1999, 33. The *Hof* does not mention the nationality or domicile of the parties involved, only that since the CMR does not apply Dutch road transport law governs the carriage.

[375] In Germany the term '*Schlenkerverkehr*' is used for carriage that crosses national borders but which commences and terminates in the same country. This type of carriage is not covered by the CMR. Koller 2007, p. 1150, Article 1 CMR, No. 6.

3 DETERMINATION OF THE APPLICABLE LAW: THE CARRIAGE CONVENTIONS

3.1 Introduction

Because there is no international convention that regulates multimodal carriage specifically, it can be quite a task to determine which rules apply in case of a dispute stemming from this type of transport. The current legal landscape is rather fragmented when it comes to the multimodal carriage contract; the existing international carriage conventions focus on specific types of unimodal carriage and thus cannot, and do not, regulate typical multimodal carriage difficulties such as unlocalized loss[1]. Some of the carriage conventions have incorporated provisions dealing with multimodal carriage however. Therefore it is possible that, under certain circumstances, one of the unimodal carriage conventions does apply to a claim stemming from multimodal carriage. Of course, if none of the carriage conventions covers the situation at hand, it becomes necessary to determine which national regime applies. Unfortunately not all national systems entail specific rules on multimodal carriage, so the consequences generated by one national regime may be quite different from those generated by another.

In the hope of clarifying the current state of affairs the seven Chapters following this one will establish which rules of law may apply to the international multimodal contract for the carriage of goods and under which circumstances they do so. Thus the search in the next part of this work is for the 'proper law': the law which governs the multimodal contract and the obligations of the contracting parties, the law which – normally – determines its validity and legality, its effect, and the conditions of its discharge. As Diplock LJ put it in *Amin Rasheed v Kuwait Insurance*:

> "*One final comment on what under English conflict rules is meant by the 'proper law' of a contract … It is the substantive law of the country which the parties have chosen as that by which their mutual legally enforceable rights are to be ascertained, but excluding any renvoi, whether of remission or transmission, that the courts of that country might themselves apply if the matter were litigated before them.*"[2]

The substantive law of a country, the national legal regime, includes not only its purely national legislation but also the international law, the treaty law to which the country has bound itself. A decision by the OLG Köln in 2004 may serve to illustrate this[3]. In this case, which involved three consignments of computer processors to be carried from Sevenoaks in the United Kingdom to Schiphol Airport in The Netherlands, the OLG established that the claim was governed by English law. The actual transport was performed by road from Sevenoaks to London, by air from London to the airport Köln/Bonn in Germany and from thereon by road again to its final destination Schiphol airport near Amsterdam. The goods never arrived at Schiphol as they were lost during the last stage of the transport. Since the United Kingdom is party to the CMR and English views prescribe the application of the CMR to such a road stage, the OLG applied the road carriage convention to the claim. Had German law been applicable the OLG would not have done so however. Although Germany is also party to the CMR Convention, the German point of view concerning the Convention's application scope differs from that of the English; had the

[1] Apart from a few restricted exceptions. See Chapter 10, Section 10.1.1 on unlocalized loss.

[2] *Amin Rasheed Shipping Corp v Kuwait Insurance Co*, [1984] 1 *AC* 50, [1983] 2 *All ER* 884, [1983] 3 *WLR* 241, [1983] 2 *Lloyd's Rep.* 365 *(Al Wahab)*.

[3] OLG Köln 25 May 2004, *TranspR* 2004, p. 359-361.

OLG established that German law applied to the case then the CMR would not have been applied to the claim[4].

Thus it is clear that it can be of import which national regime applies and which treaties are integrated into this national regime. The decision also shows that even the national views concerning the scope of application of uniform law may be relevant. However, this application of foreign national law and its views is possible only insofar as it is compatible with the obligations and demands of the treaties the Forum State is party to. The law in the treaties to which the Forum State has bound itself is generally granted precedence over any incompatible rules of law of a purely domestic origin that are deemed equally applicable. Had for instance the German view also been that the CMR applies *ex proprio vigore* to an international road carriage stage of a multimodal transport, then the OLG Köln would also have applied the CMR to the claim in the above-mentioned decision, but it would have done so based on its own obligations as a CMR member, and not because the English views are that the CMR is to apply in such cases. In other words, it would not have taken the detour through English law, but would have directly applied uniform international treaty law.

In The Netherlands the primacy of international treaty law over national rules is presumed by Article 94 of the Constitution[5]. In the United Kingdom, which has a dualist system in that it integrates international treaties in its national legal sphere by incorporating them into national legislation, the national enactments of transport conventions have the same status as other statutes according to the dualist doctrine. Nevertheless, in judicial practice it has generally been recognised that their international origins and their overriding objective of unifying the law warrants that such treaty law must be interpreted autonomously from other national legislation. Therefore statutes which incorporate treaty law into the national legal sphere are largely accepted as having some superior applicability[6]. When it comes to enacted provisions which are derived from treaties, Parliament has been described as 'mere machinery' rather than the source of law and thus it is not the real law-giver, but merely the law-transformer, while the treaty itself remains the (indirect) source of law[7].

Germany, like the United Kingdom, is a country holding to the dualist doctrine. To transform treaty law into *'innerstaatliches Recht'* (national law) a *Bundesgesetz* (federal statute) is enacted and the treaty is ratified[8]. Such a ratified treaty has no priority over the '*Grundgesetz*' (GG, Federal Constitution), nor is it of equal rank. It has, however, the rank of a federal statute[9].

[4] For more information on the various points of view regarding the scope of application of the CMR see Chapter 4.

[5] As of the middle of the 20th century the primacy of conventions over domestic legislation has become an unwritten rule of constitutional law in The Netherlands. Fleuren 2004, p. 338-339.

[6] '*From a substantive point of view, uniform law, even after incorporation by national Parliaments, represents a special body of law prepared and agreed upon at the international level.*' Roth & Happ 1997, p. 701. Thus, conversion does not cause uniform international law to lose its international identity. Schmid 2004, p. 23. See also *Owners of Cargo on Board the Morviken v Owners of the Hollandia*, [1983] 1 *Lloyd's Rep*. 1 (*Hollandia* and *Morviken*), in which a uniform statute such as the Carriage of Goods by Sea Act 1971 was deemed superior to the domestic conflict of law rules which allowed the choice of Dutch law and jurisdiction. In this case goods were shipped from Britain to a Dutch port on a Dutch vessel. The bill of lading provided for Dutch jurisdiction and the application of Dutch law. Both clauses were held to be null and void, for, as Holland has not adopted the Hague-Visby Rules, the ship owner's maximum liability was less than in England, so that the two clauses had the effect of lessening the ship owner's liability defined by the English Carriage of Goods by Sea Act of 1971.

[7] Mann 1983, p. 377. Mann maintains that the superiority of the Act incorporating the Hague-Visby Rules in the *Hollandia* case is based on public policy as the Act concerns a law of a strictly positive, imperative nature.

[8] The procedure for the enactment of such a law is laid down in Article 59(2) of the *Grundgesetz*, the German Constitution. Rupp 1977; Firsching & Von Hoffmann 1997, p. 12; Pernice 1998, p. 58.

[9] Van Dijk *et al.* 1998, p. 16. Robertson (ed.) 1968, p. 231. Based on § 31 GG federal law takes precedence over land law at least. Furthermore, since a convention is subject to the '*Grundgesetz*' after it has been transformed into national law, it can be subjected to Constitutional scrutiny by the German Federal Constitutional Court.

As in England, the German view is that domestic rules which derive from treaties are to be interpreted with consideration for their international origin[10].

The result of all this is that the term 'proper law' as used by Diplock may be considered too tight a fit if it would restrict the search for the law applicable to an international multimodal carriage contract to rules of national law and those conventions that possibly apply because they are included in the applicable national regime[11]. The search for the applicable law below will therefore also consider the conventions to which the Forum State is a member and which its courts are thus forced to apply[12].

As a result the first subject that is addressed in the following Section is the concept of forum shopping. Since the membership of the Forum State of certain international treaties may lead to the application of said treaty law to the multimodal contract from which the dispute has arisen, it may be prudent for the claimant to establish which legal regimes the various courts he may address are likely to apply before choosing one. This phenomenon of making a calculated choice as to which forum to address in international disputes is named forum shopping[13]. It is thought by some to lead to unwarranted litigation and to even on occasion provide the carrier with an unfair advantage[14]. Nevertheless, whether it is considered the mere exercise of a claimant's right of action or whether it is deemed misuse of the opportunities offered by international disputes, the choice of forum is an instrument which provides the claimant with the opportunity to manipulate which legal regime is applied to his claim in addition to being the first step on the road to the applicable law.

[10] BGH 18 June 2009, *I ZR* 140/06. In this decision the BGH refers to Articles in the national legislation which are of international origin, but which have been amended before incorporation into the HGB, such as Article 13 of the Athens Convention 1974 which has been transformed into Article 10 of the Appendix to § 664 HGB. This referral shows that adherence to the dualist doctrine provides States with the unwarranted opportunity to amend the rules of the treaty they have promised to uphold to suit their own needs.

[11] The choice for a certain national regime includes the treaty law included in said regime. If for instance a choice is made for German law this includes the rules of the CMR. See OLG Dresden 14 March 2002, *TranspR* 2002, p. 246.

[12] Strikwerda 2005, p. 75. A court of law is bound only by the scope rules of a convention to which the Forum State is party; these scope rules take precedence over those of the conventions that are part of the foreign national regime which applies to the dispute but of which the Forum State is not a member.

[13] "*In its widest sense forum shopping connotes the exercise of the plaintiff's option to bring a lawsuit in one of several different courts*." Juenger 1989, p. 554. Forum shopping can lead to complicated situations. For instance, the cargo-claimant may institute legal proceedings in one jurisdiction while the carrier seeks a declaration of non-liability in another. *Andrea Merzario v Internationale Spedition Leitner*, [2001] 1 *Lloyd's Rep.* 490; European Court of Justice (ECJ) (Case 129/83), [1984] *E.C.R.* 2397 (*Siegfried Zelger v Sebastiano Salinitri*); ECJ (Case 406/92), [1994] I *E.C.R.* 5439 (*Tatry*); ECJ (Case 144/86), [1987] *E.C.R.* 4861 (*Gubisch Maschinenfabrik AG v Giulio Palombo)*; Hof Amsterdam 22 February 1996, *S&S* 1998, 8; *Frans Maas v CDR Trucking*, [1999] 2 *Lloyd's Rep.* 179 *et seq*.

[14] Commonly the carrier is the first to know if damage or loss occurred as a result of the carriage, which means he can forestall any claimants by choosing a forum and instigating a request for a declaration of non-liability or one of limited liability. Haak & Hoeks 2005, p. 98. Forum shopping as a phenomenon has a rather negative reputation which can be derived from the following comment by Kerr LJ: "*Claims for declarations, and in particular negative declarations, must be viewed with great caution in all situations involving possible conflicts of jurisdictions, since they obviously lend themselves to improper attempts at forum shopping*." *Saipem spa v Dredging VO 2 BV,* [1988] 2 *Lloyd's Rep.* 361 (*Hollandia* and *Morviken*). Whether the negative attitude towards forum shopping is deserved is the question; it is after all more a consequence than the cause of the unwanted disharmony in uniform law. Forum shopping can also be seen as a positive thing, it sometimes allows plaintiffs – often by virtue of their legal representation – a modicum of influence concerning the outcome of the legal proceeding they intend to start. Ferrari *RIW* 2002, p. 179. In addition it has also been argued that forum shopping and even the differences between the various national law regimes will in time lead to better law since the differences give the parties a larger palette to choose from. Forum shopping can be deemed an important indicator for tension between legal systems. This indicator could promote the perception and awareness of deficiencies of a legal system and thus be instrumental in its improvement. Rennert 2005, p. 133.

3.2 Jurisdiction and forum shopping

Which court to address is a very basic question when one intends to litigate, one on which the outcome of the entire action can depend. The reason for this is that firstly not all States are party to all conventions, as was touched upon above, and secondly that, even if all States where an action may be brought are party to the same conventions, the theory that the courts of every Member State interpret a convention in a similar fashion is just that, a theory. In reality courts in one State are likely to interpret a convention quite differently from courts in another State. This is the natural consequence of having a different legal culture as a starting point in every State. So, although the existence of international uniform law contributes to the goal of restricting forum shopping, it is not able to eliminate it completely[15].

Besides the downsides generated by the existing lack of unity in the ideas on the multimodal contract, there are also aspects of this diversity that may sometimes work in the claimant's favour. When it comes to jurisdiction issues the claimant has the advantage, since as claimant he has the ability to choose; he can select the forum at which his case will be presented. And since not all countries are members of the same conventions and not all members of a convention will interpret it identically, the choice of court may very well influence the law that is applied to a dispute. To the dispute resulting from an accident of a mobile crane during road carriage between Cairo and Alexandria in Egypt for example, the *Rechtbank* Rotterdam applied the CMR when addressed[16]. But would an Egyptian court have done the same? Most likely not, since Egypt is not party to the CMR, and therefore its courts are not obligated to apply it[17]. This decision is also a showcase of the fact that not all courts of law in the same country may come to the same conclusion concerning the application of a certain convention as long as there is no decisive judgement by the local supreme court. In this case other Dutch courts might not have chosen to apply the CMR since the leg of the transport during which the damage occurred was domestic[18].

Naturally, a well advised plaintiff with sufficient financial means will always commence proceedings in the court most likely to give a favourable outcome. This 'shopping' for the most advantageous forum can be a demanding task. Making an informed choice concerning which court to address when it comes to multimodal transport may require extensive comparative research. Not only knowledge of the ideas on the nature of the multimodal contract common in the Forum State is needed, but data on the internal laws and the manner in which the forum is likely to interpret potentially applicable unimodal carriage conventions is also essential.

Whether a court will accept the case in question is determined by the local law of the court seized. In Europe this normally is the Brussels I Regulation[19], which indeed provides a

[15] Rennert 2005, p. 128.

[16] Rb Rotterdam 24 January 1992, *S&S* 1993, 89. The entire carriage of the crane from Cairo to Geleen in The Netherlands was performed by both land and sea.

[17] Only the forum in a Member State is bound by a convention. Strikwerda 2004, p. 92. Compare *Hartford Fire Insurance Co. v Orient Overseas Container Lines (U.K.) Ltd*., (2nd Cir. 2000), *ETL* 2001, p. 212 (*Bravery*). Here an American court did apply the CMR to the road transport stage of a multimodal transport, not because the Forum State was party to the CMR, but because there was no admiralty jurisdiction and the bill of lading contained a choice of law clause indicating the applicability of the CMR.

[18] For a more detailed account of the scope of application of the CMR see Chapter 4.

[19] The Brussels I Regulation (or Council Regulation (EC) No 44/2001, of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters). The Regulation governs jurisdiction between all EEX Contracting States except Denmark. Denmark does not participate in what is now Title IV of the EC Treaty (visas, asylum, immigration and other policies related to free movement of persons) which comprises the legal basis – Article 65 – for adopting measures on judicial cooperation in civil and commercial

claimant with a little room to choose the forum that seems most likely to cater to his or her wishes. The basic rule of the Brussels I Regulation is that the parties to a contract are free to agree on which courts will have jurisdiction to settle disputes in relation to the contract. Such jurisdiction shall be deemed exclusive unless the parties have agreed otherwise[20]. Nonetheless there are exceptions to the applicability of the Brussels I Regulation. Whenever a claim is covered by the CMR, the COTIF-CIM, the Hamburg Rules or the Warsaw or Montreal Conventions the Regulation only applies insofar as it does not conflict with the rules on jurisdiction found in these carriage conventions due to Article 71(1) of the Regulation[21]. All the mentioned conventions contain jurisdiction provisions which take priority over those in the Brussels I Regulation. It is therefore sensible to qualify the contract in question before attempting to answer the jurisdiction question. It can even be said that if a suit concerns a contract to which either the CMR, the COTIF-CIM, Montreal/Warsaw Convention or the Hamburg Rules may possibly apply (either to the contract as a whole or only to a certain part), the correct sequence of actions would be to qualify the contract, to determine whether one of these conventions applies and only then endeavour to tackle the jurisdiction matter[22].

Of the carriage conventions which include rules on jurisdiction it is the CMR – or more precisely Article 31 CMR – which deserves attention the most. One of the reasons for this somewhat dubious honour is that the CMR is not only subject to different interpretations by different national courts as all conventions are, it also literally defers to the *lex fori* when it comes to assessing the entitlement of the carrier to avail himself of the provisions of the CMR which exclude or limit his liability[23]. Obviously, instead of creating the uniformity that is the purpose of any international treaty, this stimulates unwanted heterogeneity[24].

In practice this has had some unwanted but hardly unexpected side effects. Ever since the *Hoge Raad* passed the 'anti-breakthrough' decisions in 2001, road carriers have flocked to the Dutch courts whenever possible[25]. These 'anti-breakthrough' decrees entailed a new, more restricted formula concerning what is considered wilful misconduct under Article 29 CMR. Under this formula, wilful misconduct covers only intentional misconduct and consciously reckless conduct meaning that the acting person knew about the danger inherent to said conduct

matters. Between the European Community and Denmark there is a special Agreement on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The purpose of the Agreement is to apply the Brussels I Regulation in relations between Denmark and the rest of the EC and to arrive at a uniform application and interpretation. The jurisdiction between the EEX Contracting States and the EFTA (EC EFTA Convention on Jurisdiction and the Enforcement of Judgements in Civil and commercial Matters) Countries (Iceland, Liechtenstein, Norway, Switzerland and Poland) is governed by the Lugano Convention (of 1988), which is very similar to the EEX Treaty (Brussels Convention on jurisdiction and enforcement of judgements in civil and commercial matters of 1968). The general jurisdiction rule is that defendants domiciled in a Member State, whatever their nationality, will be sued in their own courts (Article 2 of both EEX and Brussels I). See Van de Velde & Heeren 2003.

[20] Article 23 Brussels I Regulation.

[21] The rules on jurisdiction in the CMR (Article 31), the COTIF-CIM (Article 46), The Hamburg Rules (Article 21), the Warsaw Convention (Article 28) and the Montreal Convention (Article 33) take precedence over those in the Brussels I Regulation due to Article 71 of the Regulation which determines that the Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgements. De Meij 2003, p. 255, 259, 262, 264, 266-268, 270-272, 273, 274-275, 292-293; Haak 'Jurisdictieperikelen' *ETL* 2004, p. 142; Rb Rotterdam 19 October 2000, *S&S* 2001, 126, under 3.5; Rb Rotterdam, 28 October 1999, *S&S* 2000, 35 (*Resolution Bay*), under 4.5; Rb Rotterdam 21 December 2005, *S&S* 2007, 81.

[22] Rennert 2005, p. 122.

[23] Article 29 CMR.

[24] Haak *TranspR* 2004, p. 104-107.

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

and was aware of the fact that the chance that the danger would materialize because of this conduct was considerably higher than the chance that it would not, but would not let this knowledge stop him from behaving in this manner. Because this is a much narrower interpretation of the term wilful misconduct than is commonly used in the courts of our German neighbours, it is clear that a Dutch court is less likely to conclude that a carrier is guilty of wilful misconduct than a German court, which leaves the carrier the coveted limited liability based on the CMR provisions[26]. Since the carrier is usually the first to know when loss or damage occurs it is fairly easy for him to be the first to approach the court of his choice for a 'declaration of non-liability'[27] or a 'declaration of limited liability', the '*negative Feststellungsklage*'[28]. The shipper who in his turn tries calling upon a court of law in another State at a later time is – usually – thwarted in his attempt by virtue of Article 31(2) CMR, the *lis pendens* provision[29].

3.2.1 Article 31 CMR: the place where the goods were taken over

Another reason the CMR is worth mentioning when it comes to jurisdiction provisions – which is of rather more relevance than the '*negative Festellungsklage'* difficulties when it comes to multimodal carriage – is the interpretation of Article 31(1)(b) CMR. This is especially the case when it comes to determining what can be considered the 'place where the goods were taken over by the carrier' in case the main carrier has subcontracted portions of the carriage[30].

On the whole, Germanic case law on subcontracted carriage by road seems to gravitate towards the concept that the place of take-over is the place where the *contract* of carriage commenced[31]. The BGH picks up on this idea and argues that the place of take-over is the place where the goods were originally taken over from the sender, even:

> "*When the claim is against the subcontracting carrier who has taken over the goods at another place than the original place of taking over*."[32]

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

> "*In the purpose of Article 31(1) CMR, which is to restrict jurisdiction over disputes stemming from border crossing CMR carriage to certain specific courts of law. This should prevent*

[26] For a critical analysis of the German case law, see Thume 2002 and Fremuth 2004.

[27] Asariotis 1995 at p. 269.

[28] Haak 'Jurisdictieperikelen' *ETL* 2004, p. 140. It should be noted however that not all legal systems allow such declaratory actions.

[29] For a more detailed discussion of the difficulties concerning the '*negative Feststellungsklage*'and *lis pendens* see Haak & Hoeks 2005.

[30] Messent & Glass 2000, p. 246, Section 10.35.

[31] OGH Wien 1 April 1999, *TranspR* 2000, p. 34-36; BGH 31 May 2001, *TranspR* 2001, p. 452-453; OLG Köln 25 May 2004, *TranspR* 2004, p. 359-361 with a note by I. Koller. For a Dutch example see Rb Maastricht 28 May 2003, *S&S* 2004, 57. There are also Dutch examples of judgements which follow the opposite approach. The *Rechtbank* Rotterdam did not deem Hoogvliet in The Netherlands the place of take-over with regard to the action against the subcontracting carrier who took over the goods in Klaipeda in Lithuania – after they had been carried from Hoogvliet to Mukran in Germany by road and from there by ferry to Klaipeda by the main carrier – to carry them by road to Moscow in Russia. Rb Rotterdam 19 October 2000, *S&S* 2001, 126. See also Rb Rotterdam 28 October 1999, *S&S* 2000, 35 (*Resolution Bay*); Rb Rotterdam 11 April 2007, *S&S 2009, 55 (Godafoss)*; Rb Haarlem 17 May 2006, *S&S* 2008, 43.

[32] "*Wenn die Klage gegen den Unterfrachtführer gerichtet ist und dieser das Gut an einem anderen Ort als dem der ursprünglichen Übernahme in seine Obhut genommen hat*", BGH 31 May 2001, *TranspR* 2001, p. 452-453; BGH 20 November 2008, *TranspR* 2009, p. 26-29. See for a critical analysis De Meij 2003, p. 126-129.

different claims arising from one and the same carriage contract from being adjudicated at different courts of law in different States." [33]

Unfortunately, the BGH does not seem to take into account here that an action against a sub-carrier will not be based on the same '*Beförderungsvertrag*' as an action against the main carrier. It is possible that the subcontracting carrier does not even know he performs only part of the contract. As a result it does not seem fair to confront him with consequences concerning jurisdiction which stem from a larger contract of which he has no knowledge. In addition, the BGH does not seem to acknowledge that even if all courts in CMR Contracting States were to adhere strictly to this interpretation of Article 31(1)(b) CMR, differing decisions by courts in different States regarding the same CMR contract would still be possible. The dupe in a given case could for example pursue an action against the main carrier in Germany where this carrier has his principal place of business and an action against the subcontracting carrier in France where the goods were originally taken over[34]. Only when it comes to an action between the same parties as well as on the same grounds does the CMR draw the line and in the end, the main carrier and the subcontracting carrier are – mostly – not one and the same party[35].

Whereas there are various arguments thinkable why this may be an incorrect way to interpret Article 31(1)(b) CMR when it comes to CMR or road carriage alone, these arguments become even more valid in relation to contracts involving multimodal carriage[36]. It would generate illogical results for instance if one were to apply this rule to the famous *Quantum* case[37]. Strict adherence to this view would have granted jurisdiction to a court or tribunal in Singapore in *Quantum*. A court halfway around the world from the place where the damage occurred and probably a very inexperienced one when it comes to applying the rules of the CMR, and, more importantly, a court not bound by the CMR since Singapore is not a Contracting State[38]. Application of the CMR may thus – wrongfully – be circumvented. Furthermore, this causes a place to be named as the place of taking that has no connection with the road carriage whatsoever[39]. As a result the Court of Appeal decided differently from the

[33] "*Im Sinn und Zweck des Art. 31 Abs. 1 CMR, der darin besteht, Streitigkeiten aus der CMR unterliegenden grenzüberschreitenden Beförderungen auf ganz bestimmte Gerichtsstände zu beschränken. Dadurch sollen Klagen aus ein und demselben Beförderungsvertrag vor unterschiedlichen Gerichten verschiedener Staaten vermieden werden.*" BGH 31 May 2001, *TranspR* 2001, p. 452-453. The BGH even goes so far as to include even actions in tort against the main carrier's agents and servants or any other persons of whose services he makes use for the performance of the carriage. According to the BGH these are also 'legal proceedings arising out of carriage under this Convention' as meant in Article 31(1) CMR and thus lead to jurisdiction for the court where the goods were originally taken over. BGH 20 November 2008, *TranspR* 2009, p. 26-29.

[34] Koller 2002, p.134.

[35] Via the *lis pendens* doctrine which can be found in Article 31(2) CMR.

[36] Surprisingly, under the German national rules on multimodal carriage the place of taking over is considered to be at the beginning of the road stage. In the German domestic law on multimodal carriage each transport stage is awarded a hypothetical contract if the loss is localized (§ 452a HGB). In light of these domestic rules Koller states that such a hypothetical contract for for instance end haulage by road in the U.S. following carriage by air will not be covered by German national law based on Article 28(4) EGBGB (which is the German codification of Article 4(4) of the Rome Convention/Article 5(1) Rome I Regulation) even if the German carrier has his principal place of business in Germany since the place of taking over of the hypothetical road carriage contract is not in Germany where the entire carriage began but rather in the U.S. Koller *VersR* 2000, p. 1188.

[37] *Quantum Corp Inc v Plane Trucking Ltd.,* [2002] 2 *Lloyd's Rep.* 25; Haak & Hoeks 2005, p. 95-97.

[38] It may of course choose to apply the CMR anyway depending on the circumstances. See for example *Hartford Fire Insurance Co. v Orient Overseas Container Lines (U.K.) Ltd*., (2nd Cir. 2000), *ETL* 2001, p. 212 (*Bravery*). However, according to Clarke: "*There is nothing in the judgments handed down in Quantum to suggest that the Court of Appeal would decline jurisdiction in favour of an action started in Singapore, if the point came up under* Article *31.1(b) CMR*." Clarke *Road transport* 2006, p. 429-436.

[39] In the context of the CMR as a whole a carrier can even become liable as a CMR carrier without him actually taking over the goods at all, seeing that the contracting party may subcontract all of the agreed carriage. Logic

German BGH, it considered that the place of taking over of the goods could be read as referring to the place which the contract specified for the taking over by the carrier in its capacity as international road carrier, which was in this case Paris, France[40].

In spite of the *Quantum* decision, the OLG Köln only recently copied the argumentation of the BGH in a case involving a multimodal contract[41]. In this particular case the goods were to be transported by road within the United Kingdom from Sevenoaks to London, from there on by plane to the airport Köln/Bonn in Germany and finally by road to the final destination in The Netherlands, which was Amsterdam. Although the OLG had found the CMR to be applicable to the international stretch of road carriage during which the damage to the goods had occurred – albeit based on the fact that English law applied to the claim – it did not hold itself to be competent to try the case based on Article 31(1)(b) CMR since it did considered Köln nor Bonn the place of take-over. As if the situation in the BGH case which revolved around a unimodal contract of road carriage were no different from its own, the OLG reasons as follows:

> "*Because the place of taking over as meant in Article 31(1)(b) CMR is the place where the goods were originally taken over from the consignor when the contract of carriage is performed by one single carrier, exactly like when the carriage is partly performed by a main carrier and partly by a subcontracting carrier.*"[42]

The contrived nature of the idea that the place of taking over meant in Article 31(1)(b) CMR can only be the place where the contract of carriage commenced becomes evident if one remembers that a multimodal carriage contract is popularly characterized as a sum or chain of unimodal contracts[43]. A decision that did reckon with this special character of the multimodal carriage contract is the Dutch case involving the *'Resolution Bay'*[44]. The *Rechtbank* Rotterdam declared it had jurisdiction to try this case based on the circumstances that the lamb's meat, which had been brought by sea from New Zealand, had been transferred from the sea vessel to a lorry in Rotterdam into the custody of the subcontracting road carrier, so that it could be transported to Antwerp by road. In the eyes of the Court this designated Rotterdam as the place of taking over in relation to the CMR carriage between Rotterdam and Antwerp[45].

To consider the place of taking over referred to in Article 31(1)(b) CMR to be the place where the contract of carriage commenced initially seems a rather severe disregard of the

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dictates that the expression 'taking over' should therefore not be given too literal an interpretation. Clarke *CMR* 2003, p. 45. So even if it is one and the same party that performs both the non-road and the road carriage of a multimodal transport the place of taking over should still be deemed the place where the carriage by road commenced.

[40] *Quantum Corp Inc v Plane Trucking Ltd.,* [2002] 2 *Lloyd's Rep.* 25, at consideration 59, see also Chapter 4, Section 4.1.2.5 on the place of taking over and the place of delivery under the CMR.

[41] OLG Köln 25 May 2004, *TranspR* 2004, p. 359.

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

[43] Of course it is in fact only a single contract which encompasses more than one stage of transport to be performed by more than one mode of carriage. See Chapter 2, Section 2.3.1 for a definition of the multimodal carriage contract.

[44] Rb Rotterdam 28 October 1999, *S&S* 2000, 35 (*Resolution Bay*). See also Rb Rotterdam 11 April 2007, *S&S* 2009, 55 *(Godafoss)*; Rb Rotterdam 23 April 1998, *S&S* 2000, 10. Nevertheless, there are also Dutch courts which adhere to the German point of view on this issue; Rb Maastricht 28 May 2003, *S&S* 2004, 57; Hof Den Bosch 2 November 2004, *S&S* 2006, 117.

[45] According to the considerations under 4.3 the court would also have regarded Rotterdam as the place of take-over if the cargo had not been given into the care of a subcontractor but had been carried on by the main carrier himself. Rb Rotterdam 28 October 1999, *S&S* 2000, 35 (*Resolution Bay*).

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

The *Oberste Gerichtshof* (OGH) Wien, the Austrian Supreme Court, states that the designation of the place of taking over as the place where the contract of carriage commenced is justified since this place is easily discernable by all parties involved in the transport, because it is stated in the transport papers[46]:

> "*Far more essential is that the connecting factors envisioned by the Convention are easily determined by means of the documents by all parties involved in the transport, especially the parties potentially entitled to damages or the potentially liable parties.*"[47]

This would be true if it were not common practice for the subcontracting road carrier to issue transport documents of his own, specifically tailored to the subcontracted stage of the carriage. These will usually not mention the original place of take-over. As was said, the subcontractor may not even be aware that the carriage he will perform is part of a larger transport[48]. In those situations it should not be taken for granted that the subcontractor is acquainted with the place where the goods were taken over originally[49].

Although a court in the vicinity of the place where the goods were actually taken over would have less trouble finding evidence as to the exact causes of the loss or damage to the cargo, especially if the causes were for instance incorrect loading or incorrect transferral[50], it is the place of taking over indicated by the subcontractor's contract and the place 'designated' for delivery in said contract that should be considered decisive[51]. This can be deduced from the wording used in Article 31 and Article 1 CMR; both Articles speak of a place 'designated' for delivery and Article 1 CMR literally states that the place of taking over and the place of delivery meant are those 'specified in the contract'. Comparison with some of the other carriage conventions such as the Warsaw and Montreal regimes also points towards the contractually appointed place[52], as does the link that can be drawn between this issue and the issue concerning which law to apply when the actual performance deviates from that which has been contractually agreed[53].

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[46] OGH Wien 1 April 1999, *TranspR* 2000, p. 36. See De Meij 2003, p. 126-127 and 163-166.

[47] "*Wesentlich ist vielmehr, dass der vom Abkommen vorgesehene Anknüpfungspunkt für alle am Transport Beteiligten (und damit potentiell Ersatzberechtigten oder Ersatzpflichtigen) aus den Papieren unschwer vollzogen werden kann.*"

[48] De Meij 2003, p. 127.

[49] Koller *TranspR* 2000, p. 152.

[50] Basedow 1997, Article 31 CMR, No. 22.

[51] I Koller 2002, p. 135. Under the multimodal contract these are the places designated for taking over and delivery for each transport stage.

[52] Mankowski 1993, p. 223, see also fn. 110 at p. 224.

[53] See Chapter 2, Section 2.3.3.1 on the influence of the wording of the contract and its physical performance on the applicable law.

Only the text of Article 31 leaves some room for doubt as to whether the contractual or the actual place of taking over is meant. According to Thume and Fremuth the wording of Article 31 clearly indicates the actual place where the goods were taken over by the subcontractor[54]. This seems unlikely in light of the undeniable preference for the contractually agreed place shown in Article 1 and the clarity of the text of Article 31 CMR concerning the place designated, or in other words chosen by contract, for delivery. Since these three instances focus on the contract, the place of taking over would be the odd one out if this were to attach to the actual place of taking over, as practical as that may be in relation to the gathering of evidence. In any case, in most cases the actual place of taking over for the road stage and the contractually agreed place should not lie that far apart[55].

One last contention when it comes to the interpretation of the terms 'place of taking over' and the 'place designated for delivery' concerns the fact that, as was mentioned above, these words are also used in Article 1 CMR, which determines the Convention's scope of application. Although the analysis of the scope of application of the CMR in the next Chapter will show that the following contention is unlikely to sway the German legal community, it should have at least some authority in The Netherlands and in England. If the words 'place of taking over' and 'place designated for delivery' as used in both Article 1 and Article 31 CMR are to be interpreted as an indication of the same places then attaching the label 'place of taking over' to the contract of carriage as a whole, even if the road carriage stage is not the first stage of the transport, causes the scope of application of the CMR to be stretched beyond its intended limits. The same of course applies when attaching the label 'place designated for delivery' to the destination of the entire transport instead of to the end of the road stage, whether the last stage of the carriage concerns international road carriage or not. If the words 'place of taking over' or 'place designated for delivery' are interpreted thus, it would mean that the application of the CMR to the road stages of a multimodal transport is not an option, as the international road carriage Convention would then apply to the entire multimodal carriage – from the taking over at the very beginning of the transport, until the place designated for delivery is reached at the final destination – which it is clearly not meant to do. Article 1 CMR clearly shows that the CMR is meant to cover international carriage by road and not carriage by any other means of transport, unless it is carriage as meant by Article 2 CMR which expands the scope of application of the CMR beyond road carriage, but only when certain strict terms are met[56].

3.3 The path to the applicable law

After it is established which court is to be addressed the actual search for the law applicable to the dispute may commence[57]. The area of law that is specifically designed to provide guidelines regarding the procedure to be followed when dealing with internationally oriented contracts,

[54] Thume *Kommentar zur CMR* 1994, Art. 31, remark 25.

[55] It could be argued that if large differences do occur, the contract is also likely to have been changed accordingly.

[56] See Chapter 4, Sections 4.2 and 4.3 on Article 2 CMR.

[57] As was touched upon in Section 3.2 of this Chapter on jurisdiction and forum shopping the sequence of the normal procedure is upset when the law that may possibly apply entails mandatory provisions on jurisdiction as some of the carriage conventions do. In such cases it is necessary to first determine which legal regime applies to the claim since it is this legal regime that determines which courts may be addressed.

such as the international multimodal carriage contract, is called private international law in continental law systems and is known as conflict of laws in common law regimes[58].

The very first question to ask when trying to determine the law applicable to an international contract is which private international law system – or '*Kollisionsrecht*' as it is called in Germany – is to be used[59]. To find out which is the correct instrument of conflict law to use, and later on to determine which legal regime applies, the dispute in question should be qualified or characterized as belonging to a defined category. This qualification of the dispute can be performed in accordance with either the *lex fori*, *the lex causae* or comparatively, in other words by comparing different legal systems. Generally, the qualification of the dispute is based on the *lex fori*[60], since the *lex causae* approach – qualification in accordance with the law applicable to the dispute – tends to lead to circular reasoning and the comparative law approach is, although attractive in theory, generally too onerous a burden to place on the shoulders of the judiciary[61].

There is an exception to the *lex fori* rule, an exception which comes to the fore when the potentially applicable rule of conflict law is one of international uniform law. Under those circumstances the dispute is to be qualified based on definitions given by the convention in question[62]. If a dispute arises from the international carriage of goods by air for instance, the scope rules of the Warsaw or Montreal Conventions on air carriage can be used to characterize the dispute. Does the dispute meet the requirements for application set in one of these conventions, then the dispute can be qualified as a dispute involving international air carriage and at the same time it is clear that the rules of said convention apply to the dispute[63]. This course of action preserves the international legal uniformity which is the main aim of international law[64]. Thus, a contract involving international carriage should be qualified with the use of the scope of application rules of the carriage conventions.

This is true of a dispute involving a multimodal carriage contract as much as of a unimodal carriage dispute. As there is no international convention regulating multimodal carriage, the scope of application rules of the relevant unimodal carriage conventions are to be considered to see if they fit the – multimodal – dispute in question. Of course the unimodal conventions can only apply if this is based on their own merits[65]. If one of the carriage conventions applies, it generally does not cover the entire multimodal contract, although there are some exceptions. If an international carriage contract concerns both road and ro-ro transport for instance, it may be entirely covered by the CMR and if an international rail transport is supplemented by domestic road carriage under the same contract, such a contract is also entirely covered by the same convention, which is the COTIF-CIM[66]. Still, it is more common that a unimodal carriage regime which applies to the part of the contract from which the dispute arose

[58] Fawcett & Carruthers 2008, p. 16-17. Indeed, the question which legal regime applies to international private law disputes has been the main research topic in this legal area for most of its existence. The other two core subjects of private international law, which are international jurisdiction and the recognition and enforcement of foreign judgements have only relatively recently come into the picture. Scientific interest for these areas emerged as late as the 20th century. Pontier 2004, p. 5.

[59] Basedow 1999, p. 31.

[60] Firsching & Von Hoffmann 1997, p. 208; Strikwerda 2005, p. 46; Dicey & Morris 2006, p. 39.

[61] Strikwerda 2005, p. 47; Dicey & Morris 2006, p. 40.

[62] Strikwerda 2005, p. 44.

[63] This accords with the view that the scope of application rules found in systems of uniform international law are unilateral conflict rules that take precedence over national conflict of law rules. Mankowski 1995, p. 304; Mankowski 2004, p. 1061; Mankowski 2008, p. 177.

[64] Firsching & Von Hoffmann 1997, p. 209.

[65] Ramming 1999, p. 332.

[66] See Article 2 CMR and Article 1(3) COTIF-CIM.

does not cover the entire multimodal carriage contract. When for example diamonds are stolen during the international air stage of a transport the claim for damages may be covered by the Montreal Convention, but the preceding or ensuing road carriage generally is beyond the scope of the uniform air carriage regime[67].

Of course no part of the contract exists in a legal vacuum. There is always a national regime applicable to the contract; it is only that these national rules apply in a supplementary capacity to the parts of the multimodal carriage contract that are covered by uniform law. The domestic law applicable to the contract only applies insofar as it does not conflict with international rules that also apply. In order to find these national rules, courts in the EU Member States are bound to apply the Rome I Regulation on the law applicable to contractual obligations[68]. It is after all an international contract, which is the only requirement this Regulation sets for application. What is more, the Rome I Regulation provides rules on which legal regimes apply to international contracts in general; it contains an international private international law system that encompasses many more types of international contracts than only those involving carriage. It is thus a *lex generalis* of sorts. Nevertheless, as will be shown in the following the procedure laid out by this '*lex generalis'* will also lead to the scope of application rules of the carriage conventions when the contract under scrutiny is an international multimodal carriage contract.

3.3.1 The Rome I Regulation and the multimodal mix

When a dispute that necessitates a choice between the laws of different countries arises from a contract, the Rome I Regulation can serve as the basis for the qualification of the dispute[69]. The scope of application rules of this Regulation are to be found in Article 1(1) which reads:

> "*This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.*"

It is obvious that international multimodal carriage contracts will fit the bill as this is a rather expansive scope of application. Thus, when confronted with a dispute involving such a contract, the European fora will be obliged to apply the Rome I Regulation to find the law applicable to the contract[70].

In the Rome I Regulation the traditional method of finding the law applicable to an action involving a foreign element is used. This method consists of two steps. The first is characterizing or qualifying the dispute as belonging to a certain defined category, as was done in order to find the private international law system to use. The second step involves the identification of the

[67] See Articles 38 and 18 MC.

[68] The Rome I Regulation replaces the EC Convention on the Law Applicable to Contractual Obligations of 1980 (Rome Convention) as of 17 December 2009.

[69] The Rome Convention and the replacing Regulation were drafted specifically for the purpose of determining the law applicable to contractual obligations and completely replace all national conflict rules in force in a Contracting State which are of purely national origin and not part of any convention to which the Contracting State is a party. Germany has chosen to take a rather unusual course to fulfil this purpose however. Although it has ratified the Convention, the Act ratifying the convention contains a reservation in Article 1(2) pertaining to Articles 1 through 21 of the Convention; these Articles are not to apply directly in Germany. Instead, they have been incorporated in the German legislation in Articles 27 through 34 of the EGBGB. Doubts have been put forward as to whether this so-called 'copying-method' is compatible with the rules of international law. Martiny 2004, p. 18-19, No. 16.

[70] Contracts of carriage are within the scope of the Rome I Regulation. Dicey & Morris 2006, p. 1762; Basedow 1999, p. 35.

applicable national law in relation to points of attachment of the category concerned[71]. Thus, when determining which legal regime applies to an international contract the customary starting points would be to qualify the contract, after which the national legal regime that applies to the contract is pinpointed.

This is also true in relation to the multimodal carriage contract. When considering the multimodal contract however, it is very likely that international instruments exist which apply to the different types of carriage of which the multimodal contract consists because carriage law is *par excellence* an area of law that is severely internationalized. It consists of a considerable number of international conventions, not the least of which concern carrier liability. These conventions, if applicable, are meant to take precedence over any provisions the applicable national regime may have to offer on the subject[72]. In such cases, all that is left for the national rules is to perform in a supplementary capacity, and sometimes not even that is necessary[73].

Efficiency considerations would therefore dictate that the first step in the process of determining which legal regimes apply to a multimodal contract of carriage is the close scrutiny of the scope of application rules, or scope rules, of the relevant carriage conventions[74]. Skipping the step of determining the applicable national regime for now is economical as it saves time, but that is not its only benefit. It also coincides with one of the basic reasons for the existence of unified law. Uniform private law is, *inter alia*, designed to avoid the need to determine whether, from the substantive standpoint, the *lex fori* or foreign law should be applied and, in the latter case, which foreign law this would be. This need for a search and its outcome have some drawbacks. For one, it may result in the application of a foreign law which is not familiar to the court or to the parties and their representatives. For another, consistency in the outcome of individual cases, which is one of the objects of private international law, is by no means guaranteed since there may be considerable differences between the national rules that are applied.

If, on the other hand, an actual situation may fall within the scope of application of internationally unified rules, a judge's task is greatly simplified. In such a case it is necessary only to determine whether the unified rule applies to the situation in question and if so, to apply this unified rule[75]. As early as 1937 Greene LJ showed in *Grein v Imperial Airways* that he appreciated the benefits uniform law brings[76]. He stated in relation to the underlying philosophy of the Warsaw Convention that:

> "*The rules laid down are in effect an international code declaring the rights and liabilities of the parties to contracts of international carriage by air; and when by the appropriate machinery they are given the force of law in the territory of a High Contracting Party they govern (so far as regards the courts of that party) the contractual relations of the parties to the contract of carriage of which (to use language appropriate to the legal systems of the United Kingdom) they become statutory terms. The desirability of such an international code*

[71] Tetley 'Mixed jurisdictions' 1999, p. 591-619.

[72] The Rome I Regulation, unlike its predecessor the Rome Convention, is somewhat unclear on the precedence of uniform carriage law in Article 25. For more details on this quandary see Section 3.3.2. on Article 25 Rome I Regulation.

[73] The various existing unimodal carriage conventions have precedence over all internal law due to their nature as international instruments of uniform law. Firsching & Von Hoffmann 1997, p. 24; Strikwerda 2004, p. 68. Recourse to national law is not the only technique which can be applied when trying to fill in the blanks of the international conventions. Basedow 'Globalization' 2000, p. 7.

[74] Hartenstein 2005, p. 10; Basedow 1999, p. 33.

[75] Loewe *Commentary on the CMR* 1975, p. 12-13.

[76] *Grein v Imperial Airways, Ltd.,* [1936] 55 *Lloyd's Rep*. 318. This statement was also cited in *Holmes Respondent v Bangladesh Biman Corporation Appellants*, [1989] 2 *WLR* 481.

for air carriage is apparent. Without it questions of great difficulty as to the law applicable to a contract of international carriage by air would constantly arise. Our courts are familiar with similar questions arising under contracts of through carriage otherwise than by air; and it is easy to imagine cases where questions of the greatest difficulty might arise as to which law or laws governed the contract and whether different laws might not apply to different stages of the journey. ... Thus different laws might be held to apply according as a ticket (to take a simple case) was taken in Paris for a flight to London or in London for a flight to Paris, according as the carrier was a French or an English company, according as an accident took place in England or in France. Where the carriage is effected by stages covering several countries and involving aeroplanes belonging to companies incorporated in several countries, the difficulties increase as well as the unlikelihood of finding in the various countries in which actions might be brought any uniformity of legal principles for their decision. It is, I think, apparent from the subject matter with which the Convention deals and from its contents that the removal of these difficulties by means of a uniform international code, to be applied by the courts of the various countries adopting the Convention, is one, at any rate, of the main objects at which the Convention aims; and it is in my judgment essential to approach it with a proper appreciation of this circumstance in mind."

Overall, the more efficient route to the law applicable to the international multimodal contract seems to commence with an examination of the scope of application rules of the relevant carriage conventions, as they are meant to take precedence over any applicable national regime[77].

3.3.2 Article 25 of the Rome I Regulation

It is clear that the application of uniform law has definite advantages. If unified rules in the shape of one or more of the carriage conventions apply to an international contract however, there is a concurrence of treaty law; in such a case both the rules of the Rome I Regulation and those of the carriage convention apply. The drafters of the Regulation's predecessor, the Rome Convention (RC), realized that the conjuncture of the Rome Convention and other treaties was very likely[78]. The solution to this dilemma was found in the generally accepted view that the scope of application rules of international uniform law – such as the carriage conventions – take precedence over the rules of private international law of the Rome Convention[79]. Indeed, they take control over any type of private international law due to their unilateral design and thus the conventions apply regardless of the normal conflict of law rules[80].

Of course, the fact that scope rules, which are part of international conventions, have priority over national rules of private international law is rather unremarkable as uniform law naturally takes precedence over national law. The *Rechtbank* Rotterdam illustrated this regarding the application of the CMR by making the following statement in a case involving the transport of frozen lamb's meat from Lorneville, New Zealand, to Antwerp in Belgium by means of road and sea carriage:

[77] Mankowski 1993, p. 213; Basedow 1999, p. 33.

[78] It is specifically mentioned by the explanatory report on the Convention by Guiliano and Lagarde. Giuliano & Lagarde 1980, Article 21.

[79] "*Die Anwendungsnormen von Übereinkommen des Internationalen Einheitsrechts verdrängen nämlich die Anwendung des algemeinen Internationalen Privatrechts, wenn der Staat des Gerichtes Mitgliedstaat des betreffenden Übereinkommens ist. Dies folgt aus der Rechtsnatur dieser Anwendungsnormen*". Mankowski 1993, p. 213; Mankowski 'Transportverträge' 2004, p. 1220-1221, No. 1675. See also Dicey & Morris 2006, p. 1763. With regard to the CMR see Haak 1986, p. 40; Ramming 'BGH 3 May 2007' *TranspR* 2007, p. 409. Scope of application rules are known as '*kollisionsrechtliche Abgrenzungsnormen'* in Germany. Kropholler 1975, p. 191.

[80] Johansson 2002, p. 386; Clarke *CMR* 2003, p. 16.

> "*The Convention has direct effect and determines itself in which situations and to what extent it applies; its applicability does therefore not depend on the national law that otherwise applies to the multimodal carriage contract.*"[81]

That the scope rules of one uniform instrument should take precedence over those of another international instrument is somewhat less logical however. To avoid complications the drafters of the Rome Convention complied with the general consensus and the adage '*lex specialis derogat legi generali*' and incorporated Article 21 into the text of the Convention. This predecessor of Article 25 Rome I Regulation prevents complications on an international law level by expressly laying down the precedence of carriage conventions such as the CMR, and any other international treaties[82]. It contains the following text:

> "*This Convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party.*"

The Rome I Regulation followed suit and incorporated a similar Article, namely Article 25 Rome I, which states:

> "*1. 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.*" [83]

The Articles are not quite identical however, which may generate difficulties in the future. The first deviation concerns the fact that in Article 25 Rome I Regulation the phrasing 'or becomes' is missing. The result is that the precedence granted by the Rome I Regulation to certain 'conflict-of-law rules' is restricted to those which are laid down in conventions to which the Member States are party on 17 December 2009, the moment the Regulation enters into force. Any conflict of law rules in a new convention would however not receive the priority such a uniform regime requires[84]. Only if the entire EU were to ratify or accede to such a convention at once by means of for instance a Regulation as it did concerning the Montreal Convention[85], thus

[81] Rb Rotterdam 28 October 1999, *S&S* 2000, 35 (*Resolution Bay*). See also Rb Rotterdam 11 April 2007, *S&S* 2009, 55 (*Godafoss*) and Chapter 4, Section 4.1.1.2.2 which deals with jurisprudence supporting *Quantum*.

[82] Article 30(2) of the Vienna Convention on the Law of Treaties provided a solid legal basis for provisions such as Article 21 Rome Convention. It determines 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.

[83] Besides the first paragraph which is similar to Article 21 RC, Article 25 Rome I also includes a second paragraph which uncovers its intent to take priority over certain conventions between Member States of the European Community. Article 25(2) RC thereto states: "*2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.*" Since a previous proposal of the Regulation only mentioned the precedence of the Regulation over the Hague Convention of 15 June 1955 on the law applicable to international sales of goods and the Hague Convention of 14 March 1978 on the law applicable to agency it should be safe to assume that only conventions which focus on private international law are meant to grant the Regulation precedence. The proposal version of the Regulation can be found in COM(2005) 650 Final, Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), Brussels 2005.

[84] Hartenstein 2008, p. 146.

[85] Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents.

making it Community law, would the new treaty have precedence over the Rome I Regulation[86]. If a EU Member State were to attempt to accede to a new convention by itself however, the consequence would be that the scope of application of such a convention would conflict with the Rome I Regulation. If such a conflict were to cause the rules of the Rome I Regulation to have priority then all that is left for the newly ratified convention is application via national law[87]. The new convention would then be applied only if the Rome I Regulation appoints the *lex fori* to be the applicable national law or the law of another State which has also become party to the new convention. Such an outcome is clearly irreconcilable with the core objective of uniform law. Uniform law is meant to unify, to eradicate the legal diversity generated by the existence of differing regimes of domestic law. Thus, to accept this line of reasoning without any criticism or attempt to rectify the situation seems somewhat defeatist[88]. In addition, there is the limited authority of the European Community to ratify or accede to conventions. Europe may be authorized to do so in relation to transport law conventions, but it does not have this authority in all areas of law. As a result, the view described above would cripple the chances of creating real uniformity of any convention involving an area of law in regard of which Europe lacks such authority. It is submitted here that such a consequence is unwarranted.

A solution to this quandary may be found in the second difference between Article 21 RC and Article 25 Rome I regulation. Where Article 21 RC grants priority to entire conventions without much ado, Article 25 Rome I Regulation refines this by requiring that these conventions lay down conflict of law rules relating to contractual obligations. There are writers, such as Wagner, who suggest that scope of application rules of conventions cannot be deemed conflict of law rules as meant by Article 25 Rome I Regulation. In his view the conflict of law rules meant by Article 25 Rome I Regulation are only those conflict rules which appoint State law as the applicable law. The scope of application rules of conventions, or the '*statutistischer Kollisionsnormen*' (legislative conflict of law rules) which regulate the scope of the '*vereintlichte Sachrecht*' (uniform material law), apply directly according to Wagner, without intervention or intercession on the part of the Rome I Regulation[89]. The unilateral nature of the scope of application rules bars them from coming into conflict with the Rome I Regulation.

Wagner's point of view seems to be the most expedient one as this solves the problem concerning the precedence of any future uniform carriage law conventions such as for instance the Rotterdam Rules, without violating the unilateral conflict of law rule nature of the scope of application rules of conventions[90]. It also fits in with Article 25(2) Rome I Regulation; if the scope of application rules of the carriage conventions are not considered to 'concern matters governed by the Regulation', the precedence granted to the Regulation in relation to conventions concluded exclusively between two or more of EU Member States is also exorcized.

Thus, as long as the European Court of Justice does not decide otherwise in this matter, it still seems likely that the most efficient initial response in a multimodal dispute is the examination of the scope of application rules of the relevant carriage conventions to see whether one – or more – of them applies. Although such a dispute may concern an international contract, the objectives of the Rome I Regulation and uniform carriage law should play second fiddle to

[86] Article 23 Rome I Regulation. Fawcett & Carruthers 2008, p. 763-764. The same difficulties arise from Article 28 of the Rome II Regulation. Smeele 'Implicaties Rome II' 2009, p. 45.

[87] Hartenstein 2008, p. 147.

[88] Smeele 'Implicaties Rome II' 2009, p. 46-47.

[89] Wagner 2009, p. 107-108. Hartenstein seems to adhere to the same point of view in relation to the identical Article 28 in the Rome II Regulation. Hartenstein 2008, p. 149.

[90] Unfortunately it does not solve the difficulties that may arise if a new (carriage) convention is ratified by a single Member Sate which contains universal conflict of law rules provisions such as Article 29 CMNI. Luckily provisions such as Article 29 CMNI are not common in uniform transport law. Mankowski 2008, p. 178.

the carriage conventions. The first response of the court that is addressed should therefore be the scrutiny of the scope of application rules of the international carriage conventions[91].

Whether a court of law will deem one or more of these conventions – directly – applicable however, depends, amongst other things, on its interpretation of the scope rules of the international arrangement in question. Because the manner in which these rules are interpreted is rather significant and because the interpretation of a certain scope rule by a court in one country is not always the same as that of a court in another country, a large part of this Chapter will be devoted to the ways in which the scope rules of the various unimodal carriage conventions are interpreted in academic writing and courts of law in the countries on which this research is focused: The Netherlands, Germany and England.

3.4 The carriage conventions: scope of application rules

Because of their import the general scope rules are normally placed in one of the first few Articles of a convention[92]. Nevertheless, it is not unusual for a convention to contain additional Articles concerning its scope which either serve to expand or restrict the convention's scope, or to define it more clearly[93]. The rules that determine the scope of application of the various carriage conventions are not completely similar. When comparing the focus of the scope provisions one sees for instance that while most conventions specifically require the existence of a carriage contract for applicability, the air carriage conventions lack this requirement[94], which extends their coverage. When it comes to the carriage of passengers, the air carriage conventions are also more expansive than most of their colleagues; the carriage of passengers is also covered by the Warsaw and Montreal Conventions whereas most of the other carriage conventions, excepting the COTIF, are restricted to the carriage of goods[95]. The Hague and Hague-Visby Rules on the other hand, limit their scope of application rather than extending it. By making their application depend on the existence of a bill of lading or a similar document of title, they limit their range rather effectively.

The purpose of the scope of application rules of uniform carriage law is twofold. To begin with they serve as genuine rules of conflict law; as was mentioned above the scope rules of the conventions of which the Forum State is a member should set national – and even international – conflict rules aside and determine exclusively whether the uniform law of the convention applies to a certain case. They are '*lex specialis*' to the '*lex generalis*' embodied by the other rules of private international law[96]. Furthermore, they act as '*sachrechtlichen Abgrenzungsnormen'* or material scope of application rules. They determine whether a certain situation meets the requirements set by the convention for application[97]. This is the function that is called upon when a dispute is qualified[98]. The scope rules also demarcate the formal domain of

[91] Basedow 1999, p. 31; Mankowski 2008, p. 177; Hartenstein 2005, p. 10.

[92] Article 1 CMR, Article 1 WC, Article 1 MC, Article 2 CMNI, Article 1 COTIF-CIM, Article 2 Hamburg Rules. The Hague and Hague-Visby Rules are the exception; their scope rules can be found in Article 10 H(V)R. In addition the conventions also contain other provisions which influence their scope of application by for instance defining certain terms used in the treaty text such as Article 1(b) and (e) HVR.

[93] Examples are Article 38 MC, Article 2(2) CMNI, Article 2 CMR, Article 1(3) and (4) COTIF-CIM *et cetera*.

[94] It is however generally assumed that they do presuppose the presence of a carriage contract. Koning 2004, p. 94.

[95] The COTIF regulates passenger transport by means of the CIV appendix.

[96] Kropholler 1975; p. 190; Saf 1999; Hartenstein 2008, p. 146.

[97] Mankowski 1993, p. 214-215; De Meij 2003, p. 49-50.

[98] Or, when the instrument lacks a definition the contract is to be qualified autonomously rather than based on the *lex fori*. Firsching & Von Hoffmann 1997, p. 209.

application. They segregate the internationally oriented disputes from those that are purely internal. Only the disagreements with international connections qualify for the application of the carriage conventions[99].

In other words, under the header 'material and formal scope of application rules' these rules set limits to the type and place of the occurrences that are covered by the international instrument aimed at the unification of law. The wider these limits are fixed, the easier it is to appreciate a legal situation with international implications. In addition, legal certainty is served because it is easier to predict in advance which rules will apply if an instrument of uniform law covers a substantial range of situations. However, there is also a downside to incorporating expansive scope rules into a convention or interpreting scope rules too extensively. Such a broadening of the scope of application of unified rules might be considered to be an infringement of the sovereign rights of non-Contracting States, especially when the expansion concerns the territorial scope of the convention[100].

3.5 The need for uniform interpretation of scope of application rules

> "*When I use a word,*" *Humpty Dumpty said in a rather scornful tone,* "*it means just what I choose it to mean…*"
> Lewis Carroll, *Through the looking glass*, 1935

Because the scope of application rules function as gatekeepers to the usually mandatory provisions of the carriage conventions, the importance of a uniform interpretation of these rules would seem to be self-evident[101]. After all, the principal objective of uniform commercial law such as the carriage conventions is to achieve international uniformity of law, because predictability and certainty facilitate and stimulate international trade[102]. However, even if apparent uniformity is achieved following the adoption of a single authoritative text, uniform application of the agreed rules is by no means guaranteed. In practice different countries almost inevitably come to put different interpretations upon the same enacted words[103]. Thus, regardless of the patently obvious need of homogeneous appraisal, the interpretation of treaty law has still managed to set many a pen in motion. Keeping uniform law uniform is regarded as a particularly difficult task, but it is a task that is inherent to this type of regulation.

Schiller notices for instance that there are those who propagate the idea that, since it is very difficult to revise or change multilateral conventions in order to keep them up to date, the manner in which to keep the existing and sometimes perhaps somewhat outdated uniform carriage law abreast of modern times is to interpret it extensively and freely. He frowns upon this

[99] De Meij 2003, p. 86.

[100] Loewe *Commentary on the CMR* 1975, p. 12-13. The CMR for instance is applicable to carriage of goods between different countries according to Article 1; for the application of the Convention it is however sufficient if only one of these countries is party to the CMR.

[101] Haak 1986, p. 15 *et seq.*; De Meij 2003, p. 7 *et seq.*; Clarke *TranspR* 2002, p. 433 and 434; Brouwer, Hendrikse & Margetson 2005, p. 45-55.

[102] "*The purpose of an international convention is to harmonise the laws of all contracting states on the particular topic dealt with by the Convention. It is therefore very important that the interpretation of the Convention should be the same, so far as possible, in all contracting states.*" Dicey & Morris 2006, p. 13; *Abnett (known as Sykes) v British Airways Plc. & Sidhu v British Airways Plc.*, [1997] 2 *Lloyd's Rep.* 76.

[103] Munday 1978, p. 450. See *Ulster-Swift Ltd. v Taunton Meat Haulage Ltd.,* [1977] 1 *Lloyd's Rep.* 346 at p. 350, which revealed that courts in six Member States had produced no less than 12 different interpretations of particular provisions of the CMR.

idea, because the practical difficulties that are encountered when attempting to change international multilateral legislation may be many, but they do not provide licence to deviate from the manner of interpreting that is generally accepted between the Member States as being correct. If a Member State is of the opinion that the treaty in question is truly obsolete and is no longer fit to be applied under the current circumstances, there is always the option of denunciation[104].

To assist those attempting to interpret rules of law a number of methods of interpretation exist. Von Savigny categorized them as the grammatical, teleological, historical and systematic interpretation methods[105], a categorization which is prominent still[106]. When the systematic interpretation is employed the meaning of rules is determined by the context in which they are used and by the overall concept of the law in which they are incorporated. Making use of the method of teleological interpretation on the other hand causes the interpreter to search for the purpose of a law. When this purpose has been established the interpreter chooses among the several possible interpretations of the rule in question the one which is most conducive to putting this purpose into practice. A historical interpretation determines the meaning of a legal phrase based on what the persons involved in drafting the legislation had in mind. This method differs from the others in that it does not only use the legal text in question, but also other texts such as drafts and discussion protocols. The grammatical interpretation focuses on the literal meaning of the text of the rule to be interpreted, which in some situations may lead to evidently unwanted or absurd outcomes[107].

A result of the existence of all these different methods is that the outcome of the interpretation process is all the more unpredictable. Although using the same method in similar cases is not a guarantee that the rules of law involved will be interpreted in the same manner, when judges make use of diverging interpretation methods the chances that their findings concur become rather slim. The preferred methods of interpretation sometimes seem to differ per country, something that was considered by Denning LJ during the Court of Appeal proceedings of *James Buchanan & Co. Ltd. v Babco Forwarding & Shipping (U.K.) Ltd*. In his view, English rules of statutory interpretation differ from the continental approach in that, in England, far greater attention is paid to the literal meaning of enacted words, whereas on the continent chief regard is paid to the purpose underlying the legislation[108]. He considers the following with regard to the *modus operandi* of the continental judiciary:

> "*When they come on a situation which is to their minds within the spirit – but not the letter – of the legislation, they solve the problem by looking at the design and purpose of the legislature – at the effect which it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means that they fill in gaps, quite unashamedly,*

[104] Schiller 1996, p. 173.

[105] His approach to legal methodology was first put forward in a lecture at Marburg University in the winter of the academic year 1802-3. There are only 2 reproductions of the presented '*Methodenlehre*', one was published in 1840 in the first volume of the '*Systems des heutigen Römischen Rechts*' and one in 1951 under the name '*Juristische Methodenlehre, nach der Ausarbeitung des Jakob Grimm*', by G. Wesenberg.

[106] The English 'literal rule' is comparable to the grammatical interpretation method, but is restricted by the 'golden rule' which keeps the literal meaning of a statute from being adopted where it would lead to an absurd rather than sensible result unless the words are so clear that an alternative meaning is impossible. The English 'mischief rule', which grants regard to the mischief the statute was meant to prevent when interpreting, seems similar to the teleological approach. The application of these national rules or *canones* is unlikely to lead to uniformity however. Goode, Kronke & McKendrick 2007, p. 702-703.

[107] For a detailed description of these approaches see Kropholler 1975, p. 264-278.

[108] The literal approach was especially valued in commercial law it seems. Devlin stated to this end that "*in commerce the letter of the law is better than the spirit.*" Devlin 1965, p. 44.

> *without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? They lay down the law accordingly. If you study the decisions of the European Court, you will see that they do it every day. To our eyes – shortsighted by tradition – it is legislation, pure and simple. But to their eyes, it is fulfilling the true role of the courts. They are giving effect to what the legislature intended, or may be presumed to have intended. I see nothing wrong in this.*[109]

Denning LJ's plea contains a subtle flaw however; it is an error to assume that continental courts only employ the teleological method of interpretation. Nevertheless, there should be genuine concern to achieve a degree of uniformity with other signatories to an international convention[110]. When there is no supreme international jurisdiction capable of resolving differences between national courts, such as regarding the CMR for instance, the most effective approach for all States concerned is to pay serious heed to one another's case law[111]. To interpret the words of treaties with regard for their international character requires that they are projected against an international background, meaning the body of international experience developed through case law and scholarly writing[112]. Perforce, the methods of interpretation that are used abroad deserve equal attention. That this has been perceived by the English judiciary as well is confirmed by *Fothergill*[113]. In this case the House of Lords took a more 'European' view of the interpretation of conventions. Scarman LJ professed to believe that English courts must "*have recourse to the same aids to interpretation as their brother Judges in the other contracting States*", thus supporting Wilberforce LJ's opinion that "*the process of ascertaining the meaning must vary according to the subject matter*". The expression of this point of view can definitely be characterized as a step in the right, or perhaps more accurately, in a more uniform direction.

Realistically however, one must be resigned to the fact that in the international sphere there will always remain a tendency for national courts to put differing interpretations upon international conventions. Nevertheless, it is possible to reduce the scope of such divergences[114]. It has been generally accepted for instance, that the avoidance of the application of typically national concepts would go a long way, although this is easier said than done[115]. The need to avoid the interpretation of international rules based on specifically national ideas was for instance already acknowledged in 1954 by Devlin J who asserted concerning the application of the Hague-Visby Rules:

> "*It is no doubt necessary for an English Court to apply the Rules as part of the English law,*

[109] Denning LJ in *James Buchanan & Co. Ltd. v Babco Forwarding & Shipping (U.K.) Ltd*., [1977] *Q.B.* 208 or [1978] *AC* 141.

[110] "*It is the Court's* '*responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties*'." Thus O'Connor J writing for a unanimous U.S. Supreme Court articulated the standard for international treaty interpretation in *Air France v Saks* (470 *U.S.* 392, 105 *S.Ct.* 1338, *U.S.Cal.,* 1985). As cited in Lewis 2008.

[111] De Meij would even go so far as to conclude that if a judge were inclined to interpret a certain part of a convention differently from judges in other Convention States he is bound to follow their interpretation for the sake of uniformity. De Meij 2003, p. 39.

[112] Honnold 1999, p. 89-90.

[113] *Fothergill v Monarch Airlines Ltd.,* [1980] 2 *All ER* 696, [1980] 2 *Lloyd's Rep.* 295.

[114] "*It is interesting in this connection to discover initiatives being urged on the continent in an effort to narrow the gap between civilian and common law canons of construction. For example, it is well known that in many continental jurisdictions the courts are entitled to consult the travaux préparatoires to assist them in determining the intention of the framers of the legislation. It is therefore significant that in a recent case before the Cour de Cassation involving the construction of the Warsaw Convention, the Avocat-General Schmelk in his conclusions strongly pressed the court not to pay too great heed to the travaux, partly because common law jurisdictions do not have recourse to them in elucidating the purpose of legislation*". Munday 1978, p. 458.

[115] Ferrari 2004, p. 141-142; Haak 1986, p. 15; Schiller 1996, p. 173.

but that is a different thing from assuming them to be drafted in the light of English law."[116]

Trying to fit internationally oriented rules within domestic legal structures and frames of thought would very much hinder the emergence of a uniform view, and thus thwart the unifying purpose of uniform law. International conventions should be interpreted with the international origin of the rules in mind; they should therefore not be under the rigid control of domestic precedents of antecedent date[117]. As Diplock LJ stated in the *Fothergill* case[118]:

> "*The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English Judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law. It should be interpreted as Lord Wilberforce put it in James Buchanan & Co. Ltd. v. Babco Forwarding and Shipping (U.K.) Ltd., [1978] 1 Lloyd's Rep. 119; [1978] A.C. 141, at pp. 122 and 152--*
> *. . . unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation*".

3.6 The Vienna Convention on the Law of Treaties

An important question in this context, to which the international legal doctrine's answer is not unanimous, is to what extent the rules on interpretation which are found in Part III Section 3 (Articles 31 through 33) of the Vienna Convention on the Law of Treaties are to play a part in the interpretation of rules contained in uniform private law[119]. These Articles of the Vienna Convention (VC) provide guidelines to achieve autonomous interpretation, the central canon in the struggle to achieve uniform explanation of international rules[120]. In spite of this the Convention appears unusable in the quandary how to interpret many of the carriage related scope rules at first glance. Based on its fourth Article, the Vienna Convention applies to treaties which are concluded by States after its entry into force only, therefore its own scope of application bars it from being used directly for the interpretation of many of the carriage conventions, with the exception of the fairly new Montreal Convention, the CMNI and the 1999 version of the COTIF-CIM. But, because the provisions of the Vienna Convention are in general codifications of already existing customary international law, it is clear that its content is of influence when the text of a convention necessitates interpretation[121]. The Convention's provisions should at the very least by applied by analogy, since they reflect pre-existing practices and the prevailing *opinio iuris*, which justifies the international legal community view of the Vienna Convention as a codification of current customary international law[122]. That such analogous application should be considered the bare minimum is also supported by the fact that the Vienna Convention

[116] *Pyrene Company Ltd. v Scindia Steam Navigation Company Ltd.*, [1954] 1 *Lloyd's Rep.* 321 QBD.
[117] *Stag Line v Foscolo, Mango & Co*, [1932] AC 328. See also The Muncaster Castle case (*Riverstone Meat Co. v Lancashire Shipping Co.*), [1961] 1 *Lloyd's Rep.* 57, 88.
[118] *Fothergill v Monarch Airlines Ltd.,* [1980] 2 *All ER* 696, [1980] 2 *Lloyd's Rep.* 295.
[119] De Meij 2003, p. 8.
[120] Kropholler 1975, p. 265. See also BGH 14 February 2008, *TranspR* 2008, p. 323-327.
[121] Clarke *CMR* 2003, p. 6; Trompenaars 1989, p. 117; Schiller 1996, p. 175; Jesser 1997, p. 172; De Meij 2003, p. 10-11; Schmid 2004, p. 43-44; HR 29 June 1990, *NJ* 1992, 106 (*Gabriele Wehr*); BGH 10 October 1991, *BGHZ* 115, 299; Haak 1990, p. 328.
[122] Borgen 2005, p. 601-602.

contains the only codified rules of uniform law on this issue; there simply is no alternative on this level.

Neither is the argument convincing that the Convention should not be applied to uniform private law such as the carriage conventions because these conventions focus on the relations between private parties and only contain a modest amount of rules on the relations between States. It contains customary law specifically created to guide the interpretion of treaty law after all. In addition, denying application of the Vienna Convention to such a large number of treaties would undermine the Convention severely[123].

Criticisms have also been levelled specifically at the use the provisions of Part III Section 3 of the Vienna Convention for the interpretation of uniform private law. Both the subordinate role of the '*travaux préparatoires'* in the interpretation process[124] and the lack of room for the comparison of different legal systems have been indicated as shortcomings of the regime[125]. The first of these critiques can be repudiated by examining the intentions of the drafters of the Vienna Convention. The subordinate role of the preparatory work of the treaty is the result of their view that the text of a treaty must be presumed to be the authentic expression of the intention of the parties. Thus, the starting point of interpretation was not to be an investigation *ab initio* into the intentions of the drafters of a convention, but rather the elucidation of the meaning of the text[126]. It is a compromise between the continental teleological interpretation and the English 'literal rule' or 'plain meaning' approach. The preparatory work is of importance, but is only resorted to in order to confirm the meaning resulting from the application of the general rule found in Article 31(1) VC, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. The *travaux préparatoires* are not relegated to a subordinate and wholly ineffective role; they are merely placed at the second tier instead of at the first. A second tier place is reasonable when one bears in mind Honnold's accurate words: 'legislative history – like vintage wine – calls for discretion'[127]. Discretion is needed because using the preparatory work of a treaty is a demanding task. Firstly, the opinions offered in the preparatory writings cannot be taken at face value, as these writings are often accountings of meetings between parties with very different views. The text of a treaty is nearly always based on compromise. Thus, the positions expressed in the *travaux* could very possibly represent the views held by a minority; they could be the opinions of a sole delegate and not reflect consensus in the least. Only when it is entirely undisputable what is meant by a certain provision, meaning that the view expressed by the *travaux* is supported by at least a majority of those involved in the drafting process, can the *travaux* play a part in the interpretation of said provision. Secondly, the *travaux* often fail to meet the second standard for use set in the *Fothergill* decision, which is that the material involved is readily available, meaning that it is public and accessible[128].

[123] De Meij 2003, p. 9. In addition the validity of the distinction between rules concerning the relations between private parties and those regulating the relations between States has been questioned by writers such as Kropholler. He is of the opinion that cutting up uniform instruments based on such a distinction serves no other purpose than creating additional interpretation problems. Kropholler 1975, p. 237; De Meij 1998, p. 608.

[124] Article 32 VC states that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31. The lack of rules on how to handle gaps in uniform law regimes is also criticized. Brouwer, Hendrikse & Margetson 2005, p. 46.

[125] Trompenaars 1989, p. 121-123.

[126] Sinclair 1984, p. 115.

[127] Honnold 1999, p. 94.

[128] *Fothergill v Monarch Airlines Ltd.,* [1980] 2 *All ER* 696, [1980] 2 *Lloyd's Rep.* 295.

The second criticism that was mentioned, the lack of room for the comparison of different legal systems, loses some of its sting when held against the backdrop of Article 31(3)(b) VC. This provision resolves that, together with the context, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation shall be taken into account. Trompenaars' objection that Article 31(3)(b) VC does not mean national courts of law when it refers to the agreement of the 'parties', but to the drafters of the convention in question and thus cannot be seen as incorporating the comparative law approach into the Vienna Convention, is somewhat off the mark[129]. Naturally it is true that the provision refers to the drafters of the convention at hand and not to national adjudicators. What is meant to influence the interpretation of treaty law however, is the body of law that has been developed by these national courts while using Article 31; developed while trying to establish the manner in which the drafters of the convention at hand meant it to be interpreted. Thus the Vienna Convention most certainly does provide for the use of the comparative interpretation method in Article 31[130]. Nonetheless it is true that Article 31 VC puts some restrictions on the type of subsequent practice that falls within its scope. Article 31(3)(b) does not cover subsequent practice in general, but only a specific form of subsequent practice, namely concordant and consistent subsequent practice common to all the parties[131]. Strictly interpreted this means that only generally accepted judicial views, only prevailing court opinions accepted by all States party to the convention can serve as a primary means of interpretation based on Article 31 VC.

The view expressed by Sinclair that even if the subsequent practice that is readily available for comparison, but which is not covered by this narrow definition may possibly constitute a supplementary means of interpretation within the meaning of Article 32 VC seems an effective manner in which to counter the restrictive aspects of Article 31 in this area[132]. Article 32 VC provides courts of law with the opportunity to make use of the case law and scholarly writings of the various States party to a convention even in circumstances where a consistent practice has not – yet – been established, thus making the development of a concordant body of law on the subject a possibility.

3.6.1 Articles 31-32 of the Vienna Convention on the Law of Treaties

Despite the above-mentioned criticisms the general opinion is 'pro' Vienna Convention[133]. The Convention has an ample amount of advocates in academic writing as a result of the unifying effect generated by the consequent application of the clear cut rules of interpretation[134]. The principal rules of interpretation are found in Article 31(1) VC which contains the following text:

[129] Trompenaars 1989, p. 122.

[130] A detailed overview of the comparative law interpretation method can be found in Kropholler 1975, p. 278-281. See also De Meij 1998, p. 614.

[131] The clear and concordant practice under a treaty may establish the interpretation of a treaty's provisions and thus enable them to fit the times. Clarke *TranspR* 2003, p. 439. This suggests that subsequent practice may even modify the terms of the treaty. *Cf.* Sinclair 1984, p. 138.

[132] Sinclair 1984, p. 138.

[133] De Meij 1998, p. 608.

[134] Schmid 2004, p. 44; De Meij 2003, p. 8-9; Herber 1994, p. 377; Jesser 1997, p. 172; Basedow 1994, p. 338-339; Rogov 2005, p. 186; Clarke *CMR* 2003, p. 6; Sinclair 1984, p. 114-158. Contrary to the practice in English courts the German and Dutch courts do not seem to use the rules of the Vienna Convention much. *Cf. Deep Vein Thrombosis and Air Travel Group Litigation*, [2006] 1 *Lloyd's Rep.* 231; *Fujitsu Computer Products Corp & Ors v Bax Global Inc & Ors*, [2005] *EWHC* 2289; *King v Bristow Helicopters Ltd.,* [2002] 1 *Lloyd's Rep.* 745; the considerations by AG Strikwerda concerning HR 20 January 2006, *NJ* 2006, 545 and HR 30 March 1990, *NJ* 1991,

> "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"

This paragraph contains three separate principles. The first – interpretation in good faith – flows directly from the *pacta sunt servanda* maxim. The second principle is the very essence of the textual approach; the terms used are to be presumed to have that intention which appears from their ordinary meaning. The third principle is one both of common sense and good faith; the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose[135]. The result is a method of interpretation, which could be styled objective-teleological[136] and autonomous, that entails the analysis of provisions by means of the concepts of the convention itself, using the convention's objectives as a guideline or by considering which meaning would fit in best by the rest of the structure of the system. The autonomous interpretation method incorporated in Article 31(1) VC rests on teleological and systematic arguments. It is not a method of interpretation in addition to other methods; it is rather a principle of interpretation that gives preference to a particular kind of teleological and systematic view in interpreting a legal text. The importance of this approach is found in that it does not proceed by the reference to the meanings and particular concepts of national law regimes[137].

Interpreting a treaty in the light of its object and purpose as prescribed by Article 31(1) VC should result in the adoption of the interpretation which enables the treaty to have the appropriate effect when a treaty is open to two interpretations. Properly limited and applied, the maxim does not call for interpretation that is too extensive or liberal in the sense of going beyond what is expressed or implied by the terms of the treaty.

Article 31(2) VC explains what is meant by the context referred to in Article 31(1) VC. That the Preamble forms part of a treaty for purposes of interpretation is too well settled to require comment, as is also the case with documents which are specifically made annexes to the treaty. The question is to what extent other documents associated with the convention are to be regarded as forming part of the 'context'. Article 31(2) VC postulates that two types of documents should be so regarded: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; and (b) any instrument which was made in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. A unilateral document cannot be regarded as forming part of the 'context' within the meaning of Article 31 VC, unless it was specifically made in connection with the conclusion of the convention and its relation to the convention was accepted by the other drafting parties. That these two types of documents are recognized by Article 31(2) VC as forming part of the 'context' does not mean that they are necessarily considered integral parts of the treaty. Whether they can be considered part of the treaty depends on the intention of the parties in each separate case.

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249 and by AG Wortel concerning HR 15 September 2006, *NJ* 2007, 277; *ECHR* 4 February 2005, *NJ* 2005, 321; OLG Köln 30 March 2001, 2 *Ws* 590/97, www.justiz.nrw.de; BGH 10 October 1991, *BGHZ* 115, 299.

[135] Report on the work of the International Law Commission's eighteenth session, *Yearbook of the International Law Commission*, 1966 Vol. II, p. 187-274 at p. 221.

[136] The distinction between the objective and subjective methods of interpretation is much used concerning treaty law. The objective method confines itself to the text while the subjective method attaches a great deal of value to the historical principles and motives of the drafters which are hidden beyond the text. Haak 1986, p. 16 fn. 53; Kropholler 1975, p. 259.

[137] Gebauer 2000, p. 686-687.

Article 31(3) VC specifies as further authentic elements of interpretation to be taken into account together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty, (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation and (c) any relevant rules of international law applicable in the relations between the parties.

The subsequent agreements referred to under (a) generally do not play a significant part in the interpretation process, based on the simple reason that they are very rare[138]. When it comes to transport law the only area in which they are more or less commonplace concerns the area of air carriage law. The most apt example is the Guadalajara Convention of 1961[139]. This Convention's main function is to explain the term carrier as it is used by the Warsaw Convention.

The importance of the subsequent practice mentioned under b on the other hand, as already indicated, is obvious; such practice, if concordant and consistent, constitutes objective evidence of the understanding of the parties as to the meaning of the treaty[140]. It has even been argued by Schadee, the drafter of the Dutch national carriage regime, that the comparative law method – which is embedded in this rule – is the most important method of interpretation as it is the only approach that can ensure the international uniformity that is needed to generate '*rechtsrust*', or legal tranquillity[141]. Nevertheless, the comparative law method should be placed in some perspective because not all foreign judgements should be awarded the same amount of influence. As Diplock LJ aptly put it in *Fothergill*[142]:

> "*As respects decisions of foreign Courts, the persuasive value of a particular Court's decision must depend upon its reputation and its status, the extent to which its decisions are binding upon Courts of co-ordinate and inferior jurisdiction in its own country and the coverage of the national law reporting system. For instance your Lordships would not be fostering uniformity of interpretation of the Convention if you were to depart from the prima facie view which you had yourselves formed as to its meaning, in order to avoid conflict with a decision of a French Court of appeal that would not be binding upon other Courts in France, that might be inconsistent with an unreported decision of some other French Court of appeal and would be liable to be superseded by a subsequent decision of the Court of Cassation that would have binding effect upon lower Courts in France.*"

When thus put into context, the enthusiasm for the comparative method is dampened somewhat. Although it is an important instrument, the comparative method should not reign supreme. Courts should give effect only to the prevailing currents of foreign opinion on the true construction of a convention. Thus is reasonably explained why the approach has not been embedded in Article 31(1) VC, but rather found its home in Article 31(3) VC subsequent to the objective-teleological and autonomous approach.

The comparative law method does not only refer to the use of foreign case law as interpretation instrument, but also to foreign scholarly writings. A judge should equally be prepared to get himself acquainted with notions which are advanced in both foreign and domestic legal literature concerning the relevant subject matter in order to be able to come to a

[138] Sinclair 1984, p. 136.
[139] Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, signed in Guadalajara on 18 September 1961.
[140] See Section 3.6 of this Chapter on the Vienna Convention on the Law of Treaties.
[141] Schadee 1960, p. 209.
[142] *Fothergill v Monarch Airlines Ltd.,* [1980] 2 *All ER* 696, [1980] 2 *Lloyd's Rep.* 295, per Diplock LJ.

congruent decision[143]. It is needless to say that the same caution is to be had when comparing legal writings as is necessary in the comparison of judgements.

The third element to be taken into account, the relevant rules of international law, was incorporated with the intention to make sure an interpreter reads every treaty provision in the wider context of international law in general. This requirement is of special import in the area of carriage law. A cautious 'comparative convention' approach to interpretation for this area of law has been advocated by Haak[144]. In his overview of the systematic interpretation method Kropholler also discusses the comparison of conventions. Although he does not advocate the method which compares uniform private law regimes in general, as uniform regimes generally form separate little legal spheres, he does make an exception regarding international carriage law[145]. The uniform carriage conventions regulate largely the same type of matters and at times the issues that require interpretation share a strong likeness. In addition, the carriage regimes are to some extent interconnected because certain carriage conventions, or parts thereof, were based upon others. Therefore the resort to the conventions which served as mould can be justified as part of the search for the purpose, or as part of the legislative history of a provision[146]. The Warsaw Convention of 1929 for instance, was modelled after the Hague Rules of 1924[147] and the CMR, created in 1956, was modelled after the CIM of 1890[148]. In its turn, the newest version of uniform law on the carriage of goods by rail, the COTIF-CIM as amended by the 1999 Vilnius Protocol, has been based upon the CMR.

In CMR cases brought before English courts, assistance has also been drawn from the Warsaw Convention on carriage by air, which seems to be a lot less closely related to the CMR than the CIM[149]. Notwithstanding the lesser degree of kinship between these two conventions, this type of recourse seems acceptable if employed with caution. The carriage conventions deal with such similar subjects that they can hardly be drafted independently and without any form of recourse to the existing legal framework[150].

Article 31(4) VC provides for the somewhat exceptional cases where, regardless of the apparent meaning of a term in its context, it is established that the parties intended it to have a special meaning. Because the technical or special use of the term is normally deduced from the context without difficulty, Article 31(4) VC has primarily been incorporated in the Vienna Convention to clarify that the burden of proof rests on the shoulders of the party invoking the special meaning of the term.

3.6.2 Treaties authenticated in several languages: Article 33 Vienna Convention

Article 33 VC, which deals with the interpretation of treaties authenticated in two or more languages, is also of import when interpreting the carriage conventions, as most of these exist in more than one authentic version. Of the carriage conventions the Warsaw Convention is an exception to the rule since it was concluded in French only[151]. Even the six protocols and the one

[143] Haak 1986, p. 18.
[144] Haak 1986, p. 17.
[145] Kropholler 1975, p. 273-274.
[146] Clarke *CMR* 2003, p. 10.
[147] Stephan 1999, p. 22.
[148] International Convention concerning the Carriage of Goods by Rail, 14 October 1890.
[149] Clarke *CMR* 2003, p. 11. Clarke offers the examples of *Gefco Ltd v Mason,* [1998] 2 *Lloyd's Rep.* 585 and *Andrea Merzario v Internationale Spedition Leitner,* [2001] 1 *Lloyd's Rep.* 490.
[150] Brandi-Dohrn 1996, p. 49.
[151] *Corocraft Ltd v Pan American Airways Inc.,* [1968] 2 *Lloyd's Rep.* 459.

convention amending or supplementing either the Warsaw Convention or the Warsaw-Hague regime, although these all have authentic texts in several languages, include a proviso that in case of any inconsistency the text in the French language is to prevail. The newer air carriage regime, the Montreal Convention, cannot be deemed an improvement in this area. It is drawn up in six languages, all of which produced an equally authentic text, but it fails to include a proviso granting precedence to one of the versions when they are interpreted differently[152].

During the drafting sessions of the Vienna Convention it was maintained that of a treaty there can exist only one authentic text, of which there may be versions in several languages[153]. Therefore Article 33(3) VC determines that the terms of a treaty are presumed to have the same meaning in all authentic language versions of the text[154]. Despite this, jurists still manage to differentiate between the various language versions. They attach different meanings to terms which should be considered identical[155]. The terms "*dispositions impératives*" in the French version of Article 2 CMR and the terms "*conditions prescribed by law*" in the English version for instance, have led to divergent interpretations. It is argued that the French wording is rather more restrictive than the English[156].

Thus, as all of the authentic versions of the treaty text are deemed to possess equal authority, it is necessary to take all of the authentic versions into account in order to achieve autonomous interpretation[157]. That is to say, excepting cases where the treaty itself provides or the parties agree that, in case of divergence, a particular text shall prevail. This guideline as to whether a version is deemed authentic or what status it should be awarded is found in Article 33(1) VC. In addition, Article 33(2) VC which deals with similar issues asserts that a version of a treaty in a language other than one of those in which the text was authenticated should be considered an authentic text and be taken into consideration as well, but only if the treaty provides for this or the parties so agree.

Article 33(4) VC, like Article 33(3) VC, contains rules for the interpretation of multilingual treaties. It provides that the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the terms. If a difference of meaning is not resolved by resorting to the standard rules of Articles 31 and 32 VC, the interpreter should adopt the meaning which best reconciles the texts as regards the object and purpose of the treaty.

3.7 Keeping an eye on your neighbours

Whether a court of law will deem any of the existing unimodal carriage conventions applicable to a multimodal transit depends on the manner in which it interprets the relevant scope of application rules. The jurisprudence on this subject shows discrepancies between decisions in different countries and sometimes even between different courts within the same State. The most

[152] Cheng 2004, p. 856.
[153] Tabory 1980, p. 170.
[154] *Cf.* BGH 20 October 1981, *BGHZ* 82, 88 at p. 91.
[155] Notwithstanding the increasing complexities and difficulties involved in multilingual drafting and interpretation however, only a relatively small number of linguistic discrepancies of significant practical or legal consequence have been recorded. Tabory 1980, p. 227.
[156] Haak 1990, p. 237; HR 14 June 1996, *S&S* 1996, 86 (*St. Clair*).
[157] Gebauer 2000, p. 687.

common examples of this are of course the overturning of a decision of a lower court by a higher court of law[158].

The meaning attached to the terms under consideration depends by and large on which method of interpretation the court chooses to apply, and on the manner in which the chosen method is applied. The interpretation methods are, for the most part, no more than principles of logic and good sense. They assist in appreciating the meaning of the expressions found in the texts of conventions. Their suitability for use in any given case hinges on a variety of considerations; the particular arrangement of the words and sentences, their relation to each other and to other parts of the treaty, the general nature and subject matter, the circumstances in which it was drawn up, *et cetera*. The interpreter appreciates all these elements. Even if a possible occasion for the application of one or more of the methods appears to exist however, application is not automatic. Which method is chosen, or even if one is chosen at all, depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case. Recourse to these principles is discretionary rather than obligatory and interpretation is to some extent an art, not an exact science[159].

Hence, it becomes clear that the differences between interpretations of the scope rules of the carriage conventions are an obvious result of the multitude of influences a court of law has to contend with. There is always the temptation to advance national interests and to use national legal concepts to interpret international treaties. An interpretation method may sometimes even be chosen which justifies the sought after promotion of domestic notions and interests. Nevertheless, it is evident that disparities in the interpretation of uniform law are contrary to the purpose of this type of legislation, which is to create a legal certainty internationally so as to promote trade. To do justice to the uniformity that instruments of uniform law are intended to generate it is therefore of the essence to keep an eye out for what legal developments occur beyond national borders, whichever method of interpretation is used[160]. This applies especially to the interpretation of scope of application rules when multimodal carriage is involved. Because there is no specific convention on multimodal transport, any legal certainty that can be gleaned from the uniform interpretation of the unimodal carriage conventions in light of this subject is very welcome indeed.

[158] Cour de Cassation 25 November 1995, *BACC* 1995, IV, p. 248- 249; *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* 25; HR 14 June 1996, *S&S* 1996, 86 (*St. Clair*); BGH 22 February 2001, *TranspR* 2001, p. 372-375.

[159] Report on the work of the International Law Commission's eighteenth session, *Yearbook of the International Law Commission*, 1966 Vol. II, p. 187-274 at p. 218.

[160] In *Quantum* Mance LJ determines thereto that it is a matter of general principle that courts of law should try to harmonize interpretation of the CMR, as well as any other international convention, with any recognizable body of foreign law that has developed. *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another*, [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535-560. Keeping an eye out does not necessarily mean conforming to the foreign decisions indiscriminately however. As Koller points out, it is possible that the foreign courts have erred and that in such a case a deviating decision can lead to rectification of the situation. Nevertheless, in dubious cases where the issue remains controversial it is best to take a more unifying approach. Koller 2007, p. 1127, Article 1 CMR, No. 4.

4 MULTIMODAL TRANSPORT UNDER THE CMR

Road carriage is a type of carriage that is deeply intermeshed with multimodal carriage as it plays a part in nearly all contracts of this type. For one, it is often the only option for the transport of cargo to and from infrastructure hubs such as ports, railway stations or aerodromes. Whether the CMR applies to stages of road carriage that are provided for in an international multimodal contract however, is, and has been cause for ample discussion ever since the advent of multimodal carriage[1]. Because the CMR only makes partial provision for multimodal transport in Article 2, a provision which only covers the 'roll-on, roll-off ' variety of multimodal transport operations[2], the lack of clarity on its position concerning other types of multimodal carriage enables the existence of differing opinions on the scope of application of the CMR. Some of the aspects of the ongoing discussion can be illustrated by comparing the following two cases.

In the first case – which was already mentioned above[3] – a mobile crane had been transported from Cairo (Egypt) to Geleen (The Netherlands); from Cairo to Alexandria (Egypt) by road on a low-loader, from Alexandria to Antwerp (Belgium) by sea – without the low loader – and lastly from Antwerp to Geleen by road again. During the road transport between Cairo and Alexandria the low-loader tipped over and dumped its cargo, the crane, on the road. In this case the *Rechtbank* Rotterdam decided in January 1992 that the CMR rules applied to the cargo interest's claim.

The circumstances of the second case were largely similar to those of the first[4]. In this case however, the *Rechtbank* Rotterdam concluded – in March of 1998 – that the CMR did not apply to the damage to a shipment of pharmaceutical products, as it was of the opinion that the carriage did not meet the conditions set by Article 1 CMR[5]. The damage to the pharmaceuticals occurred during the performance of a transport from Caponago in Italy to Spijkenisse in the Netherlands, which consisted of road carriage between Caponago and Milan, rail carriage between Milan and Rotterdam and another stage of road carriage between Rotterdam and Spijkenisse. Because the road stage between Caponago and Milan where the damage was caused did not cross any borders, the *Rechtbank* decided that the rules of the CMR did not apply.

These two judgements were decided differently because the scope rules of the CMR were not interpreted in the same manner in both instances, even if they were pronounced by the same Court, the *Rechtbank* Rotterdam. In the more recent judgement the *Rechtbank* deemed the CMR applicable to the carriage of goods by road only if the road stage itself crossed one or more State borders[6] while in the older judgement the *Rechtbank* thought it sufficient if the place of taking over of the goods at the beginning of the entire multimodal carriage and the place designated for delivery at the end, as specified in the contract, were situated in two different countries.

Unfortunately this is by no means the only point which causes disagreement with reference to the exact scope of the CMR in relation to multimodal carriage. In a judgement passed by the OLG Dresden in 2002, the OLG stated that the only rules that can possibly apply to multimodal carriage are to be found in Article 2 CIM, Article 2 CMR and §§ 452 and 452a

[1] That the CMR on the whole is cause for much debate is illustrated by an article by Wijffels written in 1976, which reveals that courts in six Member States had produced 12 different interpretations of particular provisions of the CMR. Wijffels 1976, p. 208.
[2] Messent & Glass 2000, p. 39.
[3] See Chapter 3, Section 3.2 on jurisdiction and forumshopping.
[4] Rb Rotterdam 24 January 1992, *S&S* 1993, 89.
[5] Rb Rotterdam 19 March 1998, *S&S* 1999, 42.
[6] Just as Rb Rotterdam 3 May 2006, *S&S* 2007, 114, under 3.6.

HGB[7]. Because the case at hand did neither concern railway carriage nor roll-on, roll-off carriage, the OLG concluded that therefore §§ 452 and 452a HGB were to be applied. In other words; the OLG Dresden did not consider the CMR to be applicable to any type of road carriage provided for in a multimodal contract, apart from the type of carriage which is described in Article 2 CMR. In 2008 the BGH confirmed this point of view concerning the scope of the CMR[8]. Although this point of view can be considered contrary to the objective of the unifying purpose of the CMR, its results are not quite as dire as its seems in terms of harmonization. If the national regime applicable to the contract is German law the domestic German rules on multimodal transport – which can be found in §§ 452 through 452d HGB – cause the liability rules of the CMR to be applicable to any international road carriage stages of the multimodal contract via domestic law. Chapter 10 Section 10.4.2 contains more details on the workings of the German domestic law on multimodal carriage. So, although the BGH and the German legal doctrine seem to reject the direct application of the CMR to multimodal contracts – a view that will be discussed in more detail in Section 4.1.2 of this Chapter – the most prominent provisions of the Convention are applied by analogy through German domestic law, which creates at least a semblance of harmonization, albeit meagre.

All in all, the CMR is very likely the most notorious example of the fact that not all carriage conventions are as clear as the Warsaw[9] and Montreal[10] Conventions on air carriage when it comes to their applicability in multimodal transport[11]. For that reason the following will contain an overview and an evaluation of the differing opinions in this area, which will be examined and evaluated on the basis of the scope of application rules of the CMR found in Articles 1 and 2 CMR.

Article 1 is a unilateral conflict rule and contains the prerequisites for the general scope of application of the Convention[12]. Article 1(1) determines that the Convention applies to all contracts 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. In short, the CMR applies to international carriage by road, which includes the taking over and the delivery of the goods.

Article 2 on the other hand expands the scope of application determined by Article 1 by bringing a certain type of multimodal carriage – ro-ro carriage in the extensive sense to be precise[13] – within the CMR's sphere of influence[14]. Due to Article 2 and its expansion of the

[7] OLG Dresden 14 March 2002*, TranspR* 2002, p. 246.

[8] BGH 17 July 2008, *TranspR* 2008, p. 365-368.

[9] Article 31 WC states that in case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this convention apply only to the carriage by air, 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.

[10] According to Article 38(1) of the Montreal Convention, 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.

[11] And even pertaining to the air carriage conventions differing opinions still seem to be possible, see Ramming 1999, p. 328-329.

[12] Kropholler 1975; Mankowski 2008, p. 177; p. 85; Saf 1999; Hartenstein 2008, p. 146; Clarke *CMR* 2003, p. 16. A unilateral conflict rule differs from the traditional (universal) conflict rules in that the latter apply in any possible international situation and identify any one of an indefinite number of national substantive laws as the governing law while the unilateral conflict rule only identify one set of rules as the applicable law under such international circumstances as described by the rule. Saf 1999. See also Chapter 3, Section 3.3.2 and 3.4.

[13] This is also known as 'mode on mode' carriage. The essence of this type of carriage is that one means of transportation is carried by another. In most cases it involves road vehicles including their cargo being carried on

CMR's application scope there seems to be a general international consensus that the CMR can in fact apply to road carriage that is performed under a multimodal contract[15]. Whether or not the 'multimodal' scope of application of the CMR is also *limited* to Article 2 carriage remains a point of discussion. Moreover, the above-mentioned examples show that even among those that do deem it possible that the CMR applies to part(s) of a multimodal carriage contract through Article 1, there is dissent on the exact circumstances required for application.

4.1 Scope: Article 1(1) CMR

The main scope of application rule of the CMR can be found in Article 1. This Article defines in principle both the *ratione materiae,* the material scope of application or the subject matter covered by the Convention, and the *ratione loci,* the geographical scope of application. Since the provisions of the CMR are both uniform and mandatory[16], which means that if the scope of application covers a certain transport or part of a transport the contracting parties are unable to invoke contractual conditions that deviate from the rules of the CMR, it is important to establish the exact scope of the Convention as it potentially has great impact on a carrier's liability.

Of the various paragraphs in Article 1 CMR it is the first that contains the principal scope of application provisions, whereas 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. Article 1(5) can almost be said not to relate to the Convention's scope of application at all. This last paragraph 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.
Article 1(1) CMR 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.*"

Thus the scope of application *ratione materiae* is determined objectively, independent from any conflict rules of private international law[17]. The impossibility of a conflict between the scope

other means of transport by sea, inland waterway or rail. Clarke *CMR* 2003, p. 29. See Chapter 2, Section 2.3.3.3 and Section 4.3 of this Chapter.

[14] Loewe *Commentary on the CMR* 1975, p. 6.

[15] Although it should be commented here that not all writers endorse the idea that *transport superposé* is in fact multimodal in nature, see Chapter 2, Section 2.3.3.3.

[16] According to Article 41 CMR any stipulation which would directly or indirectly derogate from the provisions of the Convention shall be null and void. In particular, a benefit of insurance in favour of the carrier or any other similar clause, or any clause shifting the burden of proof shall be null and void. The nullity of such a stipulation shall not involve the nullity of the other provisions of the contract. The rules regarding liability are thus mandatory in both directions; both the carrier and the sender are stuck with them. Johansson 2002, p. 387.

[17] De Wit 1995, p. 92. In Italy the *Corte Suprema di Cassazione*, the Supreme Court, holds to 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 to such a statement, even though Article 4 CMR detemines 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 to the provisions of

rules of the CMR and the rules of private international law simplifies matters somewhat, but that does not mean there is consensus concerning the scope of application of the CMR resulting from Article 1. The scope of application of the CMR conditions to road carriage under multimodal contracts has been the subject of ample discussion and is prone to contrary interpretations by different States and courts[18]. The different ideas relating to which circumstances exactly cause the CMR to apply via 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 is international.
(iii) The CMR does not apply to any part of a multimodal transport via Article 1 CMR, because a multimodal contract is not a contract for the carriage of goods by road.

These three views will be discussed below, the first two in Section 4.1.1 and the third in Section 4.1.2. The one thing that can be said with a degree of certainty is that the text of Article 1 CMR does not provide for the application of the CMR rules to the non-road carriage stages of a multimodal carriage contract[19].

4.1.1 Differing interpretations: the CMR applies by means of Article 1

The basis for all the existing dissent regarding whether the CMR is to apply via Article 1 to road carriage which is part of a multimodal transport is the interpretation of the words "*contract for the carriage of goods by road*" which can be found in Article 1(1) CMR. The opinion that these words do not literally demand that the whole voyage has to be made by road, merely that the contract includes a road stage is held by many a writer and court of law in Europe[20]. Indeed, the

the CMR. Berlingieri 2006, p. 40. The lower Italian courts do not all share this view of the CMR's scope of application. Margetson 2008, p. 130.

[18] See Haak & Hoeks 2005, p. 95-97.

[19] Ramming 1999, p. 329; Haak speech Antwerp 2006.

[20] Clarke *CMR* 2003, p. 46 and Clarke *JIML* 2003, p. 436-443; Haak 1986, p. 98-99; Messent & Glass 2000, p. 45; Van Beelen 1994; Thume *Kommentar zur CMR* 1994, p. 92; Putzeys 1981, p.103-104; UNCITRAL A/CN.9/WG.III/WP.29, p. 29, No. 115; *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535-560; *Datec Electronic Holdings Ltd v UPS Ltd.,* [2006] 1 *Lloyd's Rep.* 279; Cour de Cassation 25 November 1995, *BACC* 1995, IV, p. 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 28 September 2005, I-18 U 165/02, www.justiz.nrw.de. Even the German BGH seemed to support this view in the past, but in a recent judgement the BGH has clarified its views as being quite the opposite. BGH 24 June 1987, *TranspR* 1987, p. 447-454; BGH 30 September 1993, *TranspR* 1993, p. 16-18; BGH 17 July 2008, *TranspR* 2008, p. 365-368. See Section 4.1.2.1 of this Chapter on the BGH judgement of 17 July 2008 for a more detailed overview of this decision. The LG Aachen was quite clear that it did deem the CMR applicable however in 2006: "*Darüber hinaus ergibt sich die Anwendbarkeit der CMR aus dem hier maßgeblichen Beförderungsabschnitt Rotterdam-S. aus Art. 1 Nr. 1 CMR. Unabhängig, ob das Frachtgut auf See- und Straßenstrecke einheitlich ohne Umladung befördert wurde und somit die CMR gemäß Art. 2 Nr. 1 Satz 1 CMR auf die gesamte Beförderung anwendbar ist, gilt die CMR jedenfalls für denjenigen Beförderungsabschnitt, in dem nach dem Beförderungsvertrag das Gut auf der Straße mittels eines Fahrzeuges grenzüberschreitend transportiert werden sollte (vgl. Fremuth/Thume, Kommentar zum Transportrecht, Art. 2 CMR, Rn. 5). Hier sollte das Elektrokupfer von Rotterdam nach S. per Lkw, also auf der Straße mittels eines Kraftfahrzeuges die deutsch-niederländische Grenze*

Article does not mention that the carriage has to be exclusively by road, nor even that it has to be predominantly by road. Therefore, if international carriage is to or from a Contracting State according to the contract, it is governed by the CMR as the CMR applies to 'every contract *for* the carriage of goods by road', whether or not the contract is *for* some other type of carriage as well[21].

It is submitted here that interpreting these words differently, so that the CMR does not provide the possibility of applying through Article 1, would lead to unwarranted inconsistencies between similar carriage contracts. The easiest manner in which to illustrate this statement is to compare several examples of international carriage contracts involving road carriage. The first is a contract for international carriage by road, for instance from Warsaw in Poland to Seville in Spain. Such a contract would, as a rule, be subject to CMR, as this concerns 'normal' international carriage by road. The second example covers almost the same distance and is a contract for carriage from Warsaw to Rabat in Morocco, which would also be subject to CMR by virtue of Article 2 CMR, if the goods remained on their trailer for the short sea passage from Algeciras to Tanger. If the CMR could not apply to road stages of a multimodal contract via Article 1 however, the nearly identical third example contract entailing carriage by road from Warsaw to Algeciras and by sea from Algeciras to Tanger whereby the goods are transferred from the trailer to the ship in this instance, would not be subject to CMR, not even the road stage between Warsaw and Algeciras, which comprises the largest part of the transport.

It is hard to imagine that either the drafters of the CMR or the participants in the international transport industry would regard it as sensible that rights and responsibilities for long international trucking legs in comparable cases are to depend on whether a carrier by road does or does not accept carrier liability concerning the sea leg, or, if he does accept it, on whether or not he transports the goods on his trailer during the this stage[22].

Noteworthy in this regard is that the 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[23]. This is one of the recognized advantages of the application of uniform law. It also synchronizes the scope of the CMR with that of the air carriage conventions and the Hamburg Rules. These are the only uniform carriage regimes that express their stance on multimodal carriage[24]. The Warsaw, Montreal and Hamburg regimes are the only carriage conventions that specifically state that they apply to the stages of a multimodal transport that concern carriage by the mode of carriage that the convention is intended to regulate. In Article 31 of the Warsaw Convention and in Article 38 of the newer Montreal regime for instance, it is stated clearly that in the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this convention shall apply only to the carriage by air. To be sure, landmark cases in multimodal transport law such as *Quantum* and the OLG Köln judgement of 2004 concerned the combination of air and road carriage, and in both instances the CMR was deemed to apply to

überschreitend, transportiert werden. Damit liegt für diesen Beförderungsabschnitt Straßengüterverkehr im Sinne von Art. 1 CMR vor." LG Aachen 28 November 2006, *TranspR* 2007, p. 40-44.

[21] Clarke *CMR* 2003, p. 45 and 29-30; Clarke *JIML* 2003, p. 32.

[22] Mance LJ in *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535-560 under no. 26.

[23] 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.

[24] For more information on the air carriage conventions see Chapter 5 and for more information on the Hamburg Rules see Chapter 8, Section 8.2.

the road carriage segment[25]. The Hamburg rules are even clearer on their stance in relation to multimodal transport than the air regimes are. In Article 1(6) the Hamburg rules declare 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 the Convention only in so far as it relates to the carriage by sea. Interpreting the words 'contract for the carriage of goods by road' as meaning to include international road segments of a multimodal contract would therefore cause a little more uniformity to appear in the area of international carriage law. Especially since the other inland carriage conventions, such as the COTIF-CIM and the CMNI contain scope rules that are largely identical to those of the CMR. Harmonization of the CMR and the Warsaw, Montreal and Hamburg regimes would therefore most likely affect the interpretation of the scopes of the uniform rail and inland waterway transport regimes as well.

Among those that adhere to the idea that the CMR can apply to the road carriage part of a multimodal transport there is some discord relating to the extent of the scope of the CMR. There are those who are of the opinion that the international nature of the entire contract is sufficient for application of the Convention to the road leg, even if this road leg is domestic, and there are those who deem the application of the CMR restricted to road carriage based on a multimodal contract if the road leg itself is international. When this approach is exercised the application of the CMR is restricted to the road legs of a multimodal carriage that themselves cross one or more borders.

Those who on the other hand deem it sufficient that the contract as a whole is international, that the place of taking over and the place of delivery can be restricted to the beginning and the end of the carriage contract, will not hesitate to apply the CMR to domestic road carriage as well, as long as it is part of a larger journey which is designated to end in another State than the one in which it started.

4.1.1.1 When the contract as a whole is international

In his handbook on the CMR Clarke seemingly supports the view that a purely national road stage which is part of a multimodal contract is governed by the CMR, if followed or preceded by a stage to or from another country, provided that the entire movement is the subject of a single contract and the road stage begins or ends in a Contracting State[26]. In 2002, in an article specifically on multimodal carriage and the CMR, he writes that as CMR is an international convention it is customary but not essential that the subject matter (carriage of goods by road) be international. What he deems most important about the 'taking over' in Article 1 CMR is that it marks the beginning of contract performance which must begin in one country and end in

[25] *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535-560 and OLG Köln 25 May 2004, *TranspR* 2004, p. 359-361.

[26] Clarke *CMR* 2003, p. 46. Clarke has listed some examples of judgements that attest to this, see fns. 402 and 403 at p. 46. Hancock expresses a similar view concerning the scope of the CMR in an Article on multimodal transport in relation to the Rotterdam Rules. He deems the CMR applicable to the carriage as a whole if internal carriage by road is followed by a sea leg followed by internal carriage by road. Hancock 2008, p. 495. Hancock's reasoning that the CMR should in such cases apply by virtue of Article 82 RR seem faulty however as Article 82 RR only grants precedence to "*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*". Thus, it does not extend the scope of application of the CMR beyond its original extent, it merely grants the road carriage convention precedence over the Rotterdam Rules whenever a sea stage is performed by means of ro-ro carriage.

another[27]. His exact stance on this issue is somewhat opaque however, as in another part of his handbook on the CMR he gives an example to explain the scope of Article 2 CMR in which he determines that the CMR does not apply to carriage by road entirely within a certain State, not even if the road carriage is followed by carriage by another mode to a different State which makes the entire transport international[28]. It is possible that he merely meant to point out that such an internal road stage which is followed by transhipment is not covered by the CMR through Article 2 CMR.

Like Clarke, the *Rechtbank* Rotterdam has also expressed the view that the CMR applies to road carriage provided for in international multimodal contracts. It did so in two decisions stemming from 1992[29]. However, these decisions did differ somewhat in their interpretation of the CMR's requirement that the contract of carriage by road involved be international.

The first dispute to be discussed is the previously mentioned case which involved damage resulting from the carriage of a mobile crane from Cairo in Egypt to Geleen in The Netherlands[30]. Shortly after his departure from Cairo the chauffeur of the flatbed trailer on which the crane was loaded performed a faulty manoeuvre, which caused the trailer to sink into the softer ground alongside the road. When the cable of another crane, which was used to lift the trailer including its cargo back on to the road, snapped, both trailer and crane toppled over, due to which the crane sustained considerable damage. After this incident the damaged crane was loaded on to the vessel the '*Salah Labiad*' in Alexandria and carried by sea to Antwerp, where it was loaded on to a truck and transported to Geleen.

The Court's justification of its choice to apply the rules of the CMR to the incident in Egypt was based on an '*a contrario*' explanation of Article 2 CMR. The judges believed Article 2 CMR to mean that, whenever there is multimodal or 'combined' carriage[31] during which the goods are to be unloaded from the road vehicle and loaded on to a ship, the CMR merely does not apply to the sea carriage leg of the transport. Although the Court was aware that the contract was not a road carriage contract from start to finish, the Court did conclude that there was an international carriage contract as the place of taking over and the place of delivery were situated in two different countries. Because part of this contract entailed road carriage the requirements of Article 1 CMR were met, at least insofar as the road stages were concerned. Therefore, judging the CMR inapplicable to all parts of the transport would needlessly and excessively restrict the CMR's scope of application. According to the Court, the text of the Convention does not impose such an interpretation and to interpret the Convention in this manner would be contrary to the intentions of the parties to the Convention to create a uniform regime. The Court stated that:

> "*The facts under consideration concern carriage by road – for at least part of the distance – between places situated in different countries in accordance with the provisions of Article 1 CMR, which means that the CMR applies to the road legs of the carriage at hand. When, as*

[27] Clarke *JBL* 2002, p. 215; UNCITRAL A/CN.9/WG.III/WP.29, p. 29. In later writings by Clarke other examples of his view that the CMR applies to international road stages only can be found. He determines for instance that there appears to be no potential conflict between the CIM 1999 and the CMR, as CIM only applies to road transport when it is a case of "*internal traffic ... as a supplement to transfrontier carriage by rail*". Clarke www.juridicum.su.se 2005, p. 7.

[28] Clarke *CMR* 2003, p. 29.

[29] The first was also mentioned in the introduction this is Chapter because it is the most unambiguous example of this sort.

[30] Rb Rotterdam 24 January 1992, *S&S* 1993, 89. According to Van Beelen the *Rechtbank* Rotterdam followed the teachings of Haak with this decision. Van Beelen 1994, p. 43; Haak 1986, p. 99 and more recently Haak speech Antwerp 2006.

[31] The Dutch judiciary tends to refer to 'combined' carriage instead of multimodal carriage because the Dutch Civil Code uses this term. The terms are considered interchangeable in The Netherlands.

is the case here, the prerequisites of Article 2 CMR have not been met the only result thereof is that the CMR is not also applicable to the carriage by sea."

That same year the *Rechtbank* Rotterdam drew a similar conclusion in relation to a series of potato transports from Gameren in The Netherlands to several destinations in Italy. In that case the Rotterdam Court decided that since the transport started with carriage by road in one country and ended with carriage by road in another country the CMR applied[32]. That the potatoes had been carried by rail between the first and the last road leg did nothing to counter the applicability of the CMR to the road carriage according to the *Rechtbank*. Reasoning along much the same lines as in the earlier case the Court held that if the potatoes had been transported by rail while still on the trailer, the CMR would have applied to the whole journey based on Article 2 CMR, and that the CMR applied to the road carriage stages via Article 1 if the potatoes had been taken off the trailer and loaded on to a rail carriage for the rail leg of the transport. It was not deemed necessary for the road leg itself to be international in order for the CMR to apply via 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.

A criticism levelled at this decision is that it stretches the scope of application of the CMR too far to apply the Convention to a domestic road leg if it is the only road leg in the transport. This critique seems slightly incongruous, because if consequently employed, the 'pro CMR' perspective[33] should cause the CMR provisions to apply to all road carriage under a 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 plainly does not supply any basis on which to support this type of differentiation.

A weakness in the '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 can be read in the Preamble, the CMR is meant to standardize the conditions governing the contract for the *international* carriage of goods by road. It is submitted here that to apply the CMR to domestic carriage simply because it is part of an international carriage contract does not do justice to this intent[34]. There is a limit to the uniformity of law which treaties can or should achieve. Van Beelen accurately 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 in the CMR[35].

Neither of the two examples stemming from 1992 given above concern road carriage contracts as meant in Article 1 CMR from A to Z. The only qualification that can be given to these contracts as a whole is the label multimodal – or combined – carriage contracts. If the separate parts of such a contract are to be considered, which the *Rechtbank* does by determining that the CMR does not apply to the sea or rail stage[36], logic dictates that the different road stages should also be considered separately.

[32] Rb Rotterdam 5 June 1992, *S&S* 1993, 107. The *Rechtbank* Rotterdam seems to deem it necessary that the transport begins *and* ends with road carriage.

[33] The view discussed in this Section has been fittingly christened thus by Van Beelen. Van Beelen 1994, p. 35-50.

[34] 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 meant for 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, p. 569-570.

[35] Van Beelen 1994, p. 47.

[36] At least not if there is no ro-ro carriage, which is not clear in the second case.

Furthermore, applying the CMR to domestic road carriage would create recourse problems for the multimodal carrier. When a subcontractor is hired to perform the road leg of the transport he will be held accountable based on rules of national law when the contract between him and the multimodal carrier concerns national carriage. If the multimodal carrier is liable to the cargo interests according to the CMR rules, this may very well put him at a disadvantage[37]. When the subcontracting carrier can validly rely on a lower level of limitation or different liability conditions due to the applicability of a national regime, the multimodal carrier might not be able to recover his losses in full. However, to prevent such a recourse gap from occurring, the multimodal carrier can of course include a choice of law for the CMR in his contract with the domestic road carrier[38].

As a last and perhaps most important objection there is Article 17 CMR. This Article determines that the carrier is liable for any loss of the goods and 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 were meant to be understood as being the very first taking over at the start of the multimodal carriage and the last 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 *opinio iuris* is that this is not the case[39].

4.1.1.2 Only if the road leg itself is international

A more generally accepted view is that the terms 'place of taking over' and the 'place of delivery' of the goods under Article 1(1) are to be read as referring to the start and end of the contractually provided or permitted road leg[40]. An early example of a decision fitting in this train of thought is a ruling by the BGH in 1987, which explicitly declares concerning a multimodal transport from Neunkirchen in Germany to Portadown in Northern Ireland that the CMR applies to the road stage from Neunkirchen to Rotterdam: "*The CMR applies to the land stage of the carriage, as ensues from Article 1 of the Convention*"[41]. Conversely, the BGH determined *vis-à-vis* the Northern Irish road leg of the transport between Belfast and Portadown, which constituted the last part of the transport, that the CMR did not apply as this road leg did not cross any borders[42]. A more recent judgement of the OLG Düsseldorf shows that the German judiciary still

[37] The most prominent example here is the fact that the kilogram limitation may vary; under the CMR it is 8,33 SDR while under the national law of The Netherlands it is 3,40 Euro. The German national law on the other hand makes use of the CMR limitation (§ 414 HGB) as does the U.K.

[38] Under Dutch law such a choice sets aside conflicting mandatory rules of Dutch law based on Article 8:1102 BW. See also HR 5 January 2001, *S&S* 2001, 61 (*Cigna/Overbeek*).

[39] Ramming 1999, p. 329 and Ramming *TranspR* 2007, p. 284.

[40] *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep*. 25, *ETL* 2004, p. 535; 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, *S&S* 2007, 114; *Datec Electronic Holdings Ltd v UPS Ltd.,* [2007] 1 *WLR* 1325; Cour de Cassation 25 November 1995, *BACC* 1995, IV, p. 248-249; Hof Den Bosch 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.

[41] "*Für die Landstrecke gilt die CMR, wie sich aus Art. 1 des Abkommens ergibt*"*;* BGH 24 June 1987, *TranspR* 1987, p. 447-454 at p. 447. However, in 2008 the BGH explained that this judgement applied the CMR indirectly, *i.e.* via German domestic law and not directly via Article 1 CMR. BGH 17 July 2008, *TranspR* 2008, p. 365-368.

[42] *Cf.* BGH 17 May 1989, *TranspR* 1990, p. 19-20, *NJW* 1990, p. 639-640, *ETL* 1990, p. 76-80; OGH Wien 19 January 1994*, TranspR* 1994, p. 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*

supports the view that the CMR does not apply to domestic road carriage that is part of an international transport, even though the contract as a whole concerned international carriage. In its 2004 decision the OLG established that:

> "*In contrast to the opinion of the Landesgericht the CMR does not cover these carriage contracts because no border-crossing carriage by road has taken place. Rather, these cases concern multimodal transport, because the defendant carried the packages to the Köln airport, in order to carry them by air from thereon to either Rome or Madrid.*"[43]

In legal literature writers such as Hill and Loewe already voiced their preference for this interpretation long before the 1980's, and over the years the number of those who hold to this opinion has been steadily increasing[44]. In his 1975 commentary on the CMR for the UNECE Loewe interprets the scope rules of the CMR to mean that if another means of transport is used over part of the journey after there has been carriage by road, CMR governs the carriage up to the transhipment between the road vehicle and the other means of transport, and this operation terminates the carriage by road. If, later, the goods are again loaded on to a road vehicle, CMR will be applicable to this second journey by road only if it too is international within the meaning of the Convention[45]. Also in 1975 Hill expressed a similar view while describing which regimes applied to short sea and continental traffic. Since carriage to and from Great Britain almost always involves sea, rail, or air carriage due to the Channel, 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 carriage which is found in Article 2 CMR can be ascribed to the English delegation[46]. Against this backdrop Hill remarked that when there are no roll-on, roll-off 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[47].

There is also no shortage of more contemporary examples that illustrate the widespread adherence to this view[48]. Perhaps the most prominent of these is the *Quantum* case[49]. The

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Aktiengesellschaft and Another, [1991] 2 *Lloyd's Rep*. 383. According to the *Rechtbank* Rotterdam the CMR would on the other hand have applied to the road stage of a multimodal transport between Dublin (Ireland) and Cookstown (United Kingdom) since the stage crosses the Irish-British border if the Protocol of Signature had not excepted it from the CMR's application scope by stating that: "*This Convention shall not apply to traffic between the United Kingdom of Great Britain and Northern Ireland and the Republic of Ireland*". Rb Rotterdam 5 September 2007, *S&S* 2009, 41.

[43] "*Diese Frachtverträge unterliegen jedoch entgegen der Auffassung des Landgerichts nicht den Bestimmungen der CMR, weil keine grenzüberschreitende Beförderung auf der Straße stattgefunden hat. Vielmehr handelt es sich um multimodale Transporte, weil die Beklagte die Pakete jeweils zunächst zum Flughafen in Köln befördert hat, um sie sodann auf dem Luftweg nach Rom beziehungsweise Madrid weiterzutransportieren.*" OLG Düsseldorf 16 June 2004, I-18 U 237/03, www.justiz.nrw.de.

[44] Loewe *Commentary on the CMR* 1975; Hill 1975, p. 604-605. Some examples of the more contemporary sources, are: Wilson 2004, p. 246; Mankabady 1983, p. 136 and perhaps Clarke *CMR* 2003, p. 29.

[45] Loewe *Commentary on the CMR* 1975, p. 8.

[46] 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.

[47] Hill 1975, p. 604-605.

[48] *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another*, [2002] 2 *Lloyd's 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, *S&S* 2007, 114; *Datec Electronic Holdings Ltd v UPS Ltd.,* [2007] 1 *WLR* 1325; Cour de Cassation 25 November 1995, *BACC* 1995, IV, p. 248-249; Hof Den Bosch 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.

decisions of both the Commercial Court and the Court of Appeal have provoked some noteworthy commentaries[50]. Of these decisions, especially the one by the Court of Appeal contains clear and explicit considerations regarding the applicability of the CMR on road carriage in multimodal agreements. Because of its impact, the dispute and the ensuing judicial decisions are discussed extensively in the next few Sections.

4.1.1.2.1 *Quantum v Plane Trucking*

The *Quantum v Plane Trucking* case is a fine example of the intricacies of multimodal carriage law in practice[51]. The case centres on the loss of a consignment of hard disks owned by Quantum, which were to be transported by Air France from Singapore to Dublin. The disks were flown from Singapore to Paris by Air France itself. At Charles De Gaulle airport the three pallets were unloaded from the aircraft. The second segment of the transit was to be a road and roll-on, roll-off movement from Paris across the Channel to Manchester and was to have continued across the Irish Sea to Dublin. While in the course of being carried by road in England towards 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 on to which they had been loaded in Paris – albeit now hauled by a different tractor vehicle – from that which had initially taken the goods from Charles De Gaulle airport to the French coast. When Quantum sought compensation for the loss of the goods from Plane Trucking, Plane Trucking contended that by reason of a Himalaya clause included 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[52]. This raised the questions whether Air France was liable for the loss, and if so, based on what grounds. The first question was answered rather swiftly and without much difficulty by the acceptance of liability by Air France. The answer to the second question turned out to be somewhat more problematic however, which can be inferred from the differences in approach between the Court of Appeal and the Commercial Court.

An interesting detail is that the question as to whether the CMR applied in this case touched upon both scope of application provisions 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. Although it is mentioned only *en passant* in the judgements, the carriage between Paris and Dublin, or at least the carriage between Calais and Dover concerned roll-on, roll-off carriage. Had not at least the trailer accompanied the goods during the crossing of the Channel, the choice made in both judgements as to where the goods were taken over would not have been between Paris and Singapore only but would have involved Dover as well.

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[49] *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another*, [2001] 2 *Lloyd's Rep.* 133; *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535-560. Words of Mance LJ in the judgement of the Court of Appeal: "*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.*"

[50] Koller 2003, p. 45-50; Clarke *TranspR* 2005, p. 182-185; Clarke *JBL* 2002, p. 210-217; Clarke *JBL* 2003, p. 522-524.

[51] *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another*, [2001] 2 *Lloyd's Rep.* 133; *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535-560.

[52] 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 Court of Appeal; *Adler v Dickson (Himalaya),* [1954] 2 *Lloyd's Rep.* 267.

Because the contract in question comprised of more than just the transport between Paris and Dublin, the application of Article 2 CMR was taken for granted somewhat, and thus the Article played only a subordinate part in this dispute. The main focus of the legal arguments made was the scope of application provision of Article 1 CMR. The question whether the CMR applies directly to international road stages which are part of a multimodal contract or not was the crux of the matter in the proceedings.

The decision by the Commercial Court[53]

At first instance 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. The question which regime then did apply to this stage became the focus of the dispute. Air France on the one hand argued that its standard contract terms applied and not the rules of the CMR. The reason for Air France to defend this view was the content of Article 29 CMR. In a case involving wilful misconduct of the driver such as this one Article 29 CMR would cause Air France to be liable as carrier without being entitled to invoke the provisions of the CMR which exclude or limit liability or which shift the burden of proof in its favour. Thus, being afraid that it would be held to reimburse Quantum for the entire loss, Air France pleaded that the CMR does not apply to carriage by road performed under a multimodal contract. The claimants on the other hand disagreed; they contended that the CMR does apply under such circumstances since they wanted to be compensated in full. If the Court decided that the CMR did not apply, Air France's general conditions of carriage by air for cargo would regulate the loss and then Air France would be entitled to limit its liability to 17 SDRs per kilogram in accordance with Article 11.7 of said standard contract terms. During the proceedings, Air France admitted that its general conditions were, like any set of contractual terms, expressly subject to any mandatory rules of an applicable convention and could have effect only to the extent that they were not inconsistent with the mandatory rules of such a convention. Because Article 41 CMR states that any stipulation which would directly or indirectly derogate from the provisions of the Convention shall be null and void, all CMR rules are compulsory. As a result the main question became whether the CMR applied to the movement between Paris and Dublin.

Confronted with this quandary, Tomlinson J was quite aware that his decision would have far reaching consequences as the point of dispute concerned the general application of the CMR in relation to multimodal transport. There is no doubt that if the carriage to Dublin had commenced in Paris, it would have been subject to CMR. The contract of carriage in question added an air carriage segment to this international road leg however. An addition which caused Tomlinson J to emphasize 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. He also considered the opposite to be true of the Warsaw Convention, as this convention applies to all international carriage, gratuitous carriage included, of persons, baggage or cargo performed by aircraft for reward. Because of the attachment of the CMR to contracts, Tomlinson J insisted on looking at the entire movement from Singapore to Dublin[54]. In his view it was the nature of the contract

[53] *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another*, [2001] 2 *Lloyd's Rep.* 133.

[54] "…[I]*t 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*'*); and see generally Fellowes (or Herd) v Clyde Helicopters Ltd.,* [*1997*] *AC 534 and Western Digital Corporation v British Airways plc,* [*2000*] *2 Lloyd's Rep. 142, especially par. 42 ('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*

which must be examined. After close scrutiny of the contract he found that it was 'essentially' and 'predominantly' a contract for carriage by air, and that what was true of the whole was true of the parts[55]. In his estimation this conclusion was supported by the circumstance that the place of taking over of the goods specified in the contract could only be Singapore. He considered:

> "*The place of taking over of the goods specified in the contract must be the place at which the contractual carrier assumes liability for the goods – that is spelled out in art. 17(1) and no doubt explains the requirement in art. 6(1)(d). Air France did not take over the goods in Paris. They could not take over goods for which they had already assumed liability in Singapore.*"

Tomlinson J was convinced that the CMR Convention simply did not fit the presented situation; either the whole of the carriage envisaged by the contract must be governed by CMR, or none of it. Viewed as a whole, as carriage from Singapore to Dublin, the contract of carriage concerned mode *to* mode carriage, to which, he held, Article 2 and thus the CMR did not apply, not even between Paris and Dublin. Accordingly, the claimants' argument that CMR applied to the loss, was rejected[56]. Clarke criticized Tomlinson's take on this matter by stating that if the contract of carriage was characterized based on the distance between Singapore and Paris relative to the rest of the journey and the associated cost, this is like saying of a cocktail like a Bloody Mary that it should be classified as non-alcoholic because it contains more fruit juice than vodka. If however duration and risk are also considered, in other words where loss or damage was most likely to occur, then the road stage between Paris and Dublin would surely have been considered of greater significance[57].

Oddly enough Tomlinson J did recognize that the CMR might fit in other, fairly similar, situations. Had the goods for example been sent from Dublin to Singapore, first by road (and by sea) to Paris and then by air to Singapore, then the CMR might perhaps have applied to the Dublin-Paris leg. This accentuates that Tomlinson's views on the interpretation of the words 'place of taking over' in Article 1 cause him to differentiate between situations in which the road carriage happens to come first and situations in the transit commences with another type of carriage. This differentiation seems contradictory to his notion that the contract of carriage is to be viewed as a whole.

Nevertheless, Tomlinson J seemed to feel that a contract for the carriage of goods by road can include other types of carriage and still remain a contract for the carriage of goods by road, as long as the other type of carriage is not used for the initial movement of the goods. This is underscored by the citation of a text written by Fitzpatrick in 1986. A citation which reads as follows:

> "*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.*"[58]

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had very much in mind as a premise to its application the existence of a relevant contract of carriage')". Comment by Mance LJ in the appeal of this case, *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* p. 25.

[55] Clarke *JBL* 2002, p. 210-217. 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, p. 447-454.

[56] Clarke *JBL* 2003, p. 522.

[57] Clarke *TranspR* 2005, p. 184.

[58] Fitzpatrick 1968, p. 311.

According to Tomlinson J the extent to which the Convention implies the contrary is Article 2 CMR. This Article, he indicates, presupposes that the goods are first loaded on to a road vehicle. A contract of the sort that was the basis of the dispute in the *Quantum* case, a contract that does not commence with a road leg, cannot be properly be described as a contract for the carriage of goods by road since, in Tomlinson's opinion, there is nothing in the Convention which can begin to support such a suggestion.

This line of reasoning appears to be endowed with some flaws though. Had Article 2 CMR used the fiction that the described mode-on-mode carriage was to be deemed carriage based on a contract for the carriage of goods by road, then Tomlinson's assumption that Fitzpatrick meant to say that Article 2 covers the extent to which the Convention applies to combined transports would have been correct. As Article 2 merely mentions that the Convention is to apply to the described mode-on-mode carriage however, it is no more than an extension of the application scope of the CMR; it does not cause the Convention to apply to mode-on-mode carriage by means of Article 1 CMR. It can therefore not have been the contrary implication Fitzpatrick aimed at and neither does it provide legitimate grounds to curtail the scope of Article 1 CMR.

The decision by the Court of Appeal

The cargo claimants, Quantum California, Quantum Ireland and their freight forwarders, appealed against the decision by the Commercial Court[59]. They did not agree that the correct approach was to characterize the contract as a whole, and that, unless the contract as a whole could be said to be for carriage by road, any road carriage which it embraced fell outside the terms of the CMR Convention. To their good fortune the Court of Appeal shared their views on this subject. The Court of Appeal reversed the Commercial Court's decision and acknowledged that the scope rules of the CMR did cover the carriage of goods by road from Paris to Dublin as performed by Plane Trucking. The interpretation approach used by the Court was the one established in *Buchanan*[60]; to construe the English text in a normal manner appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation. It was also recognized that the English Court should try to harmonize interpretation of CMR, as of any other international convention, with any recognizable body of foreign law that has developed. In addition, the Court took note of the words of Hope LJ in *Fellowes or Herd*[61] concerning the Warsaw Convention that a convention is and should be capable of accommodating changes in the practice of the carriage industry. By interpreting the CMR Convention based on these conditions, the Court of Appeal came to a different conclusion than that of the Commercial Court. It did not employ the absorption doctrine or the 'overall consideration[62]' as its predecessor had, but applied the accumulation principle instead[63]. It concluded that the contract in dispute

[59] *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535-560.

[60] *Buchanan & Co. Ltd. v Babco Forwarding & Shipping (U.K.) Ltd.,* [1978] 1 *Lloyd's Rep.* 119, per Wilberforce LJ.

[61] *Fellowes or Herd v Clyde Helicopters Ltd.,* [1997] 1 *All ER* 775, per Hope LJ.

[62] *Gesamtbetrachtung;* an overall consideration or examination. *Cf.* BGH 24 June 1987, *TranspR* 1987, p. 447-454.

[63] "*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. 535-560*,* per Mance LJ.

was for carriage by road within the parameters of Article 1(1) CMR in relation to the roll-on, roll-off leg 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.

Mance LJ laid down the reasoning behind this decision, which was supported by both Latham LJ and Aldous LJ, in a detailed account. In it he stresses that the basic issue in this case is what constitutes a 'contract for the carriage of goods by road in vehicles for reward' within the meaning of Article 1(1) CMR.

Of course, Article 1 CMR also contains another precondition, a geographical one. The place of taking over of the goods and the place designated for delivery, as specified in the contract, should be situated in two different countries, of which at least one is a contracting country. In Mance's view the case at hand involved such a situation. Although there was only one contract, by it Air France contracted, firstly, for the carriage of goods by air to Paris and thence, secondly, for their carriage by truck to Dublin.

When considering the non-geographical requirements of Article 1 two questions present themselves. The first being to what extent the application of the CMR depends upon a carrier having bound himself contractually to actually carry by road and whether options in the contract to carry by another means are of influence in this matter[64]. The answer to this question depends upon the force, in context, of the word 'for' in the reference in Article 1 of the Convention to a 'contract for the carriage of goods by road'. The second question is if, and if so to what extent, a contract can 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 does not apply.

In answer to the first question Mance puts forward the example of a simple contract for carriage from country A to country B, without any unloading from the trailer. In keeping with this example he sketches a range of four possibilities, each of which may actually lead to goods being carried by road internationally. The situations include those where:

(a) the carrier promises unconditionally to carry by road and on the trailer,
(b) the carrier promises this, but reserves the right to opt for some other means of carriage for all or part of the way,
(c) the carrier leaves the means of transport open, either entirely or as between a number of possibilities where at least one of them is carriage by road, or
(d) the carrier undertakes to carry by some other means, but reserves the right to opt for carriage by road instead.

In situation (a), the contract cannot be considered anything else than a contract 'for' carriage by road within the parameters of Article 1 CMR. If one were to confine the application of Article 1 to situations such as described under (a), this would generate a reasonably clear-cut distinction between cases where the Convention would, and cases where it would not apply. However, this would also mean an unnecessary limitation of the scope of application of the Convention. A limitation that is contrary to the purpose of the Convention to standardize the conditions under which this kind of carriage is undertaken[65]. It would effectively exclude a large number of the contemporary contracts of carriage as many, if not most, of these contracts contain options as to alternative modes of performance, whether general or related to specific emergencies. In situation (b) the contract is also 'for' carriage by road, unless and until the carrier decides to perform the carriage by another means of transport for all or part of the way. The mere inclusion of such an option in a carriage contract cannot sensibly bar the application of the CMR when it is

[64] *Cf.* Chapter 2, Section 2.3.3.1 on unspecified and optional contracts of carriage and deviation.
[65] Rb Rotterdam, 24 January 1992, *S&S* 1993, 89.

not invoked. In situation (c), the CMR applies when the carrier chooses to perform the carriage by road; although the contract does not promise carriage by road, it does permit it. In a way, the permission contained in the contract provides 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. In the last situation, situation (d), the prospect of carriage by road is the most remote. But, Mance observes, it is rather difficult to draw any very clear or satisfactory distinction between situation (d) and the previous ones. Hence, if the previous situations are all within the scope of application of the CMR, there seems much to be said for treating case (d) as also within the CMR.

As was asserted by both the Commercial Court and the Preamble of the Convention itself, the purpose of the CMR is to standardize the conditions under which international carriage by road is undertaken. Standardization would be incomplete and potentially capricious however, if the application of CMR depended upon whether the carrier could be said to have contracted unconditionally and at the very outset to carry by road. In all examples carriage by road is in some way provided for in the contract. This contractual foundation justifies the application of the CMR, but only in as far the carriage is actually performed by road. Carriage by road *contrary* to the terms of a contract raises rather different considerations however[66].

To the second question – whether or not a contract can be both for the carriage of goods by road and for some other means of carriage – Mance LJ answered that a contract can be both, for which he had several reasons. Firstly, the Protocol providing that the Signatories to the Convention 'undertake to negotiate conventions covering contracts for … combined carriage', which is often cited to indicate that the Signatories intended to exclude non roll-on, roll-off multimodal carriage from the application of the CMR, does in his opinion not warrant such a conclusion. Mance LJ agrees with Fitzpatrick that the signing parties most likely did not mean to curtail the application of the Convention. In all probability they meant no more than to establish that they intended to design a convention that applies to the contract for combined transport as a whole[67]. A convention that goes beyond the system of Article 2 CMR, and which supersedes the various conventions or national laws applying to each part.

Secondly, when it comes to Article 2 CMR, an Article often dredged up as evidence in the debate on the applicability of the CMR on multimodal carriage, Mance does not think the Article affects the scope of Article 1 CMR in any significant manner. The express provisions of Article 2 cause the CMR to be applicable to the *whole* of the carriage where the goods are carried by road and are carried in the vehicle over part of the journey by means other than road. It has been argued that the word 'nevertheless' in this Article means that when carriage does not meet the requirements of Article 2, the Convention at least applies to the international carriage by road stage of the transport. Then again, the word may also have been introduced to merely point out a contrast with the situation where no part of the Convention would otherwise apply. Although Mance LJ does not deem Article 2 CMR to be inconsistent with the view that Article 1 can apply where a contract is in part for one form and in part for another form of carriage, neither does he deem it conclusive.

What Article 2 did do however is prevent a solution like that of Article 31 WC[68] to be incorporated in the CMR.

[66] *Cf.* Chapter 2, Section 2.3.3.1.1 on deviation.

[67] Fitzpatrick 1968, p. 314.

[68] Article 31 WC stems from 1929 and could have been used as a template to solve the scope issue if Article 2 CMR had not prevented this. The Article 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

Mance brushes aside the suggestion that the application of the CMR to a prior or ensuing road carriage leg can lead to a 'clash of conventions' with the Warsaw Convention as being too esoteric to serve as a reliable guide to the scope of the CMR. A clash could perhaps occur when the road stage of a transport which also includes an air leg starts or ends in an airport. After all, when goods are in charge of the carrier in an aerodrome the carrier liability rules of the Warsaw Convention apply. If such a clash were to occur Mance LJ suggests that it would be resolved, either by recognizing the difference in capacity in which the goods are held, or, if both Conventions really could apply at the same time, by recognizing that nothing in either prevents the carrier from undertaking a higher responsibility according to Article 41 CMR and Article 32 WC. Whether a conflict may or may not occur between the air and road carriage regimes and what the consequences of such a conflict would be is discussed later on in Chapter 9[69].

As to the fact that no consignment note had been issued to cover the road carriage from Paris to Dublin, he pointed out that such a note is not a necessity for the application of the CMR due to Article 4 CMR[70]. Chapter III on the conclusion and the performance of the contract of carriage contains detailed Articles that focus on core or typical situations. It is largely directed at situations where a consignment note has been issued and which involve a contract performed by road throughout or which falls within the parameters of Article 2. But that does not in itself mean that the Convention is limited to those situations.

Thus, pertaining to the question whether a contract can include both the carriage of goods by road, falling within the scope of Article 1 of the CMR, *and* some other mode of transportation to which the CMR does not apply, the Court of Appeal concluded that if a multimodal carriage contract provides for a road leg, that part of it can be qualified as a contract for the carriage of goods by road. As a consequence it deemed the CMR applicable to the road carriage stage – the roll-on roll-off leg included – of the carriage in question and, to the extent that they would limit Air France's liability, that the contractual conditions were overridden accordingly. It was therefore open to the claimants to argue that there was wilful misconduct or equivalent default on the part of the carrier as meant in Article 29 CMR, disentitling Air France to limit its liability for the loss which occurred during the road transit.

4.1.1.2.2 *Some jurisprudence supporting* Quantum

There is an ample body of case law supporting the decision made by the Court of Appeal in *Quantum*[71]. Some of the Dutch and German judgements supporting the Court of Appeal's decision are worthy of a closer look as they focus on the different aspects of the *Quantum* decision.

nothing prevents the parties from inserting in the document of air carriage conditions relating to other modes of carriage.

[69] *Cf.* Chapter 9, Sections 9.1.1 and 9.1.2 on possible conflict situations.

[70] "*...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 to the provisions of this Convention.*"

[71] Nevertheless, a recent decision by the *Rechtbank* Haarlem disagrees with the opinion that the CMR applies to international road stages which are part of a multimodal carriage contract, which is an opinion that is adhered to by most other Dutch courts. Rb Haarlem 9 July 2008*, S&S* 2009, 9.

*The '*Resolution Bay'*: the place of taking over*

In this case, which already mentioned above[72], a container of lamb's meat was transported under a multimodal contract from Lorneville New Zealand to Port Chalmers and from there on to Rotterdam by means of the ocean vessel '*Resolution Bay'*[73]. The journey continued by road from Rotterdam to Antwerp in Belgium where it was established that the meat had defrosted en route and had gone bad. The CT-document that was issued did not mention the mode of transport to be used between Rotterdam and Antwerp. It did however include a law and jurisdiction clause which determined that any claim or dispute resulting from the carriage was to be determined, at the option of the plaintiff, either by the courts of the country where the carrier, or the defendant if not the carrier, has his principal place of business according to the laws of that country.

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 of the carriage 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 per vehicle by road, while the contract, as contained in the CT-document, provided her 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.*"

Like in *Quantum* the Court deemed the CMR applicable to the – international – road stage even though the contract did not specify but merely permitted carriage by road for this part of the transit. Unlike in the above-mentioned decisions made in 1992[74] however, 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[75]. As a result the road stage itself needs to be international in order for the CMR to apply.

BGH 24 June 1987: the network approach

In this case the BGH was concerned with a counterclaim in relation to the loss of part of a container load of machine parts during carriage from Neunkirchen in Germany to Portadown in Northern Ireland[76]. The parts were stuffed in a container which was carried by road from Neunkirchen to Rotterdam, where it was shipped without trailer to Belfast. In Belfast the carrier terminated the carriage, because of a dispute about payment of the carriage charges. Concerning the application of the CMR to the entire contract the BGH held that:

> "*… weil die Beförderung ab Rotterdam nicht als grenzüberschreitender Straßengüterverkehr in Sinne der CMR angesehen werden könne*."[77]

[72] *Cf.* Chapter 3, Sections 3.2.1 on Article 31 CMR and 3.3.2 on Article 25 Rome I.
[73] Rb Rotterdam 28 October 1999, *S&S* 2000, 35 (*Resolution Bay*).
[74] Rb Rotterdam 24 January 1992, *S&S* 1993, 89; Rb Rotterdam 5 June 1992, *S&S* 1993, 107.
[75] *Cf.* Rb Rotterdam 11 April 2007, *S&S* 2009, 55 *(Godafoss)*. For a different view see Hof Den Bosch 2 November 2004, *S&S* 2006, 117; OLG Köln 25 May 2004, *TranspR* 2004, p. 359-361.
[76] BGH 24 June 1987, *TranspR* 1987, p. 447-454.
[77] "*… because the carriage from Rotterdam cannot be deemed border crossing carriage of goods by road as meant by the CMR*."

The BGH did however deem the CMR applicable to the international road stage between Neunkirchen and Rotterdam:

> "*Für die Landstrecke gilt die CMR, wie sich aus Art. 1 des Abkommens ergibt*."[78]

With this decision the BGH distances itself from the previously developed theory of *Gesamtbetrachtung* (overall consideration). This theory had been used in previous proceedings concerning contracts which involved both (road) carriage and freight forwarding services. In those cases the overall consideration approach prevented the carrier from avoiding the mandatory carriage regime by claiming that the damage or loss occurred before or after the carriage during the execution of freight forwarding services. Instead of looking at the whole of the contract as Tomlinson J did in the Commercial Court proceedings of *Quantum*, the BGH applied the network theory which was generally countenanced by the legal literature of that time. The BGH determined that, firstly, the overall consideration theory does not apply in cases where the subject of the contract is the transport of goods using various means of transport from the outset. In many of these types of transports it is not possible to determine which stage of the carriage is the most significant, which prevents the application of the overall consideration on practical grounds. Secondly, it resolved that the same applies when different liability regimes, such as the CMR and the Warsaw Convention in this case, are specified as mandatory with regard to the means of transport used for the various sections of the route. For these reasons, which were supported by precedents, the viewpoint of the overall consideration cannot be taken as authoritative where it is clear from the start that different means of transport are to be used to perform the contracted carriage.

The BGH did not mention whether optional contracts such as the one featured in *Quantum* – contracts that leave the means or mode of transport to be used completely or partly up to the carrier – are to be treated differently, and if so in what manner[79].

In the end, the newfound network approach did not avail the BGH much in this case. No conclusive evidence as to where and when the damage or the loss occurred was produced. The CMR rules were eventually applied, not because the scope of application rules of the CMR covered the whole contract, which they did not, but because the BGH held that in case of unlocalized loss the multimodal carrier was to be held liable based on the unimodal regime most favourable for the cargo claimant[80]. This approach resulted from the fact that the burden of proof in respect of the place of damage lay on the carrier as a matter of general German law.

[78] "*The CMR applies to the land stage, which follows from Article 1 of the Convention*."

[79] In 1993 the BGH referred to the 1987 judgement however when it applied the CMR to a stage of the transport that should have been performed by road but was, although the contract did not allow for this, performed partly by rail instead. BGH 30 September 1993, *TranspR* 1994, p. 16-18.

[80] Paschke 2000, p. 116. Decided in the same manner in BGH 22 February 2001, *TranspR* 2001, p. 372-375 and partly in BGH 30 March 2006, *TranspR* 2006, p. 250-254. The last judgement concerned several losses, some of which were covered by the new regime. Under the new German rules on multimodal transport – §§ 452-452d HGB – it is no longer the regime most favourable for the cargo claimant that is applied in case of unlocalized loss, but rather a certain section of the HGB – §§ 407 HGB and following – concerning general carriage law. *Cf.* Chapter 10, Section 10.4.2 on the German national multimodal transport legislation.

BGH 17 May 1989: deviation or permitted substitution?

The contract under consideration of the BGH in its judgement of 17 May 1989 was nearly identical to the carriage contract in *Quantum*[81]. As in *Quantum* one of the main issues was the question as to what consequences the – permitted – substitution of the initially contracted for means of transport are. The contract, which was assumed by the BGH and in the previous instances to be an air carriage contract, involved the carriage of electronics by air from Stuttgart to Algiers. An air waybill had been issued for the carriage on the backside of which a referral to the general conditions of the carrier – an IATA member – was made. The carrier entrusted a German airline with the actual carriage. The airline in turn engaged subcontractors to carry the goods by road from Stuttgart to Frankfurt, so that they could be carried from Frankfurt by air to Algiers. During the road journey the components were destroyed by a fire which resulted from an accident.

One of the questions raised was whether the actual carriage of goods by road from Stuttgart to Frankfurt was permitted by the contract. Permission for the road carriage could have been gleaned from the contract itself or from the incorporation of IATA Resolution 507b into the contract. This Resolution permits so-called 'trucking', which is the transport of air cargo – under flight number – between different airports by road[82]. The BGH did not deem it necessary to determine whether the substitution was permitted and, if it was, what the source of the permission was. It said that the air carrier was liable in any event, according to whatever rules were applicable to the carriage by road, for transit damage suffered by air freight in the course of carriage by road, whether the road carriage was in accordance with the contract or not.

Because the damage was not caused during the carriage by air, the BGH concluded that the Warsaw rules did not apply based on Article 18(1) WC[83]. The prevailing opinion on this matter is however that it is relevant whether the substitution was permitted by the contract[84]. With this conclusion the BGH is in disagreement with the general consensus that the consignor, who is seen as the weaker party in this, should be able to rely on the liability regime that was agreed and on which he has based his insurance. It is thought that he should not have to contend with the possibility that a liability regime less favourable to him applies, because the carrier breaches the terms of the contract[85].

The BHG was however of the opinion that the German national rules on road carriage were applicable – the KVO – whether carriage by road was *contrary* to the provisions of the air carriage contract or not. If the air carriage contract entitled the carrier to perform the leg from Stuttgart to Frankfurt by road instead of by air, the carriage by road constituted contractual performance. Therefore it is governed by the relevant rules, which are those of the KVO as the road carriage concerned carriage by road within Germany. If the contract of air carriage did not entitle the carrier to perform a leg from Stuttgart to Frankfurt by road instead of air, the carrier was liable for transit damage *at least* to the same extent. A breach of the contract for carriage by

[81] BGH 17 May 1989, *TranspR* 1990, p. 19-20, *NJW* 1990, p. 639-640, *ETL* 1990, p. 76-80.

[82] IATA's Resolution 507b stemming from 1971 defines the circumstances under which air cargo shipments can be delivered as surface cargo. They are: (1) lack of available capacity on an aircraft, (2) consignments cannot be handled on aircraft operated by an airline due to size, weight or nature of the consignment, (3) carriage by air will result in delayed transit times or cannot be accomplished within 12 hours of acceptance of the consignment by the air carrier, (4) carriage by air will result in missed connections.

[83] Article 18(1) WC: "*The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.*"

[84] *Cf.* Chapter 2, Section 2.3.3.1.1 on deviation.

[85] Müller-Rostin *TranspR* 1996, p. 220.

air could not improve the carrier's position. The application of the Warsaw regime would have been more advantageous to the carrier and the BGH deemed it inappropriate that a carrier should benefit from a breach of contract. According to the BGH the liability regime attached to the mode of carriage the carrier actually used should count as a minimum in circumstances like these[86].

It is clear that if the road carriage had extended from Stuttgart to an airport outside Germany from whence the goods were to be carried by air to Algiers, the BGH would have held (1) that CMR applied to the international road carriage leg if the air carrier was permitted to perform partly by road and that (2) if this was not permitted the air carrier's *minimum* responsibility would have been that imposed by the CMR. Thus, the highest German Court of law adopted the view that the CMR applies even if a carrier undertakes to carry by some other means, but reserves the right to opt for carriage by road instead.

4.1.1.2.3 *Opinions on* Quantum

That *Quantum* deals with some subjects that have kept, and apparently still keep many minds busy can be inferred not only from jurisprudence, but also from the abundance of reactions to it in academic writing[87]. One of the earlier responses came from the hand of Clarke as a reaction to the decision of the Commercial Court. In later articles he also discussed the decision of the Court of Appeal. Clarke disagrees in his articles with the view held by the Commercial Court that an intermodal transport must be classified as a whole and that in *Quantum* it is predominantly a contract for carriage by air, based on the distance[88], to which the CMR does not apply. Article 1(1) CMR provides that it 'shall apply to every contract for the carriage of goods by road': not exclusively by road or even, as held at first in *Quantum*, predominantly by road. If international carriage is to or from a CMR Contracting State, except in specified cases such as furniture removal, CMR applies to '*every* contract *for* the carriage of goods by road' whether or not the contract is *for* some other kind of service too[89].

Koller on the other hand, one of the leading German writers on transport law, does not agree with the judgement of the Court of Appeal in his reaction[90]. Although he concurs that *'Gesamtbetrachtung'* is not in order here, he feels that the scope of the CMR can never include road transport under a multimodal contract. He bases this restrictive interpretation of the CMR scope on various arguments such as the authentic French version of the CMR text, some statements in the *travaux préparatoires* regarding the intention of the drafters of the CMR to draft a separate convention for the multimodal carriage of goods in the future, an explanation of Article 2 CMR which reads this Article as being proof that the CMR does not extend itself to carriage under a multimodal contract and the reasoning that to declare the CMR applicable to part(s) of a multimodal contract would generate conflicts between the existing unimodal conventions.

In contrast, he seemingly contends the opposite while interpreting Article 38 of the Montreal Convention on air carriage. In an article in *Transportrecht* in 2005 he starts by stating that when a carrier contracts for the carriage of goods partly by aircraft and partly by truck, and

[86] *Cf.* HR 22 January 1993*, S&S* 1993, 58. Van Beelen agrees with the BGH on this issue. Van Beelen 1996, p. 76.
[87] Clarke *JBL* 2002, p. 210-217; Koller 2003, p. 45-50; Hill 2004, p. 7-8; Haak speech Antwerp 2006; Koning 2004, p. 93-101; Clarke *JBL* 2003, p. 522-524; Clarke *S&TLI* 2002, p. 6-7; Chamberlain 2001, p. 271-273.
[88] And duration plus possibly associated costs.
[89] Clarke *JBL* 2002, p. 213.
[90] Koller 2003, p. 45-50.

the road stage traverses one or more national borders, either Article 18(4) MC or Article 38 MC applies, which in itself is unremarkable. He continues by stating however, that Article 38 MC clearly establishes that the CMR applies when the damage or loss resulting in the claim is caused during the road stage[91].

After the multitude of arguments against the application of the CMR provided by him over time, this apparent change of heart seems somewhat peculiar, especially since Article 38 MC merely determines that in such a case the air carriage regime does not apply and does not prescribe which rules are to fill the gap[92]. Nevertheless, Koller is not alone in propagating the concept that the CMR applies when international road carriage is combined with air carriage in the German legal literature. His views in this area are for example shared by Harms and Schuler-Harms, Ruhwedel, Müller-Rostin and Brinkmann[93]. Perhaps they mean to suggest that the CMR rules apply indirectly through §§ 452 or 452a HGB under these circumstances, but in order for these Paragraphs to have effect, it would first have to be established that German national law applied to the claim or contract in question.

4.1.2 The CMR does not apply by means of Article 1

Although it seemed that the BGH decided to apply the CMR multimodal road carriage via the network approach in the late 80's and the early 90's[94], the contemporary German legal literature defends a different point of view. The currently prevailing opinion among German authors is that the scope of application in Article 1 CMR does not cover this type of carriage[95]. Many detailed objections to the direct application of the CMR to anything other than a unimodal road carriage contract besides through Article 2 CMR have been raised, mainly in the last decade. There may be a connection between the emergence of the largest part of the objections and the entrance into force of the TRG, although it should be noted that some writers, such as Koller, defended the restricted view of the CMR's scope long before the TRG came into being[96]. The TRG introduced specific rules on the '*Frachtvertrag über eine Beförderung mit verschiedenartigen Beförderungsmitteln*', the contract of carriage involving carriage by different means of transport

[91] Koller 2005, p. 179.

[92] Article 38 MC determines the following: "*1. In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of Article 18, apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1. 2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.*"

[93] Harms & Schuler-Harms 2003, p. 371; Ruhwedel 1998, p. 347 fn. 40; Giemulla & Schmid *Montreal Convention*, Article 18 MC, No. 92; Brinkmann 2006, p. 146-147.

[94] BGH 24 June 1987, *TranspR* 1987, p. 447-454; BGH 17 May 1989, *TranspR* 1990, p. 19-20, *NJW* 1990, p. 639-640, *ETL* 1990, p. 76-80; BGH 30 September 1993, *TranspR* 1991, p. 16-18.

[95] Basedow 1994, p. 338-339 and Basedow 1999, p. 35. Older – and even some relatively recent – German case law seemingly shows that at least some of the German courts of law had a different take on the subject. BGH 24 June 1987, *TranspR* 1987, p. 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 deviating point of view. Puttfarken 1997, p. 175. A recent judgement by the BGH has put an end to the discussion however by determining that in their view the CMR does not apply to international road carriage which is part of a multimodal transport contract. BGH 17 July 2008, *TranspR* 2008, p. 365-368.

[96] Koller 1989.

into the HGB, which are found in §§ 452 through 452d HGB[97]. However, these provisions 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[98]. Since the TRG causes parts of the CMR regime to apply to international road stages of a multimodal contract – via the intervention of domestic legislation in § 452a HGB that is[99] – the German legal doctrine does not deem direct application of the CMR to such road transport a necessity or even a possibility. As was hinted at in the introduction of this Chapter, the rerouting of uniform international law through domestic channels does not sit well with the main objective of treaty law, which is to create uniformity[100]. Most other States party to the CMR do not have legislation which regulates multimodal contracts and it is thus less likely that they are willing or even able to apply the CMR by analogy if they follow the German approach concerning the scope of the CMR in relation to multimodal transport. In addition, the uniformity which is generated by the direct application of the CMR is not achieved even within the German legal sphere when applying the CMR via the HGB. Because the provisions of the HGB pick and choose – only those rules of the CMR which concern carrier liability are applied to the international road stages of multimodal carriage contracts – the German approach fails to apply for instance the CMR's uniform rules on jurisdiction in multimodal circumstances.

Up until recently it was unclear where the German courts of law 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 following of the 1987 and 1989 BGH decisions[101]. The confusion seems to be resolved now however, as the BGH has recently decided the issue. In July 2008, some 20 years after the previous BGH decisions on the application of the CMR in multimodal transport, the BGH established 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 on to the other means of transport used.

4.1.2.1 BGH 17 July 2008[102]

In May 2000 a Japanese manufacturer of copying machines contracted with a Japanese *Speditionsunternehmen*, a freight forwarder who acted as carrier, for the carriage of 24 containers stuffed with copiers from Tokyo to Mönchengladbach. The waybill that was issued

[97] For a more detailed description of the German legislation on multimodal carriage see Chapter 10, Section 10.4.2.

[98] "*...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 § 452 HGB.

[99] "*If it has been established that the loss, damage or event which caused delay in delivery occurred on a specific stage of the carriage, the liability of the carrier shall, contrary to the provisions of the first subsection, be determined in accordance with the legal provisions which would apply to a contract of carriage covering this stage….*"

[100] Article 41 CMR illustrates the existence of this objective by stating that "*1. Subject to the provisions of article 40, any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void. The nullity of such a stipulation shall not involve the nullity of the other provisions of the contract. 2. In particular, a benefit of insurance in favour of the carrier or any other similar clause, or any clause shifting the burden of proof shall be null and void.*"

[101] BGH 24 June 1987, *TranspR* 1987, p. 447-454; BGH 17 May 1989, *TranspR* 1990, p. 19-20, *NJW* 1990, p. 639-640, *ETL* 1990, p. 76-80; OLG Düsseldorf 28 September 2005, I-18 U 165/02, www.justiz.nrw.de; LG Bonn 21 June 2006, 16 O 20/05. In OLG Köln 25 May 2004 (*TranspR* 2004, p. 359-361) CMR was applied to an international road stage of multimodal transport, but the OLG did so only because English law applied to the claim.

[102] BGH 17 July 2008, *TranspR* 2008, p. 365-368.

for the carriage contained a clause granting the Tokyo District Court exclusive jurisdiction over any claims arising from the contract of carriage and a clause choosing Japanese 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 to trailers on which they were to be transported by road to Mönchengladbach. For this road transport a CMR consignment note was issued by the Japanese freight forwarder. One of the containers did not reach its destination unharmed however. After it was taken over for the carriage by road, but before it even left the port area, the trailer bearing this container toppled over during an attempt by the driver to turn left. As a result the container was severely deformed and perforated by a large steel pole and of course many of the 50 copiers inside sustained damage.

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 authorized to claim, the OLG Düsseldorf judged the freight forwarder liable for the damage based on the CMR[103]. 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 under a contract for carriage, even if said carriage contract also involved carriage by other modes such as in this case carriage by sea.

The BGH rescinded the OLG's decision and rejected the claim as inadmissible since it was of the opinion that German courts lacked jurisdiction regarding this claim. The crux of the matter was a different take on the scope of application of the CMR by the BGH. Unlike the OLG the BGH did not deem the CMR directly applicable to the road carriage stage of the multimodal transport contract under scrutiny, as it followed the opinion generally supported by the German legal literature[104]. Neither did the CMR apply indirectly via § 452 nor § 452a HGB as the parties had chosen Japanese law as the law applicable to the contract, which prevented application of these Paragraphs of German national law. Hence, since the CMR did not apply, Article 31 CMR could not confer jurisdiction on the German courts of law.

In its decision the BGH sums up several reasons as to why it interprets the CMR in such a manner that it does not apply to road segments of a multimodal carriage contract, even though it admits that the wording of the scope of application provisions does not compel such an interpretation. Its first reason is the phrase 'contract for the carriage of goods by road' utilized in Article 1 CMR. The BGH is of the opinion that this description indicates that the contract meant is a contract for carriage by road alone. As a second reason the BGH points out that the CMR does have a provision specifically dealing with multimodal transport, namely Article 2 CMR. The existence of this Article is 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 is of a historical nature and involves the Protocol of Signature of the CMR. In this Protocol it shows that the drafters of the CMR intended a separate treaty to regulate multimodal carriage to be drawn up by providing that the Signatories to the convention were to undertake to negotiate such a convention[105]. For that reason the BGH deems that the designers of the CMR intended to refrain from regulating any or all parts of a multimodal contract. The

[103] OLG Düsseldorf 28 September 2005, I-18 U 165/02, www.justiz.nrw.de.

[104] The BGH referred to: I. Koller, Transportrecht, München: Beck 2004, § 452 HGB, No. 19, Article 1 CMR, No. 5 and 6; Koller 2004, p. 361-363; Herber 2006, p. 435-439; Ramming 1999, p. 325-345; Basedow 1997, Article 2 CMR, No. 1; Thume *Kommentar zur CMR* 1994, p. 113-152, No. 51; Drews 2003, p. 12-19; Erbe & Schlienger 2005, p. 421-429; Rogert 2005, p. 15 and 117; Mast 2002, p. 185 and 193; Herber & Piper 1996, Article 1, No. 45 and Article 2, No. 6.

[105] Haak 1986, p. 95 fn. 31.

purpose of the CMR, which is to uniformize the rules for international carriage of goods by road, does not hamper this point of view according to the German Supreme Court as this purpose relates to unimodal road carriage and mode-on-mode carriage involving road vehicles only. Besides, the German legislator also supports this view of the scope of the CMR as is illustrated by the need to refer to the '*Teilstreckenrecht*', which is the law applicable to carriage by the stage of the transport in question if it had been unimodal, in § 452a HGB.

Furthermore, the BGH felt the need to explain that although the Court of Appeal had listed the BGH's previous decisions stemming from 1987 and 1989 as supporting its expansive view of the scope of the CMR in *Quantum*, in fact these decisions did not support the views expressed in *Quantum* at all. In both judgements 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 decisions. As a consequence the CMR was applied indirectly; the CMR's liability rules were only applied since they were part of the German legal sphere. There was no question of an autonomous application of the CMR[106].

Obviously these objections by the BGH deserve some closer scrutiny. In the following the primary objections to application of the CMR as listed above by the BGH and the objections raised by the legal literature are discussed and evaluated.

4.1.2.2 A 'contract for the carriage of goods by road'

The first, and perhaps foremost, reason given by those who adhere to the point of view that Article 1 CMR and multimodal road carriage do not see eye to eye is the assertion that the words 'contract for the carriage of goods by road' in Article 1(1) CMR literally mean a contract that concerns road carriage only[107]. The CMR would then be restricted to the contract providing for carriage by road from start to finish, with the single exception being the option of roll-on, roll-off carriage contained in Article 2 CMR. This assumption results in the conclusion that the CMR can never apply on multimodal contracts by means of Article 1. A result which may be considered unsatisfactory as it would severely limit the CMR's scope of application[108]. Justification for this thorough curtailing is said to be found in linguistics; the French version of the CMR requires a *'contrat* de *transport de marchandise par route*'. This apparently should be interpreted as a stricter requirement than is made by the English version, which demands a mere 'contract *for* the carriage of goods by road'. Due to the French word '*de*' the words 'of goods by road' are in fact to be read as adjectives to the word 'contract' according to Koller. These adjectives should therefore be seen as excluding contracts from the scope of the CMR which concern more than mere 'carriage of goods by road'[109].

On the whole however, this argument seems rather tenuous, as the exact translation of '*de*' is 'of' in English. This makes the French version demand a 'contract *of* carriage of goods by road' instead of a 'contract *for* the carriage of goods by road'[110]. This is a rather slight difference at best and it does not seem to be a foundation solid enough to support the resulting restriction of

[106] Koller already implied as much in 2004 in a reaction to a judgement by the OLG Köln: "*Der BGH hat zwar die Teilstrecke eines internationalen Kfz-Transportes 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, p. 361.

[107] Koller 2003, p. 45-50; Berlingieri *Liber Amicorum Roger Roland* 2003, p. 37-55.

[108] Berlingieri *Liber Amicorum Roger Roland* 2003, p. 39-40.

[109] Koller 2003, p. 47 under 1.

[110] *Cf.* Chapter 3, Section 3.6.2 on treaties authenticated in two or more languages.

the CMR. Especially not in light of the reconciliation rule in Article 33(4) of the Vienna Convention on the Law of Treaties which states that:

> "*When a comparison of the authentic texts discloses a difference of meaning, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.*"

If one tries to reconcile the outlook that the French choice of words excludes multimodal road transport with the rationale behind Article 1 CMR[111], which is to regulate international road carriage in a uniform manner, this seems an extremely ill fit[112]. When application of the CMR is withheld from road stages that are part of a multimodal contract, national rules and contractual provisions come into play which obviously creates legal diversity rather than uniformity[113].

In addition it seems an unacceptable circumvention of mandatory uniform law. Not applying the CMR to international road carriage because it is performed under a contract that entails more than the road carriage alone appears to be at odds with the fact that the rules of the CMR are compulsory according to Article 41 CMR. This Article establishes that – subject to the provisions of Article 40, which allows carriers to deviate among themselves from the Convention's provisions other than those concerning recourse actions – any stipulation which would directly or indirectly derogate from the provisions of the CMR is null and void. Subjecting a carrier who for instance contracts for carriage by road from Helsinki in Finland to St. Petersburg in Russia to such a mandatory liability regime while the carrier who agrees to carry that same stage by road but also undertakes to transport the goods by rail from St. Petersburg to Moscow seems hard to justify. Especially so if this means that the last mentioned carrier is therefore free to limit his liability more extensively under the applicable national law.

4.1.2.3 The Protocol of Signature

Those who object to application of the CMR to multimodal contracts find another reason to reject multimodal carriage from the CMR's scope in the CMR's Protocol of Signature. As was mentioned above, this Protocol provides that the Signatories to the Convention are to undertake to negotiate a convention covering contracts for combined carriage[114]. It is suggested that this indicates that the Signatories intended to exclude the road legs of an international multimodal carriage contract from the scope of application of the CMR[115].

This does not mean that the drafters of the CMR intended to keep the CMR out of play in case of further international developments in the field of multimodal transport[116]. This can be deduced from the fact that with the same stroke of the pen used to agree to undertake to negotiate a convention on combined carriage the Signatories also agreed to undertake such a venture regarding a convention on furniture removal. Neither of these intentions became a reality, but while furniture removal is explicitly excluded from the scope of the CMR by Article 1(4)(c), combined or multimodal carriage is not.

[111] Herber & Piper 1996, p. 54.
[112] Haak & Hoeks 2005, p. 96.
[113] A practical disadvantage of this view is that the addressed court of law is forced to apply national law which may not be the *lex fori* and thus unknown, instead of the more familiar rules of the CMR. Van Beelen 1994, p. 47.
[114] Haak 1986, p. 95 fn. 31.
[115] De Meij 2003, p. 85.
[116] Haak & Hoeks 2005, p. 96.

It would be far more logical to interpret the words of the Protocol of Signature to mean that the CMR should not be applied to all stages of a multimodal contract, unless the contract concerns only road and roll-on, roll-off carriage[117]. And, although it must be recognized that the CMR does not regulate multimodal carriage contracts wholesale[118], this does not mean that the Convention does not apply to the road carriage stage which comprises only a part of such a contract. The CMR text does not contain any unambiguous provisions on the application of the convention on the road stage of a multimodal transport[119]. More importantly, neither does it contain anything which specifically bars the CMR from application under such circumstances.

4.1.2.4 Article 2 CMR

A third reason for the restrictive interpretation of Article 1 CMR is found by some writers in the existence of Article 2 CMR. Article 2, especially the part regulating roll-on, roll-off carriage, has been colourfully described as being '*indigeste*', '*assez embrouillé'*, 'rather puzzling' and even 'notoriously difficult'[120]. The gist of the Article is that, barring the mentioned exceptions, in cases of roll-on, roll-off transport where a truck or trailer is put on a ship with goods and all after – or before – a stage of road carriage in that same truck or trailer, 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 specific type of transport. The content and scope of the Article will be discussed in greater detail in Section 4.3 of this Chapter.

Those opposed to the 'extended' interpretation of Article 1 CMR use Article 2 CMR – among other arguments – to support their restricted view of the CMR scope. They claim that the system found in Article 2 is proof that the CMR's drafters did not intend to create a regulation that covers all road transports which are somehow envisaged in some sort of multimodal carriage contract[121]. Because if the drafters had intended to extend the CMR thus, then why does Article 2 determine that the goods are not to be unloaded from the vehicle?

The main argument based on Article 2 CMR made by those who would interpret the scope of the CMR in a restrictive manner is that the Article was taken up by the drafters to define the exact extent of the scope of the Convention concerning other modes of transport[122]. The Article shows, they say, that the CMR was intended to cover *'transport superposé'*[123], but nothing more than that[124].

[117] Haak speech Antwerp 2006.
[118] Fitzpatrick 1968, p. 313.
[119] Ramming 1999, p. 329.
[120] Haak 1986, p. 95-96 at fn. 33 and Clarke *TranspR* 2002, p. 428.
[121] A number of authors do not even consider Article 2 CMR carriage to be multimodal, but most do. Bydlinski 1997, p. 358; De Wit 1995, p. 184; Messent & Glass 2000, p. 43; Basedow 1999, p. 35.
[122] Basedow 1994, p. 338-339; Berlingieri *Liber Amicorum Roger Roland* 2003, p. 42.
[123] Also known as mode on mode carriage, superposed carriage *et cetera*.
[124] Mankabady however shows that he does not share this opinion. While making use of an example contract for carriage of goods by air from London to Paris and by road from Paris to Rome he points out that although an air carriage convention applies to the air stage of the transport, the CMR applies to road carriage stage between Paris and Rome. Mankabady 1983, p. 136. Fremuth goes even further and argues that if a flatrack is used and the rack including the goods are carried by ship for part of the transport which otherwise concerns road carriage the 'CMR-carrier' is liable for the huckepack or ro-ro carrier based on Article 3 CMR if the flatrack is not considered a vehicle. Thus he stretches the scope of the CMR as far as the *Rechtbank* Rotterdam did in 1993 in relation to the transport of a crane from Caïro to Geleen (Rb Rotterdam 24 January 1992, *S&S* 1993, 89). This judgement is however the only instance in which a Dutch court stretched the scope of the CMR in this manner. Thume *Kommentar zur CMR* 1994, p. 130.

According to Haak the *travaux préparatoires* do not support this line of reasoning however[125]. He determines that it is indicated by the drafting history of the Convention that Article 2 was proposed by the English delegation based on purely practical reasons. It was designed to extend the application of the CMR to those cases in which the means of transport itself is the object of carriage for part of the journey, as the English 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 Britain.

It is true that while drafting the CMR a study was conducted by Unidroit which contained a sharp distinction between multimodal and unimodal transport and which stated the intention to negotiate a separate convention governing combined transport in the future. One should not forget however, that in the 1950's the difficulties surrounding multimodal transport had already begun to surface, even though the real advance of containerized transport had yet to begin. Some proposals concerning an international arrangement on the issue had already been found wanting, so it is unsurprising that the CMR drafters wanted to emphasize the importance of further deliberation on the subject. Nevertheless, this does not mean to say that the drafters of the CMR intended to keep the CMR completely out of play. It seems entirely plausible that if they had known that a multimodal convention would not become a reality within the next fifty years and multimodal carriage was to take such an enormous flight, they would have wanted the CMR to have at least as much range as the other unimodal carriage conventions have[126]. To conclude that the CMR does not apply to any part of a multimodal transport unless the goods remain on a trailer based on the content of Article 2 CMR would therefore be an unjustifiable limitation of the scope of the Convention. Such a conclusion appears contrary to the CMR's purpose of standardizing conditions under which international carriage by road is undertaken[127].

Not even all writers who consider the CMR inapplicable to any or all parts of a multimodal transport agree with the interpretation of Article 2 CMR as restricting the CMR's scope. Ramming is one of these writers. Although he does not think the CMR extends to road carriage which is part of a multimodal contract that does not concern roll-on, roll-off activities, the provisions of Article 2 CMR are not the reason for this opinion[128]. Ramming is of the opinion that Article 2 CMR does not deal with multimodal carriage as such. It deals with a specific type of multimodal carriage only, the *huckepack Verkehr* or *transport superposé*. Consequently, it cannot serve as a reason to exclude other types of multimodal carriage from the scope of the CMR. The applicability of the CMR to a land stage by another route is therefore not barred by the presence of Article 2[129].

Mance LJ voiced his own objection to the use of Article 2 CMR for this interpretation of the CMR's scope of application in the *Quantum* case[130]. His rather practical reaction to this type of 'contra-CMR' argument as made by Air France's legal representation was the following:

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[125] Haak 1986, p. 94. *Cf.* Chapter 3, Section 3.6 on the Vienna Convention on the Law of Treaties. The *travaux preparatoires* are not given a prominent place in the interpretation process by the Vienna Convention. This is reasonable because the opinions offered in the preparatory writings cannot be taken at face value; they are often accountings of meetings between parties with very different views. Only when it is entirely undisputable what is meant by a certain provision can the *travaux* play a part in the interpretation of treaty law. In addition the *travaux* are often not readily available which discourages their use in interpretation. Unfortunately, the *travaux* of the CMR have not been published and are therefore not easily accessible.

[126] For the scope of the other carriage conventions see Chapters 5, 6, 7 and 8.

[127] Haak 1986, p. 98-99.

[128] Ramming 1999, p. 331.

[129] Ramming 1999, p. 329.

[130] Mance LJ in *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535-560 under no. 26. *Cf.* Section 4.1.1.2.1 of this Chapter under 'The judgement by the Court of Appeal'.

> "*this submission would mean that a contract for carriage by road from Stockholm to Naples would be subject to CMR; that a contract for carriage from Stockholm to (say) Capri would also be subject to CMR, if the goods remained on their trailer for the short sea passage from Naples to Capri; but that no part of a contract for carriage by road from Stockholm to Naples and sea from Naples to Capri would be subject to CMR. Other, similar results can readily be envisaged, e.g. in respect of contracts for carriage from Spain to a Channel port in France or across the Channel into this country or from Eire to Marseilles (by roll-on, roll-off transport) with a possible final sea leg to Corsica. I do not think that either the drafters of CMR or participants in the international carriage of goods would regard it as sensible that rights and responsibilities for the long international trucking legs in such cases should depend upon whether a carrier by road does or does not undertake the final sea leg, or, if it does undertake it, upon whether or not it transports the goods on their trailer during it.*"

In conclusion it can be said that Article 2 expands the CMR scope to cover other modes of transportation. It is placed after Article 1 to show that it serves as an enlargement of the scope of application of the CMR as found in Article 1. All things considered, the annexing of other modes of transport by Article 2 seems to be a much larger step than merely assuming that the CMR covers the mode of transport it was designed for, even if the road carriage is performed based on a contract which also includes other transport modes.

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 regime to road carriage.

4.1.2.5 The place of taking over and the place of delivery

The terms 'place of taking over' and the 'place of delivery of the goods' in Article 1 CMR are also invoked as an argument against the application of the Convention. The road stages of a door-to-door or multimodal contract are thought not to be subject to the CMR because the place of taking over and the place of delivery are not related to a specific contract for the carriage of goods by road under such a contract, but rather to the door-to-door contract as a whole. In this view the taking over occurs at the place and time at which the carrier takes over the goods from the consignor, and delivery occurs at the time and place at which the carrier delivers the goods to the consignee[131]. If the road carriage covers only one stage of a larger transport either the taking over or the delivery is unrelated to the road leg[132].

The places of 'taking over' and 'delivery' of the goods are quite significant in the CMR. Not only do they influence the scope of application and in which places the plaintiff may bring an action against the carrier as they are mentioned in Article 1 and Article 31 CMR[133], they even affect the liability of the carrier due to their presence in Article 17 CMR. Article 17 CMR determines that the carrier is liable for any loss of the goods and for damage thereto occurring

[131] The '*verladeort*' and the '*entladeort*' are at the beginning and end of the '*gesamten Beförderung'*, the entire transport. Mankowski 1995, p. 56-57; Fitzpatrick 1968, p. 316.

[132] *Cf.* Berlingieri *ULR* 2003, p. 269.

[133] Rb Rotterdam 11 April 2007, *S&S* 2009, 55 *(Godafoss)*. Due to the consensual nature of the carriage contract it is of no import where the goods are actually taken over, or where they are actually delivered. Decisive are the place of departure and the place of destination as designated by the parties in the contract. Loewe *Commentary on the CMR* 1975, p. 15.

between the time when he takes over the goods and the time of delivery. Above it was shown that if these terms are read as being at the very beginning and the very end of the multimodal carriage that Article 17 CMR would then cause the CMR liability regime to be applicable to all stages of the transport, not just to those involving road carriage[134]. Although there is not much in the scope of the CMR in relation to multimodal carriage that inspires accord, there is consensus on this issue. The prevailing opinion is that the CMR does not apply to the non-road stages of a multimodal transport. Therefore, if the CMR is to apply, the place of taking over and the place of delivery should be considered to be the places where the goods are taken over for the road stage[135] and the place where they are delivered at the end of the road stage.

It is argued that considering these places to be at the very beginning and end of the multimodal transport is too literal an interpretation of the words 'take over'. A carrier does not have to physically take over the goods to become liable as a CMR carrier after all. A carrier who sub-contracts the whole performance of his obligations to another is nevertheless a carrier[136].

Linking the 'take over' and 'delivery' places to the road stage complements the notion that 'taking over' occurs at the moment the goods pass to the control of the carrier. It is suggested that the 'control' in such circumstances must be control for the purposes of carriage – in case of the CMR evidently carriage *by road* – and not principally for other purposes such as warehousing or packing[137]. If this is true regarding packaging and warehousing obligations it is very likely to be equally true regarding the obligations to carry by other modes of transport under the same contract which are as much principal obligations as the intended stage of road carriage.

That the '*Obhutzeit*', or the 'period of responsibility' of the carrier which is thus covered by the CMR liability regime does not cover the totality of the contract is a typical characteristic of carrier liability regimes. That a regime covers no more than the (non)performance of the principal obligation of the carrier during the period in which he has custody of the goods is a common phenomenon in transport law[138].

Yet, when the places of taking over and delivery are considered to be the beginning and the end of the road stage a series of practical objections to the application of the CMR can and have been made[139]. These objections are in general centred on the provisions found in Chapters 3 and 5 of the CMR concerning the conclusion and performance of the contract of carriage and the rules on claims and actions. More specifically they concern the payment of charges at the place of delivery (Article 13), the time bar concerning indications of loss or damage after delivery (Article 30), the time bar on actions which is also connected to the delivery (Article 32) and the places at which a plaintiff may bring an action (Article 31).

4.1.2.5.1 Payment of charges due under the consignment note

Article 13 CMR determines that after the goods arrive at the place designated for delivery, the consignee is entitled to require the carrier to deliver the goods to him. Article 13(2) clarifies that in order to get the carrier to deliver the goods the consignee has to pay the charges shown to be

[134] *Cf.* Section 4.1.1.1 of this Chapter on the application of the CMR to national road stages of a multimodal contract.

[135] Rb Rotterdam 11 April 2007, *S&S* 2009, 55 *(Godafoss)*.

[136] Clarke *CMR* 2003, p. 45. See *Gefco (U.K.) Ltd v Mason,* [2000] 2 *Lloyd's Rep.* 555, 563; *Ulster Swift Ltd. v Taunton Meat Haulage Ltd.,* [1975] 2 *Lloyd's Rep.* 502; Hof Den Bosch 1 November 2005, *S&S* 2007, 21; Rb Rotterdam 22 December 2004 and 16 February 2005, *S&S* 2006, 118; Rb Breda 30 June 2004, *S&S* 2006, 36.

[137] Messent & Glass 2000, p. 110; Clarke *CMR* 2003, p. 167; Haak 1986, p. 180.

[138] Haak 1986, p. 179.

[139] Koller 2003, p. 47-49.

due on the consignment note. If the place of delivery for the road carriage is not identical to the final destination of the goods it is the sub-carrier hired for the next stage that needs to take custody of the goods to carry them onward. The perceived problem here is that the consignee is thought to experience difficulties paying the road carrier. It is proposed that the next sub-carrier then could perhaps act as an agent for the consignee and pay the road carrier, which would mean that the consignee is forced to pay this party an advance with which to do so[140].

This solution suggests that there is a mix-up concerning which parties are involved and their relationships. In relation to the carriage stage of the multimodal transport it is not the sub-carrier that has to be paid by the consignee but rather the multimodal carrier. The consignment note for this part of the carriage, if there is one, is not likely to show that there are any charges due for this individual stage of the transport as the consignee is more likely to be obligated to make a single payment for the entire transport to the multimodal carrier. Under the contract between the multimodal carrier and the sub-carrier, in which the multimodal carrier is the consignee, there should not be more difficulties regarding the payment of the charges than under any other unimodal road carriage contract[141].

4.1.2.5.2 The period of limitation for an action

The CMR, like all carriage conventions, limits the period of time which a cargo claimant has to start proceedings against the carrier. Article 32 CMR restricts this prescription period to one year, a period that is extended to three years in cases concerning wilful misconduct, or equivalent default. The start of the period of limitation is determined in relation to the date of delivery in cases concerning partial or total loss, damage and delay in delivery[142].

That a year is not a long time when it comes to commencing legal actions is rather obvious. Therefore objections against applying the CMR on multimodal contracts have been made based on this Article. And indeed, it does seem rather unfair for the consignee to have to forfeit a part of the precious one year period even before he can take delivery of the goods, which is the case when the place of delivery is considered to be at the end of the road stage when this is not the end of the transport. As a result the period of one or three years which Article 32 CMR actually means to grant the claimant is shortened by days or perhaps even weeks.

The wording of Article 32 CMR does not provide useful guidance on how to prevent this seemingly uncalled for result. When the term ‘delivery’ is constructed as having the exact same meaning as in Article 1 CMR, which a court of law would be obliged to do if the rigid literal interpretation method was their only option, then the only options are robbing the consignee of a part of his one year period or not applying the CMR at all.

Of course, the interpretation of treaty law does not have to be approached in a strictly literal fashion[143]. Because of the uniform nature of convention law the autonomous interpretation is thought to be more appropriate for the CMR than the literal interpretation method alone[144], or

[140] Koller 2003, p. 48.

[141] There is of course no reason why the cargo interests could not pay the subcontracting road carrier as agents of the multimodal carrier if the road stage is the final stage of the transport.

[142] In all other cases the prescription period commences on the expiry of a period of three months after the making of the contract of carriage.

[143] See Chapter 3, Section 3.5 on the need for uniform interpretation of scope of application rules.

[144] *Cf.* OLG Köln 27 September 2005, *TranspR* 2007, p. 316-320. “*Im Rahmen einer autonomen Auslegung der CMR kommt es nicht auf das moderne Verständnis des Multimodalbeförderungsvertrages, sondern im Interesse der Rechtseinheit primär auf den Wortlaut und die Systematik der CMR sowie in zweiter Linie auf die Materialien.*” Koller 2004, p. 362.

for any of the other carriage conventions for that matter. The autonomous interpretation of Article 32 requires an analysis of its object and purpose. The purpose of the Article is twofold. It is meant to limit the period of time in which a carrier has to reckon with a possible liability claim, but it is also designed to provide the consignee with a reasonable amount of time in which to bring such a claim. Clearly Article 32 CMR emphasizes a rather different aspect of the term delivery than for instance Articles 1 and 31 CMR. The latter Articles are mainly focused on the geographical aspect; they concentrate on the whereabouts of delivery. Article 32 on the other hand focuses on the temporal aspect; in this Article the term delivery is used to identify a certain point in time. This illustrates that the purpose of the term is not entirely consistent throughout the Convention. An interpretation of the term delivery differing from the one used regarding Articles 1 and 31 CMR may therefore be more in accordance with the objective and the purpose of Article 32 CMR.

Because the purpose of Article 32 CMR is to determine that the period of limitation starts only after the goods have been delivered to the consignee, a reasonable interpretation of the term delivery in this Article would be to consider it to mean the final delivery, even if this is not the delivery at the end of the road stage. If it is interpreted thus, the consignee will be granted the possibility to 'duly check' the goods at the very beginning of the prescription period.

That this could indeed be deemed the purpose of the provision can be gathered from several resources such as case law[145], the text of provisions on prescription in other carriage conventions and the text of other CMR provisions which are connected to Article 32 in some way. One of the provisions so connected to Article 32 is Article 30 CMR. This Article, like Article 32, uses the term delivery to identify a point in time at which the period for the notification of loss starts. Contrary to Article 32 however, Article 30 explicitly mentions that by delivery it means the delivery to the consignee which occurs at the end of the carriage. One of the characteristics of said delivery is that the consignee gains the opportunity to duly check the goods.

As regards the text of other conventions on prescription the fairly recent CMNI on inland waterway carriage is a helpful example[146]. Under the CMNI the above-mentioned difficulty concerning the interpretation of the term delivery is less likely to arise, even though, as in the CMR, a description of what is meant by the term delivery is lacking. In Article 24 the CMNI uses almost the same wording as the CMR concerning prescription. There is however a subtle difference which prevents problems in case of multimodal carriage which does not end with an inland waterway leg. The CMNI does not just take the 'date of delivery' as starting point of the prescription period, it states that all actions arising out of a contract governed by this Convention shall be time-barred after one year commencing from the day when the goods were, or should have been, delivered *to the consignee*. Here a parallel can be drawn between Article 30 CMR and Article 24 CMNI. Thus the CMNI ensures that the prescription period will start only after the goods have been delivered at the end of the carriage and the consignee is given the chance to inspect the goods himself. In addition, the CMNI also differentiates between 'the port of

[145] *Cf.* Rb Rotterdam 19 July 2006, *S&S* 2007, 84 which involved sea and road carriage and which only mentions the moment the goods are delivered to the consignee by the road carrier at the end of the transport in relation to the prescription period found in the HVR.

[146] Another (national rather than international) example of a regime in which the delivery in relation to the time bar for actions is always considered to be at the end of the carriage is the Dutch national carriage law. The Dutch national law contains a provision specifically tailored to prescription under multimodal carriage contracts. Article 8:1722 of the Dutch Civil Code establishes that the normal carriage law rules on prescription are to apply to actions which result from multimodal carriage, with the exception that the day of delivery is to be read as the day of delivery at the end of the combined transport.

discharge' and 'the place of delivery'[147], which means that the end of the inland waterway stage does not necessarily have to coincide with the end of the carriage as a whole. As a result, the term delivery in the CMNI, unlike that in the CMR, does not seem to necessitate more than one interpretation in relation to multimodal carriage in this context.

It follows from the above that it would not be in line with the aim of Article 32 CMR or of the CMR as a whole, nor with that of carriage law in general, to shorten the time available to the claimant to less than a year. Especially not since the one year period is in itself a relatively short one when compared to those found in some of the other carriage conventions[148]. The solution would be to interpret the term delivery a little differently when it is used to identify a certain moment in time rather than a place. If this is done then there is no reason why the prescription provision of Article 32 should present an obstacle to the application of the CMR to road carriage under multimodal contracts.

4.1.2.5.3 The time bar for reservations at or after the delivery

The objection made in relation to the above-mentioned Article 30 CMR is that if the delivery occurs halfway through the multimodal transport it is only the multimodal carrier who can send himself reservations giving a general indication of the loss or damage that may have occurred during the road stage. If he fails to do this at the delivery or within 7 days after if the damage or loss was not apparent, if he fails to act as an agent of the consignee in this, this shall be taken as *prima facie* evidence that the consignee has received the goods in the condition described in the consignment note. The evidence resulting from Article 30 CMR is refutable, and therefore the time bar does not always constitute an insurmountable barrier; it may be proven afterward that the damage or loss did indeed occur during the road carriage.

But even so, it may under certain circumstances prevent the consignee from gaining compensation for his losses. Thus, when the road transport is part of a larger journey the application of the provision seems rather objectionable. If read carefully however, Article 30 CMR states that it applies only *if* the consignee takes delivery of the goods. When the delivery after the road stage does not coincide with the final delivery, the consignee is not the party taking delivery of the goods. Consequently, the provisions of Article 30 CMR do not apply to the relationship between the consignee and the multimodal carrier when the road stage in question is not the last stage of a multimodal contract[149].

Apparently the CMR does not provide a time bar for reservations to be sent in situations like these. There was a good reason to incorporate a time bar for the standard situations in which the consignee takes delivery into the Convention however. The carrier needs to be informed whether damage or loss has been established and whether he is going to be held liable as soon as possible so that he is granted a real opportunity to gather and preserve evidence. The time bar in

[147] Article 2(1) CMNI.

[148] Article 29 WC: 2 years; Article 35 MC: 2 years; Article 20 Hamburg Rules: 2 years; Article 25 MT Convention: 2 years. But Article 3 HVR: 1 year; Article 24 CMNI: 1 year; Article 48 COTIF-CIM: 1 or 2 years depending on circumstances.

[149] Article 30 CMR does apply to the relationship between the multimodal carrier and the road carrier to whom he has subcontracted the road segment of the transport. If the road stage is not the last segment of the transport either the multimodal carrier himself or any subsequent sub-carriers employed by him for further transport will then be taking delivery of the goods as consignee, whereby the sub-carrier acts as an agent of the multimodal carrier. In order to safeguard any recourse options pertaining to the road carriage segment it is important for the multimodal carrier to make sure that if he employs another sub-carrier for the stage of the transport subsequent to the road carriage that this subsequent carrier duly checks the goods as they are delivered to him and notifies him of any reservations if needed.

Article 30 CMR provides him with a degree of certainty that if notice is not given within the allotted time there is no need for such activities.

To preserve some of the thus created certainty for the carrier, certainty which reduces for instance the carrier's insurance needs and thus causes carriage to be less costly, a reasonable solution would be to interpret the terms 'time of delivery' in Article 30 CMR in the same manner as is pleaded above concerning the term delivery as used in Article 32 CMR, namely as relating to the delivery at the final destination of the multimodal transport.

4.1.2.5.4 Jurisdiction – the places where the plaintiff may bring an action

Another CMR provision which features the places of taking over and delivery is Article 31 CMR, which regulates which courts have jurisdiction in legal proceedings arising out of CMR carriage. Article 31(1)(b) CMR establishes that the plaintiff may bring an action in any court or tribunal of a country within whose territory the place where the goods were taken over by the carrier or the place designated for delivery is situated. Here the terms are specifically used to identify a place, a country, and not a certain moment in time. If the line set out in the above is consistently followed that means that the place of taking over and the place of delivery mentioned in Article 31 CMR, as in Article 1 CMR, are to be interpreted as being the start and end-points of the road carriage stage, but not necessarily the start or end-points of the entire transport.

Unfortunately, although there are indeed leading decisions in which this view was applied such as the *Resolution Bay*[150], there are also – recent – examples to be found in which the court decided the exact opposite. One of these examples is a judgement passed by the OLG Köln in 2004[151]. This judgement was criticized by Koller, not because he did not agree with the OLG's views on Article 31, but rather because he disapproved of the fact that the CMR was applied at all[152]. The case involved three transports of computer processors from Sevenoaks to London by road, followed by an air transit from London to the airport Köln-Bonn where the computer parts were subsequently loaded on to a truck and carried by road to Amsterdam. The goods failed to arrive at their final destination because they were stolen at the carrier's depot in Amsterdam before they could be delivered. In spite of the general opinion in German academic writing on the application of the CMR in situations like these the OLG Köln decided, like the LG before it, that the CMR was to apply to the last road leg of the transit, because 'British' law applied to the contract[153]:

> "*In British national law, the law that applies to this dispute based on Article 28(4) EGBGB (Article 4(4) of the Rome Convention/Article 5(1) Rome I Regulation, MH), it is generally accepted that the rules of the CMR apply directly to an international road carriage stage of a multimodal transport.*"[154]

[150] *Cf.* Rb Rotterdam 28 October 1999, *S&S* 2000, 35 (*Resolution Bay*); Rb Rotterdam 11 April 2007, *S&S* 2009, 55 *(Godafoss)*.

[151] OLG Köln 25 May 2004, *TranspR* 2004, p. 359-361.

[152] Koller 2004, p. 361-363.

[153] The prevailing opinion in German academic writing seems to be that the CMR does not apply to any part of a multimodal contract unless the carriage is covered by Article 2 CMR. *Cf.* Section 4.1.2 of this Chapter and Ramming 1999, p. 325-345; Koller 2004, p. 361-363; Koller 2003, p. 45-50; Herber 2006, p. 439; Basedow 1994, p. 338-339 and Basedow 1999, p. 35.

[154] "*Innerhalb des nach Art. 28 Abs. 4 EGBGB anzuwendenden britischen Rechts sei insoweit anerkannt, dass auf einer grenzüberschreitenden LKW-Teilstrecke innerhalb eines multimodalen Sendungstransports die Regelungen der CMR unmittelbar zur Anwendung gelangen würden.*"

Whether the OLG would also have applied the CMR had German national law been the law of the contract was left unsaid.

The OLG interpreted the English views in this area correctly by determining that a English court of law would have applied the CMR to the road leg in question and thus the OLG followed suit. It is most likely that the OLG based its interpretation of the English views on multimodal carriage and the CMR on the *Quantum* judgement that has been elaborately discussed above[155]. Surprisingly however, it applied English law in a noticeably inconsistent manner, for if the English views held sway when interpreting the CMR's scope rules, surely they would have had to influence the interpretation of the jurisdiction rules of the CMR as well? Especially since these rules very nearly use the same terminology as the scope rule found in Article 1 CMR. On this subject the OLG nevertheless saw fit to plot another course. It determined that, in following of the BGH[156], the term 'place of taking over' in Article 31 CMR did not refer to the place where the goods were taken over for the road carriage leg where the damage had occurred, but to the taking over at the very beginning of the transit which was in Sevenoaks. Therefore the OLG pronounced that neither it, nor any other German court of law could derive the necessary jurisdiction from Article 31 CMR to pass judgement in this case[157]. The OLG supported this by referring to the "*Sinn und Zweck*", the meaning and the purpose of Article 31(1)(b) CMR[158]. It determined that:

> "*In case of carriage by a carrier based on a uniform, single contract the place of taking over as meant in Article 31(1)(b) CMR is the place where the goods were taken over originally, in other words where they were taken over from the consignor.*"[159]

This decision is in line with a 2001 decision by the BGH[160] in which the Court decided that when an extra-contractual claim is made against a sub-carrier the place of taking over in Article 31(1)(b) CMR is not the place where the sub-carrier took over the goods. Rather, the place where the goods were taken over from the consignor at the beginning of the carriage was designated as the place meant in Article 31(1)(b) CMR. Koller rightly criticizes this rather bold BGH judgement as well as a similar judgement by the Austrian OGH. That the sub-carrier addressed may also avail himself of certain provisions based on Article 28(2) CMR does not mean that he must do so. For one, the sub-carrier may not even want to invoke Article 31 CMR, especially not if the place of taking over or delivery are thus interpreted by the Court; they might force him to

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[155] *Cf.* Section 4.1.1.2.1 of this Chapter on *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another.*

[156] "*Bei Einschaltung mehrerer Frachtführer ist nicht der Ort der Übernahme des Gutes durch den Unterfrachtführer, sondern der Abgangsort der gesamten Beförderung Ort der Übernahme i.S. von Art. 31 Abs. 1 lit. b CMR.*" BGH 31 May 2001, *TranspR* 2001, p. 452-453. This case did not involve multimodal carriage however; the whole journey between Aachen and Milan was to be performed by road. See also OGH Wien 1 April 1999, *TranspR* 2000, p. 34-36.

[157] A more elaborate analysis of the consequences of the interpretation of the terminology shared by Articles 1 and 31 CMR can be found in Section 4.1.2.5 of this Chapter on the places of taking over and delivery.

[158] According to the Vienna Convention on the Law of Treaties, the interpretation of provisions of Conventions should indeed be based on these factors. Article 31 VC determines that the ordinary meaning of a term is not to be determined in the abstract but in the context of the Treaty and in the light of its object and purpose. *Cf.* Chapter 3, Section 3.6.1 on Articles 31-32 VC.

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

[160] BGH 31 May 2001, *TranspR* 2001, p. 452-453, can also be found in *ETL* 2002, p. 80 and in *RIW* 2001, 941.

participate in legal proceedings far from his place of residence or business. And for another, it is very much disputable whether Article 31 contains a provision that either excludes the liability of the carrier or fixes or limits the compensation due[161].

Unlike the BGH and OGH decisions, the 2004 OLG Köln judgement concerned multimodal carriage and involved a claim made by the cargo interests against the multimodal carrier rather than against the sub-carrier. This is quite a different cup of tea; Article 31 may not differentiate between '*Art oder Ort des Schadenseintritts*' (the type of or places where damage may have occurred) when the whole transport is covered by the CMR, but it does differentiate between damage that was caused during a CMR stage and damage that was caused during another part of the carriage. This is the logical result of the fact that the scope of application of the CMR is restricted to road carriage.

In his critique on the OLG Köln ruling Koller agreed with the OLG in that he deemed it inappropriate for a German court to have jurisdiction in this matter because the case concerned carriage of goods from the United Kingdom to The Netherlands; Germany was merely the place where the transhipment happened to occur[162]. He admits however, that Article 31 concerns claims that are in some way connected to the CMR carriage specifically, which makes it peculiar that he does not consider the place of taking over or delivery in Article 31 CMR to be attached directly to the road carriage stage. His argument that the relations in international road carriage have changed a lot since the CMR came into effect seems to support this last view rather than that held by the OLG; the country in which the goods are taken over is no longer necessarily the same country as where they were sold, nor is the country where the goods are delivered per definition the country where the buyer has his principal place of business or residence anymore. In other words, the connection between the consignor or consignee and the place of taking over or delivery is tenuous at best in many contemporary cases. This is hardly more so when the start and end of the road stage are appointed to be the place of taking over and delivery than when the start and end-point of the whole transit are qualified thus.

Still, adhering the terms 'place of taking over' and 'place designated for delivery' directly to the road stage if the CMR is applied to the international road carriage stage of a multimodal transport does appear to have one downside of a procedural nature. There is the situation in which the loss cannot be localized initially but is established to have been caused during the international road stage during the legal proceedings. If, in such a case, the court addressed is a court in the State where the goods were taken over at either the end or the beginning of the entire multimodal transport, and this is not the State where the road stage started or ended and neither does it concern any of the places mentioned in Article 31(1)(a) CMR, then this court is not granted jurisdiction under the CMR. This means that if the State where this court is situated is party to the CMR, and its judiciary is of the opinion that the CMR applies to road stages of a multimodal contract, the proceedings have to be discontinued and resumed before a court that is granted jurisdiction by Article 31 CMR[163]. This downside seems rather minor as it does not seem to be a situation that will occur frequently, but this is only conjecture.

After taking all the above into account, it is submitted here that jurisdiction should be granted by Article 31 CMR to courts of States that are closely connected to the road stage. Thus,

[161] Koller 2002, p.133-136; OGH 1 April 1999, *TranspR* 2000, p. 34-36; Koller *TranspR* 2000, p. 152-154. See also Spijker 2007, p. 61-77.

[162] Koller 2004, p. 361-363.

[163] This could for instance occur if a consignor were to contract for multimodal carriage by rail from Rotterdam to München in Germany and from there to Linz in Austria by road. In such a case the Court of Rotterdam would lose jurisdiction after the loss was localized. The proceedings can however not be continued in Germany, as a German court would not consider itself to be granted jurisdiction in such a case by Article 31(1)(b) CMR. The only option would therefore to bring the case before an Austrian court.

the terms 'taking over' and 'delivery' in Article 31(1)(b) CMR should be considered to be attached to the road stage and not to the entire transport under the multimodal contract.

4.1.2.6 The consignment note

Article 4 CMR states that the absence, irregularity or loss of the consignment note shall not affect the existence or the validity of the contract of carriage and that this contract shall remain subject to the provisions of the Convention. The English Court of Appeal illustrated the expediency of this provision in 1998 in *Gefco v Mason*[164]. In this decision the Court determined that the absence of a consignment note does not affect the application of the CMR to a contract, which, in this case involved regular road haulage from the United Kingdom to France. The contract concerned was a so-called umbrella contract. The terms of this umbrella agreement were orally agreed between the parties at a meeting and set the contractual framework for each individual journey. Pertaining to the application of the CMR to the umbrella contract Morritt LJ held the following:

> "*It is apparent that the contract in this case fell squarely within the terms of art. 1.1. Thus it is a contract to which the Convention applies unless compliance with some further condition is to be implied in that Article. Should such an implication be made?*
> *18. In my view no such implication may be made. ... Second, art. 4 makes it plain that the absence of a note, for whatever reason, does not affect the validity of the contract or the application of the Convention. It would be inconsistent with that provision that the contracts to which the Convention applied should be limited to those for which a note could be made contemporaneously with the conclusion of the contract. Third, apart from the purposes indicated by art. 4, the consignment note is, primarily, needed to enable a consignee to exercise the right to stop the goods in transit (art. 12) and to impose liability on a successive carrier (arts. 34 and 35). There is nothing in that purpose which requires the implication of a condition into art. 1.1 such as that for which Mr. Mason contends.*"

Nevertheless, it is suggested that the consignment note is an absolute necessity for CMR carriage due to some practical reasons. The consignor would for instance be put at too much of a disadvantage if he were to be deprived of such an important instrument of evidence. That the consignment note does indeed play an important part in terms of evidence is illustrated by case law and is supported by Article 9 CMR[165]. Article 9 CMR determines that the contents of the consignment note are *prima facie* evidence of the making of the contract of carriage, the conditions of the contract and the receipt of the goods by the carrier[166]. One could say this makes the consignment note very nearly indispensable for the consignor or consignee[167].

This almost compelled use of a CMR consignment note is, in combination with the mandatory nature of the CMR which is based on Article 41, one of the arguments Koller uses to exemplify his point that the CMR should not be applied to road stages of multimodal carriage contracts. He gives the example in which a CMR consignment note is issued by a multimodal

[164] *Gefco (U.K.) Ltd v Mason*, [1998] 2 *Lloyd's Rep.* 585.

[165] In many, if not most cases the consignment note serves as an important form of documentary evidence. Some examples are *Royal & Sun Alliance Insurance Plc v MK Digital FZE (Cyprus) Ltd.,* [2006] 2 *Lloyd's Rep.* 110; Rb Rotterdam 3 May 2006, *S&S* 2007, 114; OLG Hamm 2 November 1998, *TranspR* 2000, p. 361-363; OLG Hamm 9 December 1999, *ULR* 2001, p. 432.

[166] See also Richter-Hannes & Richter 1978, p. 104.

[167] Therefore in Dutch law Article 8:46 BW causes a CT-document (Combined Transport document) to be considered to be a CMR consignment note with regard to the road stage of a multimodal transport.

carrier who performs the entire carriage with his own means of transport. The carrier issues the consignment note at the start of the air transit that is to precede the road carriage. Koller rightly observes that this may cause certain problems as the consignor will not be able to ensure in person that the carrier will sign the consignment note at the start of the road carriage thus providing the presumption that the cargo is taken over by him complete and in good condition.

Why this would be a reason not to apply the CMR to a road stage of multimodal transport remains unclear. Certainly, this is a problem that may arise during a multimodal transport, but is it not equally likely to occur when the CMR is not applied to the road carriage of the transport? The problem here, if there is one, is posed by the fact that the consignor is not there to verify that the consignment note is signed, and not by the rules of the CMR. Koller asserts that the use of a consignment note in such a situation would make the '*Bock zum Gärtner'*. It would make the carrier, the 'buck' whom he deems would then represent both himself and the consignor at the start of the road stage, the gardener. It is logical for the carrier to serve his own interests and perhaps in some cases even enter unwarranted reservations in the consignment note.

This last part of the argument against the use of a consignment note in multimodal carriage is however more of an argument for the use of the CMR rules in such situations than against; the CMR rules would prevent a good number of nasty surprises due to the mandatory nature of the CMR's liability system.

4.2 Scope: Article 1(2)-(4) CMR

The core of the CMR scope rules is that there has to be a contract for international carriage by road as we have seen above. In addition to these main conditions however, Article 1 contains a few more conditions and also a number of exceptions. In Article 1(1) CMR can also be found for instance that for the CMR to apply the carriage should not only be international and by road, but it should also concern *goods* which have to be carried in *vehicles* for *reward*. Article 1(2) and (3) CMR are not meant to tack on even more conditions, but rather to clarify the boundaries of those already mentioned. Article 1(3) determines that the CMR shall also apply where carriage coming within its scope is carried out by States or by governmental institutions or organizations[168].

But, even if these requirements are all met, it is possible that the rules of the CMR will still not apply. The carriage of household effects and a car from Tegelen in The Netherlands to Addis Abeba in Ethiopia was for example not covered by the CMR system[169]. The reason for this is that contracts involving furniture removal are exempted from the CMR's scope of application in Article 1(4), as are funeral consignments and carriage performed under the terms of an international postal convention.

Although the provisions in Article 1(2) through (4) CMR can be considered of minor importance in comparison with that of Article 1(1), they do influence the Convention's scope of application. Therefore the fairly minor aspects found in Article 1(2) and (4) merit some attention and will be reviewed in short order in the following Sections, as will the heretofore not discussed requirements set by Article 1(1) CMR.

[168] Since it is neither an exemption nor an expansion of the Convention's scope of application the scope would not be affected if this provision were to be deleted.

[169] Hof Den Bosch 30 March 2004, *S&S* 2005, 60.

4.2.1 Of CMR goods, vehicles and rewards

To begin with Article 1(1) CMR demands that the carriage is performed in return for some sort of payment, a reward. A reward is not necessarily a cash payment. Any consideration with monetary value is a reward; it does not have to concern actual money[170]. It may derive from any other benefit granted to the carrier, provided that the value of the benefit corresponds with that of the carriage. Although a reward is required, this does not mean that the carriage must be performed by a person who is a carrier by trade. Unlike the CVR or § 425 HGB, the CMR does not stipulate that the carrier has to be a professional[171]. Thus, carriage performed for reward by private individuals is also subject to CMR, even if the volume or value of the goods is small[172].

In light of the condition that the carriage is performed with vehicles Article 1(2) CMR provides further information. This paragraph states that for the purpose of the CMR, 'vehicles' means motor vehicles, articulated vehicles, trailers and semi-trailers as defined in Article 4 of the Convention on Road Traffic dated 19 September 1949[173]. The Road Traffic Convention classifies the motor vehicle as any self-propelled vehicle normally used for the transport of persons or goods upon a road, other than vehicles running on rails or connected to electric conductors, excepting cycles fitted with an auxiliary engine of a certain type. It describes articulated vehicles as being motor vehicles with a trailer that has no front axle and which is attached in such a manner that part of the trailer is superimposed upon the motor vehicle and a substantial part of the weight of the trailer and of its load is borne by the motor vehicle. The trailer that thus partially rests on the motor vehicle is called a 'semi-trailer'. And lastly the Convention considers a trailer to be any vehicle designed to be drawn by a motor vehicle[174].

Having read these definitions it would be logical to define for instance a Mafi trailer as being a vehicle; a Mafi trailer is after all a platform with wheels which is designed to be drawn by a motor vehicle. In his comments on a certain judgement Herber remarks that a Mafi trailer may just as easily be considered part of the goods[175]. The case in question concerned the transport of 11 printing presses from Bremen in Germany to Durham (presumably) in the U.S.[176]. The presses were stacked on pallets and placed on Mafi trailers during the sea transit between Bremerhaven and Portsmouth. In the port of Portsmouth the Mafi trailers were tugged to the truck with which the machines were to be transported farther inland. Because the presses were to

[170] Mankowski 'Transportverträge' 2004, p. 1054, No. 1398; Basedow 1997, p. 892.

[171] The Convention on the Contract for the International Carriage of Passengers and Luggage by Road, of 1 March 1973.

[172] Loewe *Commentary on the CMR* 1975, p. 8.

[173] Since the Convention's entry into force in 1952 it has been replaced by the Convention on Road Traffic, of 8 November 1968, which in its turn has been supplemented by the European Agreement supplementing the 1968 Convention on Road Traffic of 1 May 1971 and amended in 1993 and 2006. This raises the question which one of these versions of the Convention should currently be deemed decisive on the meaning of the CMR term 'vehicle'. The importance of this question is underlined by the appearance of new transport equipment such as Mafi trailers and straddle carriers. To illustrate the problem; the most current version of the Convention no longer defines motor vehicles, trailers and semi-trailers in Article 4 but rather in its first Article under p through r. For a more detailed approach to this issue see Haak 1986, p. 48-49.

[174] According to the OLG Hamburg even a swap trailer, a trailer without wheels which looks rather much like a container on stilts, is a vehicle as meant in Article 1 CMR. This seems rather odd as something without wheels is unlikely to be designed to be drawn by a motor vehicle, at least not by road. OLG Hamburg 13 March 1993, *TranspR* 1994, p. 194-196. For these reasons Basedow is of the opinion that a swap trailer, a '*Wechselpritze*', cannot be considered a vehicle. He comments that to be a vehicle under CMR the object in question must be 'driveable', which a swap trailer is not. Basedow 1994, p. 338-339.

[175] Herber 2006, p. 438.

[176] OLG Hamburg 19 August 2004, *TranspR* 2004, p. 402-404. See also Chapter 2, Section 2.3.3.2.2 on transhipment.

be taken from the Mafi trailers and loaded on to a truck the cables securing them were loosened. After the first set of presses was loaded, the trailer with the remaining presses was manoeuvred for easier access. During this movement one of the presses fell off the trailer and sustained damage. In second instance the OLG Hamburg decided that the 300 meters of movement on the Mafi trailer between the ship and the storage area where the truck was waiting was an independent road stage and applied German national law to the claim for compensation. The BGH in its turn reversed the judgement by the OLG by stating that the transport on the Mafi trailer in the port area was not a separate stage of transport at all[177]. The damage was however not allocated to the sea stage from Bremerhaven to Portsmouth (U.S.) but rather to the road stage from Portsmouth to Durham (U.S.) as the loading of the truck had already started. If the Mafi trailer had been considered a vehicle under the CMR, then the CMR rules would have been applied to the claim via Article 2 CMR[178]. Especially since the 'Article 2 stage' was to be followed, after transhipment, by another road stage. Apparently, since Article 2 CMR was not mentioned in either instance, the Mafi trailer was not considered to be a vehicle as meant by Article 1 CMR by the OLG and, more importantly, most likely also by the BGH. The BGH's ideas in this cannot clearly be derived from this judgement however, as Article 2 CMR would not necessarily have been mentioned if the damage was deemed to have occurred during the inland road stage[179].

Drews' explanation that Mafi trailers are trailers with small wheels built to carry heavy burdens which are not allowed in normal road traffic seems to support the view that Mafi trailers are not to be considered vehicles under the CMR[180]. Mafi trailers are moved with the use of small tug machines whose use is restricted to port areas. Normally, the cargo remains on the Mafi trailer during the whole transport, even during the transhipments.

On the other hand, it could very well be argued that instead of concluding that the Mafi trailer in the above-mentioned case involving the printing presses does not fulfil the prerequisites of a CMR vehicle, the OLG Hamburg did no more than establish that the Mafi trailer was used more as packaging material than as a vehicle in this case. And indeed, it is true that under certain circumstances vehicles can be judged to be packaging or goods[181]. The contract to transport empty containers or an empty trailer from Vienna to Stockholm is as much a contract of carriage as a contract to transport containers or a trailer filled with cargo[182]. In the first scenario the containers or the trailer clearly are goods as they are the objects to be carried. If they are put at the disposal of the carrier by the consignor stuffed with cargo why then should they not be considered part of the goods in the second scenario? Even when the carrier furnishes the trailer or the container himself they can be considered to be the object of the carriage contract and are therefore deemed part of the goods by some, although there is some dissent concerning this point of view[183]. So, when a consignor delivers goods to be carried to the carrier 'packaged' on a pallet, in a container, a trailer or a semi-trailer, the cargo and the 'packaging' together are

[177] BGH 18 October 2007, *TranspR* 2007, p. 472-475.

[178] Drews even points out that the parallel with Article 2(1) CMR is obvious. Nevertheless, he speaks of 'a parallel', which suggests that he does not think transport by Mafi trailer on a ro-ro vessel to actually be Article 2 CMR transport. Drews 2004, p. 450 fn. 4.

[179] It is unclear, even after BGH 17 July 2008 (*TranspR* 2008, p. 365-368), whether the BGH would consider the CMR to apply directly to the entire transport concerning a combination of an Article 2 CMR carriage stage and a national or international road carriage stage.

[180] Drews 2004, p. 450.

[181] Haak 1986, p. 49.

[182] As the CMR applies to the carriage of goods by road *in* vehicles however these types of carriage are not covered by the CMR. Clarke *CMR* 2003, p. 31.

[183] Fischer 1995, p. 335. For a different view see Basedow 1997, p. 893. For a more detailed analysis of the legal status of containers in general see Bordahandy 2005.

generally thought to make up the 'goods' to be carried[184]. Unfortunately, the OLG Hamburg did not clarify whether it thought of the Mafi trailer loaded with the printing presses as a vehicle or rather as part of the goods.

The scope of application of the CMR is restricted to the carriage of goods as opposed to for instance the air carriage conventions which also cover the transport of passengers. This constraint is only natural as the carriage of passengers by road was to be regulated by another convention, the CVR. This Convention stemming from 1973 has however not entered into force.

Although the CMR's scope is limited to the transport of goods, the term 'goods' is not defined in the Convention. As a result it is tempting to resort to national law to find a definition. Restraint should be exercised here however, as the premises from which an instrument of uniform private law such as the CMR proceeds is the eradication of the diversities between national law systems[185]. It is in the interest of uniformity to avoid resorting to national notions as much as possible. According to Clarke this results in the conclusion that the CMR should be applied to everything that is in fact carried by road, except those things specifically excluded by Article 1(4) CMR such as mail or funeral consignments[186]. Mankowski's definition of goods under the CMR as being all movables with the exception of those mentioned in Article 1(4) CMR corresponds with this[187], but is supplemented by some with the condition that the movables are corporeal[188]. As a result the term 'goods' should not be interpreted narrowly as meaning merchandise which is carried from one place to another for the purpose of sale, even if the term used in the French text is '*marchandises*'. That the meaning of 'goods' or '*marchandises*' is not restricted to commercial wares is supported by the fact that the drafters thought the exception of funeral consignments found in Article 1(4) necessary, as bodies are never commodities[189].

4.2.2 Exceptions

After the provisions that determine which types of contracts are covered by the CMR regime a few exceptions can be found in Article 1(4) CMR. According to this paragraph the rules of the CMR do not apply to (a) carriage performed under the terms of any international postal convention, to (b) funeral consignments, nor to (c) furniture removal. The main reasons for excluding both postal movements and funeral consignments are that they were already subject to international conventions of their own. Furniture removals on the other hand were initially included. At the outset the draft text of the Convention contained a series of special provisions on this type of carriage. During the deliberations it became apparent however that the discussions on this issue would have required a great deal of time and would have unduly delayed the final drafting of the Convention. In the end, the drafting parties were not even able to find a

[184] De Meij 2003, p. 67.
[185] Haak 1986, p. 13; Fischer 1995, p. 326; Kropholler 1975, p. 265.
[186] Clarke *CMR* 2003, p. 26. A draft provision which was not included in the final version of the CMR put more emphasis on the relationship between the object and the carriage contract however. It read: "*Goods refer to the objects to which the transport contract relates*". Haak 1986, p. 50 fn. 53. The reference to the relationship between the object and the carriage contract in this provision would have been superfluous as the existence of a contract for carriage by road is already a prerequisite for the application of the CMR. If there is no contractual basis for the carriage of the goods the CMR does not apply.
[187] Mankowski 'Transportverträge' 2004, p. 1054, No. 1398; Basedow 1997, p. 892.
[188] Fischer 1995, p. 328; Koller 2007, p. 1153, Article 1 CMR, No. 10; Koller 1994, p. 54.
[189] Loewe *Commentary on the CMR* 1975, p. 7. In addition the term '*marchandises*' in the French text of the old COTIF-CIM that was used as a template for the CMR was acknowledged not to have been restricted to commercial goods. Fischer 1995, p. 327.

satisfactory definition of the concept of 'furniture removal'[190]. Thus the furniture removal contract was excepted from the scope of the CMR. Such removals required too many special rules and it was therefore thought that they should be regulated by a separate regime[191]. The Protocol of Signature to this end contained the promise by signing governments to undertake to negotiate, besides a multimodal transport convention, a convention governing contracts for furniture removal[192].

It is questionable whether modern day furniture removal – especially where the furniture is moved in containers – truly deserves such special treatment however[193]. It seems that only some additional difficulty in damage assessment – removal generally concerns used goods – and the fact that the mover always takes care of loading and stowage, instead of very nearly always as in normal road carriage, set the removal agreement apart.

As regards the other exemptions it should be mentioned that the exemption concerning postal movements under provision (a) does not exclude all carriage of packages or letters sent by post from the scope of application of CMR. It merely excludes those consignments that are subject to an international postal convention. In relation to the exclusion of funeral consignments it can be submitted that the foremost category of such consignments concerns the transport of human or animal remains intended for burial[194]. Equally excluded are ancillary transport operations related to funerals such as the carriage of flowers and wreaths that accompany the coffin which contains the mortal remains. On the other hand, the exception does not cover the carriage of objects which are merely intended for funerals such as the transport of coffins and wreaths from a workshop to the funeral home where they will be sold[195], or the transport of organs.

Article 1(5) CMR also contains a few exceptions. Exceptions to the prohibition established by this paragraph to vary any of the provisions of the Convention by special agreements that is. Despite this prohibition, Member States are allowed to exclude frontier traffic from the scope of the Convention or to authorize the use in transport operations entirely confined to their territory of consignment notes representing a title to the goods.

4.3 Scope: Article 2 CMR

At the time of the drafting of the CMR the technical developments in ship design and the emergence of the container had already led to the emergence of the specific type of integration of transport modes named roll-on, roll-off or ro-ro transport. The advantages of this transport system are obvious. Since the goods remain on the same vehicle at all times, the most dangerous stages of a

[190] Loewe *Commentary on the CMR* 1975, p. 12. A symptom of the struggle the drafters faced in this regard is the difference between the French and English texts of the Convention concerning this exception. Where the English text speaks of 'furniture removal', which could be interpreted as being restricted to the removal of actual furniture and thus not concern the removal of other household goods such as washing machines, bicycles, paintings, books *et cetera*, the French version on the other hand speaks of '*transports de déménagement'* and thus links to the purpose of the transport rather than the objects or goods to be carried. Basedow 1997, p. 898.

[191] Fischer 1996, p. 408.

[192] Loewe *Commentary on the CMR* 1975, p. 2.

[193] Clarke *CMR* 2003, p. 28. Although the Dutch legislation on the contract for the carriage of goods by road carriage excludes contracts for furniture removal in Article 8:1092 BW, the judiciary does apply the general road carriage rules (Articles 8:1080-1081 BW) to removal agreements. Rb Rotterdam 30 March 2004, *S&S* 2005, 60.

[194] Clarke *CMR* 2003, p. 27.

[195] Loewe *Commentary on the CMR* 1975, p. 11-12.

transport – when the goods are transhipped from one mode of transport to another, statistically the stages where loss or damage most frequently occur – can be avoided[196].

In order to regulate this type of transport, which entails the carriage of the road vehicle including cargo on a ferry, train or barge during a part of the journey, the CMR had to expand the scope of application of the Convention beyond mere carriage by road. Article 2 CMR contains the needed expansion of the Convention's scope of application and regulates the liability of the carrier in situations involving ro-ro transport.

As was mentioned above the incentive for bringing ro-ro transport under the auspices of the CMR was the geographical bearing of Great Britain[197]. The English delegates realized during the drafting of the Convention that, if no concessions were made, the rules of the CMR would never apply to carriage by road in Britain[198]. Because Britain is an island, goods that are carried to or from it have to cross the Channel or the Irish Sea, which could in 1956 only be done by air and sea, not by road[199]. Thus, the CMR needed to extend its coverage to include at least some other modes of transport if it was to conform to the English wishes.

The provisions of Article 2 CMR provide the shipper or cargo claimant with several advantages. One of the advantages is that by expanding the scope of application of the Convention Article 2 CMR denies the carrier the opportunity to contractually exempt himself from the liability imposed on him by virtue of Article 17 CMR *et seq*. in the given circumstances[200]. The circumstances required by Article 2 for the expansion of the scope of the Convention beyond road carriage are that a vehicle containing goods should be transported over part of the route by rail, air, sea or inland waterway while the goods are not to be unloaded from the road vehicle. Under these conditions, the CMR regime applies to the entire transit[201]. However, if the goods are lost, damaged or delayed while the vehicle is being carried by the other mode of transport by an event which could only have occurred as a result of the use of that other mode, the liability of the road carrier will be determined by the international mandatory law applicable to that other mode[202]. Only if there is no such mandatory law applicable will the terms of the CMR continue to apply.

Haak has suggested that another benefit for the cargo claimant of the application of the CMR via Article 2 is that it provides him with a procedural advantage. Due to Article 2 the claimant is spared the necessity of searching for the carrier who carried the goods by the other means and it enables him to go straight to his original co-contracting party, the road carrier[203]. Although this is indeed an advantage, it is only an improvement when compared to the situation in which separate contracts are concluded for the road carriage and the carriage by the other mode of transport. When a multimodal carriage contract is concluded this also provides the cargo claimant with one party to address, which is the multimodal carrier. Still, the expansion of the CMR regime via Article 2 to ro-ro contracts does offer one important advantage over your run-of-the-mill multimodal contracts. Under ro-ro contracts there are far less variables as to what liability regime applies to a claim concerning damage or loss. Firstly, Article 2 CMR carriage

[196] Massey 1972 p. 739-745.
[197] Koller 2007, p. 1158, Article 2 CMR, No. 1.
[198] Haak 1986, p. 94.
[199] Since the opening of the Chunnel in 1994, the Channel Tunnel, there is also the option of rail carriage.
[200] Haak 1986, p. 89.
[201] Even though the Article also provides for the possibility that the vehicle is transported partly by air this is largely a theoretical option.
[202] Although the text of the provision refers to 'conditions prescribed by law', which does not exclude national rules one of the ensuing Sections of this Chapter will clarify that the exception is generally thought to refer to international rules of uniform law only. See Section 4.3.5 of this Chapter on the hypothetical contract and the conditions prescribed by law.
[203] Haak 1986, p. 90.

claims are always governed by mandatory uniform law, even if the loss cannot be localized. Secondly, it is certain that the CMR rules apply to damage which occurs during the road stage of the transport, and if it occurs during the other stage either the CMR rules or the rules mandatory for that other type of transport apply, even in cases where they may not be considered applicable in and of themselves[204].

Although the expansion of the CMR's influence thus seems to provide a modicum of legal certainty, it has generated a great deal of debate and thus uncertainty as well. The rather complicated exceptions to the expansion of the CMR rules, which occur only when a number of conditions are fulfilled, seem to be the focus of most of the dissent. Therefore they will be considered at length in one of the ensuing Sections. First however the relation between Article 2 CMR carriage and multimodal transport will be studied, the 'split personality' awarded by Article 2(2) will be explained and the sphere of action of the regulation will be outlined.

4.3.1 Ro-ro transport: a specific type of multimodal carriage?

The meaning of the term ro-ro transport does not completely coincide with that of the term *transport superposé*. Ro-ro carriage is only one of the forms of 'mode-on-mode' transport or *transport superposé*; it is mode-on-mode carriage involving the carriage of a road vehicle including goods[205]. Although this indicates that ro-ro transport comprises at least two means of transport, one of these means does not propel anything, and the actual ro-ro stage makes use of only one transport infrastructure. That is to say, ro-ro carriage in the strict sense, which only concerns the parts of the transport by sea, inland waterway, rail or air where the road vehicle including the goods is being passively carried by the other means of transport, does not comprise more than one transport infrastructure. This part of the transport alone can therefore not be said to be multimodal as the road vehicle merely serves as a container for the goods from the moment it is parked aboard the ferry or train[206]. Ro-ro carriage in the strict sense is evidently no more than the carriage of goods by one means of transport by one type of transport infrastructure[207]. As a result only the presence of the road vehicle aboard the other means of transport provides the expansion of the road carriage regime to the other mode of transport with a varnish of legitimacy.

Although mode-on-mode carriage in the strict sense is unimodal, Article 2 CMR carriage always concerns multimodal carriage. The text of the Article expressly requires a road stage either before or after the mode-on-mode carriage or both for application. Thus Article 2 CMR deals with ro-ro carriage in the extensive sense; besides the sea, rail or inland waterway stages it also covers the road stages of the transport. Still, because the vehicle is taken along during the sea or rail stage it remains a peculiar type of multimodal carriage. It is a type of carriage that causes a transformation of the legal status of the vehicle; the moment it boards a vessel or a train it turns into part of the goods, or is perhaps reduced to mere packaging[208]. In ro-ro carriage one

[204] If the other stage concerns rail carriage for instance it may be so that a court of law will apply the COTIF-CIM liability rules to the mode on mode stage. Based on Article 2 CMR such a court will even do this if it is of the opinion that the COTIF-CIM does not apply *ex proprio vigore* to the –international – rail stages of non-mode on mode multimodal transports.

[205] Other types of mode on mode carriage are for instance lash carriage, 'lighter aboard ship', and rail-on-ship which involves the carriage of rail cars on ferries and for which there is a service between New Orleans and Coatzacoalcos, Mexico.

[206] Glass 2004, p. 273.

[207] Mankabady describes the possibilities of ro-ro transport as the potential of two modes of transport to be integrated and considered as one mode. Mankabady 1983, p. 137.

[208] Whether the vehicle is considered to be part of the goods or packaging can be of import if the Hague or Hague-Visby Rules apply to the claim as under these Rules neither the carrier nor the ship shall be responsible for loss or

of the elements which are characteristic for road carriage, namely the vehicle, is employed during a non-road stage, albeit in a fashion which is uncharacteristic for road carriage.

4.3.2 Article 2(2): the 'split personality' fiction

Article 2(2) CMR contains a peculiar fiction. It establishes that if the carrier by road is also himself the carrier by the other means of transport, his liability shall also be determined in accordance with the provisions of Article 2(1) CMR, but as if, in his capacities as carrier by road and carrier by the other means of transport, he were two separate parties. This Article was entered into the Convention because not all legal spheres are familiar with the concept of this type of doubled up liability. In order to clarify matters for those legal systems to which such a concept is foreign Article 2(2) CMR explicitly provides for such a situation[209].

The fiction has significance only in relation to damage or loss which occurs during the non-road stage of the transport. If this stage by the other means of transport is also performed by the road carrier and the carrier has not been at fault in his guise as road carrier, then the claim will be regulated by the relevant 'conditions prescribed by law'. Where for instance the goods are damaged because the road vehicle was not secured properly in or on the vessel, which is a typical example of negligent stowage by the carrier as sea carrier, the CMR rules on carrier liability make way for the 'conditions prescribed by law'. If, on the other hand, the damage occurred due to a fault on the part of the carrier as road carrier, for instance when the damage during the sea segment was the result of defective loading of the road vehicle he was responsible for, the rules of the CMR will apply to the claim[210]. It is clear however that difficulties will arise when the cause of damage, loss or delay is not as easily allocated as in the given examples.

4.3.3 The radius of the expansion

The text of Article 2 CMR is rather extensive. The Article's basic radius of action can be found in its first paragraph which contains three sentences, each of which contains a specific rule. The first of these sentences communicates the basic range of the Article with the following words:

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

As a result the main rule of the provision is that besides governing the relation between shipper and carrier for the transport during international road carriage, the CMR also governs this relationship during a non-road stage, but only under the mentioned circumstances[211]. If these

damage arising or resulting from insufficiency of packing. Whether the vehicle will be deemed part of the goods or packaging depends on the rules applicable to the claim for compensation and the circumstances of the case. Under the CMNI the vehicle is unlikely to be deemed part of the goods. Article 1(7) CMNI establishes that in case the goods are consolidated in a container, on a pallet or in or on a similar article of transport or where they are packed, such article of transport or packaging is considered part of the goods only if supplied by the shipper. The vehicle will however generally be supplied by the carrier.

[209] Loewe 1976, p. 524.

[210] Messent & Glass 2000, p. 60.

[211] Haak 2005, p. 309.

conditions are satisfied it is possible that, whilst the road carrier's contract with the consignor of the goods remains governed by CMR, his *liability* with regard to the consignor may be governed by different rules applicable to carriage by sea, rail, inland waterway or air. This difference generally puts the carrier at a disadvantage when the other means of transport is carriage by sea; the extension of the CMR's scope of application leaves it to the carrier to bridge the recourse gap[212].

Although the provision seemingly attaches to the carriage and does not mention the contract, the carriage of the goods by road and the other mode of transport need to be based on a single contract which provides for international carriage by means of a vehicle. As Koller states the extension of scope by Article 2 CMR is not meant to affect more than the requirement for the infrastructure used. It is not intended to expand the scope beyond carriage based on the single 'contract for the carriage of goods' as described in Article 1 CMR[213]. As the first sentence of the Article voices that only part of the journey can be by sea, rail, inland waterways or air, it is clear that although the actual length of the mode-on-mode stage of the transport is of no consequence, application of the CMR requires that it does not cover the entire distance to be travelled. Besides the length of the mode-on-mode stage its position is also unimportant. It does not matter for the application of the CMR rules whether the sea, air, rail, or inland waterway carriage occurs at the beginning, the middle or the end of the transport[214].

The initial intention and agreement of the parties is decisive when determining whether a certain contract of carriage warrants the application of the CMR rules through the extended scope of application of Article 2 CMR[215]. If for instance the carrier deviates from the contract by substituting load on-load off carriage for the agreed roll-on, roll-off transport without the consent of the shipper, the rules of the CMR will still govern the contract[216]. When parties contract for 'carriage by road' and it is clear that to reach the agreed destination part of the transport will involve sea carriage out of strict necessity, this is construed as permission for the carrier to employ mode-on-mode carriage[217].

[212] In his recourse action, the carrier is at a disadvantage when none of the special exemptions of the sea carriage regime apply and the kilogram limitation applies and not the package limitation. The kilogram limitation in the sea carriage regimes is far lower than that of most other carriage regimes, the CMNI excluded, whereas the package limitation of the sea carriage regimes may result in a higher amount of compensation than can be obtained based on the inland or air carriage regimes. For more information on the kilogram and package limitation see Chapter 8, Section 8.3.4 on non-localized loss or damage under the Rotterdam Rules.

[213] Koller 2007, p. 1158, Article 2 CMR, No. 2; Van Beelen 1994, p. 39; Rb Rotterdam 11 April 1996, *S&S* 1998, 102.

[214] Messent & Glass 2000, p. 44.

[215] The OLG Düsseldorf on the other hand determined: "*Im übrigen kommt es für Art. 2 CMR nicht darauf an, was der Frachtführer ursprünglich einmal beabsichtigt haben mag, sondern darauf, wie er letztlich handelte, und das war hier ausweislich des CMR-Frachtbriefs vom 09.01.2004 ein durchgehender LKW-Transport, ...*". OLG Düsseldorf 16 April 2008, I-18 U 82/07, www.justiz.nrw.de. In this case the original agreement left room to be interpreted as being for '*Huckepackverkehr*', which caused the OLG to decide for Article 2 CMR as the consignment note mentioned '*durchgehender transport'*. In spite of the fact that Article 2 CMR attaches to the actual carriage and not to the contract as Article 1 CMR does Koller agrees with the '*herrschende Meinung'* that the carrier should not be able to avoid the CMR by not conforming to the contract. Koller 2007, p. 1160, Article 2 CMR, No. 4. See also Section 4.3.4.2 of this Chapter on unloading.

[216] Clarke *CMR* 2003, p. 31; Thume *Kommentar zur CMR* 1994, p. 122. See also Chapter 2, Section 2.3.3.1 on the influence of the wording of the contract and the physical performance.

[217] OLG München 8 June 2000, *TranspR* 2001, p. 399-401; OLG Düsseldorf 16 April 2008, I-18 U 82/07, www.justiz.nrw.de. *Cf.* Rb Rotterdam 30 November 1990, *S&S* 1991, 56.

4.3.3.1 The vehicle

The term 'vehicle' found in both Articles 1 and 2 CMR means, as was discussed in Section 4.2.1 of this Chapter, motor vehicles, articulated vehicles, trailers and semi-trailers as defined in the Convention on Road Traffic. This description includes both self-propelled means of transport as well as trailers, so not all CMR 'vehicles' are capable of movement by themselves[218].

Not covered by the term 'vehicle' is the flat rack or flat however. The *Rechtbank* Rotterdam decided this in relation to a transport of bags of sodium carbonate from Rotterdam through Hull to Manchester[219]. The bags were loaded on to a flat rack by the carrier and transported by road to the Europort area in Rotterdam. There the flat including the bags was placed on to a trailer provided by the sea carrier and after arrival in Hull the bags and flat were transported by road on a trailer to Manchester. Once the goods had arrived at Manchester it was established that the sodium carbonate had sustained water damage. *Prima facie* the *Rechtbank* decided when passing judgement on the cargo claim that the rules of the CMR applied as the contract involved international carriage of which part at least was to be performed by road. Since the goods were transhipped twice however, the carriage in question was combined carriage to which the CMR did not apply by means of Article 2. The *Rechtbank* did not consider the flat rack on which the goods were stacked a vehicle as meant in Article 2 CMR[220]. The reason for this outcome is the simple fact that 'flats' or 'flat racks' do not have wheels and are thus not 'driveable'[221]. The same can be said of containers[222]. A container may perhaps be considered part of the vehicle under certain circumstances, but it is never a vehicle on its own. Mafi trailers on the other hand do have wheels, but, although they are therefore driveable, they should nonetheless not be considered vehicles within the meaning of Article 2 CMR, as their use is restricted to port areas and they are not allowed in normal road traffic[223].

[218] *Thermo Engineers Ltd and Anhydro A/S v Ferrymasters Ltd.,* [1981] 1 *Lloyd's Rep.* 200; Rb van koophandel Antwerpen 28 January 1985, *ETL* 1990, p. 210; Rb Rotterdam 11 April 1996, *S&S* 1998, 102; Rb Arnhem 18 July 1996, *S&S* 1997, 33; Hof Den Haag 17 October 1995, *S&S* 1996, 54 *et cetera*. Since trailers are vehicles the *Rechtbank* Rotterdam was asked to decide whether the mere tugging of a trailer packed with frozen chicken from the terminal to the hold or deck of the ship could be considered sufficient reason to deem the carriage in question to be Article 2 CMR carriage instead of sea carriage. It was not. Rb Rotterdam 22 April 1994, *S&S* 1994, 126.

[219] Rb Rotterdam 30 November 1990, *S&S* 1991, 56. See also HG Wien 4 January 1994, *TranspR* 1994, p. 304-309; OLG Bremen, 11 January 2001, *TranspR* 2001, p. 166-169. For a different view see OLG Hamburg 13 March 1993, *TranspR* 1994, p. 193-195. The OLG does consider a '*wechselpritsche*', which is the German name for a flatrack, to be a vehicle as meant by Article 1 CMR. For a critical comment on the judgement by the OLG see J. Basedow, 'Bemerkungen zur Anwendung der CMR auf Wechselpritschentransporte durch OLG Hamburg 13. 3. 1993 *TranspR* 1994, 193', *TranspR* 1994, p. 338-339.

[220] For a different view see OLG Hamburg 13 March 1993, *TranspR* 1994, p. 193.

[221] "*Zwar braucht es für ein Fahrzeug nicht unbedingt einen eigenen Motor, aber ohne Räder geht es nun einmal nicht ... Die CMR spricht schlicht von Fahrzeugen, und ohne Räder kann man nicht fahren.*" Basedow 1994, p. 338-339. Herber seems to think that to require wheels but not an engine is rather arbitrary, but establishes that the arguments to do so outweigh those not to. Herber 1994, p. 376.

[222] *Lamy Transport,* Tome 1, 2007, p. 394-395; Thume *Kommentar zur CMR* 1994, p. 129 and 134; BGH 24 June 1987, *TranspR* 1987, p. 447-454; Hill 1976, p. 183; Koller 2007, p. 1159, Article 2 CMR, No. 4.

[223] See Section 4.2.1 of this Chapter on the meaning of the terms goods, vehicles and rewards in Article 1 CMR.

4.3.3.2 Unloading

Only when the contract of carriage determines that the cargo is not to be unloaded or transhipped during the mode-on-mode carriage does the CMR apply to said carriage[224]. That is to say, the CMR rules apply to the 'whole of the carriage' according to the last part of Article 2's first sentence. Based on the Court of Appeal's *Quantum* judgement the 'whole of the carriage' does not necessarily mean the entire transport that is agreed in the contract, but rather relates to the carriage during which the goods remain in the vehicle. For example, if cans of tomato soup are carried by rail from Milan to Bremen where they are loaded on to a truck which carries them partly by road partly by sea from Bremen to Aberdeen, then the CMR rules apply by means of Article 2 to the transport stages between Bremen and Aberdeen, but not to the rail stage between Milan and Bremen.

There are exceptions to the rule that unloading or transhipment causes Article 2 CMR to retreat. Unloading of the goods for inspection, reconditioning or restowage, does not prevent the application of the CMR via Article 2, provided that the goods continue their journey on a road vehicle, but this does not necessarily have to be the original vehicle[225].

4.3.4 The exception to the expansion: the other means of transport

The second sentence of Article 2 CMR is rather long and complicated and seems to occasion a great deal of debate. The provision can be roughly cut into two parts. The first part provides an exception to the applicability of the CMR rules as regards the liability of the carrier and the second part points out which rules are to be applied if the liability rules of the CMR are in fact are to be disregarded. The entire sentence reads as follows:

> "*Provided that to the extent 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 be determined not by this convention but in the manner in which the liability of the carrier by the other means of transport would have been determined if a contract for the carriage of the goods alone had been made by the sender with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport.*"

As the Dutch *Hoge Raad* established in *Gabriele Wehr*[226] in 1990, there is no consensus on the exact meaning of this provision in the States signatory to the Convention. As a result courts of law are forced to interpret the provision themselves. Unfortunately, the *travaux préparatoires* of the Convention cannot be used as a guideline during this process. As Wilberforce LJ comments in *Fothergill*[227], the interest of uniformity of application demands that, in considering whether to

[224] Koller is of the opinion that it is unclear whether Article 2 CMR applies if the parties contracted for ro-ro carriage and the goods are unloaded from the vehicle for carriage by sea as he deems Article 2 to attach to the actual carriage and not to the contract. He also believes that the carrier should not be able to avoid the CMR by not conforming to the contract however. Koller 2007, p. 1160, Article 2 CMR, No. 4.

[225] Clarke *CMR* 2003, p. 32; Koller 2007, p. 1159, Article 2 CMR, No. 3.

[226] HR 29 June 1990, *S&S* 1990, 110 (*Gabriele Wehr*) or *NJ* 1992, 106 with comment by J.C. Schultz.

[227] *Fothergill v Monarch Airlines Ltd.,* [1980] 2 *All ER* 696, [1980] 2 *Lloyd's Rep.* 295.

use *travaux préparatoires*, regard is to be had to the general practice applied, or likely to be applied, in the courts of other Contracting States[228]. In case of the CMR this means that the *travaux* are excluded from use in the construction process, as no record or documentation concerning the preparatory proceedings has been published or made available to the public by other means[229]. As a result the use of the *travaux* as a guideline cannot lead to a uniform result, since not all courts have access to it. Under these circumstances the *Hoge Raad* deemed the purpose and import of the provision to be of decisive importance in *Gabriele Wehr*, while the House of Lords established in *Fothergill* that the purposive approach is always a legitimate part of the process of interpretation[230]. As a result the question what the purpose is behind the exception to the CMR's applicability in Article 2 needs to be answered. In response several possibilities have been suggested, first and foremost of which is that the carrier will thus be granted sufficient recourse prospects[231].

The constraint of the extension of the CMR's scope of application which is found in the second part of Article 2(1) CMR serves as a check and balance; the network proviso counters the ill effects the extension of the CMR's scope may have had for the carrier in situations where such an extension is deemed unwarranted.

Most of the debate generated by the exception in the second sentence focuses on the interpretation of two specific concepts which are both found in the second part of the provision. Apparently the three circumstances required by the first part of the sentence are less prone to dissent. These three cumulative requirements are that the loss, damage or delay: (1) is not caused by an act or omission of the road carrier, but rather by (2) an event that could only have occurred in the course of and by reason of the carriage by the other means of transport and (3) actually occurred during the carriage by the other means of transport[232].

Of these three requirements only the second seems to have occasioned prominent legal proceedings, at least in The Netherlands[233]. In *St. Clair* a truck loaded with a shipment of textile

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[228] *Cf.* Megaw LJ in *Buchanan & Co. Ltd. v Babco Forwarding & Shipping (U.K.) Ltd.*, [1978] 1 *Lloyd's Rep.* 119: "*But as it is an international Convention, we must do our best to interpret it, so far as we can, with a view to promoting the objective of uniformity in its interpretation and application in the Courts of the States which are parties to the Convention.*"

[229] Some details of the preparatory works are provided by Haak. Haak 1986, p. 93-96. According to Schelin it would not make much difference even if the reports on the CMR negotiations were to be used in the interpretation of the text as they give very little guidance. He reasons that this is because the negotiating parties often were of very different opinions on how the provisions should be interpreted. Schelin 2002, p. 382. Koller is of the opinion – based partly on the Vienna Convention on the Law of Treaties – that the *travaux* can be used but only as a secondary option. Koller 2007, p. 1125-1126, Article 1 CMR, No. 4.

[230] Autonomous interpretation – interpretation independent from related concepts in the respective laws of the Contracting States, see for instance ECJ (Case 351/96), [1998] *(Drouot Assurances SA v Consolidated Metallurgical Industries (CMI Industrial Sites) and Protea Assurance, Groupement d'intérêt économique (GIE) Réunion Européenne)* – is a subject that elicited quite a bit of discourse. The *Hoge Raad*, makes frequent use of this interpretation method. See for instance HR 1 February 2008, *NJ* 2008, 505; 10 January 2003, *NJ* 2005, 516; ECJ 17 September 2002, *NJ* 2003, 46; HR 16 November 2001, *NJ* 2002, 469; HR 24 March 1995, *NJ* 1996, 317.

[231] Glass 2000, p. 567-569. Glass also suggests that the establishment of a network system may have been a secondary motivation. HR 14 June 1996, *S&S* 1996, 86 (*St. Clair*). Van Beelen on the other hand deems the recourse function to be of secondary import; the main purpose of the exception to Article 2's extension of the scope of the CMR is to bring the main contract into line with the mode on mode contract so that for instance sea carriage is regulated by sea carriage rules which is the core of every network system. Van Beelen 1997, p. 16.

[232] *Thermo Engineers Ltd. and Anhydro A/S v Ferrymasters Ltd.,* [1981] 1 *Lloyd's Rep.* 200.

[233] This is hardly surprising in relation to the third condition as this is largely redundant in light of the second requirement. As regards the first condition it is important to note the influence of Article 3 CMR. This Article causes the road carrier to be equally responsible for the acts of omissions of his agents and servants and of any other persons of whose services he makes use for the performance of the carriage under Article 2 CMR. Thus read, the road carrier is also liable for the actions of the sea carrier and his servants and agents which defeats the purpose of the restriction that the loss, damage or delay was '*not caused by act or omission of the carrier by road'*. Therefore Neill J considers in *Thermo Engineers v Ferrymasters* that in Article 2 CMR the words 'carrier by road' have to be

was carried under CMR from Meerssen in The Netherlands to Marseille in France and from thereon by sea to Tunisia[234]. The vehicle boarded the '*St. Clair'* in Marseille for the sea trip to Tunisia, during which it was damaged by a fire. During the proceedings the question was tackled whether the fire was an event that could only have occurred in the course of and by reason of the carriage by sea. The *Hoge Raad* overruled the preceding judgement by the *Hof* Den Bosch which caused the carrier to pay full damages under CMR, because he could not discharge his burden of proof relating to the cause of the fire. The *Hoge Raad* rejected the view that Article 2 CMR requires an event that is typically related to the non-road carriage stage of the transport. It is enough if the loss of the goods – or the damage or delay – is realized *in concreto* during the non-road carriage[235].

In *Thermo Engineers v Ferrymasters*, a case involving ro-ro carriage of heat exchangers from Aylesbury in the United Kingdom to Copenhagen in Denmark, Neill J judged the damage claim in a largely similar manner. He determined regarding the damage which was caused by the collision of the trailer and the loaded goods with the bulkhead of the ship that:

> "*One is concerned to consider not whether the loss or damage could only have occurred in the course of the other means of transport but whether the event could only have so occurred. It seems to me that any adequate description of the relevant events in this case would have to include a statement to the effect that a collision with the bulkhead of a ship had taken place in the course of loading the ship.*"[236]

Thus Neill J indicated that the phrase 'some event which could only have occurred in the course of and by reason of the carriage by that other means of transport' should not be equated with the concept of perils of the sea; the proviso fastens on perils *on* the sea, not on perils *of* the sea[237].

These Dutch and English decisions widen the scope of application of the second proviso of Article 2 CMR and thus restrict the extension of the scope of application of the liability rules of the CMR. Such a carrier friendly interpretation of the second proviso seems in accordance with its purpose, which is after all redressing the balance put out of kilter by the extension of the CMR regime provided for in the first sentence, which is intended to favour the shipper.

Still, what should be kept in mind here, is that the result of any loss, damage or delay in delivery of the goods which (1) has occurred during the carriage by the other means of transport and (2) 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, is not that the CMR does not apply to the claim. The result of situations which fulfil these conditions is that the rules on carrier liability found in the CMR will step aside for the rules on carrier liability offered by the 'conditions prescribed by law' for the other means of transport. The provisions of the CMR that do not relate to the liability of the carrier will still apply. The result is a hodgepodge mixture of more than one carriage regime. The non-liability rules of the

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construed in such a way as to impose a narrower responsibility which causes Article 3 CMR to be inapplicable. *Thermo Engineers Ltd. and Anhydro A/S v Ferrymasters Ltd.,* [1981] 1 *Lloyd's Rep.* 200.

[234] Hof Den Bosch 23 March 1994, *S&S* 1994, 86 and 23 March 1994, *S&S* 1995, 67; HR 14 June 1996, *S&S* 1996, 86.

[235] Haak 2005, p. 315. The *Rechtbank* Rotterdam decided thus in the *Baltic Ferry* case, but its judgement on this issue was reversed by the Hof Den Haag. Rb Rotterdam 21 June 1985, *S&S* 1986, 56 (*Baltic Ferry*); Hof Den Haag 8 April 1988, *S&S* 1989, 1 (*Baltic Ferry*).

[236] *Thermo Engineers Ltd. and Anhydro A/S v Ferrymasters Ltd.,* [1981] 1 *Lloyd's Rep.* 200.

[237] Clarke *CMR* 2003, p. 36. Had the damage been sustained in the port area however the rules of the CMR would have applied. Not because this period of time does not literally concern perils of the sea however, as neither do loading operations. No, the reason is far less complex; the sea carriage regimes are not mandatory during the period of the sea carriage before loading and after discharge (Article 7 HVR).

CMR will apply alongside the rules on carrier liability of the other regime, although these sets of rules may not be very well suited to complement each other. In addition, as can be read in the discussion of the new Rotterdam Rules which also grant precedence to the liability rules of other regimes under specific circumstances[238], this course of action may cause conflicts between rules of uniform law to occur. If for instance a bill of lading is issued concerning the mode-on-mode carriage, or would have been issued between the sender and the mode-on-mode carrier, regimes such as the Hague or Hague-Visby Rules may apply *ex proprio vigore*[239]. An example of a conflict that might then ensue is the simultaneous applicability of both Article 3 CMR stating that the carrier is responsible for the acts of omissions of his agents and servants and of any other persons of whose services he makes use for the performance of the carriage and Article 4(2)(a) of the Hague-Visby Rules which determines that the carrier is not liable for loss or damage arising or resulting from an act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship. The question is whether the hierarchy between these two rather contradictory rules can be determined according to the normal conflict of conventions rules as found in the Vienna Convention on the Law of Treaties[240]. For one, it is unclear whether the conflicting rule stemming from the Hague-Visby regime can simply be deemed older and therefore of less prominence. Not only is this difficult as the original sea carriage regime and the Visby amendment differ in age[241], it is also problematic due to the fact that the CMR incorporates the sea carriage regime's liability rules as it were. This could be argued to mean that both the CMR and the Hague-Visby provision are to be deemed of the same age.

Plainly the complexity of unanticipated issues like these conflicts contributes its share in ensuring that Article 2 CMR lives up to the stigma of *enfant terrible* that it has been burdened with almost from the moment of its conception.

It is also evident that the question which types of occurrences are covered by the exception to the Article's extension of the scope of application of the CMR is not one to be answered easily. The easy way, meaning a literal interpretation of the CMR text, would certainly have led to results different from those discussed above. But even so, this question is not the focus of most of the treatises written on Article 2 CMR. No, most of the discourse pertaining to the Article centres on the queries as to which rules are to be deemed 'conditions prescribed by law' and what the characteristics are of the contract the sender would have made with the carrier by the other means of transport if he had not contracted for ro-ro carriage.

4.3.5 The hypothetical contract and the conditions prescribed by law

When the liability of the carrier by road is not determined by the CMR rules, it is to be established in the manner in which the liability of the carrier by the other means of transport would have been resolved if the consignor had contracted for the carriage of the goods with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport. The question is what the exact content is of this

[238] See Chapter 8, Section 8.3 on the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.

[239] This is rather uncommon however as this type of carriage generally concerns short-sea shipping for which no bill of lading is issued.

[240] For more information on the procedure to be followed in normal circumstances see Chapter 9 on the conflict of conventions.

[241] The Hague Rules stem from 1924, which is indeed older than the CMR which hails from 1956, but the Visby Protocol is younger than the CMR as it stems from 1968.

hypothetical contract and what exactly are to be considered conditions prescribed by law. Is the hypothetical contract for instance identical to the contract concluded by the road carrier and the ro-ro carrier? And are the conditions prescribed by law restricted to conditions with the same level of compulsion as the CMR rules, or is it enough if they are for instance binding on only one of the contracting parties?

In *Gabriele Wehr* the Dutch *Hoge Raad* was asked to shine some light on these issues[242]. Four trailers filled with Volvo parts were stowed on deck of the vessel '*Gabriele Wehr'* which carried them from Göteborg to Rotterdam under a non-negotiable waybill. During this sea stage, which was part of a multimodal transport as the trailers came from various places in Sweden and were to be delivered in Born in The Netherlands, a storm broke loose 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 above-mentioned issues objectively[243]. As was mentioned above, the *Hoge Raad* determined that because there was no international consensus in either legal literature or case law concerning the questions posed and the *travaux préparatoires* were not available to serve as reference, the purpose and import of Article 2(1) CMR are decisive[244]. The main rule of Article 2, which extends the scope of the Convention, only gives way to another liability regime under certain specific circumstances. Only liability regimes entailing 'conditions prescribed by law' are possible candidates, whereby the words 'conditions prescribed by law' should be interpreted while bearing in mind the fact that they are meant to specify the content of the hypothetical contract between the shipper and the ro-ro carrier. Since the interpretation of its provisions should also be in accord with the purpose of the Convention as a whole, which, according to the Preamble, is standardizing the conditions governing the contract for the international carriage of goods by road, the *Hoge Raad* was of the opinion that the terms 'conditions prescribed by law' refer to systems of 'objective transport law'. Or, in other words, they refer to the other mandatory unimodal transport conventions. In the French version of the CMR the 'conditions prescribed by law' mentioned in Article 2 are described as '*dispositions impératives*'. Both the authentic English and French language versions suggest that a certain degree of compulsion is required for the conditions or '*dispositions*' in question to take precedence over the CMR rules. Although the wording 'conditions prescribed by law' seems to cover a somewhat broader range of rules than '*dispositions impératives*'[245].

These 'objective' transport regimes leave room for contractual deviation however, especially the Hague-Visby Rules. The lack of a bill of lading for instance, or the agreement to carry on deck would normally cause them to be inapplicable to the sea carriage[246]. The objectifying approach of the *Hoge Raad* counters this unwarranted effect. In order to protect the shipper who has 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 is to be considered. The relevant proviso of Article 2 CMR deems the hypothetical contract to be "*a contract for the*

[242] HR 29 June 1990, *S&S* 1990, 110 (*Gabriele Wehr*).

[243] Such an approach is also advocated by Czapski. Czapski 1990, p. 176-177.

[244] Articles 31, 32 and 33(4) of the Vienna Convention on the Law of Treaties support this. Haak 1990, p. 328-329.

[245] Haak 1990, p. 327. The *Hoge Raad* is of the opinion however that the French version of the text which refers to '*dispositions impérative*' is not at odds with the interpretation of 'conditions prescribed by law' as meaning the uniform law of the carriage conventions minus those aspects which the contracting parties may influence by contract. It should be noted that Article 2 CMR is the only Article of the Convention that was not originally drafted in French but in English; the French version has been described as "*une traduction maladroite du texte anglais*". Haak 1990, p. 238.

[246] Ro-ro operators generally issue non-negotiable receipts, not bills of lading. Haak 1990, p. 328.

carriage of the goods alone ... made by the consignor with the carrier by the other means of transport", which makes it obvious that the hypothetical contract is not the existing mode-on-mode contract between the carriers, and that the content and the specifics of this mode-on-mode contract should not determine the hypothetical contract[247].

The result of this abstraction is that the main carriage contract – between the shipper and the road carrier – and the sub-carriage contract – between the road carrier and the mode-on-mode carrier – are synchronized. If the mode-on-mode carriage concerns carriage by sea both contracts are covered by maritime rules and if it concerns carriage by rail both agreements are subject to rail carriage law[248]. The exception in Article 2(1) CMR is a special manifestation of the network or 'chameleon' system, due to which the special requirements set by the other unimodal carriage regime such as the issuance of a bill of lading do not have to be met. In this manner the *Hoge Raad*'s approach prevents the CMR rules from applying to the entire transport in all instances involving ro-ro carriage, which would render the exception near to useless. In *Gabriele Wehr* the *Hoge Raad* establishes that the character of the CMR and its purpose to make the liability of the road carrier uniform determine that the CMR rules only yield to other equally imperative rules of other unimodal transport regimes such as the Hague-Visby Rules or the COTIF-CIM. These regimes are considered equally imperative by means of the objective approach as only the basic conditions for application of these regimes need to be fulfilled. The Hague-Visby Rules may apply between the shipper and the road carrier to the sea stage of a ro-ro transport, even if no bill of lading is issued or if the goods are carried on deck. Obviously these circumstances will occur frequently as the document that is generally issued for ro-ro carriage is a non-negotiable seaway bill and the vehicles to be carried are often parked on deck[249].

Overall, the objectifying approach seems to yield the amount of synchronization required by the principles of the network philosophy which appears to be paramount in multimodal carriage law. It could strike one as somewhat odd however that the *Hoge Raad* interprets 'conditions prescribed by law' as meaning internationally agreed regimes of uniform carriage law and in the next step strips these same regimes of all those scope of application rules that may be influenced by the contracting parties. An explanation of this course of action may lay in the fact that the rules that are to be stripped, the rules relating to aspects that can be manipulated by the contracting parties, can as a consequence not be deemed objective or mandatory. Furthermore, this 'stripping' of the uniform carriage law regimes is less the eccentric than one may think, as the entire intent of the exception to the expanded CMR scope is to cause only the rules relating to carrier liability of the non-road carriage regime to apply to a possible claim for compensation. The result is that only the objective and not to be manipulated scope of application rules of a certain instrument of uniform carriage law determine whether the rules of said instrument relating to carrier liability apply. This approach seems to have an almost poetic symmetry.

A few years after the *Gabriele Wehr* judgement the *Rechtbank* Rotterdam showed that the objective approach propagated by the *Hoge Raad* had taken hold in the *Duke of Yare* judgement[250]. Although the general approach of the *Hoge Raad* is followed by the *Rechtbank* the *Duke of Yare* also shows that the details of the mode of operation set out in *Gabriele Wehr* were still in need of some clarification. Firstly, the *Rechtbank* followed the *Hoge Raad* by not projecting the actual mode-on-mode carriage contract on to the hypothetical contract. The *Rechtbank*'s second step however was to request the parties to furnish evidence concerning the

[247] See also Herber 1994, p. 381.
[248] Van Beelen 1997.
[249] For an analysis of both the *Gabriele Wehr* and the *Duke of Yare* judgements, see Van Beelen 1997.
[250] Rb Rotterdam 1 July 1994*, S&S* 1995, 99 (*Duke of Yare*).

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. To consistently follow the 'objective' method one should first establish whether there is a more or less compulsory system of uniform international law available for the mode of carriage used during the mode-on-mode stage. If there is, then this system should be used to outline the hypothetical contract, irrespective of the specifics of the existing mode-on-mode contract between the road carrier and the mode-on-mode carrier[251].

Although the *Hoge Raad* may be charged with colouring in the purpose and import of the proviso in question by means of the perceived intent of the CMR's drafters, something which they had asserted not to do as they considered the *travaux préparatoires* of the CMR to be insufficiently available, the outcome of the objective approach seems fitting. The CMR's aim of unifying the liability of the road carrier is achieved to a certain degree, the recourse option is – partially – preserved[252] and the shipper is prevented from having to cope with conditions and exceptions stemming from contracts he was not party to.

In Germany there does not seem to be consensus on this issue. Koller for one, refers to more than four different opinions, one of which is the Dutch *Gabriele Wehr* approach[253]. Loewe concurs with the Dutch *Hoge Raad* and clearly rejects the use of the mode-on-mode contract as the template for the hypothetical contract. According to him the specifics of the mode-on-mode contract should not determine the hypothetical contract because this would enable the road carrier to invoke exceptions to his liability incorporated in his contract with the mode-on-mode carrier to which the shipper was not party and which he therefore was not able to influence[254]. Mankowski on the other hand is of the opinion that consistently applying the objective approach takes matters too far. Although as in *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 is likely to be issued if the sender were to contract 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. The issuance of a bill of lading has a twofold effect; besides causing the less onerous maritime liability regime to apply between the road carrier and the mode-on-mode carrier, it also minimizes the likelihood of recourse difficulties[255]. However, requesting the mode-on-mode carrier to provide a bill of lading does not seem a feasible solution in modern day short-sea shipping practice.

Basedow also acknowledges that whether the hypothetical contract should be based on the actual contract between the carriers is a controversial subject[256]. He however feels that the text of the proviso clearly shows that the actual contract between the carriers is of no consequence, as the hypothetical contract specifically relates to a contract that would have been concluded between the sender and the mode-on-mode carrier. And, because this hypothetical

[251] Van Beelen 1997, p. 17.

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

[253] Koller 2007, p. 1162-1163, Article 2 CMR, No. 8. Helm also adheres to the *Gabriele Wehr* approach of the Dutch *Hoge Raad*. Helm 1979, p. 440, No. 5.

[254] 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, p. 213-218.

[255] Mankowski 'Transportverträge' 2004, p. 1060, No. 1409.

[256] Basedow 1997, p. 913.

contract is wrought "*in accordance with the conditions prescribed by law for the carriage of goods by that means of transport*", it is obviously subject to these conditions prescribed by law as this would otherwise be a contradiction in terms. Especially since it is rather likely, he states, that the shipper would also not have been issued a bill of lading by the mode-on-mode carrier. Thus the non-road stage of the carriage is subject to these rules even if no bill of lading is or would have been issued in the relation between the road carrier and the mode-on-mode carrier. Only the objective conditions for application are to be observed and the subjective conditions, meaning those which are dependent on the will of the mode-on-mode carrier such as the issuance of a bill of lading or the placement of the goods on deck, are to be disregarded. He substantiates his point of view by referring to the *Gabriele Wehr* judgement, and the analogy with the commonplace model of a reference to foreign law minus the conflict rules of that legal system also corroborates his findings. The scope of application rules of international conventions are after all generally described as unilateral conflict rules[257].

Herber shows that the approach taken by the *Hoge Raad* in *Gabriele Wehr* had precursors both in German as well as in English case law. In a case judged by the LG Köln in 1985 it was established that "*auch der tatsächlich zwingende, von der Fährgesellschaft unabänderbar vorgegebene Vertragsinhalt zugunsten des Straßenfrachtführers berücksichtigt werden müsse*", and that therefore, in Basedow's opinion, a bill of lading is not required[258]. The English case that he alludes to, *Thermo Engineers v Ferrymasters*, is one that has also been touched upon above concerning the question as to what can be considered 'events that could only have occurred in the course of and by reason of the carriage by the other means of transport'[259]. In this case involving the collision of a trailer laden with a heat exchanger with the bulkhead of a ship, a bill of lading had in fact been issued. The Commercial Court held that the compensation payable to the plaintiffs was to be calculated in accordance with such conditions as they could, and would, have agreed with a carrier by sea in November 1975, if a separate contract for the carriage of the heat exchanger alone from Felixstowe to Copenhagen had been made. This seems similar to the subjective approach concerning the content of the hypothetical contract of the *Hof* Den Haag in the *Duke of Yare*. It is not however. Although a subjective element is introduced by Neill J, the question in *Ferrymasters* was not whether all scope of application rules of the Hague-Visby Rules are to be fulfilled since a bill of lading was issued and thus it was clear that the Rules applied. The question was rather whether the Rules are the only means of establishing the content of the hypothetical contract, or if there is room for contractual conditions where they are allowed by the Rules[260].

As a result the *Ferrymasters* judgement does not provide us with any insight into the English views on whether a bill of lading is required for the Hague or Hague-Visby regimes to apply by means of Article 2 CMR. Clarke points out that, as in Germany, the views on this

[257] Clarke *CMR* 2003, p. 41.

[258] "*also the actual mandatory content of the contract which the transport company could not change and which is beneficial to the road carrier should be taken into account*". LG Köln 28 May 1985, *VersR* 1985, p. 985. Herber 1994, p. 378.

[259] *Thermo Engineers Ltd. and Anhydro A/S v Ferrymasters Ltd.,* [1981] 1 *Lloyd's Rep.* 200. See Section 4.3.4 of this Chapter on the means of transport other than the transport by road.

[260] The *Rechtbank van Koophandel* of Antwerp on the other hand is of the opinion that the objective approach should be followed consistently which means 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 non-road carriage regime needs to be applied without taking into account the specific circumstances of the case. Rb van Koophandel Antwerpen 25 February 2000, *ETL* 2000, p. 527-540.

subject are not exactly homogeneous. In a previous edition of his book on the CMR, Clarke states that[261]:

> "*In cases in which no bill of lading is issued, is there then a vacuum filled neither by the CMR nor by the Hague-Visby Rules? There is no vacuum if the reference to the law 'for the carriage of goods by other means of transport' does not depend on the scope provisions of that law. Thus, just as the substantive rules of CMR are incorporated into the contract of carriage as terms of that contract, so also, in the case envisaged by the proviso to Article 2,1, the CMR also incorporates the substantive rules of the law appropriate to that stage, usually rules of maritime law.*"

Since that time he seems to have had a change of heart, as in the current edition of his book he merely establishes that there are three options. Besides the concept that the hypothetical contract should be based on the contract between the carriers and the approach taken in *Gabriele Wehr*, Clarke mentions a third perspective, which entails that the proviso is the exception where the application of the CMR is the rule. As such it should be strictly construed meaning that the CMR rules apply unless a case falls clearly within the proviso. A solution which he himself admits was rejected by the Dutch *Hoge Raad* in the *Gabriele Wehr* judgement and by a French court of law in 1986[262]. Although he is of the opinion that support can be found for the third mentioned opinion in the French text of the Convention as it speaks of '*dispositions impératives*', the difficulty of this solution is that the applicability of the conditions prescribed by law is not a condition of the scope of the exception, but rather one of its consequences, and should therefore not necessarily be construed strictly.

All things considered, the objective approach taken in *Gabriele Wehr* seems the pre-eminent solution to an issue causing much dissension. It is analogous to the commonplace model of a reference to foreign law minus the conflicts rules of said legal system[263]. Yet it is almost needless to say that the objective method is also fraught with certain disadvantages. Although it ensures that the stage by the other means of transport is covered by the law tailored for that mode of transport if there is a convention for the type of carriage in question, it does not ensure that regimes governing the main contract and the sub-contract are aligned, which leaves room for recourse difficulties. Nevertheless it seems to be the lesser evil. The alternative, applying the CMR when no bill of lading is issued, or when deck carriage is agreed, would be even less desirable. This solution, which is practised by French courts of law, obviously causes recourse problems for the road carrier. If for instance the road carrier (main carrier) and the mode-on-mode (subcontracting) carrier, who carries by sea in this case, agree that the cargo is to be transported on deck, this causes the road carrier to be liable based on CMR rules *vis-à-vis* the sender whereas the sea carrier is bound only by the conditions found in his contract of carriage as the Hague-Visby Rules do not apply to authorized deck carriage according to the French point of view[264]. Conversely, the objective approach by the Dutch *Hoge Raad* causes the agreement to carry goods on deck to carry no weight as this is a subjective element which should not influence the application of a system of uniform international law such as the Hague-Visby Rules. The transport of live animals is another matter however. Since the parties to either carriage contract are not able to influence whether the Hague-Visby Rules apply to the carriage of live animals,

[261] Clarke 1982, p. 25-26.
[262] Clarke *CMR* 2003, p. 42.
[263] Clarke *CMR* 2003, p. 42.
[264] Cour d'appel de Paris 23 March 1988, *ETL* 1990, p. 221-226 and Cour de Cassation 5 July 1988, *ETL* 1990, p. 227-228 (*Anna Oden*).

this is an objective aspect of the sea regime's scope of application rules and as such should affect its application under Article 2 CMR. In case live animals are carried mode-on-mode the Hague-(Visby) Rules will not apply as they except this type of cargo, therefore the CMR would apply, even to the sea stage[265].

4.4 Conclusions

Of the carriage conventions currently applicable in Europe, the CMR may very well have the most frequently discussed scope of application rules. These 'scope' discussions only seldom focus on subjects that are unrelated to multimodal transport. The reason for this is twofold; firstly, multimodal carriage contracts almost always entail a road stage, while the CMR lacks a clear provision which determines whether this type of carriage is covered by its rules, and if so, in what manner. Secondly, the CMR is the only convention that regulates *transport superposé* or 'mode-on-mode' transport, a rather specific and exceedingly popular type of multimodal carriage. An Article, one might add, that is rather susceptible to differing interpretations.

However, the largest source of dissent in the scope rules of the CMR is the meaning of the words 'contract for the carriage of goods by road' in Article 1 CMR. Although judiciary and academia in The Netherlands and England seem to consider these words to imply that the CMR applies to all international road carriage, even if it is only an ingredient of a larger carriage contract, there are also those who do not deem it necessary for the road stage itself to be international for the CMR to be applicable[266]. Their German judicial and academic colleagues do however not consider the CMR applicable to road carriage under a multimodal contract under other circumstances than those described by Article 2 CMR, regardless of whether the road stage is national or international. These last mentioned jurists interpret the words 'contract for the carriage of goods by road' very strictly; only contracts involving road carriage are deemed to fit the description and contracts which also involve other modes of transport do not fit the bill.

As is pointed out above, the point of view that the CMR never applies to parts of multimodal contracts besides through Article 2 CMR seems somewhat arbitrary. Although a 'road carriage contract' in this view may not entail other types of transport such as rail or sea carriage, it is commonplace for 'road carriage contracts' to include storage or transhipment operations. Yet these 'accessory' operations, which can be of such significance that they are not 'absorbed' into the road carriage obligation and are thus not covered by road carriage law but rather by their own specific rules,[267] are no bar to the application of the CMR, while the addition of another mode of transport to the contract is.

Apart from being somewhat arbitrary, the point of view excepting the road stage of a multimodal transport from the scope of the CMR must also be rejected on the grounds that it circumvents mandatory uniform law. Like most uniform carriage regimes the CMR consists largely of compulsory law. Article 41 of the Convention determines that subject to the provisions of Article 40, which allows carriers to deviate among themselves from the Convention's provisions other than those concerning recourse actions, any stipulation which would directly or indirectly derogate from the provisions of this Convention is null and void. It would be unjust to subject the carrier who contracts for carriage by road from Koblenz to Paris to such a mandatory liability regime, while the carrier who agrees to carry that same stage by road but also promises

[265] Rb Arnhem 18 July 1996, *S&S* 1997, 33.

[266] Haak 1986, p. 44-48. Rb Rotterdam 24 January 1992*, S&S* 1993, 89; Hof Den Bosch 17 December 1990, *S&S* 1991, 77.

[267] For more information on this subject see Chapter 2, Section 2.2.5 on the mixed contract.

to transport the goods from Paris onward to Salamanca by rail under the same contract is left free to rely on his contractual conditions when damage occurs during the road transport[268].

Furthermore, the German approach may lead to the right results in Germany, which is the application of the CMR regime based on analogy through German national law, it is unlikely to do so in the other CMR Member States as these do generally not have rules on multimodal carriage in their national legislation as Germany has.

The view concerning the scope of application that is most in harmony with the mixed nature of the multimodal carriage contract and which also synchronizes the scope of the CMR with that of the air carriage conventions and the Hamburg Rules, is the view in which the CMR applies *ex proprio vigore* to international road carriage, even if the contract entails carriage by other modes as well. The wish to harmonize the CMR and the air carriage conventions concerning this subject is not as capricious as it may seem. Firstly, the air carriage conventions and the Hamburg Rules are currently the only uniform carriage regimes that express their stance on multimodal carriage[269]. The air and Hamburg regimes are the only carriage conventions that specifically state that they apply to the stages of a multimodal transport that concern carriage by the mode of carriage that the convention is intended to regulate. In Article 31 of the Warsaw Convention and in Article 38 of the newer Montreal regime it is stated clearly that in the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of the conventions shall apply only to the carriage by air. To be sure, landmark cases in multimodal transport law such as *Quantum*, '*Resolution Bay*' and the OLG Köln judgement of 2004 concerned the combination of air and road carriage, and in both instances the CMR was deemed to apply to the road carriage segment[270]. Then again, in 2008 the BGH very clearly spoke against the application of the CMR in relation to a combination of international sea and road carriage[271]. The Hamburg rules in turn, are even clearer on their stance in relation to multimodal transport than the air carriage regimes are. In Article 1(6) the Hamburg rules declare 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 the Convention only in so far as it relates to the carriage by sea. Interpreting the words 'contract for the carriage of goods by road' as meaning to include international road segments of a multimodal contract would therefore cause a little more uniformity to appear in the area of international carriage law.

Secondly, the harmonization of the CMR and the air and Hamburg regimes has an even larger impact than is apparent at first glance. An additional reason to want to harmonize the views concerning the scope of application of the CMR specifically with those of the air carriage conventions and the Hamburg Rules is that the other carriage conventions, such as the COTIF-CIM and the CMNI contain scope rules that are largely identical to those of the CMR. The only exception are the Hague- and the Hague-Visby Rules, whose scope rules deviate to such a large extent from those of the CMR that harmonization would be impossible. The difficulty being of course that they require a bill of lading for application[272]. The result of harmonizing the opinions

[268] Of course the multimodal carrier is only allowed to rely on any contractual conditions or exonerations insofar as the applicable national law permits this.

[269] For more information on the air carriage conventions see Chapter 5 and for more information on the Hamburg Rules see Chapter 8, Section 8.2.

[270] *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535-560, Rb Rotterdam 28 October 1999, *S&S* 2000, 35 (*Resolution Bay*) and OLG Köln 25 May 2004, *TranspR* 2004, p. 359-361.

[271] BGH 17 July 2008, *TranspR* 2008, p. 365-368.

[272] There are the Rotterdam Rules which do not require a bill of lading for application. The scope of application of this regime would however also not be in line with that of the air carriage conventions since it is meant to apply to all parts of a multimodal transport, not just the sea carriage segments. The Hamburg Rules, as the other current sea carriage regimes for that matter, are to become obsolete under the new regime as the membership of the current sea

on the scope of application of the CMR with that of the air carriage conventions and the Hamburg Rules would therefore most likely result in a harmonization in this area of not only uniform road and air carriage law, but also of uniform rail and inland waterway transport law. How similar the scope rules of the rail and inland waterway conventions are to those of the CMR will become more apparent in the subsequent Chapters of this book which deal with the other carriage conventions.

The requirement that the road stage to which the CMR rules are to adhere should be international enhances the degree of harmony between the air and road carriage regimes, as the air carriage regimes demand this of the air stage as well, as does the Hamburg regime require this for the sea stage. The mixed nature of the multimodal contract equally points in this direction as the rules of the CMR should only attach to that part of the contract that concerns the type of operations covered by the road carriage convention. Only the agreed road carriage stage fulfils the requirement of being a 'contract for the carriage of goods by road'.

The drafters of the CMR intended the Convention to regulate no more than the carriage of goods by road. And although application of its rules to road carriage which is part of a multimodal carriage contract does exactly that, the application of the CMR to only part of a carriage contract is not without its difficulties. Because the CMR's draughtsmen thought to design a separate carriage convention which was to regulate multimodal contracts in their entirety, they did not attempt to prevent any of the problems that arise when applying the CMR rules to the road segment of a multimodal transport. This seems a missed opportunity, as most of these difficulties, which generally relate to the fact that either the starting point or the end-point of the road segment does not coincide with that of the entire transport, could easily have been avoided.

One of these problems, which seems to trouble the application of some of the other carriage conventions to multimodal carriage to a more or lesser extent as well, is the quandary as to the moment at which the prescription period should be deemed to commence if the road carriage stage is not the last transport segment. When the CMR is thought to attach to the road stage and the road stage itself should be international in order for the CMR to apply this means that the term 'place of delivery' which is used in Article 1 refers to the place where the road carriage ends. If however another transport stage commences thereafter, the place of delivery as meant in Article 1 CMR does not coincide with the place of delivery at the end of the entire transport. The term 'delivery' is quite a significant one in the CMR. Not only does it influence the scope of application and in which places the plaintiff may bring an action against the carrier based on Article 1 and Article 31 CMR[273], it even affects the liability of the carrier, due to its presence in Article 17 CMR. Because Article 32, the Article regulating the prescription period, also attaches to the 'delivery' in order to clarify at what point in time the time bar on actions shall start, this could easily be interpreted as meaning that the period of prescription is to start when the road stage has ended, but before the transport in its entirety has been performed. This would cause the already short prescription period – the claimant only has one year to commence proceedings against the carrier – to be reduced even more. This is obviously an unwarranted consequence and thus it is submitted here that the term delivery should be interpreted in keeping with the purpose for which it is used. Since the rules of the CMR should be interpreted

carriage regimes is to be renounced by States who want to become party to the new 'maritime plus' treaty. For more information on the new door-to-door carriage treaty see Chapter 8, Section 8.3.

[273] Rb Rotterdam 11 April 2007, *S&S* 2009, 55 *(Godafoss)*. Due to the consensual nature of the carriage contract it is of no import where the goods are actually taken over, or where they are actually delivered. Decisive are the place of departure and the place of destination which as designated by the parties in the contract. Loewe *Commentary on the CMR* 1975, p. 15.

autonomously this is feasible[274]. The rationale behind Article 32 CMR is to cause the prescription period to start after the goods have been delivered to the consignee, therefore a reasonable interpretation of the term delivery in this Article would be to consider it to mean the final delivery, even if this does not coincide with the end of the road stage.

All things considered the objective of the CMR to uniformly regulate the international carriage of goods by road is best served by applying its rules to such carriage even if the contract is multimodal. This does however not mean that the Convention is adequately equipped to deal with all of the consequences of such use. Yet, the difficulties created by the application of the CMR to part of a multimodal contract are mostly of minor importance and are certainly not insurmountable.

[274] Clarke *CMR* 2003, p. 12; Koller 2007, p. 1124-1126, Article 1 CMR, No. 4.

5 MULTIMODAL TRANSPORT UNDER THE WARSAW AND MONTREAL CONVENTIONS

Since the carriage of goods by air occurs between airports only, many contracts for the carriage of goods by air are part of a multimodal contract. Both pre- and end haulage are as a rule necessary to transport the goods to and from an aerodrome[1]. When this haulage is to be performed based on the same contract as the air carriage the carriage becomes multimodal.

As opposed to sea and land carriage, air carriage has a relatively short history[2]. Even so, the carriage of goods by air has been regulated by international uniform law for the better part of a century by now. The first international instrument regulating air carriage was the Warsaw Convention of 1929. The Warsaw Convention has only one authentic version, the French version, which was also the language in which it was drafted. Since its entrance into force this piece of international legislation has undergone many changes[3]. It was amended by several protocols and even by a separate convention[4]. In relation to multimodal carriage the 1955 Hague Protocol[5] (HP) and the Montreal Protocol No. 4 of 1998[6] (MP4) are specifically worth noticing. Because of the emphasis of this research on multimodal carriage any references to the Warsaw Convention in the following will be references to the Convention as amended by the 1955 Hague Protocol and the Montreal Protocol No. 4.

Not all of the amendments were ratified by all members to the Warsaw Convention however. This causes the 'Warsaw System', which is how the Warsaw Convention and all its amendments came to be called, to be extremely fragmented and complex. It is necessary to examine the precise itinerary the cargo is to take in order to establish whether the original, or some modification of the original Convention governs the transit[7]. Because the complexity of the Warsaw System could no longer be said to promote uniformity, a new convention was drafted to replace the old. This new convention, the Montreal Convention, was signed in Montreal on 28 May 1999 in six authentic versions. That the Convention is meant to fulfil the need to modernize and consolidate the Warsaw Convention and its related instruments is laid down in its Preamble.

All countries member to the European Union have acceded to the Montreal Convention[8], but so far only a little over half of the total number of members of the Warsaw Convention have ratified the Montreal Convention. Because the Montreal Convention does not demand the denunciation of the Warsaw Convention this means that the two systems currently operate

[1] Carriage by road is the most popular form of transportation for goods to and from airports as all other types of transport suffer the same difficulty as air carriage; generally a port or a station is needed at the destination, which means that not all places can be reached.

[2] In 1783 the first actual air carriage was realized by the brothers Montgolfier; they transported a duck, a sheep and a rooster in a hot air balloon over a distance of more than 1,5 kilometres. It was not until 1903 however that the brothers Wright performed the first motorized 'heavier-than-air' flight with a plane.

[3] For a more detailed history and explanation of the amendments see Cheng 2004, p. 833-839.

[4] Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier signed in Guadalajara, 18 September 1961.

[5] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air done at The Hague, 28 September 1955.

[6] Montréal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the Protocol done at The Hague on 28 September 1955 signed at Montreal, 25 September 1975.

[7] Koning 2007, p. 75.

[8] The EU acceded to the Montreal Convention by means of Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents.

alongside each other[9]. Furthermore, the new Convention may generate less harmony than is desired due to the existence of six authentic language versions. Although the Vienna Convention provides guidelines as to which meaning is to be followed in case the interpretation of the different versions conjures up discrepancies, any inconsistencies will very likely encourage litigation and produce conflicting applications[10].

In general the two Conventions are rather similar; the Montreal Convention has largely taken over Warsaw's basic philosophy, structure and features[11]. The rules on geographical scope in the Montreal Convention for instance, the explanation as to what constitutes 'international carriage' have been reproduced almost verbatim. When comparing Article 1(1) and (3) and Article 2 it becomes clear that the material scope, the *ratione materiae*, has also been defined in a similar manner.

When it comes to the rules dealing specifically with multimodal carriage however, some subtle differences can be divined. Due to these subtle differences, which do not only exist between the Warsaw System and the Montreal Convention but also between the different versions of the Warsaw Convention, the following Section will not only detail under what circumstances a part of a multimodal contract is covered by uniform air carriage law, but also how to determine which of the air carriage regimes applies.

5.1 Too many rules

Before a dispute can be classified as falling within the scope of application of an instrument of uniform air carriage law or not it is necessary to determine whether it is the scope of the Montreal Convention or the Warsaw System that should be investigated and, if it is the Warsaw System, which of the various versions is the relevant one. The rules which determine the outcome of this search are of public international law. They can be found in the Vienna Convention on the Law of Treaties. This sort of difficulty, which is in essence a conflict of conventions issue, will be more thoroughly discussed in Chapter 9, Section 9.2 on the consequences of conflicting uniform instruments in general.

5.1.1 Montreal, Warsaw or Warsaw plus?

Guidelines as to how it should be determined whether the Montreal Convention, the original Warsaw Convention or an amended version of the Warsaw Convention possibly applies can be found in Article 30 VC. Article 30 VC determines the rights and obligations of States that are party to successive treaties relating to the same subject matter.

Article 30(4) VC applies to the choice at hand; in cases where not all members of the earlier treaty have become members of the latter one, this paragraph prescribes that the lowest common denominator prevails. In light of the current question the lowest common denominator is the eldest regime, the original Warsaw Convention, and the highest the newest regime, the new Montreal Convention. In other words Article 30(4) determines that the newest treaty to which both the State where the place of departure is situated as well as the State where the place of destination is situated are party governs their mutual rights and obligations. This is in accord

[9] More detailed information on the member status of the air carriage conventions and protocols can be found at www.icao.int.

[10] Cheng 2004, p. 856.

[11] Cheng 2004, p. 845.

with Montreal's provisions. Article 55 MC determines that the Montreal Convention only prevails over any rules which apply to international carriage by air in case both States are party to the Montreal Convention and either the Warsaw Convention, the Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol, the Additional Protocols No. 1, 2 or 3 and/or the Montreal Protocol No. 4. The Montreal Convention does therefore not prevail if only one of the States involved is party to it.

5.1.1.1 The import of the place of departure and the place of destination

In multimodal transport, for example when a shipment of grapes is damaged during transport from Buenos Aires in Argentina to Rotterdam via Paris[12], the lowest common denominator rule takes some effort to apply. Because the carriage from Paris to Rotterdam was conducted by road instead of by air the question arises what the exact place of destination is under these circumstances. If it is Paris, this means that the air carriage regimes that Argentina and France have in common are relevant. If it is Rotterdam however, this leads to the relevance of the international instruments on air carriage to which both The Netherlands and Argentina are parties.

According to Koning the 'place of destination' as mentioned in Article 1 of the Montreal and Warsaw Conventions should be read to mean the place where the air carriage part of a multimodal transport ends[13]. In light of multimodal carriage Koning asserts, the airports where the air stage starts and ends are decisive, and not the places where the entire voyage begins and ends. She bases this on the fact that both Article 31 WC and Article 38 MC point out that the rules of the Conventions 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 falls within the terms of Article 1 of either Convention.

Although in the above-mentioned case the air waybill mentioned that the agreed place of destination was the airport of Rotterdam, the *Hof* Den Haag seems to adhere to the same concept. In this case it determined that the Warsaw Convention of 1929 as amended by the 1955 Hague Protocol applied, which means that it chose Paris as the 'place of destination'. Had it chosen Rotterdam as place of destination instead, then the Montreal Protocol No. 4 would also have applied seeing that both Argentina and The Netherlands have ratified it, while France has not[14].

The view propagated by the *Hof* Den Haag seems inconsistent with the statements by Giemulla and others that the 'place of departure' and 'place of destination' are the locations at which the contractual carriage commences and terminates[15] and that the conventions are not concerned with the actual places of departure and destination[16]. If Giemulla means to establish that the place of departure and the place of destination are to coincide with the start and finish of the entire transport contracted for, then his point of view does not fit the reality of multimodal carriage. If this is indeed what is meant by his statements he fails to appreciate the clear message that is sent by Article 1 WC and MC and Articles 31 WC and 38 MC. Through Article 1 the Warsaw and Montreal regimes do not apply to entire multimodal contracts; they merely apply to

[12] Hof Den Haag 27 December 2005, *S&S* 2007, 23.
[13] Koning 2007, p. 125-126.
[14] The answer would be no different if the incident occurred today; although both The Netherlands and France are party to the 1999 Montreal Convention this regime is not applicable as Argentina has not ratified the Convention.
[15] *Grein v Imperial Airways Ltd.*, [1936] 55 *Lloyd's Rep.* 318; OLG Frankfurt 18 April 2007, *TranspR* 2007, p. 367-373.
[16] Giemulla & Schmid *Montreal Convention*, Article 1 MC, No. 5 and 9; Goldhirsch 2000, p. 17.

carriage by aircraft, and then only if this concerns carriage by air[17]. All other components of a multimodal carriage contract generally fail to meet these conditions and are thus not covered by the air carriage regimes. As a result neither the place of departure nor the place of destination should be attached to these non-air components. Yet, if Giemulla's statements are interpreted to mean the locations where the contractual *air* carriage commences and terminates, this fits in rather well with the text of the Conventions[18].

A decision by the *Cour de Cassation* concerning the carriage of goods from Osaka to Amsterdam by air and from there to the French airport of Roissy by road shows that at least the French judiciary has another take on the subject[19]. The goods in this case disappeared at the Roissy airport before they could be delivered. Because the disappearance occurred after the period of road carriage but during the period in which the carrier was in charge of the goods, the *Cour de Cassation* determined that the Warsaw Convention applied to the loss. This seems to stretch the scope of application of the Convention beyond the borders set by Article 31 however, and even beyond those of Article 18 WC. Although Article 18 determines that the carrier is liable for damage sustained during the carriage by air and defines the carriage by air as comprising the period during which the cargo is in the charge of the carrier, whether in an airport or on board an aircraft, the most fitting interpretation of the term 'airport' would be to include only those airports that are actual places of take off or landing. This view is validated by the *Siemens v Schenker* judgement by the Australian High Court[20]. In December 1996, the German Schenker company issued a house air waybill for the transport of telecommunications equipment which was flown from Berlin to Melbourne via Frankfurt and Singapore. After arriving at Melbourne, the equipment was carried by truck on two pallets to a warehouse situated outside the airport boundary, about 4 kilometres from the airport's main gate. During this short transit, but after the vehicle had left the airport itself, one pallet fell from the truck because it was improperly secured. In relation to the rules that should be applied the High Court determined that Article 18(3) WC acknowledges that carriage by air might also involve movement by land outside the geographic confines of the airport of destination.

> "*In those circumstances the convention rules relating to liability do not apply, but those [printed on] the air waybill will be engaged until the ... time at which delivery may be effected to the consignee in accordance with the rules in force in the country of destination*."

The Court therefore confirmed the view that an air waybill may be evidence of a contract of carriage that begins and/or ends outside an airport. Once the consignment arrives at the airport of departure, the rules of the Warsaw Convention apply until the cargo leaves the airport of

[17] Article 18(3) WC and Article 18(4) MC extend the 'period of carriage by air' somewhat beyond actual carriage by air by means of an aircraft.

[18] The problem is that in multimodal contracts the exact location where the air stage starts or ends is not always specifically mentioned, as is proven by the judgement by the *Hof* Den Haag in which the air waybill indicates Rotterdam as the place of destination. It is fairly common for an 'air carriage contract' to contain a clause providing the carrier with the option to substitute parts of the air carriage (Condition 9 of the standard IATA waybill terms as found in IATA Resolution 600b). If air carriage is partly performed by road this is called trucking. The result of such optional contracts is that the actual place of take off or landing may yet determine where the places of departure or destination are situated. For more details on trucking see Section 5.4 of this Chapter and for a more detailed explanation of optional carriage contracts and the consequences thereof see Chapter 2, Section 2.3.3.1 on the influence of the wording of the contract and its physical performance on the applicable law.

[19] Cour de Cassation 17 October 2000, *ETL* 2000, p. 803-805.

[20] *Siemens Ltd v Schenker International (Australia) Pty Ltd.,* (2001) 162 *FLR* 469. *Cf.* BGH 3 May 2007, *TranspR* 2007, p. 405-408.

destination. There should be no revival of the Warsaw rules however if the destination of the end haulage turns out to be an airport.

So, even though there seems to be some minor discord on the issue, the text of the conventions – especially Articles 31 WC and 38 MC – provides enough support for the view that the scope of application of the Conventions, and thus the places of departure and destination, are connected to the air stage and not to the entire multimodal transport. Therefore, the places of departure and destination mentioned in Article 1 should be read as meaning the places which are agreed for the commencement and the termination of the air stage of the multimodal transport. If there is no mention of these places, the actual places of take off and landing will serve, which is in accordance with the train of thought in Section 2.3.3.1.2 on unspecified and optional carriage contracts of Chapter 2.

A result of this view is that in order for the international uniform instruments on air carriage to apply to an air transit which is part of a multimodal transport, the air stage has to cross one or more borders. In other words, like the road stage needs to be international for the CMR to apply[21], the air stage should be international even if considered separately from the other parts of the carriage. And, if the air stage is indeed international, it is the States in which the airports are situated where the air stage commences and terminates that determine which – version – of the air carriage regimes applies.

5.2 The scope of application

After pinpointing which of the air carriage regimes should be considered in a particular case it is time to take a closer look at the scope of application of the relevant regime. The initial demarcation of the scope of application of both air carriage conventions can be found in Article 1 WC and MC.

These provisions do however not prescribe that the carriage in question should be by air. This is only slightly remarkable, because although aircraft have wheels and are thus quite capable of travelling by road, they hardly ever do except during taxiing, take off and landing. This 'road carriage' is absorbed by the air carriage as these parts of the air transit do not have independent purpose or import. Considering the take off and landing independent parts of the carriage would cause all flights to become multimodal, which cannot have been the intention of the drafters of either the Warsaw or the Montreal Convention[22].

Because Article 1 does not prescribe that the carriage by aircraft should be by air, the provision on combined carriage in Article 31 WC and 38 MC is rather useful, even if an aircraft is not very likely to take a drive beyond the airport perimeters. It is these Articles that form the core of the scope of application rules together with Articles 1 and 2 WC and MC. Articles 31 WC and 38 MC restrict the scope of the Conventions to carriage by air.

An explanation of what exactly constitutes carriage by air is given in Article 18 WC and MC. These Articles seemingly expand the scope of application of the Conventions beyond actual air carriage, which is somewhat peculiar as they are principally meant to demarcate the period in which the carrier is liable for damage to or loss of baggage and cargo.

[21] See Chapter 4, Section 4.1.1 on the application of the CMR through Article 1 CMR.

[22] In relation to this the discussion on whether carriage by Mafi trailers in the port area should be absorbed by preceding or subsequent sea or road carriage or not is of interest. See Chapter 2, Section 2.3.3.2 on '*Teilstrecken*'.

Be that as it may, the result is that not only Article 1 of the Conventions contains provisions which influence the scope of application of the instruments in relation to multimodal transports, but so do Articles 18 and 31 WC and 18 and 38 MC.

The second Article of both conventions also affects the scope of application of the instruments, albeit in an unremarkable manner. It excludes the carriage of postal items almost completely from the influence of either regime[23]. Due to this provision the air carrier can be held liable by the postal administration with which it has a contractual relation only; third parties that are outside the sphere of influence of the Conventions, the sender or addressee of a letter for instance, cannot address the carrier[24].

5.2.1 International carriage of cargo performed by aircraft for reward

Both the Warsaw and the Montreal Conventions' initial attempt to demarcate their scope of application can be found in their first Chapters. The first Articles of the regimes are intended to give a general description of the scope of the instruments. Neither of the two regimes restricts the scope of the instruments to the transport of goods alone. The regimes extend their influence over passenger transport as well, which can be derived from Article 1(1) in which both sets of regulations profess to 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) the explanation of what is meant by 'international carriage' shows that, although this is not explicitly mentioned in Article 1(1), the Conventions presuppose the existence of an agreement, a contract of sorts on which the carriage is based[25]. As was commented by Mance LJ 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*".[26]

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

[23] This does not prevent parties from declaring one of the regimes applicable to the mail carriage by contract. *The Post Office and Others v British World Airlines Ltd.*, [2000] 1 *Lloyd's Rep.* 378.

[24] Müller-Rostin 1994, p. 323.

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

[26] 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, p. 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*')*...*"

5.2.1.1 Agreement

Although the air carriage conventions, unlike for instance the CMR, do not mention the existence of an agreement as a condition for application the general consensus is that the existence of an agreement between the carrier and the consignor is necessary for the application of the Montreal and Warsaw regimes[27]. The text of the regimes clearly implies that the drafters had a carriage agreement in mind as the basis for the air carriage provisions. Not only do the texts often refer to a contract of carriage[28], the parties traditionally involved in a transport contract like the carrier, the consignor and the consignee are also frequently mentioned.

The necessity of a contract for carriage is neatly detailed by the following discourse in the *American Block v Compagnie Nationale Air France* judgement:

> "*The contract plays a role fundamental to the objectives of the Warsaw Conference. The obligations arising from the contract between the carrier and the passenger carry out the Conference goal that the rules of limited liability be known to both parties. This knowledge enables the passenger to determine in advance the amount of insurance he needs; permits the carrier's insurer to gauge the carrier's long-term risk, and act accordingly; and, finally, advises the carrier as to what law it needs to conform its transportation documents to.*" [29]

Nevertheless, the drafting history of the Warsaw Convention shows that even though the contract of carriage was the basis for the instruments provisions, the drafters did not spend much time or deliberation on the exact meaning of the terminology and refrained from incorporating a definition of the term in the Convention on purpose[30].

5.2.1.2 International carriage

Article 1(2) WC and MC entails an explanation of the expression 'international carriage'. By determining that any carriage in which, according to the agreement between the parties the place of departure and the place of destination – whether or not there be a break in the carriage or a transhipment – are situated either within the territories of two States that are members of the Convention, the paragraph focuses more on what is meant by international rather than on what constitutes carriage[31].

In the linguistic sense carriage simply means the act or process of transporting or carrying. Under the air carriage regimes however, carriage means more than that. Article 18(2) WC (or Article 18(3) MC) indicates that the term carriage means more than mere conveyance; it also includes the procedures and actions incidental to movement such as the period of waiting

[27] Giemulla & Schmid *Warschauer Abkommen*, Article 1 WC No. 9; Koller 2005, p. 179. "*Zumindest aus der in Deutschland herrschenden Sicht muß deshalb zwischen dem Absender und dem Transportunternehmer ein Vertrag zustande gekommen sein*."; *Western Digital Corporation v British Airways plc*, [2000] 2 *Lloyd's Rep.* 142; Clarke & Yates 2004, p. 318; Ramming 1999, p. 328; Mankiewicz 1981, p. 33.

[28] Articles 3, 4, 5, 12, 13, 30 and 33 WC.

[29] *Block v Compagnie Nationale Air France,* (1967) 386 *F.2d* 323.

[30] Koning 2007, p. 86.

[31] For a description of what is meant by international see Section 5.1.1.1 of this Chapter on the importance of the place of departure and the place of destination.

before an aircraft can take off[32], and any incidents which occur while the goods are in custody of sub-contractors answerable to the carrier[33]. The OLG Frankfurt justifies this as follows:

> "*The period in which the carrier is in charge of the goods includes the period in which the goods are in the custody of sub-contractors employed to carry, handle or care for cargo which are answerable to the carrier among which even the airport authority can be counted when it concerns the custody of the goods after landing. (…) The purpose of Article 18(2) WC is to expand the period in which the carrier is liable for damage sustained to the goods beyond the period of actual flight to the period in which the goods are in charge of the carrier before delivery. During this time the carrier is able to fulfil the duty that having custody has put upon him; he is in a position where he is able to control the situation and protect the goods from being lost or damaged.*."[34]

On the other hand, the air carriage regimes do not apply to for instance test and instruction flights, because the movement contracted for is not the principal purpose of the flight[35]. Although there is nothing in the conventions to indicate that the purpose for which the cargo is on the aircraft has any bearing on the question whether they apply, the structure and the purpose of the conventions cause them to be inapplicable to a relationship of 'carriage' where there are other predominant contractual arrangements between the carrier and the carried[36]. The regimes apply only if parties contract for transportation between two locations, and although carriage occurs in instruction flights, it does not occur pursuant to a contract of carriage. Thus the air carriage instruments are excluded by the absence of a contract for carriage, not by the absence of carriage as such[37].

5.2.1.2.1 Return flights

Besides carriage in which, according to the agreement between the parties, the place of departure and the place of destination are situated either within the territories of two States that are both members of the convention, so-called 'return flights' are also considered to be international carriage and are thus covered by the air carriage regimes. Article 1(2) explains that as long as the agreement provides for a stopping place within the territory of another State[38], even if this State is not a member of any of the air carriage regimes, the regime that the State of departure and destination adheres to applies to the carriage. The logic behind this is effectively illustrated by Greer LJ in *Grein v Imperial Airways*:

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[32] *Clarke v Royal aviation,* (1997) 34 *Ord.* (3d) 481, as cited in Clarke & Yates 2004, p. 320.

[33] Clarke & Yates 2004, p. 320 and 333.

[34] OLG Frankfurt 21 April 1998, *TranspR* 1999. p. 24-27; BGH 21 September 2000, *TranspR* 2001, p. 29-34.

[35] Clarke Contracts of carriage by air 2002, p. 34. Rb Rotterdam 13 September 2001, *S&S* 2002, 74. Nevertheless, in spite of older judgements in line with the view submitted the French *Cour de Cassation* applied the Warsaw Convention to an instruction flight in a hang-glider. Cour de Cassation 19 October 1999, *BTL* 1999, p. 827; Rb Rotterdam 13 September 2001, *S&S* 2002, 74.

[36] *Disley v Levine*, [2002] 1 *WLR* 785; *Fellowes (or Herd) v Clyde Helicopters Ltd.,* [1997] 2 *WLR* 380.

[37] "*Für den Begriff der Beförderung kommt es somit auf den inneren Zweck der Ortsveränderung nicht an*". Giemulla & Schmid *Warschauer Abkommen*, Article 1 WC, No. 3. *Cf.* HR 26 May 2000*, S&S* 2001, 38. In this judgement the *Hoge Raad* determined that mere movement alone is not enough for a contract to be considered a contract of carriage. Only if the carrier takes over the goods with the intention to deliver them at a certain destination can a contract entailing movement be deemed a contract for carriage.

[38] "*A territory subject to the sovereignty, suzerainty, mandate or authority of another Power*" in the original text of the Warsaw Convention.

> "*If I take a ticket at Euston for Liverpool, Euston is my station of departure and Liverpool my destination, whether I take a single ticket or a return ticket. Suppose, for the sake of illustration, I have taken a return ticket. The porter at Euston asks me what is my destination; my answer would be Liverpool. If I ask him what are the stopping places on the journey he would probably in most cases say Rugby and Crewe; he would certainly not say Liverpool. It would, in my opinion, be a misuse of language to describe the journey I was about to take as a journey from Euston to Euston with a stopping place at Liverpool.*."[39]

So although the carriage begins and ends in the same State, perhaps even in the same spot, and the passage from and to that spot is based on a single agreement, the fact that a stopping place in another State has been agreed upon makes it international. To be sure, the last sentence of Article 1(2) specifies that if carriage between two points within the territory of a single State that is member to one of the air carriage regimes occurs without an agreed stopping place within the territory of another State, this is not international carriage for the purposes of the regimes.

Although return flights are quite common in passenger transport, they are less likely to occur as regards the carriage of goods.

5.2.1.2.2 Successive carriage

Air carriers do not generally supply transport to all destinations around the globe. For cargo to reach its destination it therefore often takes a combination of carriers. The scope of the air carriage regimes would be severely limited however if each stage of what is called successive carriage performed by a different carrier was required to be international. Therefore the Warsaw and Montreal regimes feature a provision on successive carriage which expands the meaning of the term international carriage found in Article 1(2) WC and MC. The provisions on successive carriage are found in Article 1(3) WC and MC and Articles 30 WC and 36 MC. Article 1(3), the provision on successive carriage that directly influences the scope of application of the regimes, describes successive carriage and some of its consequences as follows:

> "*A carriage to be performed by several successive (air) carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.*"

The conditions for successive carriage under the air carriage regimes are therefore twofold: (a) the carriage is to be performed by several successive carriers and (b) it is considered by the parties to be a single operation. This is different from the conditions set for successive carriage in the other carriage conventions such as the CMR and the COTIF-CIM[40]. The provision found in the air carriage instruments does not focus on the acceptance of the consignment note by a successive carrier but rather concentrates on the actual performance of the carriage and the intentions of the contracting parties.

[39] Greer LJ in *Grein v Imperial Airways, Ltd.,* [1936] 55 *Lloyd's Rep.* 318.

[40] Article 34 CMR determines for instance that a succeeding carrier becomes a party to the contract of carriage, under the terms of the consignment note, by reason of his acceptance of the goods and the consignment note, while the conditions on successive carriage in Article 26 COTIF-CIM are satisfied by the acceptance of the consignment note alone.

With the requirement that the actual carriage is to be performed by several carriers the provision distinguishes successive carriage from carriage which involves sub-carriers; carriage where one carrier promises to carry the goods while the actual carriage is performed by a subcontracting carrier who has no contractual ties to the original consignor[41]. A contract of carriage cannot involve both successive and multimodal carriage as it is defined in Chapter 2 of this work[42]. One of the specific features of such a multimodal carriage contract is after all that the consignor enters into only one contract for the entire carriage with one carrier. His co-contracting party, the multimodal carrier, can of course subcontract parts of multimodal transport – even to successive carriers – but he remains the only co-contracting party of the consignor or consignee, and is as such the only carrier the consignor or consignee may address for compensation based on the contract of carriage[43]. However, it may be possible that such a multimodal contract covers only part of the transport to be performed. One of the successive carriers who operate under the same contract may for instance also perform preceding or subsequent carriage by road under said contract. Such 'trucking' operations are quite common in air carriage[44]. Under these circumstances one of the advantages of contracting for multimodal transport – namely the fact that the consignor only has to deal with one co-contracting party concerning the entire door-to-door transport – is lost.

In practice successive and subcontracted carriage are not always easily distinguished[45]. The requirement for successive carriage that the contracting parties must consider all individual stages of the transport to be the various parts of a single carriage will not be satisfied by separate contracts made for each individual part of the journey if these contracts do not refer to the transport as a whole. The intention of the parties to regard the carriage as one undivided transport does not have to be entered in the consignment note or air waybill that is issued however, nor do the names of the carriers that are to perform the air carriage need to be known beforehand[46].

In addition, it does not take that much for the presumption to be made that the parties regard the carriage as a single operation according to German case law. All that is necessary is that the air carriers know that the place where they take over the goods is not the place where they have been sent from originally, that the place where they are to deliver the goods is not their final destination, or that the subsequent air carrier is already mentioned in the consignment note of the first air carrier in the chain[47]. This point of view potentially expands the scope of application of the Montreal Convention beyond its intended boundaries however. If the fact that an air carrier knows that the goods have not been sent originally from the place where he is taking them over is sufficient for him to become a successive carrier, this will cause him to be a successive carrier under the Montreal Convention even if he takes over the goods from a non air carrier. As a result the provisions of Article 36 MC apply to the relationship between him and the consignor. In case a multimodal carrier has subcontracted for the air stage of the transport with

[41] Giemulla & Schmid *Montreal Convention*, Article 1 MC, No. 12. For a more detailed analysis of contracts involving subcontracted carriage see Chapter 1, Section 1.1.1.3 on subcontracted carriage.

[42] Chapter 2, Section 2.3.1.

[43] *Cf.* Chapter 1, Section 1.2.1 on subcontracted carriage.

[44] See this Chapter, Section 5.4 on trucking.

[45] Koning 2007, p. 114. Since the Guadalajara Convention of 1961 the difference is not quite as important as it was before since this Convention provided the consignor with the opportunity to address the actual carrier. The liability of the actual and contractual carrier are not completely identical however, which makes that the difference between successive and sub-carriage has not become completely insignificant. Details on how to discern the difference are given by the *Hoge Raad* in HR 19 April 2002, *NJ* 2002, 412 (Sainath/KLM), with a comment by K.F. Haak.

[46] Mankiewicz 1981, p. 41-42; Giemulla & Schmid *Warschauer Abkommen*, Article 30 WC, No. 9 *et seq.*; Goldhirsch 2000, p. 209; HR 19 April 2002, *NJ* 2002, 412 (Sainath/KLM).

[47] *Cf.* Article 5(2) WC and Article 9 MC. Koller 2007, p. 1609, Article 30 WC 1955, No. 3.

the air carrier the multimodal carrier is the consignor that can exercise the rights provided by Article 36, and if the air carrier himself is the multimodal carrier who has subcontracted the other parts of the transport, the original consignor is the one who can call on Article 36.

The reason that this is possible under the Montreal Convention is that although the text of Article 1(3) has hardly changed since 1929, there is one difference between the text of Article 1(3) in the Warsaw and the Montreal Convention; in the Warsaw text the paragraph speaks of successive *air* carriers, while the Montreal text merely speaks of successive carriers. This change might have had significant repercussions if not for the Article that restricts the scope of application of the Montreal Convention to carriage by air; Article 38 MC. Due to Article 38 and its restriction the application of Article 36 MC has no inopportune consequences when a multimodal transport entails an air stage. The expansion of the scope of the Convention does not manifest beyond its intended limits; it does not cause the first and last carrier to become jointly and severally liable to the passenger or to the consignor or consignee if they did not perform air carriage.

Expanding the scope of application

Article 1(3) rightly deserves its place in the Chapter marked 'scope of application'. Due to this paragraph not only successive carriage conducted on the basis of a single contract falls under the auspices of the air carriage regimes, but successive carriage performed based on a series of contracts is brought under its sway as well[48]. It is this last type of successive carriage that increases the scope of application of the Convention by expanding the meaning of 'international carriage' as described in Article 1(2).

Because Article 1(3) determines that successive carriage does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State, the air regimes apply to many more air transports than they would have otherwise. Although successive literally means 'following immediately one after the other', the regimes even apply where for instance land carriage is performed between two air stages under certain circumstances, whether the land carriage was permitted based on the contract or not. Yet the land carriage cannot be more prominent than the air carriage.

Another indication that the various air stages of a contract of carriage can be considered successive is the performance of the possible other types of carriage by the air carrier. When goods are carried by air from Algiers to Rotterdam airport, are then carried by road to Schiphol, Amsterdam by the air carrier that also performed the first air stage and are then flown to London by a second air carrier, this can be considered successive carriage if the contracting parties regarded it as a single operation[49].

The places of departure and destination in successive carriage

When successive carriage is contracted for, the places of departure and destination as meant under the conventions are not the place of departure and destination of each successive carrier but rather the place where the whole air transport commences and terminates according to the

[48] Giemulla & Schmid *Montreal Convention*, Article 1 MC, No. 23. When successive carriage is based on a single contract only the first carrier is party to the contract at the start of the actual carriage and the other carriers enter into it later on due to Article 30 WC or 36 MC. When based on a series of contracts however, all carriers are parties to the contract from the start although their rights and obligations are limited to the stage of carriage they promised to perform.

[49] Giemulla & Schmid *Montreal Convention*, Article 1 MC, No. 18.

intent of the parties[50]. At first glance this may seem the opposite of what was contemplated regarding the place of departure and destination under a multimodal carriage contract including an air stage, but it is not. On the contrary, the view that the places of departure and destination in successive carriage are to be found at the start and finish of the entire air transport fits in rather well with the concept that the place of departure and destination are to be found at the start and finish of the air stage of a multimodal transport and not at the start and finish of the multimodal journey as a whole. Both precepts aim to fulfil the purpose of the uniform air carriage instruments, which is to unify certain rules relating to international carriage by *air*[51]. Not to unify certain rules relating to carriage in general. When the place of departure and destination are connected strictly to the air carriage, whether this concerns one or several successive stages, the purpose of the uniform instruments is served best.

Moreover, situating the place of departure and destination at either end of the entire successive air transport accords with the fact that even if one or more of the separate contracts that may make up the successive carriage is to be performed entirely within the territory of the same State this does not cause the successive transport to lose its international character.

Only in situations where there is (minor) road carriage between the air stages does this seem a less than elegant solution. But even then it seems workable, due to Article 31 WC and 38 MC; as concerns the application of the air carriage regimes the road stage may then simply be subtracted from the transport[52].

5.2.1.3 Cargo

> "*La présente Convention s'applique à tout transport international de personnes, bagages ou marchandises*"

In its first Article the authentic French version of the Warsaw Convention indicates that it supplies rules regarding both the carriage of goods and passenger transport. The term '*marchandises*' found in the French version has a slightly narrower meaning than the term 'goods' in which it is translated by the English version of the Convention. The meaning of '*marchandises*' is confined to commerce, under French law it means anything able to be the object of a commercial transaction. A more accurate translation of the term would therefore have been 'merchandise' instead of 'goods', since the term 'goods' refers to all inanimate objects[53].

Since the Hague Protocol of 1955 however, the English version of the text uses the word 'cargo' instead of 'goods' despite the fact that the proposition to officially effect this change and the change of the word '*marchandises*' into '*fret*' of the English delegate Beaumont was rejected during negotiations on the Protocol[54]. Anything that can be carried and which the carrier has agreed to carry, but which is not 'baggage' is deemed cargo[55].

[50] Goldhirsch 2000, p. 17.
[51] *Sidhu v British Airways*, [1997] 2 *Lloyd's Rep.* 76, per Hope LJ.
[52] In 1992 the *Rechtbank* Rotterdam applied the CMR to the road stages of the transport of a crane by road, sea and road based on a similar line of reasoning. In that case there was no question of successive carriage however. Rb Rotterdam 24 January 1992, *S&S* 1993, 89.
[53] Thus the term goods excludes live animals whereas the term merchandise does not.
[54] Koning 2007, p. 64 fn. 54.
[55] Clarke Contracts of carriage by air 2002, p. 36-37.

5.2.1.4 Aircraft

Although it refers to carriage by aircraft Article 1(1) WC/MC does not provide a definition of aircraft. In the legal literature it is common practice to use the internationally accepted definition of aircraft found in Annex 7 of the Convention on International Civil Aviation of 1944[56]. In this annex aircraft are defined as:

> "*Any machine that can derive support in the atmosphere from the reactions of air other than the reactions of air against the earth's surface.*"

This definition comprises a wide range of craft; helicopters, paragliders and hot air balloons fall under its terms as well as regular airplanes. The part of the definition excluding machines that derive support from the reactions of air against the earth's surface does not stem from 1944. Rather, it was added to the definition in 1967 by the International Civil Aviation Organization (ICAO) to ensure that air cushion vehicles, or hovercraft, no longer fit the bill as they 'hover' on the air they spew against the surface of the earth. Whether rockets or missiles can be considered aircraft seems debatable[57].

5.3 The influence of the 'multimodal' articles on the scope of application

Besides the Articles 1 and 2 there are in both conventions two more Articles that influence their scope of application. These are Article 31 WC and Article 38 MC that restrict the reach of the regimes to air carriage in case of combined carriage performed partly by air and partly by any other mode of carriage, and Article 18 of both conventions which establishes the exact extent of the period of the carriage by air[58]. Clear as these Articles may seem to be, especially those restricting the application to air carriage alone, still they have caused differing opinions to arise[59].

The following Section will provide an analysis of the rules on multimodal carriage in the air carriage regimes and the different opinions they generate. Because the regulations on multimodal carriage in the air carriage regimes are very similar, the following Section will refer to Articles of the Montreal Convention only. Articles 18 and 38 of the Montreal Convention contain rules that are nearly identical rules to those in Articles 18 and 31 of the Warsaw Convention but the Montreal Convention has added a provision on unauthorized substitution of modes of carriage to the mix and subjects the scope rules of Article 38 MC to Article 18(4) MC.

5.3.1 Restricted to air carriage: Article 38 MC

Article 38 MC is the Article that restricts the application of the Montreal Convention to carriage by air alone whenever the carriage to be performed involves other modes of carriage besides carriage by air:

[56] The Convention on International Civil Aviation signed at Chicago in 1944 has been ratified by 190 States. Dempsey & Milde 2005, p. 68; Giemulla & Schmid *Montreal Convention*, Article 1 MC, No. 28; Diederiks-Verschoor 2001, p. 63; Goldhirsch 2000, p. 11.
[57] Diederiks-Verschoor 2001, p. 63.
[58] Article 18(5) WC HP MP4 and Article 18(4) MC.
[59] Ramming 1999, p. 328-329.

> "*1. In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of Article 18, apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.*
>
> *2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.*"

According to Article 38(1) MC the application of the provisions of the Convention is restricted to the period of the carriage by air in case of combined carriage performed partly by air and partly by any other mode of carriage. The consequences of this provision are twofold. To begin with the provision establishes that the rules of the Convention do not apply to any stage of a combined carriage contract that does not fulfil the conditions of Article 1 MC[60]. It excludes carriage by all means of transportation other than aircraft and it excludes all carriage not by air[61]. In this manner the Article clarifies that the Convention is not intended to apply *ex proprio vigore* to entire multimodal carriage contracts. Although the Warsaw Convention contained almost the exact same wording in Article 31 WC[62], after the Guadalajara Convention of 1961 entered into force some confusion regarding this subject ensued. The reason for the confusion was Article 2 of the Guadalajara Convention which contains the following text:

> "*If an actual carrier performs the whole or part of carriage which, according to the agreement referred to in Article 1, paragraph (b), is governed by the Warsaw Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Convention, be subject to the rules of the Warsaw Convention, the former for the whole of the carriage contemplated in the agreement, the latter solely for the carriage which he performs.*"

The fact that the Article proclaims the contracting carrier to be subject to the rules of the Warsaw Convention *for the whole of the carriage contemplated in the agreement* if the actual air carriage is performed by another carrier was cause for misunderstanding. This part of the Article has been interpreted in the past as meaning that the rules of the Warsaw Convention apply to the whole multimodal carriage contract from start to finish if the multimodal carrier – the contracting carrier – did not perform the actual air carriage, but hired another carrier for the performance of the air stage[63]. This view has not been accepted on a broad scale as the purpose of the Guadalajara Convention was to regulate the liability of the actual carrier and not to extend the liability of the contracting carrier beyond air carriage. The Guadalajara Convention was intended to provide the passengers and consignors or consignees with the opportunity to address the actual carrier almost as if there was a contractual relationship between them[64].

The second inference to be drawn from the provision in Article 38(1) is that the Montreal Convention prescribes the use of the network system, at least for the international air stages in carriage contracts. This means that an international air leg which is included in a 'combined

[60] Ramming 1999, p. 328.
[61] Excepting of course the situations described by Article 18(4) MC.
[62] Article 31 WC does not contain the text "*subject to paragraph 4 of Article 18*".
[63] Naveau 1975, p. 727-728.
[64] Mankabady 1983, p. 136.

carriage' contract will always be regulated by the rules of the Convention if it falls within the terms of Article 1 MC[65].

As with the expression 'contract of carriage' the term 'combined carriage' also lacks an explanation or definition in the treaty text[66]. The rules of construction of international uniform law as described above dictate that the terms 'combined carriage' should currently be interpreted as meaning multimodal carriage, especially since Article 38(1) speaks of this type of carriage as being "*performed partly by air and partly by any other mode of carriage*" [67]. The principal objective of uniform law is after all to achieve a uniformity of rules that stimulates predictability and certainty in commerce, which in turn stimulates international trade[68]. Uniform law demands an internationally uniform interpretation and thus construction based on national law should be avoided[69].

So, even though it has been said that traditionally combined contracts in air carriage made the carrier the consignor contracted with assume liability for the part of the carriage that he performed himself only and considered him a forwarding agent pertaining to the other parts of the carriage, this interpretation is no longer generally accepted and should therefore be abandoned[70]. Even if this outdated view were to be maintained though, this will not affect the application scope of the Montreal rules as the liability for the non air stages of the carriage is not covered by the Convention in any case.

It is unlikely that the meaning of the term combined carriage is restricted to multimodal carriage based on a single contract in air law. Even though the words multimodal carriage are presently thought to imply that the carriage is to be performed based on a single contract, carriage can be deemed equally multimodal if performed based on separate contracts when the meaning of the words is taken literally. Doing so would however only confuse matters unnecessarily. Article 1(3) MC implies that the rules of the Convention may also apply if the air carriage is international only through combining several contracts[71]. Be that as it may, this provision relates to successive carriage only, which is a type of carriage that can never be part of a multimodal carriage contract as defined in Chapter 2, Section 2.3.1. Of course, if carriage were to be considered 'combined' – or 'multimodal' – by virtue of a combination of more than one unimodal contract the rules of Article 38 serve no real purpose.

Article 38(2) MC adds 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.

In conclusion it can be said that Article 38 MC attempts to exclude all non air carriage from the scope of application of the Montreal Convention and prescribes a network approach towards air carriage which is to be performed based on a multimodal contract. That the Article does not succeed in excluding all non air carriage from the treaty's scope of application in the

[65] Herber 2006, p. 439.

[66] Not even the '*travaux préparatoires'* provide a clue as to what was meant with these words by the draughtsmen. Nevertheless it seems that at the time of the entrance into force of the Warsaw Convention and in the following decades 'combined carriage' was mainly thought to mean the combination of air and rail carriage. Koning 2007, p. 126.

[67] See Chapter 3, Section 3.5 on the need for uniform interpretation.

[68] "*The purpose of an international convention is to harmonise the laws of all contracting states on the particular topic dealt with by the Convention. It is therefore very important that the interpretation of the Convention should be the same, so far as possible, in all contracting states.*" Dicey & Morris 2006, p. 13.

[69] This is easier said than done however. Schiller 1996, p. 173. Koning on the other hand is of the opinion that the term should be interpreted based on the supplementary applicable national law. Koning 2007, p. 126.

[70] Nevertheless, these types of contracts, referred to as through transport contracts, are still being entered into and accepted as partly carriage partly freight forwarding contracts.

[71] *Cf.* Section 5.2.1.2.2 of this Chapter on successive carriage.

end is due to Article 18 MC, which contains an explanation as to what is covered by the terms 'carriage by air'. By broadening the concept 'carriage by air' and thus extending its meaning somewhat beyond the literal sense, the Article loosens the confines drawn by Article 38 MC a trifle. For that reason Article 18 and its consequences for the scope of application will be discussed in the following Section.

5.3.2 The period of carriage by air: Article 18 MC

Although Article 18(1) MC starts by fencing off the period in which the carrier is liable for the destruction or loss of or damage to cargo, it also influences the scope of application of the Convention. The Article does this by defining in the third and fourth paragraph what is meant exactly by the words 'carriage by air' to which Article 38 MC restricts the scope of application of the Convention:

> "*3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier*[72].
>
> *4. 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. 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. 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.*"

Strictly speaking extending the meaning of 'carriage by air' under the Convention should not affect its scope of application. If the previously discussed scope of application rules in Article 1 and 38 MC are taken into account the reason why becomes apparent. Article 38 states that the provisions of the Convention shall apply only to the carriage by air. This implies that stretching the denotation of 'carriage by air' would influence the reach of the Montreal regime. Because Article 38 adds the words '*provided that the carriage by air falls within the terms of Article 1*' to the provision however, there is another condition for the application of the regime, namely that the carriage is performed by aircraft. The relevant conditions for the application of the Montreal treaty are therefore in short that the carriage is by air *and* by aircraft. As was observed above[73] procedures and actions incidental to movement such as the period of waiting before an aircraft can take off are generally also accepted as carriage by air[74]. Carriage by air thus includes a little more than the actual flight; it also includes the actions that are closely linked to the flight such as taxiing *et cetera*. Even after this minor broadening of the meaning of 'carriage by air' beyond the

[72] Article 18(2) of the original Warsaw Convention contained more text: " *The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.*" The deletion of the last portion of the sentence does not affect the period in which the carrier is liable for the goods as Article 18(4) MC explains 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. The terms aerodrome and airport are synonyms under the Warsaw Convention, see *Rolls-Royce v Heavylift Volga Dnepr Ltd.,* [2000] 1 *Lloyd's Rep.* 653.

[73] *Cf.* Section 5.2.1.2 of this Chapter on international carriage.

[74] *Clarke v Royal aviation* (1997) 34 *Ord.* (3d) 481, as cited in Clarke & Yates 2004, p. 320; OLG Frankfurt 21 April 1998, *TranspR* 1999, p. 24-27; BGH 21 September 2000, *TranspR* 2001, p. 29-34.

literal sense, this is not enough to cover the augmentation of the scope envisioned by Article 18 MC. Consequently, if this manner of interpretation is followed, it seems that the texts of Articles 1, 38 and 18 are rather inconsistent. If interpreted thus, Article 18(3) and (4) MC serve no purpose other than to confuse as they cannot influence the scope of application of the regime.

In general the jurisprudence does not interpret the condition of the performance by aircraft this strict it seems. There are in fact several legitimate reasons not to adhere too strictly to the condition that the carriage is to be performed by aircraft, it should not be adhered to '*coûte que coûte*'. One reason is that Article 38 includes the words '*subject to Article 18 paragraph 4'*. Words which indicate that this provision is meant to influence the boundaries set on the scope of the Convention by Article 38. If Article 18 could only influence the range of the treaty in an infinitesimal manner it would hardly be worthwhile to subject the rules of Article 38 to those in Article 18(4).

The other reason is also attached to Article 18. Especially to Article 18(2) of the original Warsaw Convention that is, or Article 18(4) WC HP MP4, both Articles which 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 of 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 in which the carrier is liable for damage sustained to the goods beyond the period of actual flight[75]. The paragraphs are meant to extend the scope of the regimes to the period in which the goods are in the charge of the carrier within an airport[76], and under certain circumstances even when they are in the charge of the carrier outside of an airport.

It is submitted here that it seems somewhat odd to accommodate such expansions of the scope of application of the treaty in an Article which in first instance relates to the liability of the carrier rather than to the scope of application. By extending the period of time during which the carrier may be held liable under the rules of the regime, the scope of the regime clearly is enlarged. This leads to a 'chicken and egg' conundrum[77], because how can a carrier be liable based on a set of rules during a period of time to which these rules according to their official scope of application do not apply?

5.3.3 Extending the period of carriage by air: the presumption in Article 18 MC

The combination of Article 18(3) MC and the first sentence of Article 18(4) MC restricts the period of the carriage by air to the period in which the carrier is in charge of the goods during actual air carriage and within the confines of an airport[78]. Although the drafters of the regimes were of the opinion that a carrier should be liable during the period in which the goods are in his charge, they only intended to provide the basis upon which to ground this liability in relation to

[75] Goldhirsch 2000, p. 94; Dempsey & Milde 2005, p. 169; Diederiks-Verschoor 2001, p. 63, 80-81; Ruhwedel 1998, p. 342; *Clarke v Royal aviation* (1997) 34 *Ord.* (3d) 481, as cited in Clarke & Yates 2004, p. 320; OLG Frankfurt 21 April 1998, *TranspR* 1999, p. 24-27; BGH 21 September 2000, *TranspR* 2001, p. 29-34.

[76] BGH 2 April 2009, *I ZR* 61/06.

[77] What was there first? The chicken or the egg?

[78] If goods are stolen from a warehouse within the confines of the airport the Montreal Convention applies to the claim. The confines of the airport as meant in Article 18(4) MC are the boundaries of the airport as an economical entity, not the – wider – boundaries set by an administrative decree of which the main purpose is to demarcate the area to which government policy regarding the airport is to be applied. Rb Haarlem 9 July 2008, *S&S* 2009, 9.

air carriage. Yet the contemporary airports, especially the hubs, can be enormous and thus there are more and more road movements within the commercial area of the airport to which the air carriage regime can apply[79]. To prevent the regime from overextending its reach, from applying to non air carriage that is not as intertwined with air transport as that performed within the confines of an airport is thought to be, the first sentence of Article 18(4) MC explains 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[80]. Then again, right behind this restriction the same Article 18(4) also contains two exceptions to this rule. Exceptions which create the possibility that under certain circumstances the period of carriage by air is extended beyond actual air carriage and beyond the boundaries of the airport. The second sentence of Article 18(4) MC is responsible for the first expansion[81]:

> "*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.*"

The 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[82]. The text shows that the extension of the scope of application of the Convention rules is limited in three ways; the carriage should (a) take place in the performance of a contract for carriage by air, (b) only carriage that concerns loading, delivery and transhipment outside an airport is eligible, and (c) if it is proven that the damage occurred elsewhere, the presumption does not come into effect.

These three limitations will be discussed in the following three Sections. The second exception to the rule that the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport will be discussed in Section 5.4.1 on unsanctioned substitution, as part of the 'trucking' issue.

5.3.3.1 Unlocalized loss

Damage resulting from carriage by land, by sea or by inland waterway for the purpose of loading, delivery or transhipment, performed outside an airport based on a contract of carriage by air is only presumed to have been the result of an event which took place during the carriage by air when it concerns unlocalized loss. An example of circumstances in which this rule could not be applied is *Quantum*. To begin with it was established where the loss occurred. Although the contract of carriage entailed an international air stage governed by the Warsaw Convention applied which was followed by a stage of road carriage, it was clear that the shipment of hard disks was stolen during the carriage by road in England and thus the refutable presumption of Article 18(4) second sentence could not be applied. In comment Tomlinson J stated during the Commercial Court proceedings that:

[79] *Rolls-Royce v Heavylift Volga Dnepr Ltd.,* [2000] 1 *Lloyd's Rep.* 653; Clarke *TranspR* 2005, p. 183.
[80] Rb Haarlem 15 October 2008, *LJN* BG1240.
[81] The second exception will be discussed in Section 5.4.1 of this Chapter on unsanctioned substitution.
[82] Giemulla & Schmid *Montreal Convention*, Article 18 MC, No. 92.

> "*It is common ground that the Warsaw Convention in whatever version is not by its own terms applicable to this loss which did not occur during the carriage by air or while the goods were at an aerodrome.*" [83]

Thus, only if the cause of the loss or damage remains concealed can the provision have effect[84]. In such a case the rules of the Convention also apply to carriage which involved modes of transport other than by air[85].

Secondly, even if it had remained unclear where the hard disks were lost, the presumption could still not have caused the air carriage regime to apply to the loss as the road stage between Paris and Dublin can hardly be thought to concern mere delivery. The answer to the question as to what then can exactly be considered 'loading, delivery or transhipment' is discussed somewhat further along the line in Section 5.3.3.3 of this Chapter.

Concerning the presumption in Article 18(4) MC it has been suggested above that it is an expansion of the Convention's scope of application. But is it really? At first glance it may seem so, yet, appearances can be deceiving. In fact it is quite impossible to establish whether the Convention's scope is actually expanded by this provision or not since it pertains to unlocalized loss. Because it is unknown where the loss or damage occurred it could just as easily have been during the air carriage. And, if it is proven that this was not the case, the provision no longer applies and the Convention no longer covers the loss or the damage.

At least the boundaries of the presumption are clear-cut. It does not lead to the applicability of the air carriage regime when it is evident that, although the carrier is in possession of the goods, the damage or loss is caused while the goods are no longer in the aircraft or within the confines of an airport[86]. Even though the scope rule found in the third paragraph of the Article extends the carriage by air to the period during which the cargo is in the charge of the carrier, this period is curtailed by the first sentence of the fourth paragraph which determines that it does not extend to any carriage by land, by sea or by inland waterway performed outside an airport.

Not all courts of law seem to acknowledge the air regime's solution for these specific situations involving unlocalized loss. In a case involving the transport by road and air of two packages from Germany to Troy in the U.S. the BGH failed to apply the Warsaw Convention, even though it was unclear where the damage had been caused[87]. In the explanation of how the applicable legal regime was determined in this case the BGH did not touch upon the presumption of Article 18 – which would in this case have concerned the provision found in Article 18(3) WC HP as the Montreal Convention had not yet entered into force when the carriage was performed in October 2000 – but established merely that the place where the damage had occurred had not been pinpointed and thus § 452a HGB could not be applied. Subsequently the BGH considered

[83] *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another*, [2001] 2 *Lloyd's Rep.* 133. See also *Hitachi Data Systems v Nippon Cargo Airlines*, D.C. New York, 1995; 24 *Avi* 18, 433 as cited by Diederiks-Verschoor 2001, p. 80 fn. 72.

[84] Therefore the application of the Warsaw Convention and the Hague Protocol based on Article 18 WC HP by the *Rechtbank* Haarlem to a claim involving goods which were lost during the ferry transit from Malta to Tripoli after they had been carried – most likely by air – to Malta by the same carrier under the same contract should not have occurred. Rb Haarlem 19 February 2003, *S&S* 2005, 83.

[85] Haak 'harmonization' *ETL* 2004, p. 22; Koning 2004, p. 94-95; *Commercial Union Insurance Co. v Alitalia Airlines*, 347 F. 3rd 448 (2nd Cir. 2003) as cited by Dempsey & Milde 2005, p. 172-173.

[86] Milde seems to adhere to the idea that when goods are transported based on a through air waybill, the presumption that the loss occurred during the air transportation is not rebutted by evidence that the damage or loss occurred outside the airport. Likely this view is limited to situations in which the parties have contractually extended the air carriage regime to the entire period in which the carrier is in charge of the goods. Dempsey & Milde 2005, p. 170-171.

[87] BGH 29 June 2006, *TranspR* 2006, p. 466-468.

German national law applicable and dealt with the suit while making use of §§ 407 *et seq*. HGB. Kirchhof rightly criticizes this course of events by commenting that although there is no international treaty on multimodal carriage to which it can accede, Germany is party to other uniform carriage law instruments that take precedence over German national law. The Warsaw Convention is such an instrument and should have been given precedence insofar as it deals with multimodal carriage, which is exactly what Article 18(3) WC HP is intended for[88].

A likely explanation for the BGH's course of action is that the BGH simply did not deem the presumption in Article 18(4) applicable. It may have considered the carriage by truck to the airport in Germany beyond the meaning of the terms 'loading, transhipment or delivery' found in the provision. Although the BGH does not mention this, it is suggested by the fact that the carriage in question is named a multimodal transport; the prevailing opinion in German literature is that when a contract is multimodal this precludes it from being a contract for carriage by air and thus the air carriage regimes do not apply[89].

5.3.3.2 A contract for 'carriage by air'

The most usual types of carriage to supplement air carriage are road or rail carriage. The combination of air and sea carriage is rather uncommon[90]. This is mainly due to the differences between sea and air carriage; the usually costly air cargo is mostly stuffed in small light weighted containers while the standard cargo containers used in maritime carriage are made of steel and are big enough to carry huge amounts of low cost cargo. In addition, air carriage is far more suitable for goods that need a speedy delivery than maritime transport, which means the modes generally attract different types of cargo. As a result, air carriage is usually supplemented by land carriage, either by road or rail, although road carriage seems to be the preferred mode of carriage, especially for simple pre- and end haulage.

It is contended that the non air pre- and end haulage, the carriage for 'the purpose of loading, delivery or transhipment' also known as pick-up and delivery services or feeder services, do not cause a contract to be multimodal when they are combined with air carriage[91]. A contention that is made because the presumption in Article 18(4) MC requires that the carriage by land, by sea or by inland waterway performed outside an airport takes place in the performance of a *contract for carriage by air*.

The exclusion of pick-up and delivery or feeder services from the concept multimodal carriage is not new; in the MT Convention, a treaty which failed to enter into force, the following ramshackle and somewhat ambiguous provision can be found in Article 1:

> "*The operations of pick-up and delivery of goods carried out in the performance of a unimodal transport contract, as defined in such contract, shall not be considered as international multimodal transport.*"

[88] Kirchhof 2007, p. 137. *Nota Bene*: Kirchhof inadvertently speaks of Article 18(4) second sentence MC in his Article instead of of Article 18(3) WC HP.

[89] Kirchhof 2007, p. 134.

[90] The exception to confirm the rule is OLG Düsseldorf 1 July 1993, *TranspR* 1995, p. 77-80. In this case men's clothing was transported by sea from Bombay (India) to Dubai, between Dubai and Amsterdam (The Netherlands) by air and from Amsterdam to Sneek (The Netherlands) by road.

[91] OLG Frankfurt 30 August 2004, *TranspR* 2004, p. 471-474. The OLG considered the pick-up and delivery services to be rendered by the carrier to be no more than ancillary and because the air waybill spoke of an international contract for carriage by air the contract could not be considered to be either combined or multimodal as meant in Article 31(1) WC HP.

The idea behind the exclusion is that loading, delivery and transhipment are accessory to the air carriage; they are considered to be of lesser importance. This is not unreasonable as these operations would not be performed if there were no air carriage. Despite this status, these operations, which are – oddly enough – not even considered carriage by some[92], are not absorbed by the air carriage[93]. Nevertheless, that they are deemed accessory does not explain why the label multimodal carriage should be dismissed out of hand. When compared to the transhipment occurring during transports including a sea voyage the feeder services in 'air carriage' do not seem of lesser import. The 'maritime' transhipments in ports or the surrounding areas are sometimes considered independent stages of a transport, which can cause contracts involving sea carriage and transhipment to be considered multimodal[94]. For this to occur, the transhipment has to entail movement in order to be considered carriage, and it has to have '*eigenes Gewicht'*. A transhipment has '*eigenes Gewicht*' according to the OLG Hamburg when for instance the use of special machines was necessary and the movement is especially risky or when the distance over which the goods are to be moved is sufficient. Conversely, Drews is of the opinion that the '*Zusatzleistung*' of transhipment can only be thought to have gained enough independency when it would have been the subject of a separate contract according to the hypothetical will of the contracting parties[95].

The case brought before the OLG Hamburg in view of which it uttered these considerations concerned the carriage of printing presses from Bremerhaven through Portsmouth to Durham in the U.S.[96] After the presses were carried by sea to Portsmouth a tug machine tugged the Mafi trailer loaded with the crates in which they were packed out of the ship to a storage area 300 meters further on so that the crates could be loaded on a waiting truck to be transported by road to Durham. During the tugging operation a crate fell off the Mafi trailer when it was shunted. The OLG considered this movement of 300 meters on the Mafi trailer to

[92] Diederiks-Verschoor 2004, p. 752; Drion 1954, p. 86.

[93] For more details on the absorption doctrine see Chapter 2, Section 2.3.2.1.1. They are absorbed by the air carriage only if it remains unclear whether the damage or loss was caused during the air carriage or during another stage of the transport.

[94] R. Herber, 'comment to OLG Hamburg 19 August 2004, *TranspR* 2004, p. 402-404', *TranspR* 2004, p. 404-406. Rb Rotterdam 24 December 1993, *S&S* 1995, 116. *Cf.* Chapter 2, Section 2.3.3.2.2 on whether transhipment can be an independent stage of transport. *Cf. Hartford Fire Insurance Co. v Orient Overseas Container Lines (U.K.) Ltd*., (2nd Cir. 2000), *ETL* 2001, p. 212 (*Bravery*) under IIIA: "*Transport by land under a bill of lading is not* '*incidental*' *to transport by sea if the land segment involves great and substantial distances.*" The Court of Appeals for the Second Circuit established this in light of the spatial approach it took when deciding whether intermodal transportation contracts for intercontinental shipping can be maritime in nature. It held that the American admiralty jurisdiction does not extend to contracts which require both maritime and non-maritime transportation, unless the non-maritime transportation is merely incidental, and that long-distance land travel (850 miles across four countries) is not incidental. In *Sea-Land Serv., Inc. v Danzig,* 211 *F.3d* 1373, 1378 (C.A.Fed.2000) it was established by the Court that intermodal transport contracts were not maritime contracts because they called for "*substantial transportation between inland locations and ports both in this country and in the Middle East*" that was not incidental to the transportation by sea and in *Kuehne & Nagel (AG & Co.) v Geosource, Inc.,* 874 *F.2d* 283, 290 (C.A.5 1989) the Court was of the opinion that a through bill of lading calling for land transportation up to 1000 miles was not a traditional maritime contract because such "*extensive land-based operations cannot be viewed as merely incidental to the maritime operations*". The Supreme Court applied the spatial approach differently however and determined that: " *Conceptually, so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce-and thus it is a maritime contract. Its character as a maritime contract is not defeated simply because it also provides for some land carriage. Geography, then, is useful in a conceptual inquiry only in a limited sense: If a bill's sea components are insubstantial, then the bill is not a maritime contract.*" *Norfolk Southern Railway Co. v Kirby*, 543 *U.S.* 14, 125 *S.Ct.* 385, 2004 *AMC* 2705 (2004).

[95] Drews 2004, p. 451. In order to determine the hypothetical party will the customs that historically developed in sea carriage are to be considered.

[96] The case was also discussed in Chapter 2, Section 2.3.3.2.2 on transhipment.

have enough independence to be considered a separate stage and thus applied road carriage law to the damage instead of maritime carriage rules[97]. Although the BGH agreed with the OLG Hamburg that the '*Umschlag*' could not be attributed to the sea carriage when confronted with the case, it did also not deem the transhipment in question to be of sufficient individual relevance to avoid being attributed to the ensuing road carriage stage[98]. Even so, the BGH left unsaid whether transhipment in a port terminal could ever be considered a stage with sufficient '*Gewicht*' and if so, what conditions have to be met for this classification[99]. Ramming suggests that transhipment that is to be performed within a port terminal cannot be considered carriage, whereas transhipment that entails movement beyond the terminal is to be considered a stage of transport with enough individuality to merit applying the label multimodal to the contract of carriage if the transhipment concerns carriage by a mode different from that used for the main stage of carriage[100].

When these findings are applied to the movements by road for the purpose of loading, delivery and transhipment which tend to supplement air carriage, it is apparent that many of these should be considered independent stages which cause the 'air carriage' to be multimodal. At the very least because the supplementary carriage by road generally occurs largely outside of the airport area and it usually covers far more than a mere 300 meters from either the place where the goods are taken over to the airport, from the airport to the destination or between two airports, but mainly because these stages entail actual carriage, carriage that would otherwise have been separately contracted for.

All in all, there is no legitimate reason to treat the supplementing movements relating to loading, delivery or transhipment differently merely because the accent of the carriage is either maritime or aerial. And perhaps it is not, at least not unanimously, otherwise a provision such as the one in Article 1 of the MT Convention would not have been a necessity.

According to Kirchhof the explanation for the exclusion of air carriage combined with feeder services from the category multimodal or combined transport is rooted in the fact that Article 18(4) demands that the feeder service takes place in the performance of a *contract for carriage by air.* If a transport is considered mixed, or in other words multimodal, the prevailing opinion in German literature is that this precludes it from being a contract for carriage by air[101].

In the previous Chapter on the application of the CMR on international road carriage performed based on a multimodal contract, it was established that the German legal literature defends the view that the CMR does not apply to international carriage by road which is only one ingredient of a larger multimodal contract[102]. It is reasoned that such a part of a contract is not a 'contract for the carriage of goods by road' and thus the conditions set by the scope rules of the Convention are not fulfilled. Consequently, the interpretation of the words 'contract for carriage

[97] OLG Hamburg 19 August 2004, *TranspR* 2004, p. 402-404.

[98] BGH 18 October 2007*, TranspR* 2007, p. 473-475. *Cf.* BGH 3 November 2005, *TranspR* 2006, p. 35-37. Koller 2007, p. 706-708, § 452 HGB, No. 15. In The Netherlands the exact circumstances apparently dictate whether the carriage by Mafi trailers or tugmasters in the port area is considered sufficiently independent to be considered a separate transport stage or not. See for instance Rb Rotterdam 22 April 1994, *S&S* 1994, 126 in which the mere tugging of a trailer packed with frozen chicken from the terminal to the hold or deck of the ship was not considered sufficient reason to deem the carriage in question to be Article 2 CMR carriage instead of sea carriage. See also Rb Rotterdam 26 August 1999, *S&S* 2000, 12. In 1993 however the *Rechtbank* Rotterdam did consider the transport over a distance of 2000 meters by multitrailer during which the cargo was damaged to be an independent road stage. Rb Rotterdam 24 December 1993, *S&S* 1995, 116.

[99] Herber 2007.

[100] Ramming 'Umschlag von Gut' *TranspR* 2004, p. 60-61.

[101] Kirchhof 2007, p. 134. For those adhering to this view in The Netherlands see Koning 2007, p. 132; Levert 1993.

[102] See Chapter 4, Section 4.1.2 which discusses the view that the CMR does not apply to road carriage based on a multimodal contract via Article 1 CMR.

by air' follow the same fate; when this line of reasoning is applied an air stage of a multimodal transport is not considered a contract for carriage by air.

As was ascertained in the analysis of the scope of the CMR, this is not a view held by either the Dutch or the English judiciary; they generally consider the international road stage of a multimodal contract to be the 'contract for the carriage of goods by road' which is required for the application of the CMR[103]. As a matter of fact, even German courts have applied the CMR to international road stages of multimodal transports in the past[104]. Therefore the condition that the loading, delivery or transhipment takes place in the performance of a *contract for carriage by air* is not likely to be interpreted by either Dutch or English courts of law as excluding all types of multimodal carriage. Moreover, Article 38(2) MC even states that the parties may insert conditions relating to other modes of carriage in the document of 'air carriage' in the case of combined carriage. Thus in the case of combined carriage the document relating to the entire transport remains an air carriage document. This indicates that a contract of 'air carriage' as meant in Article 18(4) may also be a multimodal one[105].

Not that the results as to which regime would apply to such carriage would be any different even if the label multimodal was withheld from the carriage meant in Article 18(4) MC. As Koning mentions, the distinction serves no clear purpose with regard to the applicable legal regime. Both points of view lead to the direct application of the air carriage regimes to the international air carriage stages, but not to the stages involving other types of carriage[106]. The presumption of Article 18(4) second sentence only concerns a change pertaining to the proof to be garnered and does not necessarily evoke a change in the applicable legal regime. When damage is caused during the '*Zubringertransporte*', the liability of the carrier is still determined by the regime that applies to that stage of the carriage and not by any of the air carriage regimes[107], unless the loss remains unlocalized.

On the whole, the above seems to provide insufficient reason to distinguish strictly between the non air carriage meant in Article 18 and that in Article 38 MC when it comes to the meaning of the terms combined or multimodal transport. All the more because the effect of the Articles can never coincide; Article 38 can only be applied if the loss is localized, and Article 18(4), second sentence, only when it is not.

But, although 'contracts for carriage by air' as meant in Article 18 may sometimes be considered part of a multimodal contract, that does not mean that all multimodal contracts which include an international air stage meet the requirements set by Article 18(4). There are a number of legitimate reasons to refrain from interpreting the words 'contract for carriage by air' in such a manner that they include the international air stages of all multimodal transports. Aside from the fact that the words themselves implicate that the air carriage stage is of major significance

[103] *Cf.* Chapter 4, Section 4.1.2.2 on the meaning of the words 'contract for the carriage of goods by road'.

[104] LG Bonn 21 June 2006, 16 O 20/05, www.justiz.nrw.de; BGH 30 September 1993, *TranspR* 1994, p. 16-18; BGH 24 June 1987, *TranspR* 1987, p. 447-452. Since 2008 it is clear however that the CMR does not apply *ex proprio vigore* to road stages of a multimodal contract according to the German judiciary. The BGH clarified that the previous applications of the CMR to road stages had occurred via German law. BGH 17 July 2008, *TranspR* 2008, p. 365-368.

[105] In Shawcross and Beaumont it is also submitted that there can be combined carriage even though the carriage which takes place outside the period of carriage by air is merely incidental to that carriage, as for example where there is surface carriage of cargo from the premises of the consignor to the carrier's cargo terminal. The opinion is offered that the provision which refers to carriage for the purpose of 'loading, delivery or transhipment' does not treat the carriage incidental to the air carriage as 'carriage by air' and thus it is possible that such carriage is within the concept of combined carriage. Shawcross & Beaumont 1977, p. VII 337.

[106] Koning 2007, p. 132.

[107] Kirchhof 2007, p. 135.

compared to the other stages of the transport, there is also the restriction that the purpose of the non-air carriage has to be either loading, delivery or transhipment.

Furthermore, giving the air carriage regimes preference when the loss remains unlocalized under a multimodal contract in which the non-air carriage is not subservient to the air stage seems somewhat arbitrary. Especially when the non-air carriage in question would normally, in case of localized loss that is, be covered by uniform law of its own. Take for example a transport of navigation equipment which is carried approximately 15 kilometres by road from Kalyan in India to Bombay, from Bombay to Rome in Italy by air and from Rome to London in the U.K. by rail. The equipment is damaged somewhere along the way, but this is discovered only after its delivery in London. Under these circumstances it would be rather arbitrary to apply an air carriage regime merely because of the presumption of Article 18. Only when it is clear that the damage occurred before the rail stage is the application of uniform air carriage law warranted.

The best way in which to deal with this dilemma is not to interpret the provision as preventing loading and delivery services to cause the contract of carriage to become multimodal, but to interpret the meaning of the words 'contract for carriage by air' to be limited to contracts involving air carriage and carriage ancillary to the air carriage. Then the words 'contract for carriage by air' would mean contracts mainly for carriage by air, but not necessarily entirely by air. A fitting interpretation, since the purpose of the presumption is to extend the scope of application of the Montreal regime to loss or damage which might have been caused during carriage by air or during a feeder service[108], but not when there are more options than these. Consequently the words 'loading, delivery and transhipment' serve as the tools to be used to delineate what can still be considered supplementary carriage and what not, and thus which contracts of carriage are within the scope of Article 18(4) second sentence and which are not.

5.3.3.3 Loading, delivery and transhipment

It may not matter when determining the applicable law whether the stages of the carriage concerning loading, delivery or transhipment make a contract for air carriage multimodal or not, it does matter that the presumption found in Article 18(4) cannot be applied to all stages involving other modes of transport complementing air carriage. The use of the terms loading, delivery and transhipment indicate that there are certain restrictions. The carriage by road which followed the air stage in *Quantum* is for instance not covered by any of these epithets[109]. The road carriage in this case started in Paris and was to end in Dublin, which made it more significant than mere ancillary carriage; this was no mere delivery. Equally, the terms are generally restricted to what is called 'surface carriage' meaning carriage by road and sometimes rail. The combination of air and sea or inland waterway carriage is rather uncommon and it is unlikely to be mere ancillary carriage if they are performed in addition to air carriage. And loading, delivery and transhipment as meant in Article 18 can certainly be no more than that; it can be no more than accessory carriage. The rationale behind the provision is to extend the scope of the Montreal regime to situations of unlocalized loss, but only in case the air carriage is supplemented by carriage by another mode that does not have an identity of its own. This kind of ancillary carriage normally involves delivering cargo to the consignee from the airport of

[108] Clarke Contracts of carriage by air 2002, p. 118.

[109] Haak 1998; *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535-560.

destination, collecting it from the consignor and taking it to the airport of departure, or transporting it between two airports for the purpose of transhipment. If the carriage could have been performed by scheduled flights it is not ancillary however. In addition, loading and delivery are deemed to cover only the pre- and end haulage to and from the nearest airport suitable for the carriage of the goods in question[110]. If the carriage concerns a larger distance it does not comply with the conditions for loading or delivery[111]. Concerning a shipment of photo equipment from Schiphol airport in Amsterdam to Paris by road and onwards by air to Tripoli in Libya the *Hof* Amsterdam therefore decided that the Warsaw Convention did not apply, as the exact place where the 190 cameras were lost could not be established[112].

Transhipment in its turn is 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[113]. In a case concerning the carriage of three separate shipments from Hamburg to Hong Kong and back the OLG Hamburg determined that:

> "*The transport of goods from the airports Brussels, Amsterdam and London does not entail 'transhipment' as meant by Article 18(3) WC, because a transhipment as meant by this provision can only be the surface transport between two airports which cannot be performed by air for technical reasons or due to the lack of suitable air traffic connections and which could not be replaced by an alltogether different air transport*."[114]

As the mentioned movements all concerned carriage to and from airports for interim storage in warehouses outside the airport perimeters and did not occur at either the start or finish of the transports they could not be deemed loading or delivery. Neither could they be considered transhipment however, as the OLG thought of transhipment as being limited to surface transport between two airports if direct (or leven less direct) flights are unavailable. A plain example of transhipment would be the carriage of imported goods by road between the international Suvarnabhumi airport near Bangkok, Thailand and the older Don Mueang airport on the other side of the city in order to carry the goods on a domestic flight to their destination farther inland.

5.4 Trucking

The substitution of air carriage with carriage by land or 'surface transportation' despite the existence of a scheduled air service on the route in question is a phenomenon that has become

[110] OLG Karlsruhe 21 February 2006, *TranspR* 2007, p. 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 unlocalized 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.

[111] Hof Amsterdam 6 May 1993, *S&S* 1994, 110.

[112] The *Hof* failed to observe however that the road carriage stage in question was too substantial to be considered accessory, which meant the presumption found in Article 18 could not be applied.

[113] Clarke *Contracts of carriage by air* 2002, p. 119.

[114] "*Die Verbringung der Güter von den Flughäfen Brüssel, Amsterdam und London diente nicht der 'Umladung' im Sinne von Art. 18 Abs. 3 WA, da unter einer Umladungsbeförderung im Sinne dieser Bestimmung nur diejenige Oberflächenbeförderung zwischen zwei Flughäfen zu verstehen ist, die aus technischen Gründen und mangels passender Verkehrsverbindungen nicht durch eine entsprechende Luftbeförderung zu ersetzen oder durch eine insgesamt andere Luftbeförderung zu umgehen ist.*" OLG Hamburg 11 January 1996, *TranspR* 1997, p. 267-270 at p. 269.

quite common. This practice of substitution, a practice that was baptized 'trucking' by the German legal literature if the land carriage concerned carriage by road[115], is typical for the air carriage industry. It is said that on some routes the percentage of air cargo that is 'trucked' is higher than that which is actually carried by air. The popularity of trucking is evidently caused by the increase of efficiency it can generate. Performing part of an air carriage contract by road can help the carrier to circumvent some of the limitations that carriage performed by air alone has to contend with. By using trucks, constraints such as the limited cargo space in aircraft, the limited amount of flights that can be scheduled per day due to the dimensions of the airport, or due to rules of public law concerning noise limitation, environmental pollution *et cetera* are avoided. Other limitations are the fact that the larger freighter airplanes meant for intercontinental flights cannot be employed at all airports, and that in the densely populated areas sometimes prohibitions exist concerning nocturnal take offs[116].

As trucking specifically concerns the substitution of carriage that could have been performed by air, the presumption of the second sentence of Article 18(4) MC does not apply. Although is seems somewhat arbitrary that the presumption applies to the transhipment between the two Bangkok airports mentioned in the example at the end of the previous Section if there is no scheduled air service between these airports, while it does not apply to the exact same carriage if there is such a scheduled service. Perhaps reason 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.

When the substitution of the air carriage for surface transportation is permitted, the rules of Articles 31 WC and 38 MC still determine that the air carriage regimes apply only to the 'carriage by air'. Thus, if the contract becomes multimodal through the permitted substitution of part of the air carriage by for instance carriage by road, the air transport rules will only apply to that part of the carriage that is to be performed by air. That is of course, if the air carriage stage meets the requirements set by Article 1 WC or MC.

If all of the air carriage contracted for is substituted by land carriage the air carriage regimes will most likely not apply to any part of the carriage. There are exceptions to this rule however, as the practice of trucking is not limited to the permitted substitution of the contracted for carriage by air. Generally the air carrier will stipulate by means of the general conditions of carriage or some other contractual clause that he is to have the option to substitute all or part of the agreed air carriage with carriage by another mode[117]. A carrier can also refer to rules or regulations drafted by international organizations in his conditions of carriage[118]. An example of a clause drafted by an international organization which enables the carrier to substitute carriage is the 9th condition of the standard International Air Traffic Association (IATA)[119] waybill terms as found in IATA Resolution 600b. This condition contains the following text:

> "*9. Carrier undertakes to complete the carriage with reasonable dispatch. Where permitted by applicable laws, tariffs and government regulations, Carrier may use alternative carriers,*

[115] For instance by Harms and Schuler-Harms in Harms & Schuler-Harms 2003, p. 371.

[116] Koning 2007, p. 119-120.

[117] Examples are clause 6.3.2 used by Air New Zealand: "*Substitution of Carrier and Carriage. Carrier may without notice substitute alternative carriers or other means of carriage.*" Lufthansa's conditions under Article 6.3.d: "*The carrier is entitled but not obliged to carry the consignment via any other route or to forward it by any other means of transportation as representative of the consignor or consignee*." (www.lufthansa-cargo.de) and Southwest Airlines' clause 12 under B: "*Carrier, in its sole discretion*, *reserves the right to deviate from any route indicated on an Airbill, and to forward, and expedite or deliver any Shipment, via any air carrier or other transportation mode…*" (www.swacargo.com).

[118] Giemulla & Schmid *Montreal Convention*, Article 18 MC, No. 101.

[119] The IATA represents some 240 airlines comprising 94% of the scheduled international air traffic.

> *aircraft or modes of transport without notice but with due regard to the interests of the shipper. Carrier is authorised by the shipper to select the routing and all intermediate stopping places that it deems appropriate or to change or deviate from the routing shown on the face hereof.*"

If the carrier substitutes the air carriage without permission however, the air carriage regimes may not apply. Since the unsanctioned substitution of carriage raises some interesting questions as to what rules apply, it will be discussed in the next Section.

5.4.1 Unsanctioned substitution

When a contract involving the carriage of goods by air fails to provide the carrier with the option to substitute the contracted air carriage with another mode of transport and the carrier performs – part of – the air carriage by road in spite of this, this is considered a breach of contract[120]. Based on the adage '*pacta sunt servanda*'[121] and the fact that the contract of carriage is a consensual contract the content of the contract has generally been deemed decisive when it comes to the determining the applicable legal rules[122]. If the parties contracted for carriage by air and no express or silent permission was given by the consignor for the carrier to substitute the agreed air carriage the rules of the air carriage law apply to the carriage whether it was performed by air or not.

Unlike the Warsaw regime the Montreal contains a provision which provides a clear-cut basis for the application of air carriage rules to '*vertragswidriger Luftfrachterzatsverkehr'* or 'contract adverse air carriage substitution' as this type of deviation from the contract is called in German legal literature[123]. As opposed to its predecessor the Montreal Convention has an additional provision in Article 18(4) 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.*"

This extends the period of carriage by air and thus the scope of application of the Convention. Based on this sentence 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. Without the need to resort to general legal principles the current Montreal regime clarifies that 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[124].

[120] See Chapter 2, Section 2.3.3.1.1 on deviation. Basedow 1987, p. 40.

[121] Van Beelen 1996, p. 74; Müller-Rostin *Festschrift für Henning Piper* 1996, p. 967-978.

[122] Koning 2007, p. 122; Haak 2007. For a different view see BGH 17 May 1989, *TranspR* 1990, p. 19-20, *NJW* 1990, p. 639-640, *ETL* 1990, p. 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.

[123] Apparently the carriage conventions left some room for discussion due to their lack of provisions in this area. Koller 1988, p. 432-439; Harms & Schuler-Harms 2003, p. 372.

[124] As a result of which he defaults on his agreement.

For example, if a contract is made for air transport from Rotterdam to New York any ocean or road stages substituting – parts of – the air carriage are considered to be air moves, and are thus covered by the Montreal Convention. Therefore even if the actual airport of departure is London, Heathrow and the cargo is lost during the ro-ro carriage between Rotterdam and London, uniform air carriage law applies to the claim. All that will be required is that the air waybill does not mention any road or ocean stages[125].

The last sentence added to Article 18 MC stimulates legal certainty; there is no misunderstanding the applicable legal regime anymore. It seems a good thing that the carrier is to be held accountable based on the contracted for regime as this is the regime the shipper expects and has based his preparations such as acquiring insurance on[126]. In addition it seems at first glance that a carrier would not really profit from a breach of contract. After all, legally the carrier would be no better off than if he had performed the carriage by the mode of transport contracted for[127]. However, the carrier may reap non-juridical benefits from the substitution, and the substituted carriage may for instance offer more risk to the goods. The result is that the cargo-interests do in fact fare worse in such situations than if the carrier had adhered to the contract. Added to this is the fact that the unbreakable liability limit in relation to the carriage of goods under the Montreal Convention causes the possibility to abuse this rule to arise. If a carrier is for instance aware of the untrustworthiness of some of his employees or perhaps suspects that the subcontractors he means to employ are not completely reliable, he may decide to contract for air carriage with a shipper even if he intends to carry by road or rail. If it then happens that one of his employees or his subcontractors steals the cargo, the carrier is protected by the unbreakable limit of 17 SDR per kilogram of the Montreal regime[128]. Had he reserved the right to carry by road under these circumstances then he would not have been able to invoke the liability limits in the road carriage regime, because a carrier is not entitled to avail himself of these in cases involving wilful misconduct or default, not even if it is not committed by himself but rather by his agents or servants, or by any other persons of whose services he makes use for the performance of the carriage. Thus the carrier stands to elicit gain from deviating from the contract, a result that is obviously unwelcome[129].

To prevent the carrier from gaining a profit by breaching the carriage contract it has been suggested that consent for substitution given afterwards could transform the unsanctioned substitution in a sanctioned one, thus causing the regime of the actual mode of carriage used to become applicable. Kirchhof sees this solution as an unnecessary expedient and pleads for interpreting the last sentence of Article 18 MC as providing a minimum liability[130]. In line with the 1989 judgement of the BGH on this issue under the Warsaw regime he feels that if the regime applicable to the mode of transport with which the carriage is actually performed is more beneficial

[125] Hoeks 2008, p. 260.
[126] Kirchhof 2007, p. 138.
[127] As the deviation from the contract may under certain circumstances even be considered wilful misconduct his situation could even be worse under the contracted for liability regime than under the regime normally applicable to the mode of carriage that is actually used. De Wit 1995, p. 177.
[128] Article 30(3) MC determines that: "*Save in respect of the carriage of cargo, the provisions of paragraphs 1 and 2 of this* Article *shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result*." As a result the cargo carrier is always entitled to avail himself of the unbreakable liability limit of 17 SDR. Ruhwedel 2006, p. 426.
[129] Harms & Schuler-Harms 2003, p. 372; Ruhwedel 2004, p. 138; Giemulla & Schmid *Montreal Convention*, Article 18 MC, No. 114.
[130] Kirchhof 2007, p. 139.

to the claimant the claimant should also be able to claim damages from the carrier based on this regime[131].

Although Kirchhof's interpretation would solve the problem regarding the unfair advantage to be gained from a breach of contract it does not take the exclusivity of the Montreal rules into account. In *Sidhu v British Airways*, a case on exclusivity brought before the House of Lords, Hope of Craighead LJ determined concerning the exclusivity of the Warsaw Convention that:

> "*The Convention describes itself as a* '*Convention for the Unification of Certain Rules relating to International Carriage by Air.*' *The phrase* '*Unification of Certain Rules*' *tells us two things. The first, the aim of the Convention is to unify the rules to which it applies. If this aim is to be achieved, exceptions to these rules should not be permitted, except where the Convention itself provides for them. Second, the Convention is concerned with certain rules only, not with all the rules relating to international carriage by air. It does not purport to provide a code which is comprehensive of all the issues that may arise. It is a partial harmonization, directed to the particular issues with which it deals.*" [132]

When it comes to the exclusivity, the Montreal Convention does not differ from the Warsaw Convention, which means that since the issue of the applicable law has been regulated by the Convention in the last sentence of Article 18, the exclusivity of the Montreal regime prevents the success of Kirchhof's interpretation. In addition, the other carriage conventions do not support his solution either as they apply only to certain 'contracts' for carriage. If the non-air carriage was not agreed upon conventions such as the CMR, the CMNI or the COTIF-CIM do not apply to the damage resulting from the carriage[133]. As a result the sanctioning of the substitution afterwards would seem the more promising solution[134].

5.5 Application problems

Although the provisions found in Articles 31 WC and 38 MC are, in comparison to the other carriage conventions, rather clear that the air carriage rules apply to air carriage that is part of a multimodal contract, this does not mean that the application of the air regimes to such transport is completely devoid of difficulties. Some of these mostly practical difficulties have already been touched upon above but only lightly, others have not been mentioned as yet. Yet, all of them arise from the obvious fact that even though the air regimes have made an effort to account for the existence of multimodal transport, they were originally designed for one mode of carriage only. The result of which is a pair of regimes that deal with multimodal transport only in a marginal fashion, whereas the core of the instruments focuses on unimodal carriage alone. It is not surprising that this leads to problems here and there when it comes to fitting the round unimodal rules through a square multimodal hole.

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[131] BGH 17 May 1989, *TranspR* 1990, p. 19-20*, NJW* 1990, p. 639-640, *ETL* 1990, p. 76-80. This decision is discussed in more detail in Chapter 2, Section 2.3.3.1.1 on deviation.

[132] *Abnett (known as Sykes) v British Airways Plc. and Sidhu and Others v Same*, [1997] 2 *Lloyd's Rep.* 76. *Cf.* Koning 2007, p. 309 *et seq.*

[133] For application Article 1 CMR requires a '*contract* for the carriage of goods by road', Article 1 COTIF-CIM requires a '*contract* of carriage of goods by rail', the CMNI requires a '*contract* of carriage according to which the port of loading… *et cetera*.'

[134] There is also the solution of trying to get the contract nullified based on the applicable national law presented by Koller. Under German law this is apparently a possibility if the carrier contrived to misrepresent the risks of a certain transport. Koller 2005, p. 181.

5.5.1 Timely notice and prescription

One of the first things that catch the eye when searching for unimodal rules that do not easily fit the multimodal mould, concerns the periods of time allotted by the carriage conventions for complaints or actions resulting from damage to or loss of the carried goods. Articles 26 and 29 WC and 31 and 35 MC incorporate the need for a timely notice of complaints and a limitation of actions into the air regimes. Under the Warsaw regime a complaint must be made within seven days of the receipt of the goods or within fourteen days from the date on which the baggage or cargo has been placed at the disposal of the person entitled to delivery. And although these periods have been extended under the Montreal Convention to respectively fourteen days and twenty-one days, they are still relatively short considering the sanction that no action shall lay against the carrier if the complaint is not made within these periods, save in the case of fraud on the part of the carrier.

Neither is the period in which an action must be brought a very long one, although the two years prescribed by both air regimes is not excessively short if compared to the other carriage conventions[135]. If an action is not brought within a period of two years reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped, the claimant's right to damages is extinguished.

Since the mentioned timeframes are short, this may cause problems in relation to multimodal transports including an air stage[136]. It seems rather unfair for the consignee to have to forfeit a part of the precious two year period even before he can take delivery of the goods, which is the case when the place of delivery is considered to be at the end of the air stage, even if this is not the end of the transport[137]. The purpose of the prescription Articles is however to prevent the carrier from having to reckon with actions against him regarding transports performed numerous years ago. Not to coerce the consignee to examine the goods after each stage of the transport, which would hardly be practical and perhaps even impossible[138]. Nor is its objective to shorten the already short prescription period to less than the mentioned two years.

Therefore, as under the CMR, the interpretation of the term destination as found in the scope of application Articles of the air carriage Conventions does not provide any persuasive or even reasonable results if the air stage of a multimodal transport is not the last stage of said transport. Rogert is of the opinion that the provisions on prescription in the air carriage regimes are for that reason not suitable to be applied in cases concerning multimodal carriage of this sort. He argues that provisions in the unimodal carriage conventions should be excluded from application to multimodal contracts if application would lead to results that clearly do not reflect the intent and purpose of the provisions[139]. In their stead he recommends determining the applicable national law and the application of the rules of this regime to the issue. The length and start of the period of prescription should be determined by national rules, not by ill fitting uniform law. Should it occur that there are no fitting rules in the national regime, then the issues

[135] Article 24 CMNI; one year, Article 48 COTIF-CIM; 1 or 2 years depending on the circumstances, Article 32 CMR: 1 year, although 3 years in case of wilful misconduct, Article 20 Hamburg Rules: 2 years.

[136] The same difficulty arises concerning road carriage which is part of a multimodal transport; Chapter 4, Section 4.1.2.5 on the place of taking over and the place of delivery contains subsections on this issue.

[137] The limitation of actions in both Article 29 WC and Article 35 MC are restricted to actions against the air carrier. Only these claims are time barred after two years because the Articles are in both regimes placed within Chapter III which relates to the liability of the carrier. Dettling-Ott 2006, Article 29 WC, No. 4; Goldhirsch 2000, p. 189-190.

[138] Ramming 1999, p. 329.

[139] Rogert 2005, p. 94.

should be handled according to the law applicable to the last part of the multimodal transport, unless there is consistent case law based on which the matter can be settled.

It is true that the application of rules to generate an effect they were clearly not intended for does not sound reasonable. Nevertheless, Rogert's solution, which incorporates not one, but three possible sources of rules to regulate the start and length of the prescription period of which national laws and views are the most prominent, disregards the fact that mandatory uniform rules are not so easily set aside. The issue is already regulated by the uniform instruments, instruments whose rules are mandatory according to Articles 32 WC and 49 MC and which are deemed exclusive to boot. Keeping this in mind, there might be something to say for the application of the rules of the last stage of the transport as these may very well originate from an international convention and it can be argued that this solution works well under the network system as prescription is closely connected to the last stage of the transport. Since both the Warsaw and the Montreal regime are quite clear on the fact that they apply to the damage or loss resulting from the international air stages of a multimodal transport however, it seems their provisions limiting the time for complaints and actions relating to such damage or loss are at the very least equally applicable[140]. To apply the rules of the last part of the multimodal transport would therefore only lead to overlapping international rules which is something to be avoided.

Since there is no going around them, the best solution would seem to be to interpret the rules of the air regimes to fit their purpose. This means that the terms which may be thought to indicate the end of the air carriage stage are instead to be interpreted as meaning the end of the entire transport. In case of the term 'destination' which is found in the scope of application Articles as well as in the Articles relating to the prescription, this leads to two different meanings attached to the same word. Although this seems incongruous, it is certainly not unheard of, or even rare as there are many words that change meaning depending on the context in which they are used. The interpretation of the word destination in Article 1(2) MC as meaning the end of the air carriage[141] does not prevent the word destination in Article 35 MC from being interpreted as meaning the end of the entire transport contained in the contract of carriage.

5.5.2 The air consignment note and the MT document

Under the Warsaw Convention as under the Montreal Convention the absence, irregularity or loss of the air consignment note does not affect the existence or the validity of the contract of carriage[142]. So even if no consignment note has been issued the contract of carriage is still considered valid and even the rules of the conventions still apply. There is one exception to this rule which is found in the combination of Articles 5, 8 and 9 WC. These Articles cause the absence of a consignment note to rob the carrier of the right to invoke the rules relating to liability established by the Warsaw Convention[143]. This exception has not been repeated in the

[140] Both Article 32 WC and Article 49 MC determine that any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

[141] *Cf.* Chapter 5, Section 5.1.1.1 on the import of the place of departure and the place of destination.

[142] Although for a contract of air carriage some sort of document is usually issued. This can be an air consignment note but it can also be an air waybill or a forwarder airbill. Koller 2007, p. 1496-1497, Article 1 WC 1955, No. 3. An air waybill is deemed to be an air consignment note; *Corocraft, Ltd., and Vendome Jewels, Ltd. v Pan American Airways, Inc*., [1968] 2 *Lloyd's Rep.* 459.

[143] Under the Hague Protocol 1955 this was reduced to the inability to invoke the rules of Article 22(2) WC; *Cf. Fujitsu Computer Products Corp v Bax Global Inc.,* [2006] 1 *Lloyd's Rep.* 367; Rb Haarlem 19 February 2003, *S&S* 2005, 83. In 1975 the Montreal Protocol No. 4 deleted the exception from the Warsaw regime.

Montreal Convention. On the contrary, Article 9 MC specifically mentions that non-compliance with the documentary requirements set by the Convention does not affect the existence or the validity of the contract of carriage which is nonetheless subject to the rules of the Convention, including those relating to limitation of liability.

The question is whether an MT document that is issued concerning a multimodal transport including an air stage qualifies as an air consignment note[144]. And even if it does, there is the additional requirement that it should contain all the particulars set out in Article 8 (a) to (i) inclusive and (q) WC to be met, as otherwise the carrier shall still not be entitled to avail himself of the provisions of the Convention which exclude or limit his liability. Especially the requirement that the air consignment note is to contain a statement that the carriage is subject to the rules relating to liability established by the Convention is bothersome. Perhaps it could even be called somewhat illogical because it hangs the application of part of the mandatory rules of an instrument of uniform law on the presence of a contractual provision.

Luckily there is a chance that the requirement will be no more than a rarity in the future as neither the Montreal Protocol No. 4 nor the Montreal Convention cause the carrier to be deprived of his right to invoke the liability rules in the respective air carriage regimes.

5.6 Conclusions

The general intention of the air carriage regimes to apply to all international air carriage, even if it is part of a larger multimodal transport, is crystal clear. It is also apparent that the regimes are not meant to be applied to anything other than carriage by air. Because the regimes entail some expansions of the concept 'carriage by air' however, it is the exact edges of this concept that seem a bit blurred. The cause of this blurring is mainly found in the third and fourth paragraphs of Articles 18 MC. These paragraphs demarcate the scope of application of the Convention and even expand it under certain circumstances. Yet they are not incorporated in one of the scope of application Articles, Articles 1 and 38 MC, but are instead linked to an Article that deals with the liability of the carrier for damage to or loss of cargo. An Article that – according to the title of Chapter III in which it is placed – is meant to do no more than regulate the liability of the carrier. The purpose of especially the fourth paragraph would most likely have been better served if it had been entered into the Convention as a separate Article directly behind Article 38 MC.

In addition, it would probably be wise to clarify somewhere in Article 18(3) or (4) MC or in Article 38(1) MC that the condition that the carriage is performed by aircraft found in Article 1 does not apply in case the circumstances described in Article 18(3) and (4) MC occur, since otherwise Articles 1, 38 and 18 remain somewhat inconsistent. Currently Article 18 expands the scope of the Convention beyond carriage by air and by aircraft by widening the concept carriage by air, while Article 38 subjects itself to Article 18(4) but also maintains that the carriage by air is to fall within the terms of Article 1, which requires for application that the carriage is performed by aircraft.

[144] Apparently this is not a certainty as otherwise the Dutch legislator would not have seen fit to incorporate Article 8:46(3) CC in the multimodal carriage legislation which reads: "*For that part of the carriage which, according to the contract entered into by the parties, will take place as carriage by rail or by air, the CT document shall be deemed be a document intended for such carriage, provided that it also complies with the requirements therefore.*" On the other hand, Article 31(2) WC does determine that nothing in the Convention prevents the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of the Convention are observed as regards the carriage by air. According to De Wit the multimodal transport document will in many cases be governed at different stages by different legal requirements under the conventions governing each mode because there is hardly any national and no international legislation concerning this type of document. De Wit 1995, p. 231.

The view envisioned by the Warsaw and Montreal regimes that international air carriage remains international air carriage even if there are also other modes of carriage incorporated in the contract reflects a pragmatic and sensible approach to the multimodal carriage issue. This is the more so because the multimodal carriage contract is not just any mixed contract; it is a mixed contract that can be divided into almost tangible separate aspects based on the visible differences between the carriage stages. On the other hand it is also a rather special mixed contract since its different aspects are all the same at the core; they all concern carriage. This last feature makes it sometimes difficult to apply the rules of a unimodal regime to a certain stage of a multimodal contract as these unimodal regimes' focus tends to be carriage by a single mode only. The air carriage regimes are no different in this respect. They may acknowledge the existence of multimodal carriage, and even express the intent to regulate international air carriage which is part of such a contract, but despite this the focus remains on unimodal transport. The provisions on multimodal or combined transport in the air carriage conventions only regulate multimodal carriage in a marginal fashion; they are merely rules extending the Conventions' scope of application. The other rules of the regimes are not always fit for application to the air stage of a multimodal transport as they centre on the air stage alone. *Prima facie* they affect to regulate only the air carriage of a multimodal contract as is shown by Article 38 MC, but after a closer look they also attempt to regulate issues that concern the entire carriage, such as prescription or the time limit for complaints. As under the CMR this leads to confusion, since the same words may therefore have to be interpreted differently depending on the context in which they are to be used.

6 MULTIMODAL TRANSPORT UNDER THE COTIF-CIM

The COTIF Convention on international rail carriage is the eldest instrument of uniform carriage law. It is largely a European convention like the CMR, as its members are mostly European countries, but also some North African States and States from the Middle East have ratified the Convention[1].

The original COTIF came into being in 1890 after more than a decade and a half of negotiations. Since then, the regime has had its share of revisions; in 1898, 1906, 1924[2], 1933, 1952, 1961, 1970, 1980, 1990, 1992 and the most recent in 1999[3]. The reason for this parade of revisions is that as early as the 19th century the drafters already recognized that uniform law should be kept up to date just like national legislation. To ensure timely adjustments of the regime they entered certain provisions in the treaty which encouraged its members to keep out a watchful eye. Every three years the delegates of the Member States were to meet and make the necessary adjustments to the regime[4].

The latest full overhaul, called the Vilnius Protocol, was opened for signature on the 3 June 1999 by the Fifth General Assembly of the OTIF, the Intergovernmental Organization for International Carriage by Rail[5]. The Protocol, named after the Lithuanian city where the assembly was held, contains an in-depth revision of the COTIF and all its appendices. The primary objective of the revision was the reinforcement of the competitiveness of the railways in the international transport market. The Vilnius Protocol is an example of the general trend towards the simplification of uniform carriage law perceived by Clarke[6]. This latest revision of the CIM, while retaining the central core of liability, is much less detailed than before.

The entry into force of the newly revised COTIF after two thirds of the OTIF members had ratified it in 2006 increased the amount of appendices of the COTIF from 2 to 7 and almost doubled the amount of Articles contained by the 1980 version of the Convention[7].

Like in air carriage law or any other uniform law, the question as to whether the 1980 or the 1999 version of the COTIF applies in a certain case is regulated by the Vienna Convention[8]. In cases where not all members of the earlier treaty – or earlier version of the treaty – have become members of the latter one, Article 30(4) VC determines that the lowest common denominator prevails. The lowest common denominator is the eldest regime, in this case the 1980 COTIF version, and the highest the newest regime, the 1999 COTIF version. In other words Article 30(4) determines that the newest treaty to which both the State where the place of departure is

[1] Turkey, Tunisia, Morocco, Syria. Iraq and Iran for instance are members of the COTIF as amended by the 1999 Vilnius Protocol. In total 37 States had ratified the newest version of the COTIF in July 2009, see www.otif.org.

[2] The CIV and CIM were signed in Bern in 1924. Kunz 2006, p. 291.

[3] Koller 2007, p. 1739, CIM, No. 1.

[4] Article 59 COTIF 1890. Mutz 2003, p. 290-291.

[5] According to Article 2 of the COTIF the aim of the OTIF is the promotion, improvement and facilitation of international traffic by rail, in particular by establishing systems of uniform law concerning for instance 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.

[6] Clarke *TranspR* 2002, p. 430.

[7] Besides Appendix A (CIV) on international passenger transport by rail and Appendix B (CIM) on the international carriage of goods by rail there are now Appendices C through G as well, which regulate the carriage of dangerous goods, the use of vehicles in international rail traffic, the use of the railway infrastructure and the technical requirements of railway material. Hoeks 2009, p. 4395, inleidende opmerkingen; Kamerstukken I & II 2001/02, 28432 no. 1, p. 6.

[8] See Chapter 5, Section 5.1.1 on this issue pertaining to air carriage law and Chapter 9, Section 9.2 on this issue concerning conflicting carriage conventions in general.

situated as well as the State where the place of destination is located are party governs the contract of rail carriage in question.

Appendix B to the COTIF, the CIM appendix on the international carriage of goods by rail was refitted by the Vilnius Protocol as well. The main purpose of the revision was to harmonize the CIM with the regimes regulating the other modes of transport. One of the incentives to do so was the decision of the Court of Justice of the European Community of 22 May 1985[9]. Due to this decision, the Council of the European Community was obliged to introduce freedom to provide services into the transport arena, to create an active free market environment. This gave a new impetus to European transport law, including rail carriage law. Furthermore, a council directive concerning the development of the Community's railways changed the relations both between the State and the railway and between the railways, particularly with regard to monopoly of operation[10]. The revision of the CIM accounted for these changes by striking both the obligation to carry and the obligation to establish fixed tariffs, which were meant to prevent the abuse of the monopoly position that was initially enjoyed by the railways, from the regime[11]. At the same time these deletions accommodate the ongoing trend of privatisation of railways and level the playing field with regard to other types of carriage.

Another change that aspires to attain these same goals is the abrogation of the lines or services system[12] and the necessity of a through consignment note[13]. The scope of application of the COTIF-CIM after implementation of the Vilnius Protocol is no longer restricted to lines or services included in a list; currently the CIM can apply to all international contracts concerning the carriage of goods by rail for reward. Nor is the absence of a through consignment note or the fact that the carrier is not a railway company reason for the CIM rules not to be applicable any longer[14]. These alterations bring the various carriage regimes a little closer together and thus stimulate competition between the various transport modes. After all, the more similarities there are between the carriage regimes the easier it becomes to compare the costs and risks involved in the different modes of carriage.

Since harmonization was one of the main goals of the Vilnius Protocol, the current version of the CIM has a lot in common with the other carriage conventions. Especially the provisions of the CMR and the CIM are more similar than ever before, even though the CMR itself was modelled after the COTIF-CIM of 1952[15]. To begin with, the CIM has lost its rather formal nature; like the CMR it no longer requires a formal contract *in rem* in the form of a through consignment note, nor a

[9] ECJ (Case 13/83) [1985] www.eur-lex.europa.eu (*European Parliament v Council of the European Communities)*. In this judgement the Court of Justice declared that in breach of the EEC Treaty the Council has failed to ensure freedom to provide services in the sphere of international transport and to lay down the conditions under which non-resident carriers may operate transport services in a Member State. See also Fennel 1985.

[10] Council Directive 91/440/EEC of 29 July 1991. This directive is intended to create a distinction between the provision of transport services and the operation of infrastructure. Hagdorn & Kramer 2006, p. 72.

[11] Explanatory report COTIF-CIM, www.otif.org, p. 1-2.

[12] Only for the extension of the application of the CIM rail carriage regime to transfrontier inland waterway carriage or carriage by sea which supplements rail carriage is there still the requirement found in Article 1(4) CIM that such a service or line is listed.

[13] Under the previous versions of the COTIF-CIM both of these were required for application. Carr 2005, p. 358. The previous versions of the CIM required not just a consignment note but rather a 'through' consignment note. This extra requirement stems from the drafters' wish to harmonize and standardize the CIM and the SMGS, a rail carriage convention with many Member States in the east such as Russia, Kazakhstan and China. The requisite of a through consignment note was meant to facilitate the carriage of goods between parties to the CIM and the SMGS.

[14] The CIM 1999 uses the term 'carrier' where the CIM 1980 used the term 'railway'/*'chemin de fer'*. The term '*chemin de fer'* was generally thought to be restricted to rail operators such as the SNCF, NS, DB *et cetera*. Van Beelen 1996, p. 121; Ramming 1999, p. 328; Rb Rotterdam 1 March 2001, *S&S* 2002, 89.

[15] Haak *TranspR* 2006, p. 326 and 333. The Warsaw Convention of 1929 also served as a template for parts of the CIM. Mutz 1998, p. 616. There are also a lot of similarities between the CIM 1999 and the Hamburg Rules. Koller 2007, p. 1740, CIM, No. 2; Hagdorn & Kramer 2006, p. 77.

railway or a list of lines for application[16]. In the future, the contract for the international carriage of goods by rail is to be a consensual contract, following the example of the CMR and the other carriage conventions. In addition, the CIM 1999 has become more like the CMR in that it no longer considers the 'rail' system, the railway track and rail transportation, to be one unit.

Besides harmonizing the CIM regime with the other carriage regimes to suit the need for healthier competition between the transport modes the Vilnius Protocol also incorporated some of these other transport modes into the COTIF-CIM. Like its colleagues such as the CMR and the CMNI the new rail regime appropriates other modes of carriage under certain circumstances. Only its methods differ from those used by the other unimodal transport regimes. One of the CIM's extracurricular excursions concerns feeder transport, such as the pick up and delivery services which supplement transfrontier rail carriage. Yet in order to avoid conflict with the CMR the CIM restricts itself to the capture of supplementary domestic road carriage[17].

One of the other extensions of the scope of application of the CIM, the one pertaining to sea and international inland waterway carriage, is less likely to succeed in avoiding conflict with other uniform carriage law such as the Hague-Visby Rules under all circumstances. Nonetheless, the possibility of a clash has been kept to a minimum by restricting the application of the CIM rules to such carriage if it is supplemental to international rail carriage and thus of lesser import than the rail stage, and even then only if it is performed on services included in a certain list[18].

6.1 The scope of application

The result of the Vilnius Protocol pertaining to the carriage of goods can be found in the CIM appendix to the contemporary COTIF Convention. The scope of application of this CIM is determined by its first Article, of which Article 1(1) states:

> "*These Uniform Rules shall apply to every contract of carriage of goods by rail for reward when the place of taking over of the goods and the place designated for delivery are situated in two different Member States, irrespective of the place of business and the nationality of the parties to the contract of carriage.*"

The fact that the CIM does not require a specific means of transport only widens the scope of application in comparison with that of the CMR which demands that the carriage is performed by vehicle. Yet, as it is in general unlikely for rail carriage to be performed by any other means than trains which are specifically tailored to fit on railway tracks this amplification of the CIM's scope is negligible.

The geographical scope of application of the CIM is less extensive than that of the CMR however; it is more like that of the air carriage regimes. Unlike the CMR, the CIM requires both the place of taking over of the goods and the place designated for delivery to be situated in Member States, which shortens its leash to some extent[19]. The reason for this more restricted

[16] Mutz 1999, p. 736. Only concerning the expansion of the CIM's scope of application in Article 1(4) is registration of a line or service still necessary.

[17] Clarke & Yates 2004, p. 227.

[18] See Chapter 9, Section 9.1.3.

[19] Article 1(2) COTIF-CIM enables contractual deviation from this rule however: "*These Uniform Rules shall apply also to contracts of carriage of goods by rail for reward, when the place of taking over of the goods and the place designated for delivery are situated in two different States, of which at least one is a Member State and the parties to the contract agree that the contract is subject to these Uniform Rules.*" If the parties so agree, the COTIF

approach is the existence of the SMGS Convention in the east, to which countries such as Russia, Kazakhstan, China and Iran are party. It was thought unfair to force the CIM rules on rail carriage between two countries that are both party to the SMGS while only one is party to the COTIF-CIM[20].

Still, when compared to the previous versions of the CIM which required all territories through which the goods were transported to be members of the OTIF, the reach of the regime has expanded significantly[21]. Besides, the stricter geographic demands of the CIM are largely mitigated by Article 1(2) CIM. This paragraph determines that the CIM's rules also apply if the parties to the contract of carriage by rail agree that the contract is subject to the CIM, even if only the State where the place of taking in charge of goods or the State where the designated place of delivery is situated is a Member State. Under the CIM 1999 contracting parties can for instance cause the CIM rules to apply to a rail transport from Morocco to Cameroon even though Cameroon is not a Member State, merely by entering their wish to make it so into the contract of carriage.

Because it is based on uniform law, such an agreement is not considered a mere contract clause and thus subject to national rules concerning the validity of such clauses. Rather it is construed to be a rule of law that causes one of the conditions for application of the CIM to be met[22]. Otherwise a mere arrangement between parties would not be able to set aside mandatory national law, which is exactly what this kind of agreement is meant to do[23].

6.1.1 Interpretation

The rail carriage regime does not contain a provision regarding the interpretation of its rules. Nonetheless, since the CIM is an instrument of uniform carriage law its rules should be interpreted autonomously. Like all uniform law regimes the CIM does not leave room for the interpretation of its rules based on national legal concepts. Only if the subject at hand is not covered by the rules of the CIM, and not even application of the provisions of the Vienna Convention on the Law of Treaties can generate an answer to fill the gap left by the CIM, does national law make its entrance[24]. The use of national rules is to be restricted to situations in which the uniform CIM rules refer to them and only insofar as the CIM allows for their application[25].

The text of the CIM exists in three authentic language versions; in French, English and German. In case the meaning of two language versions appears to diverge, it is the French version of the treaty text that is to have precedence according to Article 45 COTIF[26].

rules have the force of normal convention law. Under these circumstances the COTIF applies *ex proprio vigore* and not merely as a set of contractual conditions. Mankowski 2008, p. 178.

[20] Bruins-Slot 2006, p. 37.

[21] Kunz 2005, p. 337; Freise 1999, p. 421.

[22] Freise 1999, p. 421.

[23] Koller 2007, p. 1746, Article 1 COTIF-CIM, No. 4.

[24] *Cf.* Chapter 3, Section 3.5 on the need for uniform interpretation of the scope of application rules.

[25] Boudewijnse 1982, p. 51.

[26] Koller 2007, p. 1741, COTIF-CIM introductory comment, No. 5.

6.2 The scope in relation to multimodal carriage

The requirement in the scope rules of the CIM that a contract of carriage of goods by rail has been concluded is almost identical to the scope rule of the CMR which demands a 'contract for the carriage of goods by road in vehicles for reward' for application. Since the CIM is obviously modelled after the CMR in this area[27], except that it refers to rail rather than road, it stands to reason that the question as to whether the CIM rules can apply to parts of a multimodal transport is answered in the same manner as under the CMR. The discussion on whether or not the CMR can be applied to road stages of a multimodal carriage can be found in Chapter 4 on multimodal transport under the CMR. According to the *communis opinio* in The Netherlands, Belgium and England the CMR applies to road carriage which is part of a multimodal transport if the road stage itself crosses one or more borders. In other countries, like for example Germany, Italy and some of the Scandinavian States the views seem somewhat mixed. In Germany at least both the legal and the judiciary support the view that the CMR should not be applied to any part of a multimodal carriage contract, since such a contract is not a contract for carriage by road[28].

As regards the application of the CIM 1999 to parts of a multimodal contract there is no case law as yet, and there is only a small amount of legal literature offering information on the CIM 1999. With regard to multimodal carriage the current literature on the new CIM generally restricts itself to mentioning the possibilities for application to supplemental carriage found in Article 1(3) and (4). In some cases this is likely to suggest that the writer in question does not deem it possible that the CIM rules apply to only a part of a multimodal transport contract, an impression which is amplified all the more by the fact that these same writers tend to adhere to the view that the CMR does not either[29].

Nevertheless, despite the lack of case law and literature to support this position, the notion that the CIM rules do apply to international rail stages which are to be performed based on a multimodal contract has merit for several reasons.

As was said, the similarity with the CMR alone should be sufficient reason for a large group of jurists to assume that the scope of the CIM encompasses rail carriage performed under a multimodal contract, as they also deem the CMR applicable to road stages of such a contract. Moreover, the drafters of the CIM must have known of the ongoing discussion on this issue and could very easily have prevented such an interpretation of the scope of application of the CIM by adding or changing the text of the scope of application rules. Had they for instance determined that the rules apply to every contract of carriage of goods 'that is to be performed strictly' by rail for reward then the scope would clearly have not permitted application of the rules to parts of a multimodal contract. They refrained from doing so however.

In addition, the fact that the CIM 1999 also applies to internal carriage by road or inland waterway which supplements transfrontier carriage by rail according to Article 1(3) CIM provides another clue as to the meaning of the scope rule found in Article 1(1). This extension of application scope to road and inland waterway is expressly limited to non-international carriage by these modes of transport as the drafters feared to create conflict situations between the CIM

[27] The Warsaw Convention which also functioned as a template for the 1999 CIM in some areas clearly had less influence on this scope of application provision as the air carriage regime does not mention the necessity of a contract, it only specifies the '*international carriage of persons, luggage or goods performed by aircraft for reward*' as requirements for application.

[28] BGH 17 July 2008, *TranspR* 2008, p. 365-368. It seems that in Germany this view was not always supported. See Koller 1982, p. 2; BGH 24 June 1987, *TranspR* 1987, p. 447.

[29] Ramming 1999, p. 325-345; Koller 2007, p. 1739 *et seq*., COTIF-CIM introductory comment, No. 1 *et seq*.; Koller 2003, p. 45-50; Herber 2006, p. 439.

and the CMR and CMNI. Conflicts which are possible only if the CMR is considered applicable to road stages of a contract involving both international road carriage and international rail transport[30].

And then there are the introduction of a CIM consignment note for combined transport by the International Rail Transport Committee in 2006 to facilitate the combined transport in Europe[31] and the mention of intermodal transport units in Article 3 and 7 CIM. It is true that the reference to intermodal transport units would not be completely unnecessary even if the Convention's scope was restricted to unimodal rail carriage and the specific types of multimodal carriage which are described in Article 1(3) and (4) CIM. Nevertheless, the inclusion of a definition of intermodal transport units seems to suggest that the CIM plays a bigger part in relation to multimodal carriage than merely applying to unimodal rail carriage contracts or rail carriage contracts involving specific sorts of supplemental carriage.

Of course, intermodal transport units or containers are also used in unimodal transport, but their first and foremost objective is to facilitate transhipment between modes, which is what they are mainly employed for. The mention of containers and swap bodies therefore engenders the idea that the CIM rules apply to international rail carriage performed in light of a wider range of multimodal operations than that demarcated by Article 1(3) and (4) CIM.

6.2.1 Changes clearing the path for multimodal carriage

A number of the requirements for application set by the COTIF-CIM 1990, which is the COTIF-CIM 1980 as amended by the 1990 Protocol[32] and the last version of the Convention before the Vilnius Protocol, caused its scope of application to be severely restricted. The restrictions were largely conceived in light of the erstwhile monopoly position of State governed railway undertakings and made it practically impossible for the COTIF-CIM 1990 rules to be considered applicable to parts of a multimodal transport. This near impossibility is displayed by a case concerning the loss of a consignment of cigarettes brought before the OLG Hamburg on 16 May 2002[33]. The cigarettes were carried by road from Langenhagen to the railway station of Hannover, from where they were transported by rail to Bishek in Kyrgyzstan. The OLG did not deem the COTIF-CIM 1990 applicable to the loss, which remained unlocalized, as the complementary carriage by road was not performed under the responsibility of a railway and therefore not to be treated as carriage performed over a line[34]. Even though the 1990 Protocol enlarged the COTIF's scope concerning multimodal transport by creating the possibility for its rules to apply to pick up and delivery carriage not by line or service, it was restricted still by the

[30] Fearing the risk of conflict with the CMR, a large majority of the delegates within the Revision Committee rejected the idea of also including transfrontier complementary carriage by road within the scope of application of the CIM Uniform Rules. Explanatory report COTIF-CIM, www.otif.org, p. 12.

[31] Earlier the International Union of Combined Road - Rail Transport Companies in Europe, the UIRR, had already adopted their own combined carriage conditions similar to FIATA's adoption of its Model Rules after the emergence of the UNCTAD/ICC Rules for Multimodal Transport Documents. This CIM/UIRR Consignment Note for combined rail - road transport is still in use today. V. Cioarec, 'CIM Consignment Note for Combined Transport: Rail Waybill or Combined Transport Document?', www.forwarderlaw.com. For a specimen of the new combined transport consignment note see www.cit-rail.org.

[32] The Protocol of 20 December 1990 for the Modification of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980.

[33] OLG Hamburg 16 May 2002, *TranspR* 2002, p. 355-357.

[34] According to Boudewijnse the term '*chemin de fer*' used by the authentic French version of the CIM is not limited to railways. He is of the opinion that the entrepreneurs providing international road carriage and shipping services performed over the lines registered in the CIM list which are covered by the CIM 1980 through Article 2(2) COTIF 1980 are equally covered by the words '*chemin de fer'*. Boudewijnse 1982, p. 55.

fact that this would only occur if such carriage was performed under the responsibility of a railway[35]. Thus, the list system and the requirement that the carriage be performed under the responsibility of a railway yet constrained the scope of application of the COTIF-CIM in relation to multimodal carriage.

The changes wrought by the Vilnius Protocol have removed such obstacles barring application as were encountered by the OLG. For one, the Vilnius Protocol abrogated the requirement that the carriage by rail is performed exclusively over lines or services that are mentioned in the lists maintained by the OTIF Central Office in Berne. For another, the new CIM emulates the other carriage conventions in that it no longer employs the term 'railway' but replaced it with the term 'carrier'. As a result it is no longer impossible for parties other than railways to be held liable for damage or loss which occurred during international carriage by rail under the CIM[36]. Thus, any kind of carrier should be able to avail himself of the rail carriage regime if he promises to carry goods by rail for reward, including a multimodal carrier.

The expansion of the scope of the CIM introduced by the Vilnius Protocol concerning substitute carriers also points in this direction. Articles 27 and 3(b) CIM clarify that a carrier under the CIM 1999 no longer has to perform the carriage by rail himself. That this was different before the Vilnius Protocol was illustrated by the *Rechtbank* Rotterdam in 2001[37]. Concerning a multimodal contract involving a stage of rail carriage the *Rechtbank* determined that the uniform CIM rules did not apply to the rail carriage stage from Romania to Rotterdam because the rail carriage was not contracted for by the carrier that would actually perform the rail carriage. The fact that the contractual carrier did not perform the rail stage of the transport but rather commissioned a subcontractor to perform the actual rail carriage for him was sufficient reason for the *Rechtbank* to conclude that it was excluded from the scope of the COTIF-CIM of that time.

Based on Article 27 of the current CIM however, a carrier remains liable in respect of the entire carriage according to the CIM rules, even if he has entrusted the performance of the carriage in whole or in part to a substitute carrier. Article 27(2) declares the provisions of the CIM that govern the liability of the carrier to be equally applicable to the liability of the substitute carrier for the carriage performed by him. This makes the substitute carrier subject to the CIM regime, but only if the main carrier is subject to it. The question is whether the scope of application rules of the CIM are to be considered 'provisions governing the liability of the carrier'. If this is the case then the substitute carrier will only be bound to the CIM rules if he performs transfrontier rail carriage or a combination of rail and other carriage as mentioned in Article 1(3) and (4) CIM. If the scope rules are not provisions governing the carrier's liability however, then even substitute carriers performing domestic rail carriage can be subject to the CIM rules, even if no supplementary rail or transfrontier barge carriage has been contracted for. Although this last option has the benefit of lessening the danger of recourse gaps in the rail carriage sector, it also lessens the predictability of the applicable legal regime for carriers

[35] In Article 2(2) the COTIF1990 states: "*The system of law provided for in §1 may also be applied to international through traffic using in addition to services on railway lines, land and sea services and inland waterways. Other internal carriage performed under the responsibility of the railway, complementary to carriage by rail, shall be treated as carriage performed over a line, within the meaning of the preceding subparagraph*."

[36] It has been suggested that the label 'railway' could also be attached to a multimodal carrier under the CIM 1980. Rogert 2005, p. 102. Article 2 CIM 1970 shows however that that is unlikely, otherwise the drafters would not have thought it necessary to specifically state in this provision concerning the carriage by more than one mode of transport that the undertakings operating road or shipping services complementary to railway services which are included in the appropriate list are also subject to all obligations imposed and enjoy all the rights conferred on railways by the CIM.

[37] Rb Rotterdam 1 March 2001, *S&S* 2002, 89.

performing domestic rail carriage. The substitute carrier is very likely unaware whether the rail carriage he performs is part of a unimodal transport, a rail transport supplemented by carriage of another type, or rather a less prominent part of a multimodal transport.

Because Article 3 CIM defines the substitute carrier as a carrier, who has not concluded the contract of carriage with the consignor, but to whom the main carrier has entrusted, in whole or in part, the performance of the carriage by rail, the coverage of the CIM regime is not extended to other modes of transport by the CIM's rules on substitute carriers. Only sub-carriers performing rail carriage can become subject to the 1999 CIM regime[38]. Thus the regulations on substitute carriage in the CIM do not expand the rail regime to other types of carriage. Other provisions of the Convention are not as modest however. The CIM 1999 contains stipulations that do cause the CIM's scope to reach beyond mere rail carriage.

6.2.2 Annexing other modes of transport

The scope of the CIM regime as altered by the Vilnius Protocol is not entirely restricted to carriage by rail alone. Besides the expansion of the scope of application in relation to substitute carriers, which still concerns carriage by rail, the CIM regime also 'annexes' other modes of transport, albeit on a moderate scale. Through Article 1(3) and (4) CIM, the main scope of application Article, the CIM's scope of application also covers certain types of carriage by other modes of transport if they are included in a contract of which the primary focus is carriage by rail. Due to these paragraphs the CIM applies to entire multimodal carriage contracts under the right circumstances[39]. It should be noted that if the complementary carriage by the other mode of carriage meets the requirements set by the CIM rules in Article 1 CIM, the application of the CIM's provisions is mandatory and not left to the agreement of the contracting parties[40]. The reason for this is that the drafters of the CIM regime aspired to as much uniformity concerning the rules applicable to a single contract of carriage as they could muster.

This pursuit of uniformity by those drafting the CIM which led to the annexation of other transport modes has a less warranted side effect however. The appropriation of other transport modes by the CIM regime 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 is liable to cargo interests based on the CIM limit of 17 SDR per kilogram. 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 3,40 Euro per kilogram in compensation from the subcarrier, which leaves him to cope with a loss of approximately 10 Euro per lost or damaged kilogram[41].

[38] It would hardly be logical or fair to subject subcarriers performing only road or inland waterway carriage to uniform rail carriage law. Freise 1999, p. 422.

[39] The COTIF-CIM has always permitted Member States to include ancillary road and shipping legs of an international journey within the scope of the Convention by the listing of lines; thus enabling all parts of the journey to be covered by the same uniform conditions. The 1990 Protocol even introduced an expansion of the CIM's scope to other modes of transport not by lines or services. Haak & Hoeks 2005, p. 91-92. The expansion of the scope of application beyond rail carriage by the Vilnius Protocol is hampered by fewer restrictions however and is thus more extensive.

[40] Explanatory report COTIF-CIM, www.otif.org, p. 13.

[41] The current value of the 17 SDR can be found at www.imf.org. In September 2009 the SDR was valued at a little more than 90 Euro cents.

6.2.2.1 Supplemental internal carriage by road or inland waterway

Article 1(3) CIM brings ancillary domestic carriage by road or inland waterway into the fold of the CIM regime. To this effect the paragraph contains the following text:

> "*When international carriage being the subject of a single contract includes carriage by road or inland waterway in internal traffic of a Member State as a supplement to transfrontier carriage by rail, these Uniform Rules shall apply.*"

As a result the CIM regime equally applies to carriage by road or inland waterway in internal traffic of a Member State if it supplements transfrontier carriage by rail and the entire carriage, meaning both the carriage by rail and the complementary carriage by other means of transport, is based on a single contract of carriage[42]. An example of a voyage which would under the current regime have been covered by the CIM in its entirety was brought before the *Hof* Den Haag in 2004[43]. In this case pharmaceuticals were carried from Caponago to the railway station in Milan by road, from Milan to Rotterdam by rail and from thereon by road again to their destination Spijkenisse. Under the CIM as amended by the Vilnius Protocol – which had not entered into force yet during the transport – not only the international rail carriage but also both the pre- and end haulage by truck would have been covered by the uniform rail carriage regime. Instead, the Court had to contend with the question as to whether the contracting parties had validly agreed to apply the CMR to all parts of the transport.

For the application of the 'Vilnius' CIM to internal road or barge traffic based on Article 1(3) it is not necessary that the carriage by road be performed by vehicles, nor does it matter if the complementary carriage occurs at the beginning or the end of the rail carriage, between two rail stages or perhaps even more than once. What is required however, and this was already pointed out above, is that the road and inland waterway carriage are expressly limited to non-international carriage to avoid conflicts between the CIM regime and the CMR and CMNI[44].

According to the explanatory report on the CIM 1999 the fact that the carriage in question is to 'supplement' the transfrontier carriage by rail expresses that the principal subject matter of the contract of carriage must be transfrontier carriage by rail[45]. Koller points out that the exact meaning of 'supplemental' carriage remains unclear[46]. He suggests interpreting it along the same lines as the loading, delivery and transhipment found in Article 18 of both the air carriage conventions[47]. In air carriage law however these operations are thought by some to be restricted to carriage with a completely subsidiary character. Only ancillary carriage that cannot be performed by air based on practical or economic reasons and which concerns the delivery of cargo to the consignee from the airport of destination, collecting it from the consignor and taking it to the airport of departure or transporting it between two airports for the purpose of transhipment is considered to be covered by the terms loading, delivery and transhipment[48]. In

[42] The CIM does not contain a provision on '*transport superposé*' comparable to Article 2 CMR as trains are generally unsuited for transport on trucks, barges or seagoing vessels.
[43] Hof Den Haag 25 May 2004, *S&S* 2004, 126, which was the appeal of Rb Rotterdam 19 March 1998, *S&S* 1999, 42.
[44] See Section 6.2 on the scope of the CIM in relation to multimodal carriage.
[45] Explanatory report COTIF-CIM, www.otif.org, p. 12.
[46] Koller 2007, p. 1746, Article 1 COTIF-CIM, No. 4.
[47] *Cf.* Chapter 5, Section 5.3.3.3 on loading, delivery and transhipment under the air carriage conventions.
[48] Clarke Contracts of carriage by air 2002, p. 119.

addition, loading and delivery operations do not cover more distance than the distance to the nearest airport.

The limited nature of the air carriage law terminology is clearly illustrated by a case brought before the OLG Hamburg in 1996 concerning the carriage of three separate shipments from Hamburg to Hong Kong and back again[49]. Regarding these shipments the OLG decided that the carriage to and from airports for interim storage in warehouses outside the airport perimeters could not be deemed loading, delivery or transhipment, as the mentioned movements did not occur at either the start or finish of the transports, nor did they concern surface transports between two airports.

It seems somewhat ill-advised to try to fit the meaning of the 'supplementary' carriage of the CIM regime into the rather tight confines sketched by the air carriage terminology. The more so because the objectives of the air carriage regimes' provisions entailing the words loading, delivery and transhipment are quite different from the aim of Article 1(3) and (4) CIM. The rationale behind the provisions in the air carriage regimes is to extend their scope to other modes moderately and only in situations concerning unlocalized loss. Just the situations where the air carriage is supplemented by carriage by another mode that does not have an identity of its own are brought under the wing of the uniform air carriage rules. Part of the reason for this is that the Warsaw and Montreal Conventions demand that the feeder services take place in the performance of a *contract for carriage by air*. If a transport is considered mixed, if the various stages have '*eigenes Gewicht'*, the prevailing opinion expressed by German scholars including Koller is that this precludes it from being a contract for carriage by air[50].

The intended expansion of the rail regime's scope of application on the other hand is far less limited. The CIM's augmentation of scope is not meant as a mere solution in case loss remains concealed but rather concerns a full-blown annexation of carriage by other modes of transport; the CIM rules are to be applied even if it is clear that the damage or loss occurred during the non-rail carriage. After all, the objective of the CIM's expansion is to cause as much of a carriage contract to be covered by the same set of uniform rules as possible. Thus the drafters intended to further the CIM's ability to compete with the other carriage regimes[51].

In addition, the infrastructure used for rail carriage is very different from its air carriage counterpart. Although both types of carriage generally need some sort of station to start and finish, there are a lot more railway stations than there are airports. Consequently, the category of transports supplementary to international rail carriage that can be considered 'loading' or 'delivery' as meant in uniform air law becomes very small indeed; if the supplementary carriage by road or inland waterway cannot cover more distance than the distance to the nearest railway station, especially the incorporation of inland waterway carriage in the CIM provision seems to have been a rather futile exercise.

The main objection to interpreting the CIM terminology like that in uniform air law is however the fact that Article 1(4) CIM illustrates that even some types of international carriage can be considered 'supplemental' as it uses the exact same phraseology as Article 1(3) CIM in relation to carriage by sea and transfrontier carriage by inland waterway. It seems unlikely that

[49] OLG Hamburg 11 January 1996, *TranspR* 1997, p. 267-270 at p. 269. See Chapter 5, Section 5.3.3.2 on supplementary carriage under a contract for carriage by air.

[50] Kirchhof 2007, p. 134. For those adhering to this view in The Netherlands see Koning 2007, p. 132; Levert 1993, p. 772-780.

[51] Kunz 2005, p. 338.

the drafters intended these types of supplemental carriage to be restricted to loading, delivery and transhipment operations[52].

Even if the parallel between the rail and air regimes were to be drawn no further than to restrict the meaning of 'supplementary carriage' to ancillary carriage that cannot be performed by rail this seems too limited an approach against the backdrop of the international nature of Article 1(4) CIM's sea and transfrontier inland waterway transport.

6.2.2.2 Supplemental transfrontier carriage by inland waterway or sea

Article 1(4) regulates the coverage of the CIM regime concerning international carriage supplementary to rail carriage by stating the following:

> "*When international carriage being the subject of a single contract of carriage includes carriage by sea or transfrontier carriage by inland waterway as a supplement to carriage by rail, these Uniform Rules shall apply if the carriage by sea or inland waterway is performed on services included in the list of services provided for in Article 24 § 1 of the Convention.*"

This paragraph preserves the list system of the previous COTIF-CIM versions by extending application to listed services such as ferries run by railways, albeit in a diminished form. In the interest of legal clarity, the registration of lines is required in the case of international carriage by inland waterway in order to exclude – following the example of the CIM Uniform Rules 1980 as regards their relationship with maritime law – any possible conflicts with the CMNI on international carriage by inland waterway. If the countries adhering to the CMNI refrain from entering services along its inland waterways into the CIM list, or exclude the waterways listed for the CIM from application of the CMNI via Article 30 CMNI[53], then conflicts between the rail and inland waterway regimes will for the most part be prevented.

In relation to supplementary sea carriage however, the registration of lines is always required for application of the CIM rules, even in case of internal carriage by sea. According to the explanatory report of the CIM 1999 this is due to the fundamentally different approaches of maritime and rail transport law[54].

Like under Article 1(3) CIM, it is necessary for the entire carriage, the carriage by rail and the transfrontier carriage by barge or ship, to be subject to a single contract. If it is, and the principal element of the contract is the carriage by rail, then the CIM rules apply to all parts of the transport.

In light of this, the question arises as to what happens when a contract of carriage entails an international road stage besides transfrontier rail carriage and a stretch of barge transport. If interpreted along the lines of the CMR, which is the logical course of action as the CMR's primary scope of application rules are replicated in Article 1 CIM, the CIM rules apply to the rail stage. They equally apply to the stage of inland waterway transport, but only if it meets the requirements set by Article 1(3) when it concerns domestic barge carriage and those of Article 1(4) if the inland waterway stage entails transfrontier transport. Therefore, the CIM rules only

[52] Koller therefore restricts his suggestion to interpret the words "*as a supplement*" as ancillary carriage that cannot be performed by rail in parallel to Article 18 of the Warsaw and Montreal Conventions to those found in Article 1(3) CIM. Koller 2007, p. 1746, Article 1 COTIF-CIM, No. 4.

[53] The CMNI allows each ratifying State in Article 30 to declare that it will not apply the CMNI to contracts relating to carriage by way of specific inland waterways situated on its territory and to which international rules of navigation do not apply and which do not constitute a link between such international waterways.

[54] Explanatory report COTIF-CIM, www.otif.org, p. 12.

cover the inland waterway stage of such a transport if it can be deemed supplemental to the rail transport, and, if the barge transport is international only if it supplemental and concerns carriage over a line. In contrast, the stage of international road carriage is not covered by the CIM regime, but falls within the reach of the CMR instead.

As to the weight of the rail stage in relation to the international road stage of the carriage one or two remarks seem to be in order. Although the CIM's explanatory report claims that the rail carriage should be the 'essential element' of the contract, Article 1 CIM only requires in Article 1(3) and (4) that the complementary carriage by road, inland waterway or sea to which the CIM rules are to be applied supplements the rail carriage. The result is that the application of the CIM to certain stages of a transport, like a domestic road carriage stage, does not depend on the rail stage of the carriage being the principal element. It merely has to be of more import than the transport stage to which the CIM rules are to be applied through Article 1(3) or (4) CIM. Consequently, the carriage of goods by road from Melchow to Berlin, by rail from Berlin to Nancy and from there by road to Tarragona would be covered from Melchow to Nancy by the CIM rules and from Nancy to Tarragona by the CMR, even if the last road stage of the transport and the rail stage are of equal importance.

One last thing that should be noted concerning Article 1(4) CIM is that the adjective 'transfrontier' is missing in relation to the rail carriage. Does this mean that contracts providing for rail carriage and sea carriage or transfrontier inland waterway carriage are covered by the CIM even if the rail carriage stage is not international? One can only assume that since Article 1(3) does contain the adjective it has been purposely omitted in Article 1(4). Therefore the rail stage of a contract of carriage as meant in Article 1(4) apparently does not need to be international for the CIM rules to apply[55]. As long as the combination of rail and inland waterway or sea carriage contracted for can be labelled 'international carriage' it is covered by the rail regime.

This is not such a drastic extension of the CIM's scope of application as it appears to be. The restricting factor here is that after all is said and done the rail carriage still has to be of more significance than the sea or inland waterway carriage. The other type of carriage is still required to 'supplement' the rail carriage, which means that only a selective few of the contracts combining sea or inland waterway carriage with rail carriage will be covered by the CIM if the rail stage does not cross any borders. A contract providing for carriage by sea from Caracas to Rotterdam and from Rotterdam to Arnhem by rail for instance is not covered by the CIM based on Article 1(4) as such sea carriage can hardly be said to be supplementary. The contract providing for carriage by rail from Lyon to Calais and by sea from Calais to Felixtowe is on the other hand covered by the CIM through Article 1(4) CIM; even though the rail carriage is internal the sea carriage is clearly supplementary to it.

6.3 Conclusions

The 1999 Vilnius revision of the COTIF-CIM has succeeded in creating more uniformity in the area of international carriage law. Due to the changes to the CIM the current regimes for air, road and rail carriage are more alike than before, as the CIM no longer requires carriage over registered lines, performed by a railway and based on a through consignment note for application. The harmonization of the mentioned carriage regimes is meant to facilitate

[55] This is confirmed by the explanatory report on the COTIF-CIM. Explanatory report COTIF-CIM, www.otif.org, p. 12.

competition between the various modes of transport and was attained by using the CMR and the air carriage conventions as templates for the new CIM.

The main scope of application rule of the new CIM, the provision stating that the CIM rules shall apply to every contract of carriage of goods by rail for reward found in Article 1(1) CIM, is clearly modelled after the primary scope rule of the CMR, which determines that the CMR shall apply to every contract for the carriage of goods by road in vehicles for reward. The result is that this CIM scope rule should be interpreted in the same manner as its counterpart in the CMR when it comes to multimodal carriage. It is somewhat peculiar however, that the drafters of the Vilnius Protocol have not seized this opportunity to clarify matters surrounding the multimodal issue, as the discussion concerning the scope of application of the CMR in relation to this type of carriage was not unknown to them[56]. Instead of adding such words as 'transfrontier rail carriage' and 'uniquely', 'primarily' or 'wholly or partly' to the scope of application rules, the CMR provision was replicated in its somewhat ambiguous original form. The proposed additions to the scope rule could lead to three more straightforward options. After adding one or more of these words the scope rule would either determine that the CIM shall apply to (a) 'every transfrontier carriage by rail based on a contract of carriage of goods wholly or partly by rail for reward', (b) 'every transfrontier carriage by rail based on a contract of carriage of goods primarily by rail for reward', or (c) 'every contract of carriage of goods uniquely by rail for reward'.

By not altering the scope of application rule of the CMR in a significant manner except to adapt it to rail carriage, the CIM is burdened with the same lack of clarity regarding the application of its rules to parts of a multimodal contract. Perhaps the next revision will offer a solution.

At any rate, the scope of application of the CIM has been significantly expanded and the regime has become rather more like its colleagues in uniform carriage law due to the abrogation of many of the restrictions set by the previous version. Nevertheless, when comparing the CIM's scope of application to that of the CMR some differences remain. To begin with the CIM applies only if both the place of taking over of the goods and the place designated for delivery are situated in two different States that are party to the CIM. Even though this is a step up as the previous CIM version required all States through which the goods were carried to be Member States, it still leads to a smaller scope of application than that of the CMR which applies if at least one of the mentioned places is situated in a Member State. In addition, the CIM lacks a provision equal to Article 2 CMR and thus does not cover '*transport superposé*' – in the sense that it does not cover the carriage of laden rail vehicles transported by other vehicles, vessels or crafts if these do not make use of railways. This is rather logical as trains carrying goods are not likely to be transported by another means of carriage during a transport.

On the other hand, the CIM extends its scope in a few ways that are not found in the CMR. Besides extending application to substitute carriers through Article 3 and 27 CIM, possibly even if these carriers perform domestic carriage, Article 1(3) and (4) CIM expand the CIM's scope even beyond rail carriage. Based on these last mentioned provisions the uniform rules of the CIM can be applied to road, inland waterway and even sea carriage, as long as it supplements carriage by rail.

The extension of the CIM's scope concerning sea and international inland waterway carriage found in Article 1(4) still calls for listed services for application[57]. The reason behind this extra condition in relation to these types of supplemental carriage is the wish to prevent the

[56] Explanatory report COTIF-CIM, www.otif.org, p. 11-12.
[57] The lists can be found at www.otif.org.

emergence of conflicts between the CIM and other carriage regimes. Even so, the possibility of conflict with the sea and inland waterway regimes cannot completely be ruled out. Since the consignment note which confirms the contract of carriage does not have effect as a bill of lading due to Article 6(5) CIM however, and the list of services mentioned only has a relatively small number of entries, the chance of a conflict between the CIM and the contemporary sea carriage conventions or the CMNI is comparatively small[58].

[58] In 2007 12 countries listed 20 lines in total, see www.otif.org. Of these entries only two concerned inland waterway lines. One is the domestic line registered by Turkey over Lake Van from Tatvan Port to Van Port. As this line does not cover an international route it cannot lead to the application of the CIM based on Article 1(4). The other line can lead to conflict between the CIM and the CMNI however as this is an international route; Germany saw fit to register a line between Friedrichshafen in Germany and Romanshorn in Switzerland over the Bodensee in 2007.

7 MULTIMODAL TRANSPORT UNDER THE CMNI

Inland waterways have been used to move freight since time immemorial. People purposely settled areas alongside rivers in order to have easy access to these trade routes. As long as overland transport depended on draft animals it was no real competitor for the waterways which offered almost no resistance to movement along its surface[1].

Currently the waterways seem to be losing the competition between transport modes however; the inland waterways are in dire need of a come back. Because a considerable reserve capacity exists both in infrastructure[2] and fleet capacity, it is a mode of transport that could offer solutions to several of the problems of modern day transport. Increased use of this mode of transport could for instance relieve some of the pressure put on the European road network. If even a small percentage of the enormous quantities of goods that are currently transported by road would be diverted to inland waterways this would diminish road congestion as well as environmental pollution since this type of transport is the most environmentally-sound mode of freight carriage[3], and it has the added bonus of very high safety standards.

Even so, the share of inland waterway transport in the total of inland transport operations is not a large one[4]. One of the obstacles barring the increased use of barges is congestion in the container terminals. Shippers are increasingly forced to take recourse to already congested roads as barges face waiting periods of up to 48 hours in seaports like Rotterdam before cargo can be loaded or discharged[5]. To stimulate the use of inland waterways to relieve the pressure on the road network first the situation in the seaport terminals has to be improved. Also, waterway traffic on the Danube, one of the two major waterways in Europe, has been severely affected in the past by the civil war in Yugoslavia[6]. Now that the blockages have been resolved for the most part, the potential of this artery can be used to a far greater extent in the future[7].

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[1] Donovan 2000, p. 322.

[2] There is a reserve capacity somewhere between 5 and 300%. Vogt 2001, p. 16. The River Danube is the most under-utilized transport artery of Central Europe. Commission of the European Community – 4th Framework Programme for RTD (1999), "European Danube Transport Research (EUDET): Evaluation of the Danube Waterway as a Key European Transport Resource", Final Report, Europäisches Entwicklungszentrum für die Binnenschiffahrt e.V. – Duisburg, Impetus Consultants Ltd. – Athens, Österreichisches Institut für Raumplanung, Vienna.

[3] Waterborne transportation has an environmental cost impact of one-fifth of that of rail and one-tenth of that of truck transport. Lambert 1998. On the other hand, barges equipped with outdated engines are sometimes no less environment unfriendly than road vehicles. But all in all, even if barges consume more energy transporting upstream than downstream, barge transportation is the most fuel efficient method of moving cargo. Moreover, air pollution resulting from water transport is far less than truck and is comparable to, or less than, rail, depending on such variables as terrain, route, *et cetera*. U.S. Department of transportation, *Environmental Advantages of Inland Barge Transportation*, Final Report, Office of Market Promotion 1994, www.port.pittsburgh.pa.us. Inland waterways transport generates fewer emissions of particulate matter, hydrocarbons, carbon monoxide and nitrous oxide than rail or truck on a per ton mile moved basis. *A Modal Comparison of Domestic Freight Transportation Effects on the General Public*, November 2007, Texas Transportation Institute, Center for Ports and Waterways, www.nationalwaterwaysfoundation.org.

[4] Therefore the European Commission pleads for shifting the balance between the various modes of transport and stimulation of integrated transport in the White Paper 'European transport policy for 2010: time to decide' (which can be found at http://ec.europa.eu), while the Working Party on Inland Water Transport of the UNECE's Inland Transport Committee strives to promote inland waterway carriage (www.UNECE.org).

[5] *Niewsbladtransport.nl* 2007. Another bottleneck seems to be the costs of handling in ports; terminal handling is a major cost frontier because the share of terminal costs in the total chain of costs of barge transport is relatively large. The handling of barges in seaports is especially expensive. Konings & Priemus 2008, p. 39-49.

[6] In addition to the actual fighting on the bank of the river there were the transit charge imposed by Serbia and the United Nations sanctions enforced by the Western European Union (WEU), which were meant to deprive Serbia of oil. The UN sanctions had a most disruptive effect on Danube transport. Martin 2002.

[7] Short 2002.

The less than prominent part barge transport plays in the total transport scheme may be the reason that the legal aspects of inland navigation have been disregarded somewhat during the past decades. Policymakers, both at the national and the international level, give relatively little consideration to inland waterway transport, as compared to that given to the other inland transport modes. Part of the explanation for this is, of course, the nature of the European inland waterway network. It covers only a limited number of countries and regions; in Europe as a whole only seventeen countries are mutually connected by inland waterways. As only a minority of countries is interested, most policymaking effort at the international level is devoted to rail and road transport, which are common to all[8].

Nevertheless, one impediment to the growth of the share of inland waterway transport, namely the lack of a unified legal regime for transport of goods by inland waterways, has recently been undone[9]. The CMNI, the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, was jointly drafted by UNECE, the Central Commission for Navigation on the Rhine (CCNR) and the Danube Commission (DC) in five official languages[10] and adopted at a Diplomatic Conference in 2000. This regime containing a uniform set of rules for international contractual responsibilities in inland navigation has currently been ratified by fourteen States[11] and entered into force on 1 April 2005[12].

Due to the novelty of the regime it has not generated any case law as yet, which makes an analysis of its rules in relation to multimodal carriage a challenging task. Parallels can be drawn between the CMNI and the carriage conventions after which it is modelled however, and the text of the Convention itself can of course also be considered a source of information.

7.1 The scope of application

To find the scope of application of the CMNI there is no need for close scrutiny as Article 2 CMNI is labelled 'scope of application'. In this Article the scope of the Convention is stated to cover 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 party to the Convention. The extensive geographic scope of application generated by this Article is clearly derived from the CMR, which, besides the air, rail and maritime carriage conventions, served as an example during the drafting process of the CMNI[13]. Like the CMR the CMNI only requires one of the mentioned places to be in a Member State[14]. This extensive scope mechanism does not guarantee however that the Convention will in actual fact be applied. Unlike the CMR, the CMNI currently only has a relatively small number

[8] Reference document for the Council of Ministers containing conclusions of the seminar 'The inland waterways on the European continent', held in Paris, 30 January 2002, CEMT/CM(2002)6, www.CEMT.org, p. 2.

[9] The CMN, the Draft Convention relating to the Contract of Carriage of Goods in Inland Navigation, was never even signed due to objections to the exemption from liability for faults in the navigation or management of the ship. Vreede 1975, p. 675. The CLNI, the 1988 Strasbourg Convention on limitation of liability for inland navigation vessels, did enter into force in 1997 but has been ratified by only a handful of States (The Netherlands, Switzerland, Luxemburg and Germany).

[10] Dutch, English, French, German and Russian.

[11] Bulgaria, Croatia, the Czech Republic, France, Germany, Hungary, Luxembourg, Moldova, The Netherlands, Romania, the Russian Federation, Slovakia and Switzerland.

[12] Initially the regime as drafted by the *Verein für Binnenschiffahrt und Wasserstrassen e.V.* in 1993 was intended to regulate all inland waterway carriage. The rules of the CMNI as it has entered force are restricted to international inland waterway carriage however. Hacksteiner 2007, p. 145.

[13] Koller 2007, p. 1854, CMNI introductory comment, No. 1; Czerwenka 2001, p. 278; Mankowski 'Transportverträge' 2004, p. 1204, No. 1654.

[14] Mankowski 2008, p. 178.

of Member States, which means that the possibility that damages are claimed in a State that is not party to the Convention is considerable. A court of law in such a country is of course not bound by the CMNI rules and is thus not obligated to apply them[15].

The requirements besides those concerning the geographical scope of the Convention that are set by Article 2(1) CMNI are threefold; there has to be (a) a contract of carriage, which (b) has to involve goods and (c) should indicate where these goods are to be loaded or taken over and where they are to be discharged or delivered. With regard to the goods Article 1(7) CMNI determines largely what the term does not include. Based on Article 1 CMNI the term goods does not include either towed or pushed vessels or the luggage or vehicles of passengers[16]. Furthermore, the Article explains that when the goods are consolidated in a container, on a pallet or in or on a similar transport aid or when they are packed, the transport aid or packaging is also considered to be part of the goods if it is supplied by the shipper[17].

The other two requirements set by Article 2 could do with a little more reflection however, which is why they are discussed in a little more detail in the following Sections.

7.1.1 The contract of carriage

The contract of carriage that is mentioned in Article 2(1) CMNI is one of the concepts that are defined in the first Article of the Convention. In Article 1 the 'contract of carriage' is characterized as any contract, of any kind, whereby a carrier undertakes against payment of freight to carry goods by inland waterway.

On the whole, the definition of the contract of carriage in the CMNI resembles the definitions found in the CMR and COTIF-CIM[18] to a large extent. Where the CMR and the COTIF-CIM speak of 'every contract for the carriage of goods by road in vehicles' and 'every contract of carriage of goods by rail', the CMNI speaks of 'any contract, of any kind, whereby a carrier undertakes against payment of freight to carry goods by inland waterway'. True, at first glance the wording does not seem quite identical, but if Article 6 COTIF-CIM, which defines the contract of carriage by rail as being a contract by which 'the carrier shall undertake to carry the goods', is added the similarity becomes more apparent.

It is unsurprising therefore, that those who do not deem the CMR applicable to road stages of a multimodal transport likewise do not deem the CMNI applicable to international inland navigation which is performed based on a multimodal contract. Writers such as Czerwenka and Berlingieri for instance assert that Article 2(1) CMNI requires a contract for carriage by inland waterway, which is deemed by them to be a contract providing for carriage by inland waterways only[19]. They are of the opinion that the addition of any other mode of carriage to the inland waterway carriage based on the same contract causes the contract to become something other than a contract for carriage by inland waterway. Although Berlingieri does allow for the possible application of the CMNI to inland waterway carriage which is part of a

[15] See Chapter 3, Section 3.2 on jurisdiction and forum shopping.

[16] The luggage or vehicles of passengers are traditionally covered by regimes dealing with the carriage of persons. Ramming 2006, p. 376.

[17] Under sea carriage law there is no regulation on this subject which leads to a lot of speculation. Bordahandy 2005.

[18] As amended by the 1999 Vilnius Protocol.

[19] Czerwenka 2001, p. 278; Berlingieri *Liber Amicorum Roger Roland* 2003, p. 37-55. Likewise Ramming 2006, p. 376-377.

multimodal contract in some of his texts, he only does so on a strictly theoretical basis in order to clarify the conflicts this would generate if the new Rotterdam Rules were to enter into force[20].

As of yet none of the writers that advocate the application of the CMR have commented on the CMNI in relation to multimodal carriage. The reason for this is perhaps that these writers generally do not reside in countries where there is much emphasis on inland waterway law or that are not even party to the CMNI[21]. Nevertheless, based on the likeness between the scope of application rules of the CMR and the CMNI it is likely that they would advocate the application of the CMNI to international inland waterway carriage, even if it is part of a multimodal contract.

In relation to the required freight Article 31 CMNI is of interest. Article 31 CMNI provides Member States with the opportunity to derogate from Article 1 and declare the Convention equally applicable to carriage free of charge. If the path of Article 31 is not taken, a contract can only be considered a contract of carriage under the CMNI if compensation in the form of freight has been agreed. It seems likely that the freight in question does not necessarily have to concern a cash payment. As any consideration with monetary value is a reward under the CMR and the COTIF-CIM as well as under the air carriage conventions[22], the same is likely to apply to the freight required by the CMNI, as long as the compensation in question represents sufficient economical value[23].

7.1.1.1 Transport documents

The contract for the carriage of goods under the CMNI is a non formal agreement for the most part. Nevertheless, the carrier is obliged to issue a transport document based on Article 11 CMNI[24]. The carrier issues a bill of lading only if the shipper requests this and if it has been agreed before the goods were loaded or before they were taken over for carriage[25]. If a bill of lading is issued it alone determines the relations between the carrier and the consignee, whereas the conditions of the contract of carriage will continue to determine the relations between carrier and shipper or consignor.

As is the case in the other areas of transport law, the transport document is of great importance when it comes to furnishing evidence[26]. The transport document is considered *prima facie* evidence, save proof to the contrary, of not only the conclusion and content of the contract of carriage, but also of the taking over of the goods by the carrier. In particular, the document provides a basis for the presumption that the goods have been taken over for carriage as they are described in the transport document. In relation to this last presumption the carrier can include reservations regarding the dimensions, number or weight of the goods into the transport document based on Article 12 CMNI, under the condition that he has grounds to suspect that the

[20] Berlingieri *Liber Amicorum Roger Roland* 2003, p. 37-55.
[21] The U.K. for instance is not a CMNI Member State.
[22] Regarding the CMR see Mankowski 'Transportverträge' 2004, p. 1054, No. 1398; Basedow 1997, p. 892. With respect to the air carriage conventions see Koning 2007, p. 65.
[23] Under the air carriage conventions 'sufficient economical value' does not necessarily mean that the contract or flight in question has to be profitable; the carrier's ultimate purpose of making a profit may also be served on occasion by carrying at a loss, for instance for marketing purposes or improving customer relations. Clarke Contracts of carriage by air 2002, p. 37.
[24] Haak 2000, p. 13-16.
[25] The second option appears to be superfluous.
[26] Hacksteiner 2006, p. 121.

particulars supplied by the shipper are inaccurate or if he had no reasonable means of checking such particulars.

In spite of this important role the absence of a transport document does not affect the validity of the contract of carriage, nor does the incompleteness of such a document have this effect.

7.1.2 Taking over or loading and delivery or discharge

Another factor that influences whether the CMNI rules are applied to an inland waterway stage of a multimodal transport is the interpretation of the terms 'port of loading', 'place of taking over', 'port of discharge' and 'place of delivery'[27]. According to the main scope of application rule in Article 2(2) CMNI its rules apply 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 signatory to the CMNI. Therefore it is necessary to determine in case of multimodal transport where exactly the mentioned places are located.

In light of the interpretation of the terms 'taking over' and 'delivery' as they are found in the CMR it has been argued that attaching them to the start and finish of the entire multimodal transport is too literal an interpretation of the words 'take over'[28]. After all, a carrier does not have to physically take over the goods to become liable as a carrier. A 'paper carrier' for example also carries, also 'takes over' the goods, even though not he, but the actual carrier to whom he has subcontracted the carriage physically takes over the cargo[29]. Furthermore, such an interpretation would fail to ensure that the CMNI is applied to international inland waterway carriage only. Although there is the opportunity in Article 31 for each State to declare the CMNI equally applicable to domestic inland waterway carriage on ratification, the Convention is of itself intended exclusively for international barge carriage.

As a result the best option would be not to attach the taking over and delivery – insofar as they define the scope of application of the CMNI – to the transport as a whole, but rather to the individual inland waterway stage.

Article 3(2) CMNI specifies that the taking over and delivery of the goods takes place on board of the vessel, unless otherwise agreed. This suggests that when the CMNI is applied to an inland waterway stage of a multimodal transport, it is the start and end of the inland navigation stage that should count as place of taking over or delivery in relation to the instrument's scope, which are not per se the start and finish of the entire transport. The fact that the alternatives mentioned in Article 3(2) are the port of loading and the port of discharge points in the same direction.

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[27] The CMNI refers to four places for attachment of the scope of application whereas the other carriage conventions such as the Montreal Convention, the COTIF-CIM and the CMR mention only two. The reason for this is that the drafters were of the opinion that not all inland waterway carriage commences or terminates in a port. For example, inland navigation may also start or end at a factory quay which is not located in a port area. Since the CMNI does not define what is considered a port under the regime however, this problem could also have been resolved by a capacious interpretation of the concept 'port' instead of by introducing alternatives to the port of loading and the port of discharge. Another option would have been to refer to the place of taking over and the place of delivery alone, as these terms also cover port areas.

[28] See Chapter 4, Section 4.1.2.5 on the place of taking over and delivery under the CMR.

[29] Clarke *CMR* 2003, p. 45. See *Gefco (U.K.) Ltd v Mason,* [2000] 2 *Lloyd's Rep*. 555, 563; *Ulster Swift Ltd. v Taunton Meat Haulage Ltd*., [1975] 2 *Lloyd's Rep*. 502; Hof Den Bosch 1 November 2005, *S&S* 2007, 21; Rb Rotterdam 22 December 2004 and 16 February 2005, *S&S* 2006, 118; Rb Breda 30 June 2004, *S&S* 2006, 36.

Another provision supporting the outlook that the places of taking over and delivery are attached to the inland waterway leg is Article 16 CMNI. This Article determines that the carrier is liable for loss resulting from loss of or damage to the goods caused between the time when the carrier takes them over for carriage and the time of their delivery. If these moments are considered to occur at the very beginning and end of the multimodal carriage this would cause the carrier to be liable according to CMNI rules during the entire carriage, even during carriage stages involving road, rail, air or sea carriage. The CMNI provisions do however not provide even the slightest cause for such a wholesale expansion of its scope of application. On the contrary; the only augmentation of the CMNI's scope beyond the inland waterways can be found in Article 2(2) CMNI and is severely restricted in nature. This expansion and the conditions which prompt its application are discussed in Section 7.1.3 of this Chapter on the combination of inland and maritime waters.

7.1.2.1 A national hole in the uniform framework

Article 16(2) CMNI contains a provision which establishes that the carrier's liability for loss resulting from loss of or damage to the goods caused during the time before the goods are loaded on the vessel or the time after they have been discharged from the vessel shall be governed by the law of the State applicable to the contract of carriage. This seems rather peculiar as the scope of application of the CMNI does not extend beyond the inland navigation part of a contract of carriage which starts with the taking over of the goods and ends with their delivery. These events, the taking over and delivery, are known to take place on board of the vessel unless otherwise agreed according to Article 3(2) CMNI. Apparently, the provision of Article 16(2), which has all the characteristics of a rule of private international law, intends to extend the reach of the CMNI beyond the actual inland waterway carriage. Yet, Article 16(2) seems an odd provision to have been intended for the extension of the CMNI's scope of application.

Strictly speaking however, the rule found in Article 16 CMNI should only have effect when the CMNI rules apply before and/or after loading and discharge. This is the case only when contracting parties have chosen to extend the carrier's period of liability under the CMNI. If the parties have chosen, based on Article 3(2) CMNI, to not let the taking over and delivery of the goods take place on board of the vessel, the scope of the CMNI expands beyond the time that the goods are actually on board of the vessel. Although this extends the influence of the CMNI's rules, the 'private international law' rule of Article 16 then points out that not the CMNI, but rather national law is to govern the period between the taking over at the point and time agreed by the parties and their loading on board the vessel and the period between their discharge from the vessel and the chosen moment of delivery. Like Article 29 and 32 CMR the uniform rules of the CMNI thus give way on certain issues to national non uniform laws and ideas.

Under a carriage contract involving only domestic transport before or after the inland navigation leg the application of Article 16 CMNI seems rather ineffectual. Although the scope of the uniform regime is expanded, the uniform regime itself determines that this increase shall be governed by the law of the State applicable to the contract of carriage, or in other words by national law. This would have been no different if the taking over and delivery would have been situated on board of the vessel. The only difference may possibly be the type of national rules that are applied to the periods between the taking over and loading and the discharge and delivery. When the taking over and delivery take place on board of the vessel, the CMNI applies during the time that goods are on board and the periods before and after that are regulated by national rules on the mode of transport that is used before and/or after the inland navigation leg.

If the taking over and delivery do not occur on board of the vessel however, there may be an extra set of rules to deal with. If the inland navigation stage of a transport is preceded by domestic road carriage for instance, this would mean that up until the moment of taking over national road carriage law would apply, between the taking over and the loading of the goods the relevant national law on inland waterway carriage and after loading the rules of the CMNI[30].

Under a multimodal contract involving international transport by road, rail or air preceding or subsequent to the inland waterway carriage the impact of Article 16(2) CMNI is larger. Where under normal circumstances only uniform law would be relevant, the CMNI smuggles in national law through the back door[31]. If goods are carried from Rotterdam to Essen by road and from Essen to Basel by inland waterway, the normal state of affairs causes the CMR to apply to the road stage of the journey and subsequently the rules of the CMNI apply to the 'wet' carriage. The CMR applies up until the moment the goods are taken over for the inland waterway stage, as long as any possible storage would not have merited a contract of its own and can thus be absorbed by the road carriage stage[32]. If the parties agree that the taking over is to take place before the loading of the vessel, this causes the period in which the CMR applies to be shortened. Under the influence of such an agreement the CMR would apply from Rotterdam to the moment the goods are taken over for the inland waterway stage, at which moment the national law applicable to the contract of carriage would take over – which would most likely lead to the application of national rules on inland waterway carriage – via the CMNI, while the CMNI rules themselves would only start to govern the situation the moment the goods are loaded on the vessel.

Thus Article 16 CMNI pokes an unsightly hole in an otherwise uniform picture, which seems a shame. On the other hand, the Hague and Hague-Visby Rules produce a similar hole, even if the parties do not contractually deviate from the Rules. Sturley illustrates the existence of said hole with the use of an example concerning the carriage of goods from Berlin to Chicago:

> "*Under our original Berlin-to-Chicago hypothetical, therefore, as many as six different legal regimes could govern each of the six distinct segments of the single multimodal journey under a single contract of carriage: (1) The European CMR would govern any cargo damage that occurred during the Berlin-to-Rotterdam road leg. (2) The bill of lading would probably govern any cargo damage that occurred in the port of Rotterdam after delivery by the trucker before loading on the vessel (although the bill of lading terms could be displaced by mandatory Dutch law to the extent applicable). (3) The Hague-Visby Rules would govern any cargo damage that occurred during the Rotterdam-to-Montreal sea leg. (4) The bill of lading would probably govern any cargo damage that occurred in the port of Montreal after discharge from the vessel before delivery to the railroad. (5) The mandatory Canadian law governing domestic rail carriage would govern any cargo damage that occurred on the train before crossing the U.S. border. (6) The U.S. Carmack Amendment might (or might not)*

[30] If the contract were to be governed by German law this doubling up of applicable rules would not occur however as the rules on inland waterway carriage in the German HGB are the same as those regulating domestic road carriage. The HGB regulates road, rail, inland waterway and air carriage with one set of rules, only sea carriage is exempted.

[31] That is to say if there is no storage between the two transport stages which is of such significance that it is not absorbed by one of the transport stages. For more information on the phenomenon absorption see Chapter 2, Section 2.3.2.1.1 and for more details concerning the concept that storage may amount to a separate commitment see Section 2.3.3.2.1 of the same Chapter.

[32] The road carriage stage ends when the goods are delivered; normally delivery would occur by placing the goods at the disposal of the person entitled to the goods so that he can exercise control over them. Haak 1986, p. 180-181. In cases concerning multimodal carriage however, placing the goods at the disposal of the carrier who will perform the next stage of the transport will constitute the same.

> *govern any cargo damage after crossing the U.S. border (depending on the U.S. court in which the dispute was heard).*"[33]

It should be noted however that Sturley's findings on this count do not coincide with the findings a Dutch court of law would present as regards the law applicable to the contract as rendered by Sturley. A Dutch court of law would deem all stages of the carriage not covered by international uniform law to be governed by the same State law, the *lex contractus*. So although the 'before and after' hole as presented by Sturley would also exist in the Dutch approach, the variations in the law applicable to stages 2, 4, 5 and 6 would not occur; these stages would all be deemed subject to the same national regime[34].

7.1.3 The combination of inland and maritime waters

The purpose of Article 2(2) CMNI is comparable to that of Article 2 of the CMR and Article 1(3) and (4) of the COTIF-CIM. It extends the application of rules specifically designed for a certain mode of carriage beyond carriage by that mode. These Articles all 'annex' other modes of carriage to some degree. Similar to the other carriage conventions the inland navigation regime does not extend its reach indiscriminately. The provision of Article 2(2) CMNI is meant to bring no more than sea carriage within the CMNI's reach, and this only if the sea carriage conforms to a set of strict conditions. To attain this goal the provision contains the following text:

> "*This Convention is applicable if the purpose of the contract of carriage is the carriage of goods, without transhipment, both on inland waterways and in waters to which maritime regulations apply, under the conditions set out in paragraph 1, unless:*
> *(a) a maritime bill of lading has been issued in accordance with the maritime law applicable, or*
> *(b) the distance to be travelled in waters to which maritime regulations apply is the greater.*"

The contracted carriage should therefore be performed by the same vessel – there can be no transhipment – otherwise the CMNI rules will not attach to the sea carriage. Neither can the sea carriage be covered by a bill of lading which meets the conditions of the applicable maritime law. This last part of Article 2(2) may be interpreted as confirmation that maritime law applies to the sea carriage stage of a multimodal carriage contract, as long as the right documents are issued. Nevertheless, the CMNI rules still fail to appropriate the sea stage, even if no maritime bill of lading has been issued, if the sea stage covers a larger distance than the river leg of the transport[35]. Only if the inland waterway stage is longer in geographical terms do the rules of the CMNI apply to the sea carriage as well[36].

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[33] Sturley 2007. A Dutch court of law is not likely to apply three different national regimes to the contract; it would determine the proper law of the contract and apply the national law which was thus found to all parts of the contract that are not set aside by mandatory international law. See Chapter 10, Section 10.4.1. Rb Haarlem 22 May 2001, *S&S* 2002, 42; Hof Den Haag 25 May 2004, *S&S* 2004, 126; Rb Rotterdam 5 January 2005, *S&S* 2005, 87; Rb Rotterdam 3 May 2006, *S&S* 2007, 114.

[34] See Chapter 10, Section 10.3.4 on the absence of choice under the Rome Convention under the heading 'The place of loading and the place of discharge'.

[35] The sea stage of the carriage is described by the CMNI as the distance travelled in waters to which maritime regulations apply. Unclear is whether this means maritime regulations concerning transport or traffic only or whether it also includes rules on marine safety *et cetera*. Unlike the CMNI the German legislator has introduced a manner in which to differentiate between sea and inland waterway based on the boundaries of maritime shipping

7.1.3.1 The 'maritime' bill of lading

In light of Article 2(2) CMNI the question as to what exactly is meant by a 'maritime' bill of lading arises. What makes a bill of lading 'maritime'? Is there a difference between the maritime bill of lading and a CMNI bill of lading?

In Article 13 the CMNI concerns itself with the 'inland navigation' bill of lading. Despite this, the document does not play such a prominent role in inland waterway carriage as it does in sea carriage, for the simple reason that it is not a prerequisite for the application of mandatory law like the CMNI[37]. Based on Article 13 the originals of such a document shall be documents of title which are issued in the name of the consignee, to order or to bearer. Handing over the inland waterway bill of lading therefore has the same effects as handing over a 'maritime' bill of lading to order or bearer. After the goods have been taken over by the carrier the inland navigation bill of lading entitles the recipient to receive the goods; handing over the bill equals handing over the goods as far as the acquisition of rights to the goods is concerned.

The most logical places to try to find other clues as to the characteristics of a maritime bill of lading under the CMNI are the international and national sea carriage regimes. Yet scrutiny of legislation like the English Carriage of Goods by Sea Act 1992, an Act which at least mentions bills of lading, does not bring any new clues. Although Article 1(2) of the Act refers to bills of lading it merely determines that only documents which are capable of transfer, either by endorsement or as a bearer bill by delivery without endorsement, are bills of lading under this Act. There is only the one exception concerning received for shipment bills of lading, which are also included in the term under the Act. Under the Hamburg Rules on the other hand, the bill of lading's definition is not restricted to bills of lading to order or bearer, but also includes the straight bill of lading[38]. The Hague and Hague-Visby Rules do not provide a definition of the bill of lading. It is true that for application they require a bill of lading, but any similar document of title, in so far as such document relates to the carriage of goods by sea that is, will do just as well. The only addition to this reference is that both regimes determine that the document that is in fact issued functions as evidence concerning various issues such as the receipt of the goods by the carrier as described in the document.

All in all, the sea carriage regimes do not provide any real means of differentiating between an inland waterway bill of lading and a maritime one. There is only the traditional expression 'marine bill of lading' or 'ocean bill of lading' which refers to documents covering carriage of goods by sea but not inland carriage stages by either rail, road or river. Such a

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given by the '*Flaggenrechtsverordnung*', the German flag law act. This may be an example which can be used for orientation until such a time when case law and literature on the CMNI can provide more clarity. Ramming 2006, p. 375; Ramming 1999, p. 326 and Ramming 2005, p. 138.

[36] Both German and Dutch transport law contain provisions – Articles 8:370(2) and 8:890(2) BW and § 450 HGB - with a similar effect. The German § 450 HGB shows a rather striking resemblance to the CMNI provision, although it emphasizes the applicability of the sea carriage rules rather than those on inland navigation. To this end § 450 HGB determines: "*Hat der Frachtvertrag die Beförderung des Gutes ohne Umladung sowohl auf Binnen- als auch auf Seegewässern zum Gegenstand, so ist auf den Vertrag Seefrachtrecht anzuwenden, wenn 1. ein Konnossement ausgestellt ist oder 2. die auf Seegewässern zurückzulegende Strecke die größere ist.*" The relevant Dutch transport law Articles are restricted to causing maritime rules to apply if the inland waterway stage is 'subordinate' and inland waterway rules if the sea stage is 'subordinate' to the inland navigation leg of the transport.

[37] Haak, Zwitser & Blom 2006, p. 158.

[38] Article 1(7) of the Hamburg Rules contains the following definition: "'*Bill of lading' means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.*"

document may be referred to on its face as a 'port-to-port bill of lading', indicating the general period of responsibility of the carrier. By contrast a 'combined transport bill of lading' causes the carrier to assume responsibility for the whole period of carriage, not merely for the sea leg. Both port-to-port and combined transport bills share the same legal attributes[39]. Because both types of bills cover carriage by sea for at least part of the transport, it follows that both of them should be considered 'maritime'.

When this information is added to the fact that the bills of lading commonly used in sea carriage and those used in inland waterway have the same basic structure,[40] this makes it likely that Ramming is right in stating that whether the bill of lading under consideration is a maritime bill or rather an inland navigation bill depends solely on the carriage that is contracted for. He states that if the chief ingredient is carriage by sea then the bill of lading is to be deemed maritime, whereas bills of lading which mainly concern inland waterway transport combined with a minor sea stage are to be considered inland navigation bills[41].

This point of view presents a problem in the last scenario as the maritime conventions do not differentiate between maritime and non-maritime bills of lading. Any bill of lading, or similar document relating to carriage by sea, which conforms to the Hague or Hague-Visby Rules causes these Rules to apply to at least the sea carriage transport covered by the document[42]. This means that if such a bill were to cover sea transport from Felixstowe to Rotterdam and inland waterway transport from there to Basel, the Hague-Visby Rules would apply to the sea stage but so would the rules of the CMNI. It is unlikely that the drafters of the CMNI intended such a conflict with the existing sea carriage regimes. Therefore, Ramming's views could do with a modest amount of nuance. Indeed, whether a bill of lading issued for both inland waterway and sea carriage is considered 'maritime' should depend on the carriage agreed upon. The situations in which a bill of lading is not considered maritime should be somewhat restricted however. In order to prevent conflicts with the sea carriage conventions a bill of lading should only be qualified as being non-maritime when the sea carriage is of such a subordinate nature that it is absorbed by the inland waterway carriage.

Interpreting the nature of a bill of lading in this manner results in the application of the CMNI to no more than the inland waterway stage between Rotterdam and Basel in the above-mentioned example and in the application of the Hague or Hague-Visby Rules to the carriage between Felixstowe and Rotterdam.

The Hamburg Rules and the new Rotterdam Rules do not require a bill of lading for application. As a result these regimes pose an even greater risk of conflicting with the CMNI via Article 2(2) CMNI. In a situation not unlike the one sketched above, but where the sea carriage is between Southampton and Le Havre and from thereon by barge to Basel, these regimes apply to the carriage between Southampton and Le Havre even if no bill of lading is issued. Nor, it is necessary to add, is their scope of application limited to situations in which the sea leg concerns the larger part of the transport. Quite the contrary; instead of taking a step back the Rotterdam Rules extend their scope of application so that not only the Rotterdam Rules and the CMNI would both apply to the sea stage between Southampton and Le Havre, but they would also both cover the carriage by river and canal between Le Havre and Basel. This potential for conflict is not as easily eradicated as that concerning the CMNI and the Hague regimes. Attempting to

[39] Gaskell, Asariotis & Baatz 2000, p. 13-14 and 140. Whether combined transport bills of lading are also documents of title remains a matter of doubt however. For more information on this last issue see Chapter 8, Section 8.1.2.1.1 on the bill of lading as a requirement for the application of the Hague and Hague-Visby Rules.

[40] Koller 1982, p. 2.

[41] Ramming 2006, p. 376.

[42] See Chapter 8 on the scope of the sea carriage regimes.

interpret the appropriate provisions in the regimes in question will not do any good in this case, as these are too explicit to leave much space to manoeuvre. There are one or two attenuating circumstances. One is that the liability regime of the Rotterdam Rules at least leaves room for incorporation of some of the CMNI rules in relation to the inland waterway leg of the transport. The other is perhaps that not many European countries are party to the Hamburg Rules, although a number of States with a prominent role in European inland waterway transport such as Austria, the Czech Republic, Hungary and Romania are[43].

7.1.4 Other expansions and restrictions

Besides Article 2, the CMNI contains several other Articles which influence its scope of application. Some of these provisions grant other legal instruments precedence over the CMNI rules. In Article 27 for instance the CMNI clarifies that if a conflict were to occur between the CMNI and an international convention or national law relating to the limitation of liability of owners of inland navigation or maritime vessels, the rules of the international convention or national law in question will take precedence over those of the CMNI. In addition Article 27(2) causes the laws and regulations of a State governing liability in the field of nuclear energy to influence whether the carrier is liable for damage caused by a nuclear incident. If the operator of a nuclear installation or another authorized person is liable for the damage caused by such an incident the provisions of the CMNI give way to the rules of the State in this area.

Other Articles, such as Articles 30 and 31 CMNI, provide Member States with the opportunity to expand or restrict the scope of application of the Convention at the time of signing or ratifying. The aspirant member can either declare that the Convention will not apply to carriage by specific inland waterways situated on its territory, or expand the scope of the Convention to include domestic and/or gratuitous carriage by inland waterway.

One of the CMNI's Articles even contains rules of private international law for those cases in which the Convention does not provide guidance. Article 29(1) and (2) CMNI are largely modelled after the rules of the Rome Convention which was replaced by the Rome I Regulation[44]. They provide the contracting parties with the possibility to choose the national law which is to apply to the contract of carriage and determine that if such a choice is not made the law of the State with which the contract of carriage is most closely connected is to be applied. In Article 29(3) details what is considered the State most closely connected with the contract of carriage. This is a provision that deviates somewhat from the rules of the Rome I regulation in order to cater to the specific needs of the inland navigation industry. To achieve this goal Article 29(3) determines the following:

> "*It is to be presumed that the contract of carriage is most closely connected with the State in which the principal place of business of the carrier is located at the time when the contract was concluded, if the port of loading or the place where the goods are taken over, or the port of discharge or the place of delivery or the shipper's principal place of business is also located in that State. Where the carrier has no place of business on land and concludes the contract of carriage on board his vessel, it is to be presumed that the contract is most closely connected with the State in which the vessel is registered or whose flag it flies, if the*

[43] The fact that only one of these States has a seaboard fails to prevent the possibility of conflict as the Hamburg Rules have an extensive geographical scope of application: the Hamburg Rules apply if the port of loading *or* the port of discharge is situated in a Member State.

[44] The Rome I Regulation replaced the Rome Convention as of 17 December 2009.

port of loading or the place where the goods are taken over, or the port of discharge or the place of delivery or the shipper's principal place of business is also located in that State."

Although both this provision and Article 5(1) of the Rome I Regulation may apply simultaneously, the rules of the CMNI have precedence in such a situation. The CMNI after all, is an instrument of uniform international law specifically designed to regulate inland waterway transport. Therefore it takes precedence due to the adage '*lex specialis derogat legi generali'*. In addition the Rome I Regulation confers precedence to conventions of uniform law such as the CMNI through Article 25. The reason for this is the generally accepted idea that the scope of application rules of international uniform law should have priority over general norms of private international law[45]. Article 25 Rome I therefore determines that the Regulation does 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[46].

7.2 Application difficulties in multimodal carriage

As with all carriage conventions that are focused on a single mode of transport, the CMNI rules do present some problems when applied network wise to the inland waterway stage of a multimodal transport. The application of for instance Articles 23 and 24 CMNI causes difficulties when the taking over and delivery under the CMNI have been defined as adhering to the inland waterway stage of the transport. The timely notice of damage and the time bar for actions which are dealt with by these Articles seem to be a general problem when applying unimodal regimes to multimodal carriage[47]. Logic and fairness dictate that the rules concerning both of these issues should attach to the end of the transport, not to the end of the inland waterway stage if this is not also the end of the carriage that was contracted for.

The problem is that both the timely notice of damage and the start of the prescription period are linked to the delivery of the goods. Above it has been argued that the delivery should be considered to occur at the end of the inland waterway stage when the term is thought relevant concerning the scope of application of the CMNI. In relation to the rights and obligations of both carrier and consignee resulting from the delivery or failure to deliver however, another approach seems necessary[48].

Article 10 CMNI shows that the aim of the carriage is to deliver the goods to the consignee by determining, among other things, that the parties can contractually agree how and, more importantly, when the goods are 'placed at the disposal of the consignee'[49]. The parties are

[45] "*Die Anwendungsnormen von Übereinkommen des Internationalen Einheitsrechts verdrängen nämlich die Anwendung des algemeinen Internationalen Privatrechts, wenn der Staat des Gerichtes Mitgliedstaat des betreffenden Übereinkommens ist. Dies folgt aus der Rechtsnatur dieser Anwendungsnormen*". Mankowski 1993, p. 213. See also Dicey & Morris 2006, p. 1763. With regard to the CMR: Haak 1986, p. 40; Ramming 'BGH 3 May 2007' *TranspR* 2007, p. 409.

[46] The Regulation does not grant precedence to conventions between Member States of the European Community that focus on private international law however. *Cf.* Chapter 10, Section 10.3.1 and Chapter 3, Section 3.3.2 on Article 25 of the Rome I Regulation. Neither the CMNI, nor any of the other carriage conventions fall within this category however.

[47] See for instance Chapter 5, Section 5.5.1 on the timely notice and prescription under the air carriage conventions and Chapter 4, Section 4.1.2.5 on the place of taking over and the place of delivery under the CMR.

[48] *Cf.* Chapter 4, Section 4.1.2.5 on the same issue in relation to the CMR.

[49] Besides any contractual agreements thereto the usage of the particular trade or the statutory regulations applicable at the port of discharge may also determine what is considered delivery under Article 10 CMNI. In

thus free to agree among themselves which actions are to constitute delivery as meant in Article 10 CMNI. In multimodal transport placing the goods at the disposal of the consignee is of course possible only at the final destination of the transport. Obviously this does not sit well with the attachment of the delivery to the end of the inland waterway stage if this does not coincide with the end of the entire carriage. For clarity's sake it would therefore be beneficial if the contracting parties were to determine in any multimodal transport contract which includes an inland waterway segment that the place of delivery under Article 10 CMNI is located at the destination of the entire contracted carriage, even if the inland waterway stage is not the last stage of the transport.

Contracting parties may fail to enter such a provision into their contract of carriage however and thus an alternative course of action may be needed to generate the uniformity coveted in transport law. The solution to this quandary would be to attach two different meanings to the word delivery in the CMNI. As was mentioned regarding a similar situation occurring under the road and air carriage conventions, it is not at all unusual for a word to have more than one meaning, depending on the context in which it is used[50]. The term delivery in the CMNI should therefore in general be interpreted as meaning the end of the inland waterway leg of a transport. Only regarding provisions that restrict the period of time in which the consignee can perform a certain action which is possible only after he has had a chance to inspect the goods should the delivery be deemed to have occurred at the end of the entire transport, even if this is not the end of the inland waterway stage.

7.3 Conclusions

The CMNI Convention's main focus is the regulation of inland waterway transport contracts. The combination of Article 1(1) and Article 2(1) CMNI tells us as much[51]. 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 is defended by certain writers that the CMNI does not apply to the inland waterway stages of multimodal contracts, as these are not contracts whereby a carrier undertakes against payment of freight to carry goods by inland waterway [52]. As with the CMR however an alternative approach is also feasible, one which does result in the application of the CMNI to transfrontier inland waterway carriage based on a multimodal contract[53]. Contrary to the first mentioned view this last interpretation of the CMNI's scope would cause it to apply to all

addition, the imposed handing over of the goods to an authority or a third party may also be considered a delivery under this Article.

[50] *Cf.* Chapter 4, Section 4.1.2.5 on the place of taking over and the place of delivery under the CMR and Chapter 5, Section 5.5.1 on the timely notice and prescription under the air carriage conventions.

[51] Hoeks 2008, p. 263-264.

[52] Czerwenka 2001, p. 278; Ramming 2006, p. 376-377.

[53] 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 U.K. had the U.K. ratified the CMNI, see Clarke *TranspR* 2005, p. 183.

international inland navigation instead of excluding contracts that add for instance pre- or end haulage by road or rail.

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 harmonization 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[54].

Since the CMNI was drafted fairly recently its designers must have known of the ambiguity concerning the interpretation of the scope of application rules of the CMR, yet they failed to take appropriate measures to prevent the CMNI from following the same path.

Even so, despite the missed opportunity in relation to its scope of application rules, it seems that the existing uniform carriage law was given ample consideration during the drafting process. The CMNI was expressly designed to fit into the framework formed by the extensive list of carriage conventions already in existence. Some of these carriage conventions, such as the CMR, have clearly made their mark on the CMNI. The Hague and Hague-Visby Rules have also had their influence on the new inland waterway regime. Article 16(2) CMNI is clearly inspired by these systems on the carriage of goods by sea[55]. Article 16(2) CMNI generally has a rather limited reach since the CMNI only applies between the taking over of the goods for carriage by inland waterway and their delivery and these events take place on board of the vessel unless otherwise agreed. Still, if the parties do agree to let the take over and/or delivery occur before loading or after unloading, then Article 16 ensures that national rules are to be applied to parts of an international transport. Because the application of national legislation does not generate the legal certainty that is much coveted in international trade the sea carriage regimes may not have been the best role models in this instance. After all, more unpredictability concerning the applicable legal regime in multimodal carriage can hardly be deemed an asset.

The intention of its makers to accord the CMNI with the patchwork of existing international transport law is illustrated by Article 2(2) of the Convention. Whether the attempt can be considered successful is as yet undetermined. Article 2(2) CMNI extends the Convention's scope of application, under certain circumstances, to contracts of carriage whose purpose is the carriage of goods without transhipment, both on inland waterways and in waters where maritime regulations apply. Unfortunately the increase of the CMNI's playground generates the possibility of conflict with the sea carriage regimes. The potential for conflict with the Hague and Hague-Visby regimes is only a minor one. As long as bills of lading which cover sea carriage of more than an accessory nature are deemed maritime, no conflicts will occur. The potential for conflict with the other sea carriage regimes, the ones that do not require a bill of lading to be issued for application such as the Hamburg Rules and the Rotterdam Rules, seems somewhat larger. Yet, pertaining to the Hamburg Rules at least, this greater potential for conflict may prove deceiving. There are after all only five European countries that adhere to the Hamburg Rules. And as for conflicts with the Rotterdam Rules, only time will tell, since this regime has not yet entered into force.

[54] 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 on 5-6 September 2001.

[55] Auchter 2002 at p. 578.

8 MULTIMODAL TRANSPORT UNDER THE MARITIME CONVENTIONS

"*They know that the sea is dangerous and the storm terrible, but they have never found these dangers sufficient reason for remaining ashore*"
Vincent van Gogh, 1853-1890.

At this point in time the weave of international law on the carriage of goods by sea is far from uniform. This is caused by the existence of not one, but rather three, soon likely to become four, international conventions covering this area of law. The first to be drafted and enter into force were the 1924 Hague Rules[1]. These Rules, which were originally intended as a set of rules which could be incorporated into contracts of carriage on a voluntary basis[2], are named after The Hague because the work on them commenced at a meeting of the International Law Association in this Dutch city in 1921[3]. They were eventually adopted by a diplomatic convention held in Brussels in 1924 and became the first effective internationally agreed control of bill of lading terms. Such control was necessary as the ship owners of that time had the commercial strength to exonerate themselves for rather too many of the basic obligations[4].

In 1968 the Visby Protocol was appended to the 1924 Convention and the Rules as amended by this Protocol were baptized the Hague-Visby Rules. The main changes introduced by the Protocol concerned the scope of application and the limitation of liability.

Either the Hague Rules or the Hague-Visby Rules are presently in force in most of the world's shipping nations[5]. Their scope of application does not seem to have given much cause to be the subject of discussion in relation to multimodal carriage. The reason for this could be that they 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[6]. When looked at from this angle, the analysis of the Rules is somewhat less interesting than that of the previous carriage conventions. And, to add insult to injury, there is a multitude of treatises which have analyzed the Rules in far more detail than is possible within the confines of this research. Therefore the review of the Rules in the subsequent Sections will be relatively modest. It will merely cover the issues that are specifically of interest in relation to their possible application to multimodal carriage such as the private international law issues raised by the Rules, their requirement of a specific document for application, their rather special stance on the period during which they are compulsory and of course the most important problems that may arise from their application to part of multimodal transport.

The Hague Rules and the Visby Amendments were established by the industrialized nations. Because of this, the developing nations have always taken a sceptical attitude toward these instruments of international law which were created without their participation. Additionally, it was the ship owner of the western nations that for the longest time dominated the

[1] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels, 19 August 1924.
[2] De Wit 1995, p. 76.
[3] Reynolds 1990, p. 16.
[4] Gaskell, Asariotis & Baatz 2000, p. 3.
[5] More than 70 States are currently party to the Hague Rules and around 27 adhere to the Hague-Visby Rules. See www.comitemaritime.org.
[6] The Hague and Hague-Visby Rules apply to the period from the time when the goods are loaded on to the time they are discharged from the ship where goods are carried under a combined transport bill, such as the P&O Nedlloyd Bill. Gaskell, Asariotis & Baatz 2000, p. 311.

carriage of cargo to and from the developing nations. To countermand these inequalities the United Nations promoted the Hamburg Rules in 1978, under sponsorship by UNCTAD and UNCITRAL. The Hamburg Rules abolished the 'nautical-fault' exception, increased the liability limits and extended the period during which they are compulsory from the tackle-to-tackle period to the entire contract of carriage by sea. They came into effect following the twentieth ratification in 1991.

While they are currently in force in thirty-three countries, none of its Member States can be considered a main player in the global shipping market. The reason for this is that the Hamburg Rules not only met with acclaim but also with vehement criticism[7]. By failing to gain the universal approval that was hoped for by the drafters the Hamburg Rules became something like a third wheel on the wagon. Instead of replacing the previously concocted dual set of international instruments on the carriage of goods by sea, the new Rules only added a possibly applicable set of rules. It can even be said that the Hamburg Rules prevented the Visby Amendment from realizing its full unifying potential as signing the Hamburg Rules hindered a State from ratifying the Visby Protocol if it had not already done so.

It stands to reason that the coexistence of three international regimes regulating the same subject matter does not promote the uniformity that is generally desired in trade law. Because in the last few decades the opinion seems to have taken hold that "*the mandatory regimes adopted by the Hague Rules are somewhat out of date, and the Hamburg Rules are not advisable either*"[8], the UNCITRAL deliberated in 1996 on a proposal to review the current practices in international carriage of goods by sea. The proposal was intended to form uniform rules in the areas where no such rules existed as yet and was put forward with a view to achieving greater uniformity of law than had so far been accomplished.

The drafters of the new Convention – the Rotterdam Rules – proclaim it to be an ambitious instrument that aims to succeed the old conventions and fill the gaps they left open[9]. One of the gaps they intended to fill is the lack of rules on the carriage preceding and subsequent to the carriage by sea. In other words, the Rotterdam Rules 2009 are meant to regulate multimodal carriage which includes a sea stage[10].

In the following all four of the mentioned sea carriage regimes and their influence on multimodal carriage will be discussed in greater detail. Because the Visby Protocol did not cause overmuch change in the structure and meaning of the Hague Rules, the Hague and Hague-Visby Rules will be considered in concert.

8.1 Hague(-Visby) Rules

As was mentioned in the previous Section, the Hague Rules make no mention of any special kind of multimodal carriage such as for example Article 2 CMR or Article 1(3) and (4) COTIF-CIM do[11]. Therefore the only relevant question in relation to multimodal carriage is the general question as to whether the Hague Rules might apply to the international sea carriage stage of a multimodal carriage contract. As with the other carriage conventions this depends on the scope of application of the instrument. The scope of application of the Hague Rules and the Hague-

[7] De Wit 1995, p. 89.
[8] Proposal by China on Chapter 19 of the Draft Instrument and the Issue of Freedom of Contract, WP.37, www.uncitral.org.
[9] Van der Ziel 2002, p. 265.
[10] According to Rabe the statistics show that 90% of all multimodal carriage involves ships. Rabe 2000, p. 189.
[11] Godin 2005, p. 347.

Visby Rules differs significantly on three counts from that of the other members of the carriage law family. The first of these differences is rooted in the Protocol of Signature of the Convention and the options it gives to ratifying States concerning how to give the Rules effect. Due to the options given in this Protocol the scope of the Rules is for a large part regulated by a complex web of private international law rules instead of only depending on the Rules' own scope of application provisions. The second count where the Hague and Hague-Visby Rules deviate from the mainstream scope of application requirements is that they demand the issuance of a certain document. If no bill of lading or similar document of title is issued for the carriage by sea the Rules fail to apply. The third aspect in which the scope of the Rules is dissimilar from that of the other carriage regimes is that they do not cover the entire period between the time the carrier takes over the goods and when he delivers them on a mandatory basis. Only during the period between the moment when the goods are loaded on the ship and the moment when they are discharged from the vessel – the so-called tackle-to-tackle period – are the Rules compulsory[12]. This shortened period of mandatory application has curious ramifications in relation to the carrier's liability in both unimodal sea carriage and in multimodal transports which include a sea stage.

In the following these three anomalies will be discussed insofar as they influence the application of the Hague(-Visby) Rules in multimodal transport.

8.1.1 The two options in the Protocol of Signature

The Hague Rules, and the Hague-Visby Rules, were meant to harmonize the law on international carriage of goods by sea under bills of lading. To achieve this aim they were made into an instrument of uniform international law; they were purposely made into a convention instead of into a set of model rules to be incorporated in contracts on a voluntary basis. In view of this desire to unify however, the Hague Rules have a significant handicap. Unlike other carriage conventions the Hague Rules include a Protocol of Signature which determines that:

> "*The High Contracting Parties may give effect to this Convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under this Convention.*"[13]

Many of the States that became party to the Hague Rules followed the second path; they gave the Hague Rules effect by incorporating them in their national legislation. The Netherlands for instance entered a somewhat adapted version of the Convention into the '*Wetboek van Koophandel*' (WvK, Commercial Code) at the time of ratification[14]. The Protocol gave States the option to adapt the Hague Rules a little when incorporating them into national legislation by stating that the Rules could be included "*in a form appropriate to that legislation*". Many of the participating States took this to heart while incorporating the Hague(-Visby) Rules into their

[12] Article 10 in combination with Article 1(e) and Article 3(8) HVR.

[13] Article 16 of the Visby Protocol establishes the same for the Hague-Visby Rules by stating in Article 16 that the contracting parties may give effect to the Protocol either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under the Protocol.

[14] Wery 1973, p. 2. *Cf.* HR 8 November 1968, *S&S* 1969, 1 or *NJ* 1969, 10 (*Portalon*). The U.S. also ratified the Hague Rules and incorporated them in its national legislation by means of the COGSA, the Carriage of Goods by Sea Act, whereas Russia did not ratify them but did however enter them into its national legislation. Puttfarken 1997, p. 114. Nevertheless, in 1999 the Russian Federation acceded to the Visby Protocol.

national systems[15]. Unfortunately, this course of action, this allowing Contracting States to include the Rules in their own legislation 'in a form appropriate to it' perpetuates diversity[16]. Because of this the Hague(-Visby) Rules did not create as uniform a system as they might have, even though they were very successful in the sense that they gathered a large number of adherents. As a commentator pointedly stated:

> "*The international uniform law appears, or rather disappears in as many national jackets as there are Member States.*"[17]

Most of the changes the contracting parties made while incorporating the Rules into their national legislations concerned expansions of the scope of application of the regime such as the inclusion of incoming transports[18]. Practically speaking the most important deviation was that the majority of Contracting States became party to the Hague Rules under the permitted condition that they would not implement gold value as the monetary unit for the carrier's liability limit but would use the terms of their own monetary system instead. They largely made use of the option given by rule 9 of the Hague Rules and entered a liability limit in national currency in their national legislation which in terms of value approached the gold value of the Rules at the time they became members[19]. Due to different rates of inflation and other factors the national standards for limitation started to diverge over time. These variations emphasized the importance of which national version of the Rules applied to a given contract for the international carriage of goods by sea. The Dutch *Katsedijk* judgement of 1971, in which compensation was sought for a power crane and dragline which were severely damaged during their carriage from New York to Rotterdam, is a poignant example in this context. The question in this case was whether the American version of the Hague Rules applied or rather Dutch law and thus the Dutch version[20]. The *Hoge Raad* determined that the American version found in the U.S. COGSA applied, thus causing the carrier to be liable for the amount of 500 Dollars per unit or collo instead of for 1250 Guilders per unit or collo which was the limit found in the Dutch version of the Rules at that time[21].

The result of these variations in the liability limits is that international sea carriage contracts which may be covered by the Hague or even the Hague-Visby Rules often occasion questions of private international law, questions that would not have cropped up as frequently if the Rules had been given the 'direct effect' that conventions such as the CMR and air carriage

[15] Herber 1994, p. 381. "*Even the Nordic countries, which have long been major partners in the international effort to achieve uniformity in this field, have incorporated significant elements of the Hamburg Rules into their domestic versions of the Hague-Visby Rules*". Sturley 2007-2008, p. 255.

[16] Mann 1983, p. 396; Myburgh 2000, p. 362.

[17] "*Het internationale uniforme recht verschijnt, of nee: verdwijnt, in evenzovele nationale jasjes als er Verdragsstaten zijn.*" W.E. Haak 1970, p. 393. W.E. Haak was AG to the Dutch *Hoge Raad*, and is not to be confused with K.F. Haak.

[18] Such an expansion can be found in Article 91 of the Belgian Commercial Code and in Article 6 of the German '*Einführungsgesetz zum Handelsgesetzbuch*' (EGHGB), the implimentation Act for the Commercial Code, which respectively cause the Belgian or German codifications of the Rules to equally apply to incoming transports. Other examples of expansions of the scope of the Rules are to be found in Article 1 of the English Carriage of Goods by Sea Act 1971 which causes the English codification of the Rules to equally apply to certain non-negotiable documents, to domestic sea carriage and to the carriage of deck cargo and the carriage of animals under certain circumstances.

[19] W.E. Haak 1971, p. 89.

[20] The U.S. adopted the Hague Rules by enacting the U.S. Carriage Of Goods by Sea Act, the COGSA (46 U.S.C. app. §§ 1300–1315 (2000)). Force 2004, p. 53.

[21] Of course, whether these amounts diverge greatly or only minimally depends on the exchange rate of that particular moment.

conventions enjoy[22]. Had the Protocol of Signature not given the Contracting States the option to give effect to the Rules by including them in their national legislations and had no deviation been permitted, then any questions concerning the scope of application of the Rules would have been answered by the scope of application rules of the Rules themselves and the liability limits would then in all cases have been the limits found in the Convention.

8.1.1.1 Status of the Rules in The Netherlands

After incorporating the Hague Rules into the Dutch Commercial Code confusion existed as to their application. Were the Rules self executing or not? In 1968 the *Hoge Raad* provided an answer to this question in the *Portalon* decision[23]. In this judgement the Hoge Raad clarified that the Protocol appended to the Hague Rules determines that the parties to the Convention can give it effect by either giving it the force of law or by including the rules of the Convention in the national legislation in a form that is appropriate for said legislation, and that this provision shows that the rules contained in the Hague Rules are not self executing. Since the *Portalon* decision the situation in The Netherlands has changed. Nowadays, the Commercial Code no longer boasts a version of the Hague Rules. As with all transport law the rules on the carriage of goods by sea were transferred to Book 8 BW in 1991. By that time the Dutch government had denounced the Hague Rules however, and had ratified the Hague-Visby Rules instead[24]. Therefore Book 8 BW includes the Hague-Visby Rules. Yet the Dutch legislator did more than include the Rules in Book 8 BW. Because it desired the Rules to be self executing like the other carriage conventions that The Netherlands had become party to in the meanwhile, Article 8:371 was entered into the Civil Code[25]. This Article is almost an exact copy of Article 10 of the Hague-Visby Rules. One could argue however that because an Article of national law causes the Convention to apply it still does not apply based solely on its own authority[26]. It appears as if the Rules apply by means of national Dutch law. That this is not the case is clarified by the *Rechtbank* Amsterdam in '*Leliegracht*':

> "*According to Article 10 HVR the HVR are applicable on a compulsory basis when the bills of lading are issued in a Contracting State as well as when port of loading is situated in a Contracting State. Both situations have arisen according to the established facts mentioned above under 1.a and 1.c. The HVR are therefore mandatorily applicable to the contract of carriage under consideration here. ... Contrary to what is argued by ... the HVR are furthermore directly applicable (self executing) which causes it to be irrelevant as to how they are incorporated in the national law of Finland.*" [27]

[22] Most of the carriage conventions apply *ex proprio vigore* specifically to avoid complex private international law questions.

[23] HR 8 November 1968, *S&S* 1969, 1 or *NJ* 1969, 10 (*Portalon*).

[24] The Hague-Visby Rules came into effect in The Netherlands on 26 July 1982. Teunissen 2009, p. 3885.

[25] HR 1 February 2008, *NJ* 2008, 505.

[26] Wery 1973, p. 3.

[27] Rb Amsterdam 5 February 2003, *S&S* 2003, 86 (*Leliegracht*) under 8: "*Volgens artikel 10 HVR zijn de HVR dwingend van toepassing zowel indien de cognossementen zijn uitgegeven in een land dat partij is bij de HVR als indien de laadhaven ligt in een dergelijk land. Beide gevallen doen zich hier voor blijkens de hiervoor onder 1.a en 1.c vermelde vaststaande feiten. Op de onderhavige vervoerovereenkomst zijn de HVR dus dwingend van toepassing. ... Anders dan ... betoogt, zijn de HVR bovendien rechtstreeks van toepassing en in zoverre is dan ook niet relevant hoe ze zijn geïncorporeerd in het Finse recht.*" *Cf.* Hof Amsterdam 2 August 2007, *S&S* 2008, 114; HR 1 February 2008, *S&S* 2008, 46.

Thus, the Hague-Visby Rules are currently considered to apply based on their own authority in The Netherlands, they apply *ex proprio vigore*[28]. That this is an acceptable view of the matter is supported by the fact that self executing uniform instruments promote uniformity rather more than uniform instruments which derive their authority from national legislation. Besides, the inclusion of Article 8:371 BW into the national law of The Netherlands is apparently the means by which the legislator of the new Dutch transport law caused the Convention to gain 'force of law'; thus it exchanged the second option given by the Protocol for giving the Convention effect for the first[29].

Nevertheless, judgements are still made that seemingly confuse the matter. In a fairly recent judgement the *Rechtbank* Rotterdam sent mixed signals concerning the shipment of three consignments of aluminium from St. Petersburg in Russia to Delfzijl in The Netherlands[30]. During the carriage of the aluminium on board of the '*Marie Bouanga'* from Russia to Rotterdam the '*Marie'* collided with the '*Zircone'*, forcing the cargo interests to contribute in general average. Subsequently the *Rechtbank* established in relation to the law applicable to the claim for compensation that:

> "*Now that it is clear that the circumstance causing the damage occurred during the sea stage Dutch sea carriage law applies, particularly the provisions of Section 8.5.2 BW. As a result of the general paramount clause found in the bills of lading the Hague-Visby Rules apply.*"[31]

Thus the *Rechtbank* considers the Hague-Visby Rules applicable to the sea stage of this multimodal transport contract. It accounts for this by first establishing that Dutch national law applies to the contract and second that the Hague-Visby Rules apply since the bill of lading contains a general paramount clause. This judgement, although confusing at first glance, does however not necessarily mean that the *Rechtbank* is of the opinion that the Hague(-Visby) Rules do not have 'direct effect'. On the contrary, the more or less unanimous views on this subject in Dutch legal literature and the judgements discussed above illustrate that it is rather unlikely that they deem the Rules no more potent than national law. To be sure, the *Rechtbank* does not clearly express its opinion one way or the other.

One could wonder whether the reason for this outcome should then perhaps be sought in the circumstance that the contract in question involved multimodal carriage rather than unimodal sea carriage. Do the Rules apply directly to international sea stages which are part of a multimodal transport or do they not? As the *Rechtbank* fails to mention Articles 8:40 through 48 BW, it also seems unlikely that it intended the Hague-Visby Rules to be applied via the Dutch national legislation on multimodal carriage. It seems therefore that it is possible that the Rules apply directly to sea carriage under a more encompassing transport contract. Whether this is actually the case, and if so, on which factors such application may depend will be discussed at length in one of the subsequent Sections of this Chapter dealing specifically with the scope of application of the Hague(-Visby) Rules. Returning to the '*Marie Bouanga'* however, the question remains as to what did cause the *Rechtbank* to apply the Hague-Visby Rules in such a roundabout manner. In the end the answer is deceptively simple; two of the three counts in Article 10 HVR lead to the application of the Hague-Visby Rules. Although the bills of lading

[28] Boonk 1993, p. 38; Teunissen 2009, p. 3885.

[29] Another option would have been to pass a law of approval concerning the Rules followed by a law of introduction.

[30] Rb Rotterdam 19 July 2006, *S&S* 2007, 52.

[31] "*Nu duidelijk is dat de schadeveroorzakende omstandigheid tijdens het zeetraject is opgekomen, is Nederlands zeerecht en zijn met name de bepalingen van afdeling 8.5.2 BW van toepassing. Ingevolge de General Paramount Clause van de cognossementen vinden de Hague-Visby Rules toepassing.*"

were not issued in a Member State – they were issued by the captain which is most likely to have taken place in St. Petersburg – the carriage started in a Contracting State and the bills of lading contained a general paramount clause evidencing that the Rules govern the contract[32]. Why the *Rechtbank* chooses to refer to the general paramount clause and not to the fact that the carriage starts in a Contracting State is unclear. The additional mention of the applicability of Dutch sea carriage law seems to confuse matters, especially since the *Rechtbank* alludes to the applicability of Dutch law before it points out that the claim is also covered by the Hague-Visby Rules. The referral to Dutch law becomes obvious however when seen as an indication of the supplementary applicable legal regime. The fact that the *Rechtbank* makes use of Article 8:461 BW which determines the identity of the carrier under the bill of lading and Article 8:442 BW which causes the parties that are deemed carriers based on Article 8:461 BW to be jointly and severally liable illustrates the necessity of such supplementary applicable national rules in the '*Marie Bouanga'* case.

So although the *Rechtbank* does not literally express it the '*Marie Bouanga*' judgement does not indicate that the Hague-Visby Rules do not apply *ex proprio vigore* in The Netherlands, not even when the contract concerns multimodal instead of unimodal transport.

8.1.1.2 Status of the Rules in Germany

Although Germany remains party to the Hague Rules, which are incorporated in the HGB, and has not ratified the Visby Protocol, it has also incorporated the Hague-Visby Rules into its HGB[33]. Therefore, the Rules are not self executing in Germany[34]. To deal with this situation the German legislator has created Article 6 EGHGB. Article 6 EGHGB establishes when and to what extent § 662 HGB[35] applies and thus whether the 'HVR provisions' found in the HGB are compulsory when a bill of lading has been issued. The Article is intended to give the part of the HGB that mirrors the Hague-Visby Rules the widest possible application.

To satisfy Germany's obligations under international law stemming from its membership to the Hague Rules however, the application of the 'HVR HGB rules' is restricted by Article 6(2) EGHGB. Article 6(2) provides that where the particular carriage of goods is connected to a State other than Germany, that is party only to the Hague Rules, the version of the HGB that reflects the Hague Rules applies, which means that the same provisions apply via § 662 HGB with the exception of the rules that refer to the carrier's liability as 2 SDR per kilogram in §§ 612 and 660 HGB[36].

[32] Russia acceded to the Visby Protocol in 1999. CMI Yearbook 2007-2008, p. 388.

[33] Herber *Seehandelsrecht* 1999, p. 26 and 308; Puttfarken 1997, p. 115. Germany was host nation to the Hamburg Rules and a signatory State and did therefore not ratify the Visby Protocol.

[34] Basedow 1987, p. 264; Ramming *TranspR* 2007, p. 283. See also BGH 18 June 2009, *I ZR* 140/06.

[35] § 662(1) HGB determines that the obligations of the carrier stemming from the 'HVR provisions' in the HGB cannot be excluded or limited when a bill of lading is or will be issued. Prüßmann & Rabe 2000, p. 792.

[36] The overall result is that on the one hand Article 6(1) EGHGB provides that § 662 HGB applies to the carriage of goods by sea under a bill of lading between ports in two different States, and thus the 'HVR HGB' rules, if: (1) the bill of lading was issued in a country that is a party to the Hague-Visby Rules, (2) the bill of lading refers to the Hague-Visby Rules or to the law of a country that has incorporated the Hague-Visby Rules in its legislation – such as Germany – regardless of where the bill of lading was issued, or (3) the bill of lading was issued in a country not party to the Hague-Visby Rules and the carriage is either to or from Germany or a country that is a party to the Hague-Visby Rules. Article 6(2) EGHGB on the other hand, provides that although § 662 HGB applies, the references to the carrier's liability as 2 SDR per kilogram in §§ 612 and 660 HGB do not if the bill of lading was issued in a country – other than Germany – that is a party to the Hague Rules and the destination of the carriage is a country – including Germany – that is a party to the Hague Rules.

There is some disagreement on whether or not Article 6 EGHGB is an actual conflict of laws rule and therefore applies regardless of the national law applicable to the contract of carriage or not[37]. When Article 6 EGHGB is seen as a normal provision and not a conflict rule, this would necessitate courts of law to first determine whether German law applies to the contract of carriage, and if it does not then Article 6 EGHGB fails to have effect.

The text and purpose of the Article however strongly suggest that it was intended as an overriding conflict of laws rule and the leading opinion in academic writing on the subject seems to support this view[38]. Indeed, Mankowski for one rejects the idea that the application of the Hague or Hague-Visby Rules as found in the HGB should depend on the applicability of German national law[39]. He reasons that the fact that the Protocol of Signature provides Member States with two options to give the Hague Rules force of law does not mean that the Member States are released from the duty to convert Article 10 HR adequately. Since Article 10 HR – or Article 10 HVR – is a scope of application provision relating to an instrument of uniform law he deems it just as much a unilateral conflict rule as the scope of application rules of the other carriage conventions, even if the uniform law it relates to is incorporated in national legislation. This point of view is convincing as it serves the general purpose of uniform international law; it enlarges the chance that the Hague or Hague-Visby Rules are actually applied and thus promotes uniformity of law on an international scale.

8.1.1.3 Status of the Rules in the United Kingdom

Like all international treaties on carriage law that are ratified by the United Kingdom, the sea carriage rules of the Hague and Hague-Visby Conventions gained force of law by means of an Act. In 1924 the Hague Rules were so implemented by the Carriage of Goods by Sea Act 1924, three weeks before the Convention even opened for signature[40]. The United Kingdom ratified the Hague-Visby Rules in 1976 and denounced the Hague Rules in 1977. On the 23 June 1977 the Carriage of Goods by Sea Act 1971 came into force, which implemented the Hague Rules as amended by the 1968 Visby Protocol into the English legal sphere and replaced the Hague Rules oriented 1924 Carriage of Goods by Sea Act. As a result the Hague-Visby Rules gained force of law in the United Kingdom. The consequences of granting the Hague-Visby Rules 'force of law' are explained by Denning LJ in 1982 in *Morviken*:

> "*The provisions of the Rules, as set out in the Schedule to this Act, shall have the force of law.*
> *What does this mean? In my opinion it means that, in all Courts of the United Kingdom, the provisions of the rules are to be given the coercive force of law. So much so that, in every case properly brought before the Courts of the United Kingdom, the rules are to be given supremacy over every other provision of the bill of lading. If there is anything elsewhere in*

Despite Article 6(2) EGHGB however, the German version of the Hague-Visby Rules applies where the bill of lading refers to the Hague-Visby Rules or to the law of a country that has incorporated the Hague-Visby Rules in its legislation, regardless of where the bill of lading was issued.

[37] Article 9 of the Rome I Regulation shows that the existence of national rules that are mandatory irrespective of the law otherwise applicable to the contract is an internationally accepted phenomenon. Article 10 HVR as incorporated in the English Carriage of Goods by Sea Act 1971 is such a rule and causes the Hague-Visby Rules to be overriding policy of the forum and hence mandatory. Carver 2001, p. 453. Mankowski is of the opinion that Article 6 EGHGB takes precedence over the *lex causae* of the bill of lading. Mankowski 1995, p. 136.

[38] Ashton 1999, at p. 37-38 fn. 63.

[39] Mankowski 1995, p. 127 and 307-308.

[40] Sturley 2008, p. 465.

> *the bill of lading which is inconsistent with the rules or which derogates from the effect of them, it is to be rejected. There is to be no contracting-out of the rules.*" [41]

Denning LJ's reason for making this statement was the fact that the bill of lading in this case contained a clause by which the parties chose the law of The Netherlands – in which the Hague Rules were still incorporated at that time – as the law applicable to the contract and which gave sole jurisdiction to the Court of Amsterdam.

The English Court was bound by the Hague-Visby Rules however, which the Court deemed to be compulsory for all contracts that fall within their scope of application as described in Article 10 HVR[42]. Article 3(8) HVR establishes that any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

Giving effect to the jurisdiction and choice of law clause would have limited the carrier's liability to an amount of 250 Pounds – under the Hague Rules the maximum liability of the carriers would be calculated on the package or unit basis – whereas under the Hague-Visby Rules the shippers would be entitled to some 11.000 Pounds, based on the weight of the damaged cargo. Therefore the choice of law and jurisdiction clause was rendered null and void and of no effect[43].

Although the Hague-Visby Rules have no direct effect in England, they are not self-executing in the United Kingdom as they are in The Netherlands, this is only a consequence of the manner in which this State deals with international treaties. Treaties do not gain force of law in England if they have not been incorporated into the national legal sphere by some form of national legislation such as an Act[44]. Nevertheless this does not mean that the scope of application rules of the Hague-Visby Rules have a different status from those of the other carriage conventions of which the United Kingdom is a Member State. The *Morviken* judgement shows that the Rules are considered of a higher order than mere national law, otherwise there would have been no reason not to give effect to the choice of law clause in the bill of lading. By determining that if there is anything in the bill of lading which is inconsistent with the Rules or which derogates from their effect, such as a choice of law clause, this is to be rejected as there is no contracting-out of the Rules, the Rules are given a higher status than provisions of purely national origin as a choice of law would generally set those aside[45].

To recapitulate, the option given by the Hague Rules' Protocol of Signature has caused a large amount of litigation concerning private international law matters, litigation that could have

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[41] *Owners of Cargo on Board the Morviken v Owners of the Hollandia*, [1982] 1 *Lloyd's Rep*. 325. This judgement was later confirmed by the House of Lords in *Owners of Cargo on Board the Morviken v Owners of the Hollandia*, [1983] 1 *Lloyd's Rep*. 1. In this last judgement Diplock LJ established concerning the Hague-Visby Rules that: "*unlike the Hague Rules, they contain in Article X their own code for their application*".

[42] Whether the Hague Rules should have been granted such precedence is unclear. It was suggested that they ought not to have precedence over foreign law since they were incorporated in an English statute and should thus be presumed to apply only to contracts governed by English law. Carver 2001, p. 452.

[43] A similar evaluation of the facts and of Article 3(8) of the Hague Rules and the Hague-Visby Rules was made in *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd.,* [1954] 1 *Lloyd's Rep*. 321, affirmed by the House of Lords in *GH Renton & Co v Palmyra Trading Corporation of Panama (Caspiana),* [1956] 2 *Lloyd's Rep*. 379 and now reaffirmed by the House of Lords in *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Company Jordan Inc (Jordan II),* [2005] 1 *Lloyd's Rep*. 57. Article 3(8) of the Rules renders void any clauses designed to lessen the carrier's liability.

[44] Carver 2001, p. 451.

[45] Article 3 Rome I Regulation verbalizes the generally accepted concept of the freedom to choose the law applicable to the contract.

been avoided if the drafters of the Rules had chosen to endow this uniform regime of international law with direct effect irrespective of the manner in which an aspirant Member State chooses to give the Convention force of law. The other carriage conventions such as the Warsaw Convention, the CMR *et cetera* all do apply *ex proprio vigore* and thus the parties involved in carriage are not encumbered by the extra stumbling block attached to the Rules consisting of private international law issues when a claim is made under these other carriage regimes.

In The Netherlands the extra private international law trap has been sprung by giving the Rules direct effect by means of Article 8:371 BW. This is a singular solution which seems to necessitate strenuous mental acrobatics in order for one to be able to grasp its mode of operation. The Rules were cause for more of these exceptionally demanding brainteasers however. Although Germany did not choose to give the Rules direct effect in any form it did incorporate the Hague Rules, which it ratified in 1939, and the Hague-Visby Rules, which it did not ratify, in its national legislation, the HGB. In order to comply with the demands of public international law pressing on its shoulders due to its ratification of the Hague Rules as well as to ensure that the incorporated Hague-Visby regime would have as large a scope of application as possible Article 6 EGHGB was designed, which is almost as much of a challenge to grasp as Article 8:371 of the Dutch Civil Code. Yet, according to leading German scholars Article 6 EGHGB is not simply a rule of national law to be applied only if German national law applies to the contract of carriage. Article 6 EGHGB is far more a unilateral conflict rule comparable to the scope of application rules of the non sea carriage conventions. Because of this view the Rules, or rather the parts of the HGB incorporating both sets of Rules, gain a status that goes beyond that of mere national law and is comparable to that of the other carriage conventions.

In the United Kingdom the Hague Rules have been denounced and the Hague-Visby Rules have been ratified, but they do not apply *ex proprio vigore*. The reason for this is the dual system operating in this State which causes all international law, regardless of its origins, to be converted into national Acts. Nevertheless, as shown by judgements such as the *Morviken*, these Acts with an international origin tend to be treated as a source of law with a higher status than 'normal' Acts, even though there is officially no ground for such treatment.

All things considered, the Hague and Hague-Visby Rules do not actually seem to occupy another rung on the ladder of precedence in any of the three legal systems that have been discussed than the other members of the uniform carriage law family. They only tend to raise an extra hurdle in legal proceedings as in courts of States that have not given the Rules direct effect the question needs answering which national regime applies to the claim which may be covered by some form of the Hague or Hague-Visby regimes.

Of course the SDR Protocol of 1979[46] harmonized the liability limits of the Rules to some extent by setting the limits at 666.67 units of account per package or unit or 2 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher amount. Even this Protocol could not eliminate all divergences between the national limitations however. There are two reasons for this failure to induce complete uniformity, the first being that the SDR Protocol still provides for the option to express the limit in national units of account, albeit only for those countries that are not member to the International Monetary Fund[47]. The second reason relates to one of the great handicaps of treaty law, namely that not all States party

[46] Protocol (SDR Protocol) amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924 (the Hague Rules), as amended by the Protocol of 23 February 1968 (Visby Protocol).

[47] Article 2(2)(d) SDR Protocol.

to the original convention, either the Hague or the Hague-Visby Rules in this case, became party to the modification Protocol[48].

8.1.2 The scope of application

Besides the less than uniform picture the Hague Rules regimes paint when it comes to national divergences, there is also the schism between those party to the Hague Rules and those who ratified or acceded to the Visby Protocol. So after the private international law hurdle as described in the previous Section is taken, the next step is to determine whether the State whose law applies – if the Convention has not been given direct effect that is – is party to the original 1924 version of the Hague Rules or the version modified by the 1968 Protocol. There is a considerable difference between the scope of application of the Hague Rules and that of the Hague-Visby Rules. The primary Article of both sets of Rules when it comes to (geographical) scope of application is Article 10. Under the Hague Rules this Article states the following:

> "*The provisions of this Convention shall apply to all bills of lading issued in any of the contracting States.*"

Whereas the Hague-Visby Rules contain the following text in Article 10:

> "*The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if*
> *(a) the bill of lading is issued in a contracting State, or*
> *(b) the carriage is from a port in a contracting State, or*
> *(c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract;*
> *whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.*"

The Hague-Visby version of Article 10 at first glance offers more possibilities for application – the situation in which the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract and the situation entailing carriage from a port in a Contracting State are added – and indeed they have a wider effect in most respects. The alterations of Article 10 by the Visby Protocol for instance made an end to the problem called the '*Vita Food* gap'. In the *Vita Food* case[49] the bill of lading provided that it was governed by English law and contained no paramount clause. English law only applied the Rules to shipments outbound from the United Kingdom however. As the shipment under consideration commenced in Newfoundland, which was at that time an independent convention country, the result of the application of English law was that the Rules were irrelevant. Thus, if a paramount clause was omitted and a bill of lading for shipment out of a Hague Rules State contained a choice of law clause for a jurisdiction which either did not apply the Rules at all or did not apply them to inbound transport, the Rules could be evaded. Therefore the international application of the Rules was to some extent torpedoed. The Visby Protocol was

[48] 27 States ratified or acceded to the SDR Protocol of 1979. CMI Yearbook 2007-2008 p. 389.
[49] *Vita Food Products v Unus Shipping Co*, [1939] *AC* 277; [1939] 1 *All ER* 513.

meant to remedy this evil[50]. It effectively stopped this gap by determining that the Rules apply if the carriage is from a port in any of the Contracting States.

On the other hand, the Visby Protocol did not enlarge the scope of the Rules on all counts. The Hague Rules have a larger scope of application than their Hague-Visby successor in one respect; unlike the Hague-Visby Rules, the Hague Rules do not require the bill of lading to relate to the carriage of goods between ports in two different States, and are thus not confined to international carriage[51].

Other aspects of the Hague Rules, such as the definitions in Article 1 HR which are identical in both the 1924 and the 1968 version of the Rules, suggest that the application of both sets of Rules is restricted to carriage of goods by sea. The carriage of goods is defined by Article 1(e) as the period from the time when the goods are loaded on to the time they are discharged from the ship. This is a temporal restriction of the scope of application of the Rules, which implies that the Rules are not mandatory concerning the period before loading and after discharge, even if the goods are in the carrier's custody. The rules of the other carriage conventions are mandatory from the moment the carrier takes over the goods until delivery.

In the same Article 1(b) the contracts of carriage to which the Rules apply are limited to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such a document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment when such a bill of lading or similar document of title regulates the relations between a carrier and a holder of the same. This provision shows that the existence of a contract of carriage is presupposed, even though the Rules do not literally state this as a requirement for application. In this a parallel can be drawn between the Rules and the Warsaw and Montreal Conventions on air carriage[52].

Thus, besides the geographical requirements the main requirements for application of both sets of Rules are the existence of a contract of carriage relating to the carriage of goods by sea and a bill of lading or a similar document of title which regulates the relations between the carrier and the holder of the document. If these two requirements are met, the Rules apply to the 'tackle-to-tackle' period; the period during which the goods are actually on board of the ship plus the time during which the goods are loaded or discharged.

8.1.2.1 The scope in relation to multimodal carriage

The question whether the sea leg of a multimodal carriage contract fulfils the requirements for application as set by the Hague(-Visby) Rules is cause for some of the same differences in opinion that exist concerning the application of any of the unimodal carriage conventions except the Hamburg, Warsaw and Montreal treaties to stages of a multimodal transport. On the one hand there are those who deem it possible that the Rules apply to a sea stage of a multimodal transport[53]. As early as 1954 Devlin J for instance remarked the following in *Pyrene v Scindia* regarding the scope of the Hague Rules:

[50] Reynolds 1990, p. 19.
[51] Carver 2001, p. 453; Mankowski 1995, p. 321-322.
[52] See Chapter 5, Section 5.2.1.1 on the necessity of an air carriage agreement for application of the air carriage conventions.
[53] The American view seems to be that they do; according to Coffey it was the onset of multimodalism in 1956 that occasioned the revision of the package rule and general limits of the Hague Rules that led to the Visby amendments. Coffey 1989, p. 582.

> "*I think they attach to a contract or part of a contract. I say 'part of a contract' because a single contract may cover both inland and sea transport; and in that case the only part of it that falls within the Rules is that which, to use the words in the definition of 'contract of carriage' in Art. I (b), 'relates to the carriage of goods by sea'.*"

And:

> "*The operation of the Rules is determined by the limits of the contract of carriage by sea and not by any limits of time. The function of Art. I (e) is, I think, only to assist in the definition of contract of carriage. As I have already pointed out, there is excluded from that definition any part of a larger contract which relates, for example, to inland transport. It is natural to divide such a contract into periods, a period of inland transport, followed perhaps by a period of sea transport and then again by a period of inland transport.*" [54]

More recently Bingham J confirmed this point of view in *Mayhew Foods v Overseas Containers* in relation to the Hague-Visby Rules by stating:

> "*The contract here was for carriage of these goods from Uckfield to the numbered berth at Jeddah. The rules did not apply to inland transport prior to shipment on board a vessel, because under s. 1 (3) of the 1971 Act, they are to have the force of law only in relation to and in connection with the carriage of goods by sea in ships. But the contract here clearly provided for shipment at a United Kingdom port, intended to be Southampton but in the event Shoreham, and from the time of that shipment, the Act and the rules plainly applied.*" [55]

Judgements such as the *Duke of Yare*[56], the *Colombia*[57] and the *Eurocolombia-Sierra Express-Ibn Bajjah*[58] show that the Dutch judiciary likewise supports the view that the Rules may apply to the sea stage of a contract for multimodal carriage.

The German academic community on the other hand is of a different opinion[59]. The prevailing view in Germany is that the Rules apply only to unimodal carriage contracts. Since the Rules do not explicitly mention multimodal transport their scope does not cover the sea segments of contracts which include other types of carriage besides carriage by sea[60], not even in those situations where a bill of lading has been issued[61].

One could argue that this is no great loss since both the Hague and the Hague-Visby Rules can in any case only be applied via national law in Germany. Thereto the rules of both regimes have been incorporated in the German Commercial Code, the HGB. When it comes to multimodal carriage involving a sea stage the provisions on sea carriage in the HGB stemming

[54] *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd.,* [1954] 1 *Lloyd's Rep*. 321.
[55] *Mayhew Foods Limited v Overseas Containers Ltd*., [1984] 1 *Lloyd's Rep*. 317.
[56] Rb Rotterdam 10 April 1997, *S&S* 1999, 19; Hof Den Haag 26 September 2000, *S&S* 2001, 21.
[57] Rb Rotterdam 17 September 2003, *S&S* 2007, 63.
[58] Hof Den Haag 22 March 2003, *S&S* 2005, 113; HR 17 November 2006, *LJN* AY8288. See also Rb Rotterdam 22 February 2006, *S&S* 2007, 119 (*EWL Central America*).
[59] Herber 2006, p. 439; Ramming 1999, p. 332; Rogert 2005, p. 117-120; Drews 2003, p. 14; Rabe 1998, p. 431.
[60] The Italian judiciary apparently agrees with this point of view: Tribunale of Turin 5 June 2002, *Chinese Polish Joint Stock Shipping Co. v Zust Ambrosetti S.p.A.*, *DM* 2003, 1042; Tribunale of Gorizia 28 May 2003, Corte di Cassazione 2 September 1998, No. 8713, *Andrea Merzario S.p.A. v Vismara Associate S.p.A. and others*, *DM* 2000, 1349.
[61] For more details on the German point of view see Section 8.1.2.1.1 of this Chapter, under 'A different view' on the influence of the bill of lading on the scope of application of the Rules.

from the uniform instruments are also applied if the loss or damage of the goods can be ascribed to the sea carriage through § 452a HGB on localized loss[62].

The question is whether the application of § 662 HGB – and the Paragraphs mentioned therein – via § 452a HGB requires a bill of lading, a '*Konnossement*', as meant by the Rules.

8.1.2.1.1 The bill of lading

The second requirement for application found in both sets of Rules is that a bill of lading is or is meant to be issued, and that the contract of carriage is governed by this bill. This requirement can be found in Article 1(b) of the Rules where it says:

> "*'Contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.*"

And in Article 10:

> "*The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States…*"

The contract of carriage thus needs to be covered by a bill of lading or a similar document of title. In the Anglo-American legal sphere three essential features of a bill of lading are summed up[63]: (1) evidence of the receipt of the goods, (2) evidence of a contract for the carriage of goods and (3) document of title[64]. A fourth has been added to this set, which is the presentation rule; only against presentation of the document can the goods be delivered legitimately. It stands to reason that when a document satisfies all of these requirements it should be considered within the scope of application of the Rules.

In multimodal carriage 'bills of lading' are frequently issued if one or more of the stages of the transport involve carriage by sea. These 'combined transport bills of lading' or 'multimodal transport bills of lading[65]' such as the Combiconbill, the FBL or the BIMCO Multiwaybill 95 are specifically fitted for multimodal carriage and generally apply the network approach concerning the law applicable to the contract[66]. Although these documents are named

[62] It cannot be done by means of Article 6 EGHGB as the scope of this Article is apparently restricted to unimodal sea carriage. For more on the German system of multimodal transport law see Chapter 10, Section 10.4.2.

[63] *Comalco Aluminium Ltd v Mogal Freight Services Pty., Ltd.,* (1993) 113 *A.L.R.* 677 as cited by Glass 2004, p. 67 and Carver 2001, p. 464 fn. 37. The 'three functions doctrine' is also adhered to in the German literature; Mankowski 1995, p. 125. See also Gaskell, Asariotis & Baatz 2000, p. 3. The fourth feature was added to the list more recently than the first three. In England the presentation rule was acknowledged in 2005 in the *Rafaela S* decision. *JI MacWilliam Co Inc v Mediterranean Shipping Co SA* (*Rafaela S*), [2005] 1 *Lloyd's Rep*. 347.

[64] These first three features largely coincide with the definition of a bill of lading that could be found in the old Dutch Commercial Code. Since then the rules on sea carriage have been changed and transferred to the Civil Code however.

[65] 'Multimodal transport bill of lading' is an alias for 'combined transport bill of lading', as is 'intermodal bill of lading'. Gaskell, Asariotis & Baatz 2000, p. 14.

[66] These multimodal transport documents are all available in both negotiable and non-negotiable versions. Many of the modern shipping documents are drafted in a form in which they can be used interchangeably for either multimodal transport, through transport or on a port-to-port basis and include terms appropriate for each

'bills of lading', there is some discussion as to whether they can be considered bills of lading under the Hague(-Visby) Rules. When it comes to the features of a bill of lading under the Rules the first two do not cause any dissension. There is generally no question that combined bills can evidence the receipt of goods as this is a function that can be fulfilled by any transport document, even waybills or consignments notes. The second feature, demanding that the combined bill of lading evidences a contract for the carriage of goods is also no cause for debate. It is rather the third requirement, the concept that a multimodal transport bill be considered a document of title, which generates the discord.

Document of title

Since the Rules require a "*a bill of lading or any similar document of title*" it is assumed that in order to be a bill of lading under the Rules a document at least has to be a document of title. In short, the document therefore needs to be a document recognised by law, which represents the goods for which it is issued. Since the bill of lading is indeed such a document according to law and mercantile custom, its transfer vests in the transferee the right to possession of the goods and possibly also the property in them.

That a document of title is not necessarily a negotiable instrument under the Rules is clarified by the judgement the *Rafaela S*[67]. In this judgement the question arose whether a 'straight' bill of lading, meaning a bill of lading providing for delivery of goods to a named consignee and not to order or assigns or bearer and thus not transferable by endorsement, was a bill of lading or any similar document of title within the Rules. In answer to this question Rix LJ stated:

> "*Whatever, the history of the phrase in English common or statutory law may be, I see no reason why a document which has to be produced to obtain possession of the goods should not be regarded, in an international convention, as a document of title. It is so regarded by the courts of France, Holland and Singapore….*"

So, although it is common ground that the Carriage of Goods by Sea Act 1992 treats straight bills of lading as sea waybills, the straight bill of lading is a document of title given that on its express terms it has to be presented to obtain delivery of the goods. As such, the straight bill of lading is subject to the Hague or Hague-Visby Rules.

This means that the terms 'bill of lading or any similar document of title' at least include not only bills of lading that are made out to order or bearer, but also those that name a specific consignee.

As regards the combined or multimodal transport bill it can be said that a bill of lading which stipulates for delivery at a place inland has been held to be a document of title. Nevertheless doubts have been expressed as to whether a bill of lading in which sea carriage is not the predominant component can be regarded as such. One objection that has been made is that it is unclear how such a document is to confer constructive possession in the goods to which it refers if the contractual multimodal carrier fails to take physical possession of the goods during

contingency. Examples of such interchangeable 'bills' are the P&O Nedlloyd Bill and the Conlinebill. Wilson 2004, p. 245; Gaskell, Asariotis & Baatz 2000, p. 14.

[67] *JI MacWilliam Co Inc v Mediterranean Shipping Co SA* (*Rafaela S*), [2003] 2 *Lloyd's Rep*. 113. Later confirmed by the House of Lords in *JI MacWilliam Co Inc v Mediterranean Shipping Co SA* (*Rafaela S*), [2005] 1 *Lloyd's Rep*. 347. *Cf. Parsons Corporation and Others v C.V. Scheepvaahrtonderneming* (*Happy Ranger*), [2002] 2 *Lloyd's Rep*. 357.

the carriage. As Clarke does concerning the CMR however[68], Baughen submits in this context that it is not the physical reception of the goods that matters, but the contractual capacity to control delivery by the performing parties. "*Commercially, the contractual carrier does not actually need to be able to hand over the 'key to the warehouse'. It should be enough that he can direct the party who does have the key as to when it should be turned*"[69].

According to Hill the mere fact that the issuer of the document undertakes not to deliver the goods to anyone other than the party who presents one of the originals of the document and demands surrender of the original in exchange for the goods, together with the practice to issue bills of lading 'to order' or 'to bearer' so that they may be transferred from one party to another, ensures the transferability of the bill itself and the goods it represents. In this context there is no reason to restrict such transferability to bills of lading issued for maritime transport only. As a result a combined transport bill of lading should be deemed to have transferability status, provided that the issuer undertakes to deliver the goods only in exchange for one of the original documents[70].

'Shipped' and 'received for shipment'

Another objection to considering a multimodal transport bill to be a document of title and thus not covered by the Rules is found in that such a bill is likely to be a 'received for shipment bill' and not a 'shipped' bill of lading.

A carrier will issue a 'received for shipment' bill of lading when he receives goods into his custody prior to shipment. Such a bill indicates that the goods will be shipped on a named or unspecified ship. A 'received for shipment' bill is thought to be an inferior document by some and may therefore be considered as providing too little security to be acceptable under a letter of credit[71]. Conversely, a 'shipped on board' bill of lading states that the goods have been shipped on board[72].

As regards this distinction between 'shipped' and 'received for shipment' bills of lading the case of *Lickbarrow v Mason* established that 'shipped' bills of lading are documents of title[73]. Multimodal or combined transport bills are generally issued when the goods are received for carriage at container terminals or depots however, before they are loaded on board of a ship. The terminal or depot may not even be in a port area if the carrier acknowledges the receipt of the goods inland. This happens frequently when sea carriage is not the first leg of the transport. A bill of lading issued under these circumstances is likely to resemble a 'received for shipment' bill more than a 'shipped on board' bill of lading[74]. Whether 'received for shipment bills' are also documents of title has not been decided as yet in an English court of law[75]. As a result the status of the 'received for shipment' combined bill of transport is not a hundred percent sure. Although the aforementioned *Mayhew Foods v Overseas Containers*[76] judgement shows that a

[68] See Chapter 4, Section 4.1.2.5 on the place of taking over and the place of delivery under the CMR.
[69] Baughen 2004, p. 173.
[70] Ramberg 1988, p. 6; Smeele 1998, p. 91-92; Van Delden 1992, p. 38.
[71] Sale contracts and letters of credit may require that the bills of lading tendered for payment to the buyer or the bank constitute 'shipped', 'clean' bills of lading. Baughen 2004, p. 5. Received for shipment documents are not acceptable under UCP 600 for instance. On the other hand, financers sometimes even accept consignment notes, for instance if the carrier promises to deliver the goods to the holder of said document.
[72] Carver 2001, p. 496.
[73] *Lickbarrow v Mason*, 100 *E.R.* 35 (1787) 2 *Term Rep*. 63.
[74] Schnitzer 2005, p. 116.
[75] See *Marlborough Hill* [1921] 1 *AC* 444; *Diamond Alkali Export Corp. v Fl. Bourgeois*, [1921] 3 *K.B.* 443 and *Ishag v Allied Bank International*, [1981] 1 *Lloyd's Rep*. 92.
[76] *Mayhew Foods Limited v Overseas Containers Ltd.,* [1984] 1 *Lloyd's Rep*. 317.

bill of lading issued for combined transport can be subject to the 1971 Carriage of Goods by Sea Act and thus the Rules "*in relation to and in connection with the carriage of goods by sea in ships … Since this bill was issued in a contracting state and provided for carriage from a port in a contracting state …*", Bingham J did not clarify whether the bill of lading in this case was a 'received for shipment' bill of lading or a 'shipped' bill. The fact that the bill had been issued some days after the first sea stage of the transport had been completed may indicate that the bill in question was a 'shipped' bill, but this is by no means certain.

In English legal literature writers seem inclined towards the idea that a received for shipment bill should be covered by the Rules. According to *Carver on Bills of Lading*, received for shipment bills are probably covered by the words 'any similar document of title' as are perhaps combined transport bills[77]. In *Scrutton on charterparties* it is submitted that although they are not within the custom as founded by *Lickbarrow v Mason*, there would now be little difficulty in establishing that through bills of lading, combined transport bills of lading and bills of lading in the form 'received for shipment' are by custom treated as transferable documents of title and thus could be covered by the Rules[78].

Thus, based on the above the conclusion that at least 'shipped' multimodal transport bills of lading are covered by the Rules seems valid. Whether the same applies to 'received for shipment' bills is uncertain, as there is no case law to provide clarity in either the Dutch or English legal sphere. The only guideline on this issue is a slight tendency to bring such documents into the fold of the Rules in some of the prominent English legal works on maritime law such as *Scrutton on Charterparties and Bills of Lading* and *Carver on Bills of Lading*.

In Germany the view is supported that the Hague(-Visby) Rules as incorporated in the HGB may only apply to the maritime stages of a multimodal contract by means of their national legislation on multimodal carriage as found in §§ 452 through 452d HGB. Since these Paragraphs base their operation on a hypothetical contract, the result is that German ideas on whether a 'received for shipment' multimodal transport bill of lading is covered by the Rules are non-existent[79].

In so far as such document relates to the carriage of goods by sea

In The Netherlands and in England at least it seems that the carriage of goods partly by sea under a bill of lading may be covered by the Hague or Hague-Visby Rules in case the multimodal transport bill is a 'shipped' bill, and perhaps even when the bill in question states the goods have been 'received for shipment'. It is unlikely however, that the entire multimodal transport falls within the scope of the sea carriage conventions. In this context the middle part of the description of what is considered a contract of carriage under the Rules in Article 1(b) is of importance. Besides having to be covered by a bill of lading or a similar document of title, the paragraph further states that the contract counts as a contract of carriage under the Rules only "*in so far as such document relates to the carriage of goods by sea*".

According to the *travaux préparatoires* of the Hague Rules these words are intended to confer that a contract may include other elements besides the sea carriage but that the Hague Rules apply only to the part of the contract concerning carriage by sea. In the *travaux* the example of the through bill of lading is given in relation to which Hill comments:

[77] Carver 2001, p. 244-245 and 464.
[78] Scrutton 1996, p. 375; Baughen 2004, p. 14.
[79] More on the German views on the application of the Hague(-Visby) Rules can be found below in this Section, under the headline 'A different view'.

> "*It is the definition of the contract of carriage, and the rules apply to the whole contract of carriage, if it comes within the definition. Mr. Paine's suggestion is that that part of the through bill of lading which applies to the ocean transport is a contract of carriage, but you will have to use some very careful wording to make that clear. It will not be sufficient to use words which will make a through bill of lading a contract of carriage, or you will find your rules applicable to the railway portion of the bill of lading.*" [80]

If this is true for a through bill of lading it is suggested to be equally true for combined transport bills. In *Carver on Bills of Lading* the words 'in so far as such document relates to the carriage of goods by sea' are thought to mean that where a combined transport bill is issued the Rules apply of their own force to the sea leg[81]. Thus it is put forward in English legal literature that a multimodal transport bill is a genuine bill of lading to which the Hague or Hague-Visby Rules apply in so far as the sea carriage is concerned[82].

The *Pyrene v Scindia* and *Mayhew Foods v Overseas Containers* judgements mentioned above suggest that the English judiciary is also inclined to consider the combined transport bill of lading to be a bill of lading, or at least a similar document of title, and thus covered by the Rules in so far as the document concerns carriage by sea[83].

As was mentioned above the *Rechtbank* Rotterdam applied the Hague-Visby Rules to the sea segment of a multimodal transport in the 2003 judgement on the *Colombia*[84]. This decision also sheds some light on the Dutch views concerning the application of the Rules to the combined transport bill of lading. In this case involving the transport of mangoes and melons from various places in Costa Rica to The Netherlands under a combined transport bill the Court agreed with the contracting parties that the Hague-Visby Rules applied to the claim resulting from the fact that the fruit had perished before arriving at the destination. The reason for the Court to consider the Hague-Visby Rules applicable was that the damage was claimed to have been caused during the sea stage between Puerto Limón and Rotterdam. Thus the Court expressed that The Rules applied to the sea carriage only.

A more recent judgement by the same Court also seems to support the view that the Hague-Visby Rules apply directly to the sea carriage segment of a multimodal transport if this is covered by a combined transport bill of lading at first glance. In truth this judgement does not provide any real clarity however. Rather, it illustrates one of the peculiarities of the Dutch multimodal transport legislation found in the Dutch Civil Code. In this case a shipment of shirts was sent under a combined transport bill of lading from Bangkok, Thailand to Rotterdam by ship and from there to Hoevelaken, also in The Netherlands, by road[85]. Because the carrier had also packed various Thai herbs and spices in the container storing the shirts, the consignee refused the shipment stating that the smell of the herbs had made the shirts unfit for sale. The *Rechtbank* determined that since the damage was caused after the carrier had taken over the boxes of shirts,

[80] Berlingieri 1997, p. 90-91.
[81] Carver 2001, p. 465.
[82] Schnitzer 2005, p. 116; Baughen 1998, p. 99. Although Baughen is not as clear on this issue in the later 2004 edition of this work it seems he still supports this view. Baughen 2004, p. 172-173.
[83] Carver 2001, p. 464; Ramming *TranspR* 2007, p. 296. In addition *Mayhew Foods v Overseas Containers* proves that under common law at least transhipment does not influence the legal status of an ocean bill of lading. Therefore, a combined transport document is not likely to be rejected as a bill of lading merely because the underlying contract of carriage entails one or more transhipments.
[84] Rb Rotterdam 17 September 2003, *S&S* 2007, 63. The transport in question concerned several containers filled with boxes of mangoes and melons which were carried by land to Puerto Limón in Costa Rica and from there by sea to Rotterdam. When the fruit arrived in The Netherlands it was spoiled as a result of several delays during the carriage by sea.
[85] Rb Rotterdam 19 July 2006, *S&S* 2007, 84.

the sea carriage stage had begun and thus the Hague-Visby Rules applied. This outcome does however not justify the conclusion that the CT-document was of itself considered a 'bill of lading or similar document of title' in relation to the sea transport by the *Rechtbank*. Since the carriage in question was multimodal and the parties had chosen Dutch law as the applicable regime, Articles 8:40 through 8:48 BW – which constitute the Dutch domestic rules on multimodal carriage – applied. One of these provisions, Article 8:46(1) BW, determines the following regarding multimodal transport documents involving sea carriage:

> "*For that part of the carriage which, according to the contract entered into by the parties, will take place as carriage by sea or by inland waterway, the CT document shall be deemed to be a bill of lading.*"

As a result this judgement fails to support the concept that the Dutch judiciary considers a combined transport bill of lading to be the equivalent of a bill of lading or a similar document of title, as it expressly mentions that it applies Article 8:46(1) BW.

Nevertheless, the conclusion is justified that in The Netherlands the Hague-Visby Rules are applied to the maritime parts of a multimodal contract which is covered by a combined transport bill of lading.

A different view

When we turn our gaze away from the English and Dutch courts of law and redirect it towards the east we find that this subject is one that should feel right at home in the multimodal pond as views deviating from the above are promoted in the academic texts of our easterly neighbours. Although Puttfarken deems the Hague or Hague-Visby Rules applicable to the sea stage of a multimodal transport if a bill of lading such as the FIATA Bill of Lading has been issued[86], many of his scholarly colleagues disagree. Erbe and Schlienger for instance clearly advocate the notion that a multimodal transport bill of lading does not satisfy the requirements for application set by the Hague and Hague-Visby Rules[87]. They support this view despite knowing that this curtails the scope of the Rules tremendously as the largest part of the contemporary sea carriage occurs in a multimodal context[88]. Besides Erbe and Schlienger Ramming also expresses that he does not consider the multimodal bill of lading a bill of lading or similar document of title as meant by the Hague or Hague-Visby Rules[89]. He argues that Article 10 of the Hague-Visby Rules requires the bill of lading to relate to the carriage of goods between ports, and thus a multimodal bill does not fulfil the conditions set by the Convention. It should be noted however that, although it is not considered 'multimodal' carriage as meant in §§ 452 *et seq*. HGB, the carriage by both inland waterway and sea does sometimes meet these standards. If the 'between ports' condition were applied rigidly, then this type of carriage would be deemed to fall within the confines of the Rules, even the inland waterway stage. This conflicts with the fact that the contract of carriage as defined by the Rules in Article 1 only concerns contracts of carriage in so far as they relate to the carriage of goods by sea however[90].

[86] According to Puttfarken a bill of lading issued by a freight forwarder is just as much a bill of lading as meant by the Rules as a bill issued by the ship owner. Puttfarken 1997, p. 175 and 178.
[87] Erbe & Schlienger 2005, p. 424; Drews 2003, p. 14.
[88] Rabe 1998, p. 430.
[89] Ramming 1999, p. 330.
[90] Of course, thus no distinction is made between the contract of carriage and the bill of lading as is done under German law. Ramming *TranspR* 2007, p. 283.

Other authors may not literally have stated that they do not consider the multimodal bill of lading a bill of lading as required by the Rules, but it is clear that the *communis opinio* in the Germanic region is that the Rules do not apply to sea stages which are part of multimodal transports, no matter the type of bill of lading issued[91].

8.1.2.2 Tackle-to-tackle

As regards the period to which they apply on a mandatory basis the Hague and Hague-Visby Rules deviate from the other carriage conventions. This is one of the peculiarities of the Hague regime that can have far-reaching consequences for the liability of the carrier in multimodal transports which incorporate a sea segment.

Where the compulsory rules of the other international instruments generally cover the period between the taking over of the goods by the carrier and their delivery, the Rules restrict their mandatory application to the carriage by sea alone[92]. The Hague Rules are only compulsory for the period during which the goods are physically on board the vessel, plus the time needed for their loading and discharging, the so-called 'tackle-to-tackle' period[93]. They do not extend to the phase in which the goods are under the ocean carrier's control in the port area, except that is, as non-mandatory rules[94]. The Visby Protocol did nothing to change the period of responsibility. It was negotiated during the onset of the 'container revolution', before multimodal contracts had become the norm, and thus the drafters of the Protocol saw no need to make any change in this area[95]. Although things have changed, it is said that around 90 percent of the current transports involving sea carriage are multimodal[96], while the period of application of the Rules remains the same.

The resulting picture concerning the rules regulating the liability of a carrier who contracts for international multimodal transport is somewhat akin to a moth-eaten tapestry. The periods 'before and after tackle' or before the goods are loaded on to the ship and after they have been discharged punch holes in what otherwise could have been a uniform carpet. Without this restriction to the mandatory scope of the Rules – which is emulated by the CMNI on inland waterway carriage[97] – international multimodal transports have the potential to be covered from door-to-door by mandatory uniform international law. As it is, the 'before and after' periods are covered by whatever national legal regime applies to the contract of carriage if excepted from the reach of the Rules by the contracting parties. If the contracting parties except the 'before and after' period from the period of responsibility of the carrier for instance concerning a number of shipments of coffee beans which are to be carried by sea from Guayaquil in Ecuador to Rotterdam and onwards from Rotterdam to Koblenz by road, this means that (1) the period after the carrier has taken the beans into custody but before they are loaded on to the vessel is covered

[91] Ramming 1999, p. 332; Basedow 1999, p. 31-35; Drews 2003, p. 14; Herber *Transport – Wirtschaft – Recht* 2001, p. 101; Hartenstein 2005, p. 10; Herber 2006, p. 439; Rabe 1998, p. 431.

[92] See Article 3(8) in conjunction with Article 3(2) of the Hague(-Visby) Rules.

[93] 'Tackle-to-tackle' has traditionally meant the period between the moment when the ship's tackle is hooked on at the loading port and the moment when the ship's tackle is unhooked at discharge. If a shore tackle is used, that moment traditionally occurs when goods cross the ship's rail. In *Pyrene Co. v Scindia Steam Navigation Co.* ([1954] 1 *Lloyd's Rep*. 321) goods were attached to the ship's tackle and were in the process of being loaded on board when they fell beyond the ship. It was held by the court that the Rules applied as the ship's tackle had been hooked on even though the goods had not crossed the ship's rail yet.

[94] Berlingieri 1997, p. 670.

[95] Sturley 2007.

[96] Rabe 2000, p. 189.

[97] See Chapter 7, Section 7.1.2.1 on the national hole in the uniform framework.

by national law[98], (2) the period that the beans reside on the ship is covered by the Hague-Visby Rules, (3) the period after discharging but before the road carriage starts is once again covered by the national law applicable to the contract and (4) the period between the moment the goods are taken over for carriage by road in Rotterdam and the moment that they are delivered in Koblenz is covered by the uniform rules of the CMR[99]. Had the contract been for carriage by air and road the entire voyage would have been subject to uniform international law as the first stage would have been covered by the Montreal Convention up until the moment the goods were taken over for the carriage by road, which would have been covered by the CMR Convention until the moment of delivery of the beans to the consignee. The Hague and Hague-Visby Rules – when applicable to the sea stage – make it impossible for an international multimodal transport to be completely regulated by international law.

8.1.2.2.1 Period of responsibility clauses

The 'national holes' in the transport chain are much appreciated by some carriers. They make good use of these holes and the opportunities they bring by entering clauses in the carriage contracts that exempt them from liability during these periods before loading and after discharge. An example of such a clause can be found in the BIMCO Conlinebill under 4:

> "*4. Period of responsibility*
> *The Carrier or his Agent shall not be liable for loss of or damage to the goods during the period before loading and after discharge from the vessel, however such loss or damage arises.*"

In The Netherlands such clauses are named 'before & after' clauses, and are thought to be admissible based on Article 7 of the Hague-Visby Rules[100] which states that:

> "*Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea.*"[101]

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[98] The applicable national rules may not even be rules of carriage law; they may for example also be national rules on storage, especially if the storage is lengthy in comparison with the carriage. Haak & Zwitser 1999, p. 175-179; Dorrestein 1977, p. 38-41; Korthals Altes & Wiarda 1980, p. 22-23. One should not assume lightly that a certain contract involving carriage is a mixed agreement entailing both carriage and storage obligations or even that the agreement entails two contracts namely one concerning carriage and one pertaining to storage. Some reserve is especially fitting in cases where the storage concerns only conventional short periods before, after or during the transport; in such cases the storage is generally absorbed by the carriage obligations making the contract strictly a contract of carriage. Clarke *CMR* 2003, p. 32. Exceptions do occur however, see for instance HR 22 January 1993, *NJ* 1993, 456 or *S&S* 1993, 58 (*Van Loo/Wouters*); Hof Den Haag 5 January 1942, *NJ* 1942, 319; *T Comedy (U.K.) Ltd v Easy Managed Transport Ltd.,* [2007] 2 *Lloyd's Rep*. 397.

[99] This is at least the case according to courts in the United Kingdom and The Netherlands.

[100] Rb Rotterdam 19 July 2006, *S&S* 2007, 84.

[101] In *Carver on Bills of Lading* (Carver 2001, p. 544) it is remarked that Article 7 of the Rules elicits a dilemma concerning the scope of application of the Rules. As the Article contains rules relating to the period prior to the loading on and subsequent to the discharge from the ship, the question arises how the Rules can regulate a period of time that they do not cover? This predicament brings the famous Baron von Munchausen to mind, who apparently was able to lift himself out of a swamp by pulling himself up by his own hair. Raspe 1785. It is most likely, considering the case law regarding the scope of application of the Rules such as *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd.,* ([1954] 1 *Lloyd's Rep.* 321), that the Article should be interpreted as merely confirming the

That this point of view sometimes leads to poignant situations is illustrated by Dutch *Hoge Raad*'s '*Iris*' judgement of 1995[102]. The lawsuit centred on a container stuffed with frozen butter which was to be carried by Geest from Tuitjenhorn in The Netherlands to Leek in the United Kingdom. After the container was carried by road to a terminal in Rotterdam it was unloaded and placed in the 'outgoing' stack next to Geest's berth, ready to be loaded on to a vessel. When push came to shove however, the container seemed to have disappeared and could therefore not be loaded on to the '*Iris'*, the vessel that was supposed to carry it to Hull. A few days later the container was located; it had mistakenly been stowed on board of the '*Cardigan Bay'*, a vessel to which carrier Geest had no ties at all, and was headed for Hong Kong. When the butter finally arrived in Hong Kong it had gone bad and had to be destroyed[103]. The bill of lading which was drafted but not issued by the carrier because of the disappearance of the container included a 'before & after' clause. Prior to this failed transport the shipper and carrier Geest had concluded several more successful carriage contracts. For these transports bills of lading were issued which also contained a 'before & after' clause stating: "*The carrier shall NOT be responsible for loss or damage of goods BEFORE they have crossed ship's rail in loading or AFTER they have crossed the ship's rail in discharging operation*."

The *Hoge Raad* judged that the applicability of the conditions found in the bill of lading depended in this case on whether the sea carriage had already started. Whether it had or not was to be assessed based on the circumstances of the case. Since the container had been unloaded and placed in Geest's stack at the terminal, causing it to be ready for loading, the *Hoge Raad* decided that the road carriage had ended and the sea carriage stage of the transport had begun[104]. Therefore the content of the bill of lading – which would have contained aforesaid 'before & after' clause – regulated the relation between the shipper and carrier Geest. Although in this instance the bill of lading had not actually been issued, the fact that the parties had had similar dealings before, which had always included the issue of a bill of lading, caused the bill of lading conditions to equally cover this transport[105]. Thus the carrier could not be held liable for the loss of the butter even though he had taken on the responsibility for the entire transport and the loss occurred when the cargo was only halfway there[106].

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obvious. On the other hand, Devlin LJ did assert that the Rules do not attach to a period of time but rather to the contract of carriage, or a part of a contract of carriage. *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd.,* [1954] 1 *Lloyd's Rep.* 321.

[102] HR 24 March 1995, *S&S* 1995, 72 (*Iris*). See also Rb Rotterdam 24 May 2006, *S&S* 2008, 35; Rb Amsterdam 1 November 2004 and 22 June 2005, *S&S* 2006, 100; Rb Rotterdam 19 July 2006, *S&S* 2007, 84; Rb Rotterdam 17 September 2003, *S&S* 2007, 63.

[103] As the deep frozen butter was stuffed in a non-reefer container supplied by carrier Geest it would have survived the relatively short transport to Leek in England in October, but the longer journey to Hong Kong and the presumably higher temperatures it was therefore exposed to it could not withstand without added refrigeration.

[104] Although the Hague(-Visby) Rules are compulsory only from 'tackle-to-tackle' the sea carriage segment of the carriage starts the moment the carrier takes over the goods for carriage by sea and ends when he hands over the responsibility over the goods to either a carrier who will carry them by another means of transport or to the consignee. HR 24 March 1995, *S&S* 1995, 72 (*Iris*); Haak 1998, p. 198-202. In relation to the ending of the road stage the decision reached by the *Hoge Raad* on the same day concerning the moment of delivery of a shipment of Mars chocolate is of interest. In this judgement the *Hoge Raad* decided that not the factual handing over of the goods is decisive but rather the moment that the goods are put at the other's disposal. Road carriage may therefore even end while the cargo is still in the vehicle. HR 24 March 1995, *S&S* 1995, 74.

[105] *Cf.* Carver 2001, p. 457 and 464*; Pyrene Co Ltd v Scindia Steam Navigation Co Ltd.,* [1954] 1 *Lloyd's Rep.* 321; *Mayhew Foods Limited v Overseas Containers Ltd.*, [1984] 1 *Lloyd's Rep*. 317.

[106] Unfortunately for the cargo claimant the stevedore responsible for the port handling could also not be held liable as the bill of lading also contained a Himalaya clause. A Himalaya clause is used to extend a carrier's defences and liability limitations to certain third parties performing services on his behalf. The clause takes its name from the

Evidenced by *'Arawa'*[107], a judgement by the Court of Appeal in 1979, the English courts deem contractual clauses exempting the carrier from liability in the before and after phases equally admissible. In the 24 bills of lading issued regarding a cargo of deep frozen lamb's carcasses which were carried from New Zealand to London on the '*Arawa'* a clause was recorded stating:

> "*Prior to the loading of the goods on or subsequent to their discharge from the vessel, whether or not the goods are in the custody of the Carrier, his agents or servants as warehousemen or otherwise and whether in craft or landed, the Carrier, his agents and servants and the vessel shall not be liable for any loss, detention or damage of or to the goods whatsoever even if caused by the negligence of the Carrier, his agents or servants or other persons for whom the Carrier is responsible . . .*"

Denning LJ determined that there was no going around this clause. Although the contract of carriage had been changed – the carcasses were transferred to lighters and taken to the wharf at Deptford instead of being discharged directly from the '*Arawa*' in London in order to save time – the change was not so great as to cause a new contract to come into being. The original bills of lading were not rescinded; the arrangement left them subsisting and merely varied them as to the mode whereby the delivery of the cargo was to be effected. And thus, since the result was that the clause in the bill of lading governed the relation between the shipper and the carrier, the carrier was exempted from liability concerning the spoilage of the meat after discharge but before delivery.

In Germany the possibility for the carrier to exempt himself from liability through the use of an exemption clause is laid down in the HGB[108]. In § 663(2) under 2 HGB is determined that although the previous Paragraph, § 662 HGB, causes various liability rules found in the German sea carriage law to be compulsory, an exception is made concerning 'the obligations that burden the carrier in relation to the goods during the periods before they are loaded and after they have been unloaded'[109].

That all of the mentioned jurisdictions allow this type of exemption is rather remarkable when held against the backdrop of the generally compulsory nature of carriage law. Although uniformity of law and legal opinions should always be aspired to, this may not have been the best possible area in which to achieve it. The result is a rather large gap in the liability of the multimodal carrier, which is odd as he has promised a certain result and should thus in principle be liable unless he can prove there was '*force majeure*'[110]. Nevertheless, through the use of a mere contractual provision the carrier is relieved from his duty to compensate his co-contracting party for any damage or loss which occurred during a rather accident prone phase of the carriage,

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S.S. Himalaya which starred in a decision by the Court of Appeal, see *Adler v Dickson*, [1954] 2 *Lloyd's Rep.* 267 *(Himalaya)*.

[107] *Producers Meats Ltd v Shaw Savill & Albion Co Ltd.,* [1980] 2 *Lloyd's Rep*. 135 (*Arawa*).

[108] BGH 26 June 1997, *TranspR* 1997, p. 379-382; Rogert 2005, p. 256-257.

[109] "Die Verpflichtungen, die dem Verfrachter hinsichtlich der Güter in der Zeit vor ihrer Einladung und nach ihrer Ausladung obliegen". Although the German view is that the Hague(-Visby) Rules do not apply ex proprio vigore to the international sea stage of a multimodal transport, the Rules as incorporated in the HGB may apply to such carriage by means of § 452a HGB. Rabe mentions that the BGH has not established as yet whether the 'Landschadensklausel' (period of responsibility clause) is in concordance with the AGBG, the *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*, which is an Act concerning standard commercial contract terms. If it is not, then the clause may be deemed invalid under German law or its effect may be restricted. Prußman & Rabe 2000, p. 565-566, Nos. 35-37.

[110] HR 24 March 1995, *S&S* 1995, 72 (*Iris*); Haak 1998, p. 198-202.

even when he is at fault[111]. Luckily, the case law examples mentioned above lead to the conclusion that if matters get too much out of hand, if for instance the carrier were to actively encourage theft during these periods or if he were to handle the goods without even the smallest amount of care, he may not be allowed to invoke the exemption clause[112]. In general however, the exemption is thought admissible. This relatively unquestioning acceptance of the period of responsibility or 'before & after' clause raises the suspicion that sea carriers may have had rather more influence on the formation of the current system of sea carriage law than might seem warranted.

Besides failing to find a real basis in equity – the clause does give the impression of being slightly unfair – the acceptation of the before and after exemption of liability can also not truly be based on Article 7 of the Rules. Although this Article is referred to in the abovementioned '*Iris*' case[113], the Article does no more than determine that nothing in the Rules prevents the exception of liability when the goods are not on the vessel. It does not state that the applicable national law should countenance the exemption of liability prior to the loading on and subsequent to the discharge from the ship on which the goods are carried[114].

In addition to the already mentioned objections, there is also the question to which stage of the carriage the stopover of the goods in the port area is to be attached to[115]. If it were to be attached to a preceding road stage for instance, the exemption of liability would not be thought acceptable. Herber remarks that the allocation of transhipment stages to either the preceding or subsequent carriage is somewhat arbitrary at times[116]. In order to solve this, he suggests not attaching the transhipment phases to any of the carriage stages but to handle them as if they were separate land carriage stages and to subject them to the general German carriage rules. Furthermore, this approach should not be restricted to the transhipments in ports but should be applied to all transhipment phases, including those between road and air carriage, road and rail carriage *et cetera*[117].

The disadvantage of this proposal is that it would generate even more, sometimes very brief, separate stages in relation to which the applicable law would need to be determined. Instead of generating clarity this may lead to confusion instead. Although the approach may work well under the German regime which has, besides a set of rules for multimodal carriage, a general Section which contains rules concerning land, inland waterway and air carriage, it seems unlikely to do as well in other jurisdictions.

8.1.3 Application problems: the time bar on actions

As in all carriage conventions the Rules also contain a limit to the period of time in which an action may be brought. This time bar, which extinguishes the plaintiff's rights after the period of one year, can be found in Article 3(6) of both the Hague and Hague-Visby Rules. The provisions are not

[111] The BGH explains the admissibility of the exemption by pointing out the during the before and after periods the carrier is in the main not in direct possession of the goods but is dependent on certain independent third parties which he is generally unable to influence directly. BGH 26 June 1997, *TranspR* 1997, p. 379-382.

[112] Boonk 1993, p. 62.

[113] HR 24 March 1995, *S&S* 1995, 72 (*Iris*).

[114] *Cf.* Carver 2001, p. 472-473.

[115] OLG Hamburg 19 August 2004, *TranspR* 2004, p. 402-404; BGH 18 October 2007, *TranspR* 2007, p. 472-475; Koller 2007, p. 706-709, § 452 HGB No. 15-16. See also Section 2.3.3.2 on the demarcation of the separate transport stages.

[116] Herber 2006, p. 438.

[117] For a more detailed discussion of the '*teilstreckenproblematik*' see Chapter 2, Section 2.3.3.2 on the demarcation of the separate transport stages.

completely identical however. The Hague-Visby Rules have added paragraph 6*bis* concerning indemnity actions to Article 3 which is referred to in paragraph 6 of the amended Convention and the parties have been granted the right to extend the period. As a result the Hague-Visby Rules determine the following in the third sentence of Article 3(6):

> "*Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period, may however, be extended if the parties so agree after the cause of action has arisen.*"

As a result the time of delivery is crucial in order to determine whether an action is time-barred or not. The term delivery under a bill of lading relates to the transfer of possession to the consignee. It is not interchangeable with the moment of discharge. Nevertheless, it is not always easy to determine when the delivery as meant by this Rule has occurred.

In 2003 the Court of Appeal judgement *Trafigura Beheer v Golden Stavraetos Maritime*[118] dealt with the fact that the cargo was not delivered at the initial destination but was, as agreed between the parties at this destination, carried to another place. The Court of Appeal held that in order to determine when delivery under the contract took place, one had to ask whether the delivery was made on the basis of the initial contract, albeit with amendments, or whether it took place under a totally separate and distinct transaction. Had it been delivered under a separate transaction, the limitation period would have started to run from the time when the cargo ought to have been delivered under that contract. In this case the on-journey had still been part of the same contract however, only with some alterations, so that delivery had taken place at the final destination. Thus, the one year time limit of Article 3(6) of the Hague-Visby Rules only started ticking at that later date.

The Rules do not specify that the delivery meant in this provision should be interpreted as meaning delivery at the end of the sea stage. Because of this, and because of the fact that the term delivery is only used in Article 3(6) H(V)R and not in the scope of application provisions, the time bar on actions in the Rules does not seem to engender the same problems it seems to create under most of the other carriage conventions when it comes to multimodal carriage[119].

Nevertheless, one could ask whether reckoning the delivery to take place after the sea carriage to which the Rules attach should not be considered somewhat of a '*Munchausenian*' manoeuvre[120].

8.2 The Hamburg Rules

The Hamburg Rules of 1978 were drafted under the auspices of the United Nations with the intent to create a regime that would replace the Hague and Hague-Visby Rules. These last regimes stemming from 1924 and 1968 were established by the industrialized nations. Because the majority of ship owners hail from these countries they were thought by the developing countries to have garnered undue privileges by exercising their influence during the drafting processes of the Hague Rules and the amendment. Ever since the Hague and Hague-Visby Rules

[118] *Trafigura Beheer BV v Golden Stavraetos Maritime Inc.,* [2003] 2 *Lloyd's Rep.* 201 *(Sonia)*.

[119] See the subsections on the time bar for claims and the time bar for reservations at or after delivery under Section 4.1.2.5 in Chapter 4.

[120] The Baron von Munchausen lifted himself out of a swamp by his hair (or bootstraps, depending on who tells the story). Raspe 1785.

came into force the developing nations have had a sceptical attitude towards these instruments of international sea carriage law established without their participation, and as these cargo owning countries have become more active participants in international trade and transport, their complaints gained more and more weight. As a result, some fifty years after the adoption of the Hague Rules enough complaints were raised against them – and thus by proxy against the Hague-Visby Rules – to incur the drafting of a new system. Ironically, the objections raised against the 1924 and 1968 Rules were largely identical to the objections raised against the legal vacuum of fifty years before, objections which resulted in the Hague Rules. Again the excessive exemptive privileges for carriers, the exoneration from negligence in key ship owner operations such as navigation and the restrictive jurisdiction clauses in bills of lading were cause for protest[121].

To address these wrongs, and to harmonize maritime carriage law since the Visby amendment had not been ratified by all Hague Rules members[122], the Hamburg Rules were drafted. In order to achieve this last aim of replacing the existing sea carriage regimes the Hamburg Rules were endowed with a provision obliging new Member States to renounce their membership of the Hague(-Visby) Rules. In the end, the unifying purpose of the Convention came to naught largely because ship owners associations and insurers opposed the new regime. They feared that the Hamburg Rules would increase carrier liability and therefore affect the cost of insurance through the Protection and Indemnity Clubs (P & I Clubs)[123]. Shipper interests on the other hand supported the Hamburg regime because they believed them to set a fairer balance between the responsibilities of carrier and shipper. This discord caused the Hamburg Rules to have a slow start. After their adoption in Hamburg in 1978 the new Rules had to wait for entry into force for 14 years. Only on 1 November 1992 did the Convention acquire the ratification of the required 20 States[124]. Even now, 30 years after adoption, the Hamburg Rules still have not reached the worldwide coverage they aspired to. The number of States that acceded to the Hamburg Rules currently numbers 33[125]. Although this may seem a rather respectable number, it does not include any of the most important shipping nations and it does not compare to the list of more than 70 memberships that the Hague Rules can bring to the fore[126]. The result is that the 'new' Hamburg Convention has become no more than a mere alternative instead of the regime unifying international sea carriage law.

[121] Shah 1978, p. 6.

[122] The Visby Protocol was ratified by almost 30 countries, whereas the Hague Rules numbers more than 70 members. This, and information on the ratification status of other maritime conventions can be found at www.comitemaritime.org.

[123] A marine insurance policy typically covers only part of the insured's liabilities. Ship owners band together in mutual underwriting clubs known as Protection and Indemnity Clubs to insure the remaining liability amongst themselves.

[124] "*The list of 20 countries includes 15 countries in Africa, with the rest scattered about. Seven of the countries are landlocked states. Ten of the countries have never participated in any cargo convention before. That's not at all impressive. It represents a very small percentage of our foreign trade.*" Comment by the Committee on Carriage of Goods of the Maritime Law Association of the United States, cited in Force, Yiannopoulos & Davies (eds.) 1996, p. 19.

[125] Diamond 2008, p. 135. The information can also be found in the United Nations Treaty Collection at http://untreaty.un.org.

[126] Only five European countries are party to the Hamburg Rules (Austria, Czech Republic, Slovakia, Hungary and Romania) four of which are completely landlocked.

8.2.1 Differences Hague and Hamburg Rules

The differences between the Hague(-Visby) and the Hamburg Rules are quite substantial. The Hamburg Rules allocate transport risks between carriers and shippers in a manner that differs fundamentally from that of its predecessors. Many new concepts are introduced by the Hamburg regime, which generally tend to increase the liability of the carrier. The most conspicuous example in this context is the repeal of the nautical fault defence. Most of the Hague Rules' defences to cargo liability such as the defences for errors in navigation and management of the vessel are eliminated by the Hamburg Rules. Instead, there is a unitary concept of fault. In this manner an increase in carrier liability for lost or damaged cargo is realized. The complex legal system of 'due diligence' and 'overriding obligations' in the previous regimes is substituted with a presumption that cargo lost or damaged while the carrier is in charge of the goods is the carrier's responsibility. Although the presumption is refutable, the carrier must demonstrate that he took all measures that could 'reasonably be required to avoid the occurrence and its consequences'[127]. The result is a continuing duty concerning seaworthiness[128]. In addition, defences of exception which cause the burden of proof to shift to the claimant have disappeared aside from the special cases of fire and salvage of life[129]. Clearly burdens above and beyond those offered by the Hague and Hague-Visby Rules are imposed upon the carrier by the Hamburg regime.

Other noteworthy changes are the extension of the limitation period to two years found in Article 20 of the Hamburg Rules instead of the period of one year provided for by the Hague-Visby Rules, and the increase of both the package and the kilogram limitations to 835 SDR per package or other shipping unit or 2,5 SDR per kilogram of gross weight of goods, whichever is the higher amount[130]. Furthermore, the extension of defences and limitation to independent contractors
under Himalaya clauses is eliminated and carrier liability for delay in delivery of the cargo is established. Certain types of cargo that were excluded from the Hague Rules, such as live animals and deck cargo are no longer excepted from the scope of application[131]. As regards live animals Article 1(5) expressly brings the risks attached to the carriage of this type of cargo into the fold of the Convention while Article 9 does the same for the carriage of goods on deck provided for in the contract[132].

The last, and in relation to multimodal transport perhaps the most significant difference to be mentioned here is the dissimilarity in the scope of application of the sea carriage regimes. Whereas the Hague Rules apply to contracts of carriage covered by bills of lading and only from tackle-to-tackle, the Hamburg Rules adhere to the entire contract of carriage by sea. This is a subtle but important distinction, as the Hamburg Rules therefore cover the entire time the carrier is 'in charge of the goods' starting at the port of loading and ending at the port of discharge. Article 4, the Article that specifies the carrier's period of responsibility, is clearly designed to remedy the 'before and after' problem created by the Hague-Visby Rules[133]. Under the Hamburg

[127] Article 5 Hamburg Rules.
[128] Force, Yiannopoulos & Davies (eds.) 1996,. p. 19.
[129] Article 5 (4) and (6) Hamburg Rules.
[130] Articles 6 and 26 Hamburg Rules. J.A. Weiss, 'Statutes and Conventions on Carriers' Defenses to Cargo Liability', www.sealaw-usa.com.
[131] Article 1(c) Hague-Visby Rules
[132] Article 5(5) Hamburg Rules does however state that with respect to live animals, the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage.
[133] See Section 8.1.2.2.1 on 'before and after' clauses.

Rules the carrier is *prima facie* no longer entitled to exclude his liability for the period in which he has charge of the goods but during which they are not physically aboard his vessel or being loaded or discharged[134]. However, after Article 4(a)(2) and (b)(3) is subjected to a more thorough analysis it appears that there is in fact still a means to shorten the carrier's period of responsibility, perhaps even to the tackle-to-tackle period. In situations where the carrier is not free to choose which stevedore to contract for the handling of the cargo, the carrier's period of responsibility can be so reduced[135].

8.2.2 Scope of application

According to Article 2(1) Hamburg Rules the Convention applies to all contracts of carriage by sea if they comply with certain requirements. In Article 1 the contract of carriage by sea is defined. Such a contract is an agreement between two parties, the shipper and the carrier, whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another. Article 2 in turn restricts the scope of application to contracts of carriage by sea that concern carriage between two different States, which puts coastal trade between two ports within the same country beyond the reach of the Convention. The type of transport document used does not influence the scope of the Hamburg Rules. Carriage under sea waybills, booking notes and other non-negotiable transport documents is also included, not just carriage under bills of lading as under the Hague-Visby regime. Nonetheless, the Hamburg Rules do not apply to charter parties. The range of voyages that is covered by Article 2 Hamburg Rules is roughly similar to those enumerated in Article 10 of the Hague-Visby Rules with the exception that the Hamburg Rules govern both inward as well as outward transports[136].
The text of Article 2(1) of the Hamburg Rules reads as follows:

> "*The provisions of this Convention are applicable to all contracts of carriage by sea between two different States, if: (a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or (b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State, or (c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or (d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or (e) the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.*"

In the situations mentioned under a through d the Convention will apply *ex proprio vigore*. In the instance under e however, the Rules apply as a matter of contract. In those situations they become terms of contract and as such are treated no differently than any other contractual provision[137]. Thus they cannot override mandatory rules of the applicable national regime[138].

[134] Wilson 2004, p. 181.
[135] Bordahandy 2005, p. 347.
[136] Wilson 2004, p. 217.
[137] Mankabady 1978, p. 44.
[138] This provision seems rather similar to the scope provision of Article 10 HVR which establishes that: "*The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if ... (c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract*". Nevertheless, the provision in the Hamburg Rules generates a very different effect; unlike the Hague-Visby Rules the Hamburg Rules will not set aside any

Another Article that influences the scope of application of the Hamburg Rules is Article 4 which demarcates the period in which the carrier is responsible for the goods. As was pointed out in the previous, the Hamburg Rules have extended this period beyond the tackle-to-tackle period employed by the Hague-Visby Rules. Based on Article 4 a carrier remains responsible for the goods from the moment he takes charge of the cargo at the port of loading up until the moment he relinquishes their charge at the port of discharge. This is not a fundamental change; although this is a significant extension when compared to the Hague-Visby regime, the Hamburg Rules still do not extend beyond sea carriage. They remain unimodal, which is not changed even by the introduction of an 'actual carrier' and the apportionment of liability to this actual carrier by Article 10. After he has been entrusted with the possession of the goods by the contracting carrier, such an actual carrier can participate in the carriage process and be held liable for his segment of the carriage. As all the provisions of the Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier however, this means that the segment of the carriage performed by the actual carrier only falls within the scope of the Convention insofar as this concerns carriage by sea.

8.2.2.1 The scope in relation to multimodal carriage

Unlike the Hague or the Hague-Visby Rules, the Hamburg Rules contain a specific reference to multimodal carriage. In Article 1(6) the exact scope of application of the Convention is established concerning situations where the carriage by sea is part of a larger contract. The first part of this paragraph defines the contract of carriage by sea to which the Hamburg regime applies as 'any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another'. When it comes to the application of the Hamburg Rules to parts of multimodal transport contracts however, the second part of Article 1(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 that found in 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[139]. The sea carriage contract is one of the parts of which the larger multimodal contract consists. Therefore the only consequence of incorporation of other

conflicting mandatory rules of the applicable national law regime if they are contractually chosen to govern the contract. Of course, due to the option to give effect to the Hague-Visby Rules by incorporating them into national legislation, the Hague-Visby Rules may very well be the rules of national law that mandatorily apply. Another similar provision is Article 1(2) COTIF-CIM. Like the Hague-Visby Rules stipulation this paragraph causes a contractual choice to let the rail convention's rules govern the contract of carriage to result in the *ex proprio vigore* application of the COTIF-CIM.

[139] Because the air carriage conventions do not mention the existence of an air carriage contract as a prerequisite for application it has been argued that the terms 'contract for carriage by air' and 'multimodal carriage contract' are mutually exclusive. In this same line of argumentation it is then concluded that the expansion of the scope of the Convention found in the second sentence of Article 18(4) MC pertains to accessory carriage by land, by sea or by inland waterway performed outside an airport only, and does not extend to such carriage based on multimodal contracts. Kirchhof 2007, p. 134.

means of transport in the contract is that the Hamburg Rules do not apply to the whole of the contract but are restricted to the international sea stage. This is underlined by Article 4(1) of the Convention which determines that the period of responsibility of the carrier for the goods under the Convention is 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.

8.2.3 The time bar on actions

In Article 20 the Hamburg Rules determine that any action relating to carriage of goods under the Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years after the day on which the carrier has delivered the goods or part thereof or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered.

As under the Hague(-Visby) Rules, and any of the other carriage conventions for that matter, the term delivery in this provision should be interpreted as meaning the delivery of the goods to the consignee at the final destination. The wording of Article 19 supports this interpretation as it determines that the notice of loss or damage, specifying the general nature of such loss or damage, should be given by the consignee to the carrier not later than the working day after the day when the goods were handed over to the consignee. If constructed thus, the period of limitation provision does not cause problems when applied to a multimodal transport, not even when the carriage by sea is not the last leg of the transport.

8.3 The Rotterdam Rules

> "*Once more unto the breach, dear friends, once more*"
> William Shakespeare, Henry V, Act III, 1599

As we know, none of the past attempts to extend the (mandatory) application of a sea carriage regime beyond the antiquated tackle-to-tackle scope or to implement a multimodal transport regime has been very successful thus far[140]. Neither the Hamburg Rules nor the MT Convention by the UN have attracted the support needed, which is primarily due to the increased liability regime they provide for the carrier[141]. The result is that a colourful tapestry of sea carriage law is currently applied in the EU. Although most of the EU Member States apply the Hague-Visby Rules, some fail to give them effect to the exclusion of their predecessor, the Hague Rules. Moreover, some Member States apply a mix of the Hague and Hague-Visby Rules and some even mix the Hague-Visby and the Hamburg regimes. To add to this fragmentation domestic laws and courts interpret the scope of application of the various sea carriage regimes differently as we have seen above[142]. An example of this is the application of the Hague-Visby Rules in Belgium to both inbound and outbound shipments, thus deviating from Article 10 of these Rules[143].

[140] Diamond 2008, p. 135.
[141] Nikaki 2005, p. 647-648.
[142] See Section 8.1.1 of this Chapter on the two options for giving the Convention effect in the Protocol of Signature.
[143] Katsivela 2008, p. 10.

In view of this absence of an updated maritime transport regime and the resulting disharmony, the UNCITRAL and the CMI organized a transport law colloquium in New York in July 2000. During this conference it became apparent that there was a general consensus among the attending parties that the existing national laws and international conventions on the carriage of goods by sea were inadequate. They were thought to leave significant gaps concerning issues such as the functioning of a bill of lading and seaway bills, and to have failed to keep abreast of the changes wrought by the use of electronic commerce and the development of multimodalism[144]. The existing law on the international maritime carriage of goods was deemed in need of reform. It was decided that a new regime should be created[145].

To this end the CMI created a preliminary working document containing drafts of possible solutions for a future legislative instrument including alternatives and comments, which was put on the agenda of the UNCITRAL in 2002[146]. The result of the deliberations of UNCITRAL's Working Group III on transport law on this issue is currently known as the *Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, also known as the Rotterdam Rules. The Convention is intended to provide a modern and uniform law which regulates all international carriage of goods which includes an international sea leg; it is not limited to port-to-port carriage. Besides providing for modern door-to-door transport the Convention contains many other novel features, including provisions allowing for electronic transport records and other more technical features to fill the perceived gaps in the existing transport regimes. According to Sturley, one of the drafters, the new regime is not as much revolutionary as it is evolutionary; the new instrument of sea carriage law draws largely from the Hague-Visby and Hamburg Rules and incorporates significant elements from both[147]. In addition, the focus during the drafting process was squarely on updating and modernizing the existing carriage regimes, on filling in some of the gaps and on harmonizing the governing law whenever possible.

8.3.1 The door-to-door concept of the Rotterdam Rules

Initially it was expected that the new regime would make use of the 'port-to-port' criteria as found in the Hamburg Rules, rather than of the 'tackle-to-tackle' tradition found in the Hague and Hague-Visby Conventions. Such a port-to-port regime would cover the entire period during which the sea carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge, rather than only the period during which the goods are on board of the vessel[148].

During the early stages of the drafting process it was noted however that although bills of lading are still used, especially where a negotiable document is required, the actual carriage of goods by sea sometimes 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 on to or discharge from the

[144] As regards the development of multimodalism the Hamburg Rules are the exception to the rule. As it was designed by the United Nations during the same period the United Nations was working on the 1980 Multimodal Transport Convention it is unsurprising that the Hamburg Rules contain Article 1(6) which specifically relates to their application in situations involving multimodal carriage.

[145] www.uncitral.org, A/CN.9/497, p. 5-6.

[146] www.uncitral.org, A/CN.9/510, p. 6. Faghfouri 2006, p. 104-105. The work on the preliminary working document had already started in 1997.

[147] Sturley 2007-2008, p. 255.

[148] De la Garza 2004, p. 97.

ocean vessel[149]. Current practice in the industry to ensure that this type of door-to-door carriage is covered by one regime as much as possible is to agree in the contract of carriage to extend the maritime regime inland. Thus the tapestry of applicable rules is made as uniform as can be achieved. The downside of this type of contractual extension is that it takes effect only with the force of a contract and thus cannot set aside even mandatory national legislation. To counter this problem and to accommodate the reality of 'multimodalism', it was decided that the Convention was to regulate more than just port-to-port carriage[150]. In order to achieve this the drafters developed a 'maritime plus' approach, and although this approach was – initially – controversial, they persevered since they appreciated that a new convention that limited itself to port-to-port transport would likely not be enough to supplant the existing complex of sea carriage conventions[151].

In order to enlarge the new instrument's scope of application beyond mere carriage by sea the words 'wholly or partly by sea' were incorporated in the name and in the scope of application provision of the Convention. The meaning of these words is threefold. To begin with they express that the Rotterdam Rules cover rather more than mere sea carriage alone. Secondly, they reveal that the instrument was originally conceived as a maritime law draft, and, last but not least, their result is that the presence of a maritime segment in the contract of carriage is a prerequisite for the application of the Convention[152]. Consequently the scope of the new Convention encompasses all carriage contracts that include international sea carriage, regardless of whether such contracts are multi- or unimodal[153]. This course of events explains how the Rotterdam Rules became a 'maritime plus' multimodal carriage instrument with a decidedly maritime liability regime[154].

8.3.2 The limited network system in preceding drafts

Originally, the purpose of the new Convention was to regulate, besides the international sea carriage leg, all parts of a multimodal transport which are not subjected to an international mandatory regime of their own[155]. This last objective was not wholly achieved however. As it is now, the Convention also regulates parts of 'wet' multimodal transports that are already subject to mandatory regimes of uniform law[156]. Since the new Convention is a complete multimodal carriage regime save for the restriction that the contract has to involve international sea carriage, some of the drafters had indeed feared that its scope might conflict with existing unimodal regimes, particularly with the CMR and the COTIF-CIM[157]. Therefore certain exceptions from the overall uniform regime of the instrument were considered necessary.

These exceptions are incorporated in the new regime by an arrangement that is described as a 'minimal (or limited) network system'[158]. This network arrangement is called minimal with

[149] www.uncitral.org, A/CN.9/497, p. 4 and A/CN.9/510, p. 10.
[150] 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.
[151] Sturley 2004, p. 146.
[152] Delebecque 2003, p. 227.
[153] There is no requirement that the non-sea carriage need be ancillary to the sea carriage or that it must not be longer than the sea carriage. Diamond 2008, p. 140.
[154] Faghfouri 2006, p. 107.
[155] www.uncitral.org, A/CN.9/WG.III/WP.21, Article 4.2.1 and A/CN.9/510, p. 9.
[156] Haak & Hoeks 2004, p. 433.
[157] Sturley 2004, p. 146.
[158] This 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

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 instrument it determines that its provisions apply irrespective of any differing provisions in other – potentially applicable – conventions[159].

During the drafting process various changes were made to the Article containing the limited network system. In the WP.56 (2005) draft[160] – all non final versions of the new Convention will be referred to as 'draft' or 'draft instrument' in the following – the minimal network was incorporated by means of the following text:

> "*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.*" [161]

The reasoning behind the restriction to *provisions that according to their terms apply* in this version is of course that thus the rules applicable to the contract are as uniform as possible, being generally the new 'maritime plus' treaty rules[162]. In a proposal by The Netherlands regarding the new instrument[163], it is argued that it would hardly be practical if different parts of a single transport are governed by conflicting provisions, which certainly has merit[164].

It is therefore somewhat ironic that this WP.56 version of the minimal network provision is defeated by its own wording. The text of the Article itself prevents it from having the very effect it was designed to generate[165]. In order for the provisions of another international convention to prevail over the ones in the draft the Article 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 (emphasis added)*". Thus the limited network provision redirects the focus of attention to the scope rules of the relevant other convention. Not the draft instrument determines whether the relevant unimodal convention, such

(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 instrument as possible. UNCITRAL A/CN.9/526, p. 69.

[159] UNCITRAL A/CN.9/WG.III/WP.29, p. 21, No. 72.

[160] A/CN.9/WG.III/WP.56, 'Transport Law: Draft convention on the carriage of goods [wholly or partly] [by sea]', www.uncitral.org.

[161] A/CN.9/WG.III/WP.56, Article 27, www.uncitral.org.

[162] The modified network system is a political compromise; it preserves to some extent the integrity of the already existing international conventions on carriage other than by sea by giving way to their provisions on carrier liability, limitation of liability and time for suit. Nikaki 2006, p. 529.

[163] A/CN.9/WG.III/WP.33, www.uncitral.org, p. 4-5.

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

[165] Haak & Hoeks 2005, p. 97.

as the COTIF-CIM or the CMR, applies to a certain non-maritime part of the carriage, but the scope rules of the unimodal convention in question do. This makes the manner in which the scope of application rules of the other convention are interpreted decisive as to whether its provisions prevail over those of the draft instrument[166].

If applied to the CMR for example, this means that if the CMR does not in and of itself apply to an international road leg of a multimodal transport according to the court addressed, 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. 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 this draft as the CMR regulates more subjects on a mandatory basis than the liability of the carrier, the limitation of liability, or time for suit, as does the draft[167]. Thus the limited network provision found in Article 27 of the WP.56 draft of 2005 was unsuccessful in preventing potential conflicts between the draft instrument and other carriage conventions.

Later on in the drafting process this possibility of conflicts was discussed on a number of occasions. A special Article was entered into the new Convention to prevent conflicts, or to at least restrict their occurrence as much as possible. This rather unique conflict of conventions Article will be discussed further down the line in Chapter 9 Section 9.2.3.4 on the new Convention's conflict of convention provisions[168].

As a remedy to the problem that the interpretation of the scope rules of the potentially applicable unimodal carriage conventions tends to vary depending on which forum is chosen, an adaptation of the part of the Article which read 'according to their terms apply' was suggested[169]. This suggestion were taken to heart and thus the later versions of the regime contained a slightly different network approach.

8.3.3 The network system in the final version

The latest version of the new Convention shows a somewhat changed network provision[170]. In the final version carriage preceding or subsequent to sea carriage is dealt with by Article 26 RR, which is a rewritten version of the aforementioned network system:

> "*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*

[166] Hoeks 2008, p. 269.
[167] 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, Nos. 72-105.
[168] The Article referred to is Article 82 in the final version of the Convention.
[169] UNCITRAL A/CN.9/616, p. 52; Haak & Hoeks 2005, p. 97.
[170] A/RES/63/122, 2 February 2009, United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.

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;

(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." [171]

The text Article 26(a), which is in effect the only relevant change 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[172]: "*Pursuant to the provisions of such international instrument 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 new Convention takes place independently of the scope provisions of other transport conventions which are, as was mentioned above, not always interpreted uniformly in their Member States[173].

There is a striking resemblance between the fiction in the text of Article 26(a) and certain parts of § 452 HGB, which is part of the German legislation on multimodal carriage[174]. § 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, "*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 carriage in general apply to the contract, unless the special provisions following after § 452 HGB or applicable international conventions provide otherwise.

The revision of the network provision is an improvement when compared to the previous versions, albeit a small one. Because of the fiction in Article 26(a) RR, 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 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 new instrument remains. At first glance the new Article may appear to have incorporated a 'complete' network system, but the network of the new version remains limited since the provisions of the new Convention 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*" according to Article 26(b) RR. The revision was never meant to create an unlimited network system[175]. Thus, if the loss can be localized and if there is a mandatory international regime applicable to that particular stage, the provisions dealing with

[171] 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.

[172] UNCITRAL A/CN.9/WG.III/WP.81, Variant A of subparagraph a, www.uncitral.org.

[173] UNCITRAL A/CN.9/621, www.uncitral.org., p. 46-47.

[174] Article 11 of the BIMCO Combiconbill also contains the fiction found in the instrument's network provision. The Combiconbill Article determines the following: "*(1) Notwithstanding anything provided for in Clauses 9 and 10 of this Bill of Lading, if it can be proved where the loss or damage occurred, the Carrier and the Merchant shall, as to the liability of the Carrier, be entitled to require such liability to be determined by the provisions contained in any international convention or national law, which provisions:*

(a) cannot be departed from by private contract, to the detriment of the claimant, and

(b) would have applied if the Merchant had made a separate and direct contract with the Carrier in respect of the particular stage of transport where the loss or damage occurred and received as evidence thereof any particular document which must be issued if such international convention or national law shall apply."

[175] A/CN.9/WG.III/WP.81, p. 24 fn. 87, www.uncitral.org.

liability, limitation of liability and time for suit of this international regime will apply to the claim for compensation, together with remaining provisions of the new Convention. As a result an obscure patchwork of different regimes that were not designed to complement each other covers the claim. This creates a lot of room for confusion and it seems rather likely that courts of law in different States, or even courts within the same State, will differ in opinion as to which provisions of each convention is to take precedence over the new Rotterdam Rules. The results of this provision would therefore seem rather unpredictable[176].

An additional imperfection in the network approach of Article 26 RR is the clause that restricts its operation to damage to or loss or delay of the goods that has occurred "*solely before their loading onto the ship or solely after their discharge from the ship*". Due to these words damage that occurs during more than one stage of the transport is covered by the rules of the new sea carriage oriented regime, that is at least, if one of these stages is the sea segment. Although it makes the network approach even less pure, it is debatable whether this imperfection should be considered detrimental. Under the current legal framework situations involving damage that occurs or was caused during multiple stages of a transport may lead to more than one applicable carriage regime if the damage cannot be divided, or the parts cannot all be allocated to one specific transport stage. If the provisions of the Rotterdam Rules can establish some uniformity and legal certainty 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 even more than one of the existing carriage regimes to apply under these circumstances. Thus, conflicts between the conventions are even more likely to occur when the damage or loss occurred or was caused during more than one transport stage and one of the stages of the transport concerns international sea carriage. Under these circumstances the limited network 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.

In situations where damage occurs during more than one of the inland transport stages of a multimodal transport involving international sea carriage, the limited network system should, according to its purpose, grant priority to the three types of rules in the non-maritime carriage regimes which 'hypothetically' apply, but it is as of yet unclear whether this provision is capable of conferring such priority to the rules of more than one regime. Among the reasons for this uncertainty is the fact that the text of the provision potentially granting precedence seems to be focused on only one set of rules; Article 26(a) RR refers to the singular form by means of the words "*such international instrument*". As a result it is likely that Article 26 RR either fails to operate or merely adds to the confusion.

This somewhat less than ideal state of affairs shows that damage which was caused or which occurred during more than one transport stage is one of the pricklier problems inherent to the combination of different transport modes in a single contract. As a matter of fact, the intricate nature of the problem is plainly demonstrated by the fact that although the rules of the new sea carriage instrument may lead to conflicts between the conventions or to differing interpretations and outcomes, it still may be the best possible solution to the quandary of the concurring causes or occurrences of damage or loss.

[176] UNCTAD 2002, p. 19.

8.3.3.1 The French proposal

The proposal made by the French delegation in the spring of 2007 to consolidate all provisions which deal with the linkage between the new instrument and the other transport conventions[177] seems less prone to generate conflicts with the existing uniform carriage law. In view of the close connection between the network and conflict of convention provisions, and in order to make the text more reader friendly the French recommended to merge the provisions which deal with the linkage between the new Rotterdam Rules and the non-maritime carriage conventions to form a single Article[178]. 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 left unsolved by the limited network system.

8.3.3.2 An alternative proposal

Although on the right track, the French proposal still suffers from the drawback that was eradicated by the improved limited network provision in the new instrument. It leaves the operation of the new Convention dependent on the interpretation of the scope of application provisions of other transport conventions such as the CMR. Therefore a combination of both the draft Article and the French proposition 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 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*

[177] A/CN.9/WG.III/WP.89, www.uncitral.org.

[178] The Articles which deal with the linkage between the draft and the other carriage conventions are distributed among various Articles in different Chapters (In A/CN.9/WG.III/WP.56 this concerned Articles 27, 64(2), 89 and 90 in Chapters 3, 13 and 19).

> *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 shall apply and prevail over the provisions of this Convention.*

It would seem that the clause under (a) is made superfluous by the clause under (b). That this is not so can be demonstrated by applying the proposed Article to a contract involving road and ferry transport. If for instance during a transport from Stuttgart to Genoa by road and from Genoa to Bastia on Corse by ferry the cargo is damaged during the ferry transport segment, the application of the clause under (b) alone would not lead to priority for the CMR rules. For application to ferry transport or roll-on, roll-off carriage Article 2 CMR requires that the vehicle containing the goods is carried only part of the journey by rail, sea, inland waterways or air which means that carriage by sea alone does not fulfil the requirements. Yet, since Article 2 CMR itself clearly states that the CMR may under certain circumstances apply to the entire carriage as contracted for in this example the clause under (a) is necessary to ensure that the network provision grants the road carriage regime the priority it deserves[179].

8.3.4 Non-localized loss or damage under the Rotterdam Rules

The above analysis of the new instrument's minimal network system shows that it 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[180]. Neither the early drafts nor the final version contain any provisions on unlocalized loss and thus, due to the scope of application of the instrument, it acts as a kind of trawl net; in situations of unlocalized loss the provisions of the new sea carriage instrument automatically apply, unless the specialized provisions of Article 82 RR prevent this[181]. The Rotterdam Rules apply to the entire multimodal transport in such cases, even if the distance to be travelled by sea is relatively short.

This is rather good news for the multimodal carrier who loses a tank of chemicals during a transport by road, sea and rail from Flixborough in the United Kingdom to Basel in Switzerland. As long as it remains unclear where the shipment was lost the carrier's liability limit is the one found in the sea carriage convention, which is 3 units of account or SDR per kilogram of the gross weight of the goods that are the subject of the claim or dispute, and not the kilogram liability limits found in the CMR and the COTIF-CIM which are respectively 8,33 SDR and 17 SDR and thus much higher.

On the other hand, the new sea carriage instrument also includes a package limitation besides the kilogram limitation just as the Hague(-Visby) and Hamburg Rules do. With its 875 units of account per package the limit under the new regime is higher than those operative under

[179] It should be noted that one of the provisions of Article 82, the conflict of conventions provision in the final version of the new 'maritime plus' instrument, is intended to prevent any conflict with the CMR in relation to ferry transport. For more details on the new instrument's conflict of convention provision and its relation to the CMR see Chapter 9, Section 9.2.3.4 on the conflict of convention Article in the Rotterdam Rules.

[180] Honka 2002, p. 11.

[181] *Cf.* Chapter 9, Section 9.2.3.4.

the older maritime conventions and may provide the opportunity for the shipper to gain more compensation than is obtainable based on the kilogram limitation. Article 59(2) RR on the limitation of liability establishes that:

> "*When goods are carried in or on a container, pallet or similar article of transport used to consolidate goods, or in or on a vehicle, the packages or shipping units enumerated in the contract particulars as packed in or on such Article of transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit.*"

When combined with Article 59(1) RR which determines that whichever of the limitation options results in a higher amount of compensation applies to the claim, this means that the compensation to be gained under the new regime may even be more extensive than the compensation which can be obtained based on the rules of the inland or air carriage regimes that would potentially apply to the dispute.

The package limitation is unlikely to gain the shipper in the above-mentioned example relating to the tank of chemicals more compensation however. A tank that can be transported by road vehicles generally contains somewhere between 15.000 and 40.000 liters, and as one liter usually approximates one kilogram, the kilogram limitation is likely to exceed the package limitation. The package limitation is also of no avail to the shipper when the contracting parties fail to enumerate all packages inside a vehicle or container. In such cases the container or vehicle is considered to constitute one package or shipping unit. In the *El Greco* judgement this did not bode well for the shipper[182]. In this case the bill of lading did not enumerate the number of packages in the container and thus the container – filled with over 130.000 posters packed in 2000 separate packages – was considered to be the package under Article 4 of the Hague-Visby Rules which contains a provision similar to that in the new sea carriage instrument concerning the necessity of the enumeration of the number of packages in the contract.

For a period of several years, between 2003 and 2007 to be exact, the draft versions resolved carrier liability in situations concerning unlocalized loss quite differently[183]. These intermediate draft versions presented the limit of liability to be invoked by the multimodal carrier as a variable factor. According to these drafts the carrier was liable for unlocalized loss, damage, or delay of the cargo:

> "*(a) if provisions of an international convention [or national law] would be applicable pursuant to Article 27 if the loss, damage, [or delay] occurred during the carriage preceding or subsequent to the sea carriage, pursuant to the limitation provisions of any international convention [or national law] that would have applied if the place where the damage occurred had been established, or pursuant to the limitation provisions of this Convention, whichever would result in the higher limitation amount.*
> *or*
> *(b) pursuant to the highest limit of liability in the international [and national] mandatory provisions applicable to the different parts of the transport applies.*"[184]

[182] *El Greco (Australia) Pty Ltd. and Another v Mediterranean Shipping Co. S.A*., [2004] 2 *Lloyd's Rep*. 537.

[183] Article 18(2) of A/CN.9/WG.III/WP.32, Article 64(2) of A/CN.9/WG.III/WP. 56, Article 62(2) of WP.81 and WP. 101, www.uncitral.org.

[184] The provisions in WP.56, WP. 81 and WP.101 all contained two versions that both displayed a strong likeness to Article 8:43 of the Civil Code of The Netherlands. Article 8:43 BW 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*

After much deliberation both varieties of this provision were deleted from the instrument as it was deemed unnecessary by most of the drafters. The majority recommended its elimination based on the argument that the new sea carriage regime was to be an international convention that focuses mainly on maritime transport; deviations from the sea carriage regime were to be limited as much as possible. Furthermore, it was said that 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 the limitation of liability rules of other regimes into the new regime in this context[185].

The deletion of the admittedly complicated provisions results in a system that is rather less than appealing for cargo claimants unless a large number of packages has been enumerated in the contract of carriage. If the shipper is forced to rely on the kilogram limitation of the 'maritime' draft due to for instance a lack of packages in the container or vehicle or when large objects are transported, he is confronted with the almost the lowest liability limitations in the carriage of goods spectrum. The result of having to rely on the 'maritime' kilogram limitation is a rather unfair distribution of the burden of proof. Under this system this burden, which should by rights be borne by the carrier who has a much greater insight into what actually occurred during the carriage, comes to rest squarely on the shoulders of the shipper or consignor/consignee[186], as raising the proof that the cause of the damage did not occur during the sea stage of the transport is solely in the interest of the cargo claimants, since only then will they be able to gain a higher amount of compensation. Those that objected to the deletion of the Article on unlocalized loss in the draft therefore protested that the provision should only have been deleted if a much higher limitation per kilogram had been agreed upon[187].

8.3.5 The multimodal feasibility of the Rotterdam Rules

When likened to its sea carriage predecessors, or any of the other carriage conventions for that matter, the geographical range of the Rotterdam Rules is quite substantial. All that is required for provisions of the Convention to apply is 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 one of the Contracting States. Thus, the instrument gains quite an extensive range of operation as only one of these four places is required to have a connection with the Convention. Other carriage conventions, especially those on air carriage such as the Montreal Convention, have a modest geographical scope of application in comparison. The scope of this air carriage convention is restricted to carriage by air where both the place of departure and the place of destination are situated within the territories of States that are party to the Convention[188]. The reasons for giving

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."

[185] UNCITRAL A/CN.9/WG.III/WP.72, p. 6. Another – although less influential – argument was raised regarding the MT Convention. The MT Convention, which did incorporate some form of a limited network solution concerning localized loss in keeping with the Draft system, did not include any provision for non-localized loss or damage. The MT Convention never entered into force due to the lack of sufficient ratifications.

[186] Czerwenka 2008, p. 8 and 19.

[187] A/CN.9/645, www.uncitral.org, p. 42.

[188] 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(2) MC.

the Rotterdam Rules such an extensive geographical scope of application were UNCITRAL's aims which are to encourage trade and uniformity of law[189].

Besides leading to an extensive geographical scope for the Rotterdam Rules the need to create uniformity of law has also led to an extensive material scope of application[190]. And it is in this area that problems may arise. The expansion of the instrument's scope to include contracts of carriage which provide for carriage by other modes of transport in addition to the carriage by sea creates the potential for conflicts between the new regime and the existing carriage conventions. These conflict situations will, theoretically at least, cause problems on an international law level. Where conflict situations occur States are forced to commit unwarranted breaches of treaty obligations. It seems however that the international community deems these breaches of little importance. Up until now they have generally been disregarded by treaty makers and judiciary alike[191].

The solution to the conflict of conventions problem which is only partly alleviated by the restricted network provision in the Rotterdam Rules is thought by the drafters to be the 'conflict of conventions' provision found in Chapter 17 of the treaty, which governs the relation of the Rotterdam Rules with '*International conventions governing the carriage of goods by other modes of transport*'. Unfortunately this provision comes up somewhat short. Besides being restricted to the relation between the Rotterdam Rules and the other carriage conventions only in so far as these conventions specifically make a claim to – certain types of – multimodal transport, it is also rather susceptible to misinterpretation. As such it is insufficient to solve the conflict problem. The exact dimensions of the shortcomings of the attempt of the Rotterdam Rules to avoid conflict will be discussed in Chapter 9, Section 9.2.3.4 which deals with the 'conflict of conventions' provision of the Convention in more detail.

Because of the less than adequate network and conflict of conventions provisions in the Rotterdam Rules, the potential for conflicts with other conventions or instruments remains and complicated questions regarding precedence arise[192]. Whenever a conflict situation occurs, it is necessary to determine which set of rules are to have priority. As will be discussed in more detail in one of the ensuing Chapters, the procedure to be followed in such a situation can be found in the Vienna Convention on the Law of Treaties[193].

The existence of this instrument of uniform law does however by no means guarantee a uniform outcome. As is common in law, it is quite possible that not all courts of law will interpret the provisions of the Vienna Convention in an identical fashion and will therefore come

[189] In turn uniformity of law is thought to have a positive effect on the development of especially international trade.

[190] The drafters vindicated the broad scope of application primarily by the treatment of performing parties, including the extent to which they are entitled to automatic 'Himalaya' protection. Sturley 2004, p. 140 and 148. By giving performing parties not only the same responsibility but also the same protection under the draft instrument as the carrier, it was thought that an amount of uniformity could be reached which would otherwise not have been attainable. If all of the potential defendants in the sphere of litigation for cargo damage were subject to the same rules, there would be less of an incentive to pursue multiple lawsuits against different parties. Sturley 2003. In the end the geographic reach of the instrument accompanying this treatment of performing parties was cause for concern. An example was given concerning goods shipped from Tokyo to Rotterdam via Singapore. The question was raised whether the stevedore handling the goods in Singapore was subject to the draft if either Japan or The Netherlands had ratified but Singapore had not. It was concluded that thus the intended reach of the instrument would be overextended. That and the fact that creating a direct right of action against a party with whom the cargo interests do not have a contractual relationship yielded disagreement, were ultimately cause to limit the scope of the 'maritime plus' instrument to 'maritime performing parties'. This narrowing of the concept undercut any justifying element the performing parties' concept may have had in relation to the broad scope of application wielded by the new instrument. Haak & Hoeks 2004, p. 427.

[191] Cheng 2004, p. 858-859.

[192] 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.

[193] Chapter 9, Section 9.2 on the consequences of conflict.

to different conclusions as to which carriage regime has precedence. To avoid these difficulties it would be preferable if the mentioned conflicts are avoided altogether. This can be achieved by expanding the limited network system in the new 'maritime plus' instrument to a complete network regime. The reference to the triptych of carrier's liability, limitation of liability, or time for suit should therefore be deleted from the text, even if doing so results in a somewhat less than uniform regime

Such an expansion could also eliminate another dilemma caused by the extension of the instrument's scope of application beyond mere carriage by sea. The dilemma being that membership of the Rotterdam Rules may cause States to be hesitant to ratify a future regime that is specifically tailored to regulate all varieties of multimodal carriage[194]. This predicament is more easily forestalled by increasing the radius of action of the Rotterdam Rules into a full fledged multimodal regime however.

It should be noted here that these solutions would only serve to eliminate the conflicts the Rotterdam Rules may generate. They obviously do not influence the suitability or the appeal of the other content of the instrument for regulating multimodal transport[195].

On the other hand, a worldwide acceptance of the Rotterdam Rules would not all be negative. It is likely to generate some positive effects as well. Worldwide acceptance would for starters create at least some semblance of international uniformity in the area of sea carriage law. Of course, because the instrument fails to appoint an international tribunal to serve as the final authority on interpretation of the instrument, the more than 90 Articles of the Convention are likely to generate rather dissimilar interpretations in the future Member States[196]. This is an unfortunate but commonplace side effect of uniform law which lacks an international forum to provide decisive judgements regarding its interpretation.

Another more or less positive consequence of a wide acceptance of the Rotterdam Rules is related to a typically multimodal quandary, namely that concerning unlocalized loss. The scope of application of the Rotterdam Rules covers situations where the loss or damage cannot be localized. Although the provision on unlocalized loss which could be found in the earlier drafts of the regime was not maintained, the gap in the legal system pertaining to this issue will be a thing of the past if the Rotterdam Rules come into force. Unlocalized loss situations will then be regulated by the rules of this new sea carriage convention. This may be a positive thing – if it was not for the low kilogram limitation of liability that is – since it at least creates a modicum of uniformity. Currently these situations are cause to apply national laws or even contractual provisions. Of the systems of national law in Europe presently only The Netherlands and Germany can bring specifically tailored for unlocalized loss situations to the fore[197].

As was touched upon above however, applying the Rotterdam Rules to unlocalized loss has a drawback. It will not stimulate carriers to reveal where the loss or damage occurred or where the delay was caused if this was not during the sea stage. The carrier's wallet, or rather that of his insurance company, is far better served by the carrier keeping mum in circumstances

[194] 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. Clarke *TranspR* 2005, p. 185.

[195] For one, the definition of the 'contract of carriage' could have been more specific. The UNCITRAL definition for contracts of carriage fails to reveal whether contracts with an option for sea carriage are also covered by the instrument. Diamond 2008, p. 140-141.

[196] Article 2, which determines that the Convention should be interpreted while having regard for its international character and to the need to promote uniformity in its application and the observance of good faith in international trade, shows that the drafters are aware of this danger. Although such an Article is a step in the right direction it is still no guarantee for uniformity.

[197] Articles 8:42-43 BW in The Netherlands and § 452 HGB in Germany. For more on the Dutch and German multimodal transport legislation see Chapter 10, Sections 10.4.1 and 10.4.2.

where he is likely to be able to invoke the kilogram limitation in the Rotterdam Rules, which is after all far lower than any of the kilogram limitations in the inland or air carriage regimes, excepting the CMNI. He will be able to invoke said kilogram limitation if no enumeration of the number of packages has been entered into the contract of carriage and/or if invoking the package limitation will only lead to an even lower amount of compensation for the cargo claimant, for instance if the cargo consists of large objects such as containers or tanks.

Only when the loss occurred during preceding or subsequent carriage by inland waterway to which the liability rules of the CMNI apply is the carrier prompted to reveal where the loss was localized in those circumstances, as the liability limit under the CMNI is only 2 SDR per kilogram of damaged or lost cargo, which is even less than the 3 SDR wielded by the Rotterdam Rules. The carrier will however not stir himself if it is likely that the damage occurred during the inland waterway stage and the package limitation is likely to be invoked. The reason for this is that the package limitation amounts to 25.000 units of account per package under the CMNI as opposed to 875 units per package under the Rotterdam Rules.

In short, if the Rotterdam Rules were to enter into force they will function as a double edged blade rather than the subtle knife of Pullman's imagining which Clarke recommends for severing the multimodal knot[198]. On the one hand it will generate some uniformity in the areas of both international sea carriage and, albeit to a lesser degree, in the area of multimodal transport. That is, if enough States are prepared to ratify the instrument. Especially in the latter area uniformity will be increased by the new regime in relation to unlocalized loss. On the other hand, although uniformity is something worth striving for, such a goal does not justify all means. Especially not since the new regime will only generate a partial uniformity. It will only cover those agreements that include carriage by sea. As it is, the Rotterdam Rules effectively embrace door-to-door transport. Its entry into force will however not bring about a drastic harmonization of transport law. Whereas it might re-unify carriage of goods by sea, it is likely to only add yet another regime to the multimodal muddle – that of multimodal transport with a sea stage departing from and destined for a State party to the new Convention[199].

8.4 Conclusions

The current scene of international sea carriage law is far from uniform. At this point in time no less than three international sea carriage regimes operate alongside each other. Of these three regimes there is only one, the Hamburg Rules, whose text actually takes the possibility of multimodal carriage into account. The Hamburg Rules are not a widely ratified convention however. In Europe only Austria, the Czech Republic, Hungary and Romania are members of the Hamburg Rules, and with the exception of Romania these countries are all landlocked. As a result the Hamburg Rules do not exert overmuch influence on the international sea trade, especially not in Europe.

In relation to multimodal carriage the Hamburg Rules provide an uncomplicated clarity by means of Article 1(6). In this paragraph the Convention establishes that its rules apply to sea carriage alone and the only consequence of adding other means of transport to the sea carriage contract is that the Hamburg Rules do not apply to the whole of the contract but are restricted to the international sea stage instead.

[198] Clarke *JIML* 2003, p. 39.
[199] De Wit 2002.

Hague and Hague-Visby Rules

The Hague and Hague-Visby Rules on the other hand are not exactly tailor made for multimodal transport. Nevertheless, the industry seems to make do without having to struggle overmuch. The reason for this is among other things that – unlike the CMR – the Hague-based Rules do not instigate any difficulties concerning the time bar since the scope of the Rules is not attached to the delivery of the goods. In addition, the words "*in so far as such document relates to the carriage of goods by sea*" in the definition of what is considered a contract of carriage under the Rules tend to simplify matters as these words imply that the Rules can apply to bills of lading which cover more than just carriage by sea but are under these circumstances merely restricted to the part of the contract that concerns carriage by sea[200].

Only the questions as to whether a combined bill of lading can be considered a bill of lading under these Rules or how the tackle-to-tackle responsibility is to be justified under a multimodal contract are cause for debate.

The most popular set of rules relating to carriage by sea, the Hague Rules, does have a rather serious drawback however, albeit not one directly related to multimodal carriage. The weakness of especially the Hague Rules, which has an even larger group of adherents than its younger cousin the Hague-Visby Rules, is that they are not per se implemented as an instrument of international law. The Protocol of Signature of the Hague Rules offered the contracting parties the opportunity to implement the Convention either by giving it the force of law or by including it in their national legislation in a form appropriate to that legislation. Many of the contracting parties chose this last option to incorporate the Hague Rules into their national legislation and adapted them at the same time to suit their national needs and wants[201]. The result is that the widespread use of the 'Hague Rules' has not brought as much harmonization as it could have, especially not in relation to the carrier liability limit[202]. The national versions of the 'Hague Rules' that are applied in practice are not completely alike. A strong family resemblance may yet be maintained but the assorted national versions can hardly be likened to identical twins.

Besides the Protocol of Signature's option to give the Rules effect by enacting them in national legislation the application of the Hague regimes is also significantly influenced by two other aspects. These two aspects, the fact that a bill of lading is required for application and the limited period of time in which the Rules are compulsory, do not only make the Rules different from most of the other carriage conventions, they also have specific consequences when it comes to multimodal carriage.

The first aspect, the requirement of a bill of lading for application of the Rules, affects the application of the Rules in the sense that a discussion is conducted as to whether the multimodal or combined transport bills of lading that are used by the shipping industry can be considered to meet the standards set for a bill of lading as meant by the Hague(-Visby) Rules. That is to say, for as far as the bill concerns sea carriage between ports in two different States. This question has not been answered yet in England, which causes some uncertainty to remain, although the legal literature tends to be of the opinion that such a multimodal bill does meet the conditions of the Rules. In The Netherlands case law seems to show that a combined transport bill of lading can be deemed a bill of lading under the Hague regimes. To make matters a little

[200] Article 1(b) Hague and Hague-Visby Rules. Certain States do not ratify or accede to international conventions however, but become parties to conventions merely by enacting national legislation. Thus the Rules may be applied via national law and in an amended form in some States. Germany is an example of such a State when it comes to the Hague-Visby Rules.

[201] Wery 1973, p. 2.

[202] An overview of the various package and kilo limitations currently in force can be found at www.mcgill.ca.

less certain than they initially seem there is the matter of Article 8:46 BW however. Article 8:46 BW determines that for that part of the carriage which, according to the contract entered into by the parties, will take place as carriage by sea or by inland waterway, the combined transport document shall be deemed to be a bill of lading. Of course this Article only operates if Dutch law is applicable to the contract of carriage, but it may still cast some doubt as to whether the Dutch judiciary considers a combined transport document a bill of lading on its own merits or whether it does so based on Article 8:46 BW.

Contrary to the situation in England and The Netherlands the opinions in the German legal sphere are rather explicit on the subject. The *communis opinio* in those parts is very clearly that a multimodal transport bill does not meet the requirements set for the bill of lading in either the Hague or the Hague-Visby Rules. As they have enacted the Rules in their national legislation however this does not prevent them from applying them to the sea stages of multimodal transports albeit via the national legislation on multimodal transport contracts in §§ 452 HGB *et seq*.

The second scope of application issue of the Hague regimes which has rather specific consequences in relation to multimodal transport is the concept that, contrary to most of the other carriage regimes, they are not compulsory from the moment the goods are taken over by the carrier until the carrier has delivered them. Instead, the Hague(-Visby) Rules are mandatory only to the tackle-to-tackle period. For multimodal carriage contracts this has the peculiar and somewhat uncalled-for result that significant holes can be punched in the period of time during which the multimodal carrier would be expected to be liable. Under a combination of the 'dry' carriage conventions or even 'dry' national carriage law the carrier could expect to be liable from the moment of taking over the goods to be carried up until the moment he delivers them at the final destination. By contracting for carriage a carrier promises a certain result, namely that the goods will be transported from place A to place B and will arrive in the same state as he has received them in[203]. Because the Hague regimes are non-mandatory pertaining to the periods 'before and after tackle' however, the period between the taking over of the goods for sea carriage and their loading and the period between the discharge of the goods from the vessel and their delivery, the carrier can exclude his liability for any damage, loss or delay that occurs in these periods[204]. Of course, when national legislation applies on a supplementary basis which prohibits such exclusions from having effect they will not avail the carrier any as these so-called 'before & after' clauses are contractual in nature. Despite the unfair aura clinging to the exclusion however neither the Dutch, nor the English or the German national law proscribe the carrier's exclusion of liability during two of the most accident and theft prone periods during carriage which involves a sea stage[205].

The result is a contractually reduced liability coverage for multimodal transports involving sea carriage which resembles nothing so much as a hole studded Gouda cheese.

The Rotterdam Rules

The new Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea as it is officially called, or in short the Rotterdam Rules, is meant to replace the existing carriage by sea regimes and thus create a degree of uniformity in this area. In order to

[203] See Chapter 2, Section 2.2.2 on the most significant features of the contract of carriage.

[204] Article 7 Hague(-Visby) Rules.

[205] Cargo is in the custody of the carrier for sea carriage before loading or after it has been discharged from the vessel it is generally handled, transhipped and temporarily stored in the port area, making it susceptible to all sorts of mishaps.

accomplish this the instrument requires its new members to denounce the Hague, the Hague-Visby and the Hamburg Rules[206].

It was thought by the drafters that to appeal to future Member States the scope of the instrument should be expanded from the initially intended port-to-port coverage to complete door-to-door transports. After all, a new instrument meant for global use can hardly afford not to take the requirements of international maritime container carriage into account, since the modern maritime carriage of goods often involves pre- and post-maritime transport by a different mode.

As the expanded scope of application of the instrument was initially not meant to affect the application of the existing carriage conventions, a network liability system was incorporated in the new instrument[207]. Such a system was believed to serve the needs of the industry better than a uniform one given the importance of non-maritime legs in door-to-door carriage, especially in containerized traffic. The widespread adoption of the UNCTAD/ICC Rules for Multimodal Transport Documents of 1992 and of the BIMCO Combiconbill Combined Transport Bill of Lading of 1995 with their own contractual versions of limited network systems seems to support this view[208]. The drafters of the Convention deemed the scope of application of the new instrument and the existing unimodal transport conventions to be mutually exclusive however[209], which, combined with their aim to create as uniform a regime as possible, caused them to limit the network system to provisions directly relating to the liability of the carrier, including limitation and time for suit. Provisions on other subjects found in the other convention that may indirectly affect liability, such as jurisdiction provisions, do not cause the provisions in the Rotterdam Rules to step back, which means the new instrument's rules are meant to prevail on these issues[210]. Thus, the new convention contains the seeds for conflicts between conventions, which the special conflict of convention provisions of the instrument are unable to stop from taking root completely.

When all is said and done, it is highly questionable whether the new sea carriage convention will be an asset for multimodal carriage. Although the instrument would finally supply some mandatory liability rules specifically tailored for multimodal carriage, even the positive aspects of the system are less constructive than one could have wished. That the new Convention provides mandatory rules to fill the gap concerning unlocalized loss certainly should be deemed a merit. Yet this gap is in fact not that poignant a problem as the industry makes use of various sets of contractual standard rules which, on the whole, seem to contain adequate solutions for situations involving unlocalized loss[211]. Solutions that are apparently very much in accordance with general transport law, and, given the popularity of these standard contracts, suit the multimodal transport practice in general[212]. In addition, the solution for unlocalized loss presented by the new instrument creates the potential for a conflict of interest. In the attribution of loss or damage to a particular stage of transport the carrier may hold the evidence to identify the mode responsible for the loss. If by revealing the evidence he will expose himself to liability for a higher amount of compensation, he is less likely to provide the cargo interests with this

[206] Article 89 RR.

[207] A/CN.9/WG.III/WP.78, p. 5, www.uncitral.org.

[208] It is questionable whether this is a legitimate argument as contractual provisions are not capable of setting aside mandatory law. Uniform liability rules in a contractual standard form have little effect where compulsory law applies.

[209] A/CN.9/WG.III/WP.78, p. 7, www.uncitral.org.

[210] A/CN.9/WG.III/WP.29, p. 17, www.uncitral.org.

[211] Examples of widely used standard rules are the UNCTAD/ICC Rules for Multimodal Transport Documents, the BIMCO Combiconbill, the FIATA Multimodal Transport Bill of Lading *et cetera*.

[212] The FIATA bill of lading is for instance likely to be the most commonly recognized multimodal transportation document amongst freight forwarders world wide. Gillespie 2004.

evidence. It is regrettable that such a conflict of interest predicament was allowed to creep into the new regime, especially since it is not a new phenomenon. Both the UNCTAD/ICC Rules and the MT Convention have in the past prompted authors to discuss this unwarranted flaw and its consequences[213].

[213] Kindred & Brooks 1997, p. 158.

9 CONVENTIONS IN CONFLICT

After the analysis of the scope of application of the various uniform transport law regimes it is evident that the existing multihued tapestry of international carriage law contains seeds for conflict when multimodal carriage contracts are at stake. There are various situations thinkable in which more than one of the carriage regimes applies. The limited nature of a carrier's liability under the uniform carriage regimes and the difference of the limits in the various uniform transport law instruments are generally sufficient to generate conflict; if more than one regime applies it is likely that at least the provisions entailing the carrier liability limits are incompatible. Only the air and rail carriage regimes share a limit of 17 SDR per kilogram. Even these regimes may be incompatible however, as the carrier liability limit of the newest air carriage regime, the Montreal Convention, is unbreakable, whereas the rail carriage regime's limit is not. On the contrary, the COTIF-CIM prevents the carrier from invoking the liability limitations of the regime when it is proved that the loss or damage results from an act or omission, which the carrier has committed either with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result[1]. Since the various carriage regimes contain more discrepancies like this one, conflict will almost certainly occur if more than one of them applies to a claim.

In the following several aspects of these conflicts will be the subject of discussion. To begin with the circumstances under which more than one of the unimodal carriage treaties may apply to a claim arising from multimodal transport will be studied. Since most of the potential conflicts resulting from multimodal carriage are created by the 'multimodal' Articles in the unimodal carriage regimes, meaning the Articles which extend the scope of the regime beyond the type of carriage they are primarily intended to regulate, these 'multimodal' Articles such as Article 2 CMR and Article 18 MC will be used to structure the discussion of the possible overlap situations. An example of a conflict which may occur due to the usurpation practices employed by these 'multimodal' Articles is the conflict enabled by the coexistence of Article 2 CMR and Article 1(3) COTIF-CIM. If a contract of carriage provides for an international stage of '*Huckepack*' transport – whereby the goods to be transported are not unloaded from the road vehicle for the rail stage but are placed on a train vehicle and all – and the goods are damaged during the pre- or end haulage which is performed uniquely by road, the rules of both the CMR and the COTIF-CIM apply if said pre- and end haulage is domestic in nature. Of course not only the scope of application expanding Articles clash with each other, they also sometimes clash with the basic scope of application of other carriage regimes. Nevertheless, without some sort of usurpation of another mode of transport by at least one of the carriage regimes situations of conflict do not arise. The basic scope of application rule found in Article 38 MC will for instance not infringe on the basic scope of application of the CMNI as carved out by Article 2(1) CMNI in combination with Article 1 CMNI, since the MC Article relates to carriage by air alone and the CMNI Articles confer scope of application on inland waterway carriage and on nothing else.

Following the overview of the potential overlaps, the question of precedence in these situations will be tackled. Since there is the near certainty that in a situation where more than one uniform regime applies to a certain claim the application of one set of rules leads to a result

[1] Article 36 COTIF-CIM.

different from that which would have been brought about by the application of the other set of rules, it is necessary to determine which of them should be given priority[2].

Article 30 of the Vienna Convention on the Law of Treaties regulates the application of successive treaties relating to the same subject matter. According to this Article provisions of a treaty that specify that it is subject to or that it is not to be considered as incompatible with an earlier or later treaty *et cetera*, so-called 'conflict of convention provisions', are instruments with which to establish hierarchy between conventions and sometimes to prevent conflict, depending on the type of provision used. Although such provisions are in theory able to provide much needed clarity with regard to the hierarchy of conflicting norms they appear only infrequently in uniform carriage law. Only the drafters of carriage conventions such as the MT Convention, the Hamburg Rules, the new Rotterdam Rules and the Montreal Convention entered 'conflict of conventions provisions' into the text of their instrument[3]. These conflict regulating provisions and their effect will be considered as regards the question of precedence. Since most of the uniform carriage law regimes lack specific provisions regulating their place in the hierarchy however, the other solutions and options such as those found in the Vienna Convention on the Law of Treaties will be discussed first.

The last subject to be considered in this Chapter is the question whether the current options to resolve a conflict between uniform norms are sufficient. The pros and cons of the existing rules on this subject will be weighed and, if found wanting, an alternative solution will be offered.

9.1 Conflicts

9.1.1 Conflicts enabled by Article 2 CMR

It is unsurprising that the first offender to be discussed when it comes to the generation of conflicts between the various carriage conventions is Article 2 CMR. This *enfant terrible* has been the cause of many a discussion and does not fail to live up to its reputation of chicanery even when it comes to conflict. The mode-on-mode carriage regulated by Article 2 CMR is a thorny subject in relation to the possible overlap of the uniform carriage law regimes.

The fact is that Article 2 extends the CMR's scope of application beyond mere road carriage. But does that mean that if the 'annexed' or 'usurped' non-road stage of the transport is international it may equally be covered by another unimodal regime specifically tailored for 'normal' carriage by that mode of transport? The answer to that question depends on two things; the first and foremost being the scope of application of the other unimodal regime, and the other whether it makes a difference that the road vehicle is added to the cargo for the non-road stage of the journey.

In relation to the cargo the answer is in fact rather simple. The multimodal transport contract between the shipper and the multimodal carrier obliges the carrier to transport goods placed at his disposal by the shipper. It makes no difference whether the contract concerns mode-

[2] When a norm complements, confirms, terminates, incorporates or provides an exception to another norm, they accumulate. It is argued that a conflict already occurs if one norm constitutes, has led to, or may lead to an incompatibility, inconsistency or breach of another norm. Pauwelyn 2003, p. 175-176. A stricter view is however that a conflict of two norms of international law occurs when two or more treaties apply to a claim and not all obligations stemming from the applicable regimes can be complied with simultaneously. Jenks 1953, p. 401. In practice this is a problem only when the Forum State is party to both the applicable but incompatible regimes.

[3] These conflict of conventions provisions are Article 25 Hamburg Rules, Article 30 MT Convention, Article 55 MC and Article 82 RR.

on-mode or mode to mode carriage; the object of the contract remains the carriage of the shipper's goods, without the road vehicle. It is only in the sub-carriage contract, the contract entered into between the multimodal carrier and the subcontracting carrier, that the road vehicle is added to the cargo. Which means that it is of no consequence that the truck is added to the cargo during the non-road stage as this is only the case in the relation subcontracting carrier to multimodal carrier and does not affect the relation between the shipper and the multimodal carrier.

The scope of application aspect is only slightly more complicated. To begin with it is necessary to establish which carriage conventions are relevant in light of Article 2 CMR carriage. The Article mentions sea, rail, inland waterways or air as possible non-road carriage. It is however highly unusual for complete trucks to be carried by air, so that for all practical purposes the scope of the air carriage conventions may be disregarded. That leaves the uniform rail transport law, the inland waterway regime and the sea carriage conventions.

As was discussed in Chapter 6 the COTIF-CIM, the uniform rail carriage regime, requires for application a contract of carriage of goods by rail for reward, according to which the place of taking over of the goods and the place designated for delivery are situated in two different States both member to the COTIF-CIM[4]. Since these requirements are met if the rail carriage itself is international even if the contract also provides for carriage by other modes, this means that the COTIF-CIM may very well apply to the rail carriage stage of a mode-on-mode transport[5]. A conflict may thus ensue between the CMR and the COTIF-CIM.

Carriage from Bordeaux in France to Gillingham in the United Kingdom by road in both countries and by rail in the 'Chunnel', the Channel Tunnel, will thus lead to conflict if damage or loss occurs during the Chunnel stage if the road vehicle is placed on board of a train during this stage.

Instead of causing a full fledged conflict situation to arise when the claim concerns damage or loss which occurs during the actual mode-on-mode carriage, the non-road carriage, Article 2 CMR restricts the potential for conflict somewhat. In situations which concern events which could only have occurred 'in the course of and by reason of the carriage by that other means of transport' and the other means of transport is covered by 'conditions prescribed by law', the CMR takes a step back and grants the other carriage regime precedence regarding matters of carrier liability[6]. Nevertheless, conflicts are still possible regarding all other matters. And even though the latest COTIF-CIM version is modelled after the CMR, the regimes still have plenty of dissimilarities. If for instance damage was caused during the mode-on-mode carriage to goods that were packed by the consignor and the consignment note contains no specific reservations nor mention the condition of the goods or their appearance, the CMR

[4] See Chapter 6 on multimodal carriage under the COTIF-CIM.

[5] Fremuth is however of the opinion that if Article 2 CMR applies this takes precedence over the network approach which means that according to him the rail carriage rules could only apply via Article 2 CMR. From this statement it can be deduced that in his view the network approach does not attach to the actual scope of application of the carriage conventions but is rather a non-codified system of rules comparable to national rules of private international law which ranks below the rules of a uniform law regime such as the CMR. Thume *Kommentar zur CMR* 1994, p. 127. This view is no longer compatible with the 1999 version of the COTIF-CIM however, as this version applies even if the carrier is not a railway and no consignment note is issued. Since the application of the current COTIF-CIM is not merely based on the network system but is grounded in the scope of application rules of the uniform regime itself the CMR scope of application rules no longer deserve unquestioned precedence.

[6] According to the *St. Clair* (Hof 'Den Bosch 23 March 1994, *S&S* 1994, 86 and 23 March 1994, *S&S* 1995, 67; HR 14 June 1996, *S&S* 1996, 86) and the *Thermo Engineers v Ferrymasters* (*Thermo Engineers Ltd. and Anhydro A/S v Ferrymasters Ltd.,* [1981] 1 *Lloyd's Rep.* 200) judgements the application of the carrier liability rules of the other transport regime does not require an event that is typically related to the non-road carriage stage of the transport. It is enough if the loss of the goods – or the damage or delay – is realized *in concreto* during the non-road carriage (Hof Den Haag 8 April 1988, *S&S* 1989, 1 (*Baltic Ferry*)).

regime presumes, unless the contrary is proved, that the goods and their packaging appeared to be in good condition when the carrier took them over and that the number of packages, their marks and numbers corresponded with the statements in the consignment note[7]. The COTIF-CIM on the other hand does not presume such a thing unless the carrier has examined the goods and recorded on the consignment note a result of his examination with tallies[8]. So if the carrier has recorded no tallies on the consignment note the burden of proof weighs a lot heavier on the consignor or shipper under the COTIF-CIM regime than under the rules of the CMR. And as we all know, it is often the burden of proof which determines who bears the burden of the loss.

Another difference which could lead to different amounts of compensation being rewarded under the CMR and the COTIF-CIM is the difference in consequences for the carrier who fails to carry out instructions or who has carried out orders without requiring the first or a duplicate copy of the consignment note to be produced. Under the CMR such a carrier shall be liable to the person entitled to make a claim for any loss or damage caused thereby[9], while under the COTIF-CIM the liability of the carrier who implements the consignor's subsequent modifications without requiring the production of the duplicate of the consignment note is limited to the compensation provided for in case of loss of the goods. The same limitation is applicable to the CIM-carrier who is liable for failing to carry out an order, but under the COTIF-CIM, unlike under the CMR, the carrier is liable for such failure only in case of fault[10].

Furthermore, the road and rail regimes deviate in relation to the options of the carrier in case it becomes impossible to carry out the contract according to its terms. Under the uniform road carriage regime the carrier is obliged to ask for instructions from the person entitled to dispose of the goods under those circumstances. Unlike the road carrier the rail carrier also has the option to carry the goods by modifying the route[11]. Thus, if a road carrier is able to obtain instructions within a reasonable amount time from the person entitled to dispose of the goods, but instead decides to deviate from the chosen route without asking said person, the carrier is liable for any damage or loss which may result, while the rail carrier may not be[12].

In addition, the procedures regarding the ascertainment of partial loss or damage show some differences which may influence whether compensation can be obtained. Under the CMR it is the consignee that is to send the carrier reservations giving a general indication of the loss or damage, not later than the time of delivery in case of apparent loss or damage and within seven days of delivery in case of loss or damage which is not apparent. If the consignee fails to do this the fact of this taking delivery shall be *prima facie* evidence that he has received the goods in the condition described in the consignment note[13]. Under the COTIF-CIM on the other hand it is the carrier that is forced to draw up a report stating, according to the nature of the loss or damage, the condition of the goods, their mass and, as far as possible, the extent of the loss or damage, its cause and the time of its occurrence. If such a report is not made up all rights of action against the carrier arising from the contract of carriage in case of partial loss, damage or exceeding of the transit period are extinguished, unless the report was omitted solely through the fault of the carrier[14]. Not only does this burden the cargo claimant under the COTIF-CIM with the task of

[7] Article 9 CMR.
[8] Article 12(3) COTIF-CIM.
[9] Article 12(7) CMR.
[10] Article 18(6) and (7) COTIF-CIM.
[11] Article 14 CMR and Article 20 COTIF-CIM. Based on Article 22 COTIF-CIM the rail carrier may even recover the costs occasioned by his decision to modify the route without having asked for instructions such as the carriage charge applicable to the route followed.
[12] Rb Rotterdam 20 July 2000, *S&S* 2001, 130; Rb Zwolle 20 January 1982, *S&S* 1983, 18.
[13] Article 30 CMR.
[14] Articles 42 and 47 COTIF-CIM.

attempting to induce the carrier to make up such a report, which seems somewhat more onerous than merely sending the carrier reservations, the failure to comply with these provisions also has far more serious consequences for the rail cargo claimant. Instead of causing the consignment note to become *prima facie* evidence, in other words refutable evidence, of the state of the goods when they were delivered as is the case under the CMR, the failure to comply with the COTIF-CIM rules on this subject causes the entire action against the carrier to be extinguished. Under these circumstances it is readily imaginable that the person entitled to the goods is more inclined to root for the application of the rules of the CMR in case the regimes concur than for the application of the COTIF-CIM provisions on this subject.

Undoubtedly there are even more rules than those already mentioned to be found in the minutiae of the road and rail carriage conventions which are not precisely identical and which may therefore conflict. Besides these less prominent stipulations there are also a few non-liability provisions in the CMR regime that are of too much significance to be labelled minutiae. Important issues such as jurisdiction and the limitation of actions are also placed outside of the CMR's Chapter on carrier liability[15]. The rules on jurisdiction are unlikely to give rise to conflict situations however, since the rules on jurisdiction found in the COTIF-CIM are rather similar[16]. In contrast, the rules on the limitation of actions, Article 32 CMR and Article 48 COTIF-CIM, are a far cry from identical. The basic limitation period of one year is the same in both regimes, but after mentioning this it seems both Articles go their own separate ways. Where the CMR provides an extension of this period to three years in case of wilful misconduct or such default as in accordance with the law of the court or tribunal seized of the case is considered as equivalent to wilful misconduct, the COTIF-CIM extends the period to two years only, but it grants this extension in more situations than only those involving wilful misconduct or its equivalent. The COTIF-CIM also extends the limitation period when the claim concerns the recovery of a cash on delivery payment collected by the carrier from the consignee or of the proceeds of a sale effected by the carrier, and when it concerns certain contracts of carriage based on which the goods were transported prior to reconsignment.

Furthermore, the conventions offer differing rules regarding the moments on which the period of limitation shall begin to run. In case of total loss both conventions determine that the period of limitation shall start on the thirtieth day after the expiry of the agreed time-limit or transit period, but only the CMR adds that if there is no agreed time-limit it shall run from the sixtieth day from the date on which the goods were taken over by the carrier. In addition both conventions supply differing rules for all situations not expressly mentioned by Article 32 CMR and 48 COTIF-CIM. Under the CMR the period of limitation shall then start after the expiry of a period of three months after the making of the contract of carriage, whereas the COTIF-CIM determines that under those circumstances the period of limitation shall start as of the day when the right of action may be exercised.

[15] That the limitation of actions falls outside of the radius of the words 'liability of the carrier' as used in Article 2 CMR is shown by the 1988 judgement concerning the '*Baltic Ferry'*. Hof Den Haag 8 April 1988*, S&S* 1989, 1 (*Baltic Ferry)*.

[16] See Article 46(1) COTIF-CIM and Article 31(1) CMR. The only difference is that the COTIF-CIM explicitly mentions that other courts or tribunals than those named may not be seized. Not all carriage conventions contain provisions on jurisdiction. The Hamburg Rules do contain such rules and these, and even those in the new Rotterdam Rules are similar to those in the CMR. The new instrument adds two options to the mix however. Besides the familiar places of receipt and delivery it adds the places in which the ports where the goods are initially loaded and are finally discharged from a ship are located. Also, the new regime refers to certain places as mentioned by the contract of carriage in relation to both the place of taking over of the goods and the place designated for delivery, whereas the CMR only determines the place of delivery to be designated while it fails to refer to the contract as regards the place of taking over of the goods. In addition it should be noted that the air carriage conventions also contain jurisdiction rules, but these are near enough irrelevant in relation to Article 2 CMR.

On the whole, it seems that if the cargo is damaged or lost during the '*Huckepack*' stage of an Article 2 CMR transport, there are plenty of opportunities for the CMR and the COTIF-CIM to clash.

The potential of conflict flowing from Article 2 CMR between the CMR and the other carriage conventions such as the CMNI or the sea carriage regimes is similar to the CMR/COTIF-CIM conflict potential. Even if only those situations involving a claim which does not concern the carrier's liability are likely to lead to conflict, there are plenty of differences between the regimes which may occasion difficulties. For one, the period of limitation under Article 24 of the CMNI is only one year. Unlike the CMR the CMNI does not provide for any extension of said period and furthermore only mentions regarding the commencement of this period that it starts the day after the day when the goods were, or should have been, delivered to the consignee, regardless of the type of damage or loss that has occurred. For another, Article 20 of the Hamburg Rules shows that the period of limitation under this regime deviates even more from that of the CMR, by setting it at two years. In relation to the Hague and Hague-Visby Rules the potential for conflict created by Article 2 CMR is in practice somewhat less than the potential pertaining to the rail and inland waterway regimes, or even regarding the Hamburg Rules. The obvious reason for this reduced amount of conflict potential between the CMR and the Hague and Hague-Visby Rules is that Article 2 CMR transport including a sea stage generally concerns short sea shipping, which is a type of sea carriage for which a bill of lading is generally not issued. Thus, in practice, there is only a chance that one of the Hague regimes applies to the sea stage if a multimodal or combined transport bill of lading is issued for the entire carriage by the multimodal – or Article 2 CMR – carrier[17]. Nonetheless, if such a bill of lading is issued, and either the Hague or the Hague-Visby Rules apply, their one year period of limitation – to which the only exception is the one regarding an action for indemnity against a third person which may be brought even after the expiration of a year if brought within the time allowed by the law of the court seized of the case – may be a cause for conflict with the CMR rules among other things.

The danger of a conflict between article 2 CMR and the new Rotterdam Rules is not lessened by the lack of a bill of lading. The new 'maritime plus' Rules do not require such a document to be issued in order to apply. The Rotterdam Rules do contain Article 82, which is a special 'conflict of convention' provision meant to avert conflicts between it and Article 2 CMR amongst other things. To prevent conflicts, the Article grants precedence to the road carriage regime in situations where Article 2 CMR extends the road carriage rules to sea carriage. Whether this attempt to avert conflict is completely successful will be discussed in the Section relating to the possibilities offered by such provisions[18].

Since the above-mentioned conflicts occur when the CMR trespasses on the domain of other carriage conventions it would seem that these problems of conflict should not occur when the damage or loss occurs during the road stage of an Article 2 CMR transport. After all, when it comes to the pre- and end haulage by road Article 2 CMR does no more than cause the CMR regime to apply to actual road carriage. Yet even here Article 2 CMR manages to cause the CMR regime to expand somewhat beyond the basic scope set by Article 1 CMR. By means of Article 2 CMR the road carriage regime also applies to road stages preceding or subsequent to the mode-

[17] For the discussion as to whether a combined transport bill of lading is sufficient for the application of the Hague or Hague-Visby Rules see Chapter 8, Section 8.1.2.1.1 on the scope of the Hague regimes and the bill of lading. If no bill of lading is issued the Hague and Hague-Visby Rules will not apply. Therefore it is strange that Article 6 of both regimes attempts to regulate carriage for which no such document has been or will be issued; although the Rules do not apply to these situations they nonetheless provide rules for them. Article 6 with its options for entering all sorts of contractual exonerations into the contract with full legal effect has been known to be used to avoid the application of the Hague(-Visby) Rules altogether. Mankabady 1978, p. 45.

[18] See Section 9.2.3 of this Chapter in general and Section 9.2.3.4 of this Chapter on Article 82 RR in specific.

on-mode carriage, even if these stages themselves are essentially domestic. Without Article 2 CMR such internal pre- and end haulage would not be covered by an international regime such as the CMR. Because of this the COTIF-CIM drafters thought to enhance the unifying effect of their convention by annexing domestic carriage by road preceding or following international carriage by rail based on the same contract. Due to this unrestricted expansion of the rail regime in Article 1(3) COTIF-CIM the domestic road stages of an Article 2 CMR contract which involves *Huckepack* transport provide the potential for conflict between both conventions. And in this context, the conflict does include a clash of their rules on carrier liability. As a result the potential for conflict during the domestic road stages is significantly larger than that during the mode-on-mode stage as, unlike Article 2 CMR, Article 1(3) COTIF-CIM contains no restrictions concerning the application of the rail carriage rules to the road stage and thus all rules of either convention may apply to these stages.

Since the main offender in this case seems to be the provision expanding the rail carriage regime, this conflict will be discussed below in Section 9.1.3 on conflicts enabled by the COTIF-CIM.

9.1.2 Conflicts enabled by Article 18 WC or MC

In his criticism on *Quantum* Koller contends that the Court of Appeal failed to appreciate the dangers of conflict between the Warsaw Convention and the CMR when the CMR is considered applicable to the international road stage of a multimodal transport entailing both air and road carriage[19]. To illustrate his objections he asserts that conflicts may occur if the CMR is applied to the carriage by road to, from or between airports for loading, delivery or transhipment, which may happen if the airport lies close to a State border and the road carriage crosses this border.

In reality, the application of the CMR to such carriage cannot lead to conflict with the uniform air carriage regimes based on the extension regarding feeder services of the air regimes' scope by Article 18. If one takes a look at Article 18(3) WC[20], the provision Koller refers to, we see that in principle the period of the carriage by air does not extend to carriage by any other mode performed outside an airport. But if such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or 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 means that if an airport lies close to the border of a country, a lot of international road carriage may be subjected to the Warsaw Convention. Nevertheless, this does not mean, contrary to Koller's opinion, that with regard to the same incident the CMR and the Warsaw Convention can both apply. After all, the CMR applies to the road leg of the multimodal journey only if it can be proven that the damage originated during the road carriage. The Warsaw Convention on the other hand only extends its scope to such road carriage if it remains unclear where the damage occurred. The result is that if the CMR rules apply, the rules of the Warsaw Convention will not and *vice versa*[21].

Nevertheless, Article 18 WC/MC does contain a seed for conflict, albeit on a smaller scale. As regards the central issue of liability, the air carrier is only liable for damage sustained according to either air carriage convention "*in the event of the destruction or loss of, or damage*

[19] Koller 2003, p. 47 under 4.
[20] This corresponds with the first two sentences of Article 18(4) MC.
[21] Haak & Hoeks 2004, p. 432.

to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air". Since Article 18 of both air carriage conventions determines 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, *a contrario* the carriage by these media inside an airport does fall within the period of the carriage by air. If the CMR is applied to an international road stage which concerns loading, delivery or transhipment, and the road carriage extends into the airport area, for instance because the cargo is to be stored temporarily in an airport warehouse, or perhaps even to be loaded directly on to a plane, then any claims arising from damage or loss that occurred during the road carriage in the airport area are covered by both uniform air carriage and road carriage law. The considerable differences between the air and road carriage regimes cause such a conflict situation to pose a rather serious problem. Not only do the liability limits differ considerably – 8,33 SDR per kilogram under the CMR and 17 SDR per kilogram under the Warsaw and Montreal Conventions – in case of the Montreal Convention this limit is unbreakable when it comes to the carriage of goods. In terms of compensation for valuable goods it is therefore of considerable importance to the cargo claimant to ascertain whether the rules of the CMR or those of the Montreal Convention are to be applied, especially if the damage or loss was caused with intent or 'conscious recklessness'.

As carriage by sea or even inland waterway is not likely to supplement air carriage and it is even more improbable that a sea or inland waterway port is situated within the confines of an airport, the potential of conflict signalled between the air carriage conventions and the CMR is unlikely to manifest itself as regards the sea carriage conventions or the CMNI. The COTIF-CIM on the other hand does share the CMR's potential for conflict with the air carriage treaties. That is to say, in theory, as in practice these conflicts are even less likely to occur than those that relate to the CMR. Two reasons come to mind to explain the improbability of such conflicts. For one, not all airports contain a railway station. Only the larger airports such as Schiphol, Charles de Gaulle or Gatwick seem to be so equipped. All airports can on the other hand be reached by road. For another the accident rate of goods carried by train is much lower than that of goods carried by road; road vehicles are more vulnerable to tipping over, more likely to collide with other vehicles or objects *et cetera*. All in all, a busy airport seems a more dangerous place for goods in a truck than for goods loaded on to a railway car.

As was mentioned in Chapter 5 on the air carriage conventions, the coexistence of the various versions of the Warsaw system and the Montreal Convention may also be a source of conflict. If for instance both the Warsaw and the Montreal Conventions apply a conflict will occur if the damage or loss was the result of an intentional act or wilful misconduct on the carrier's part. Under such circumstances the Montreal regime will still allow the carrier to limit his liability to 17 SDR per kilogram while the Warsaw Convention deprives the carrier of the option to avail himself of the provisions of the Convention which exclude or limit his liability. As these conflicts are not generated by multimodal carriage however, they will not be discussed here in detail.

9.1.3 Conflicts enabled by Article 1 COTIF-CIM

Under a standard road-rail or rail-inland waterway carriage contract the extension of the rail convention's scope of application in Article 1(3) COTIF-CIM does not lead to conflict. After all, the COTIF-CIM expands its coverage only so far as to include supplementary internal road or inland waterway carriage with this paragraph, and neither the CMNI nor the CMR cover national

carriage under normal circumstances[22]. In order to expand the scope of the uniform rail carriage regime Article 1(3) COTIF-CIM contains the following text:

> "*When international carriage being the subject of a single contract includes carriage by road or inland waterway in internal traffic of a Member State as a supplement to transfrontier carriage by rail, these Uniform Rules shall apply.*"

As was mentioned in Section 9.1.1 on Article 2 CMR, this is different in case of ro-ro carriage. If for instance a contract of carriage provides for the carriage of shoes from Plasencia to Salamanca in Spain by road, where the truck is to be loaded on to a train and carried to Bordeaux in France, from where the truck is to carry the shoes once again on its own by road to the French city of Montendre, Article 1(3) COTIF-CIM causes the rail carriage regime to apply to the entire carriage. Even the road stages are covered since they concern internal road carriage in Member States and supplement the international rail carriage leg of the transport. Yet, these circumstances fulfil the requirements for application set by Article 2 CMR as well, and since they do, the entire carriage is also covered by the rules of the CMR. As Article 2 CMR causes the CMR to give way to certain rules of the mandatory law applicable to the other type of transport this does not lead to a conflict in terms of liability issues in situations where it is clear that the damage occurred during the rail stage. Yet it does lead to full scaled conflict when the damage or loss occurred during either road stage, or when the loss or damage remains unlocalized.

Besides Article 1(3) COTIF-CIM, Article 1(4) COTIF-CIM is also a substrate for conflicts, albeit it on a relatively small scale. This provision determines that when carriage by sea or transfrontier carriage by inland waterway supplements carriage by rail, the rules of the COTIF-CIM apply if the carriage by sea or inland waterway is performed on services included in a certain list provided for by the Convention[23]. The risk of conflict generated by this provision is rather limited due to the listing requirement. The list of lines registered for this purpose contained no more than 20 entries in 2007[24], which is only a fraction of the shipping lines and inland waterway routes operated in Europe. Most of these registered lines connect Scandinavia with the main European peninsula, such as the lines Turku – Lübeck between Finland and Germany and Gøteborg – Frederikshavn between Sweden and Denmark.

As a result there are only a limited number of options where the Hamburg Rules may conflict with the COTIF-CIM. Only sea carriage over the line Marseille – Algiers between France and Algeria or over the two lines between Romania and Turkey may lead to a conflict if it is combined with rail carriage in a single contract. The reason for this is that of the countries which are connected by the registered sea carriage lines only France and Romania are party to the Hamburg Rules[25].

A conflict with the Hague or Hague-Visby Rules will also not often ensue. Only when rail carriage and sea carriage over a registered line are combined and a bill of lading is issued for the sea carriage will both the sea carriage and the rail carriage regimes apply. Bills of lading are

[22] According to the *Hoge Raad* in HR 5 January 2001, *NJ* 2001, 391, the contractual agreement to apply the CMR even if the road carriage is internal is valid. Article 1(3) COTIF-CIM however prevents the voluntary application of the CMR to a supplementary internal road stage from having effect. Since the COTIF-CIM rules are now compulsory for such supplementary road stages they prevail over any set of rules agreed to by contract.

[23] The list of registered lines can be found at www.otif.org.

[24] See www.otif.org and Chapter 6, Section 6.2.2.2 on transfrontier carriage by inland waterway or sea supplementing rail carriage.

[25] The Hamburg Rules contain a conflict of conventions provision however, which may avert the mentioned conflicts. See Section 9.2.3.3 of this Chapter on Articles 30 MTC and 25 Hamburg Rules.

however infrequently issued in short sea shipping – which is carriage by sea which fails to cross any oceans – and all of the registered lines concern either this type of short distance sea traffic or inland waterway carriage.

Conversely, the new sea carriage regime, the new 'maritime plus' Rotterdam Rules, do not require a bill of lading for application and neither is it clear which States will become party to the new treaty. As a result of especially the uncertainty of its future number of adherents it is difficult to ascertain whether the application of the COTIF-CIM regime to the sea carriage lines between Scandinavia and mainland Europe and a few others confers a large conflict potential as regards the Rotterdam Rules or not. In addition Article 82 RR is meant to prevent any conflicts between the regimes. In order to do so, the Article attempts to grant precedence to the rail carriage regime in situations where Article 1(4) COTIF-CIM extends the rail carriage rules to sea carriage. As was already mentioned above, whether this 'conflict of convention' provision is completely successful will be discussed in one of the following Sections[26].

In relation to conflicts with the international inland waterway rules of the CMNI it should be noted that only two of the 20 registered lines concern inland waterway carriage, namely the line crossing the Bodensee between Germany and Switzerland and the line crossing lake Van in Turkey. And since Turkey is not party to the CMNI, nor does this line concern transfrontier carriage, conflicts will only occur in relation to the Bodensee line and then only rarely, if ever. This relatively conflict free situation will continue as long as the countries adhering to the CMNI refrain from entering other inland waterway services into the CIM list, or exclude the waterways listed for the CIM from application of the CMNI by means of Article 30 CMNI[27].

9.1.4 Conflicts enabled by Article 2 CMNI

The youngest branch of the carriage convention family, the CMNI, has also taken it upon itself to regulate certain matters beyond mere carriage by inland waterway. Article 2(2) CMNI describes the circumstances under which the inland waterway regime extends its reach to maritime carriage. If a contract of carriage stipulates that goods are to be carried without transhipment, both on inland waterways and in waters to which maritime regulations apply, the CMNI applies to the entire carriage. Only if a maritime bill of lading has been issued in accordance with the maritime law applicable, or the distance to be travelled by sea is larger, does the CMNI take a step back. The potential for conflict in this arrangement seems obvious. Although a clash with the Hague and Hague-Visby Rules seems to be deterred by the exclusion of the situations in which a bill of lading is issued in accordance with the maritime law applicable[28], there is still room for conflicts with the Hamburg Rules, and in the future perhaps with the new Rotterdam Rules. Neither of these last mentioned conventions requires a bill of lading for application. If a contract of carriage provides for carriage by sea between Southampton and Le Havre and from thereon by barge to Basel, these regimes apply to the carriage between Southampton and Le Havre even if no bill of lading is issued. Nor, it is necessary to add, is their scope of application limited to situations in which the sea leg concerns the larger part of the transport. Quite the contrary; instead of taking a step back the new Rotterdam Rules have even extended their scope of application so that not only both the

[26] See Section 9.2.3 of this Chapter on conflict of convention provisions.

[27] The CMNI allows each ratifying State in Article 30 to declare that it will not apply the CMNI to contracts relating to carriage by way of specific inland waterways situated on its territory and to which international rules of navigation do not apply and which do not constitute a link between such international waterways.

[28] For more information see Chapter 7, Section 7.1.3.1 on the 'maritime' bill of lading under the CMNI.

Rotterdam Rules and the CMNI would apply to the sea stage between Southampton and Le Havre, they would also both cover the carriage by river and canal between Le Havre and Basel. Yet, this collision of regimes may not be a problem at all, that is, if Article 82 RR fulfils its purpose of averting conflict in this regard[29]. And as regards the possible conflict with the Hamburg Rules, there is the limited number of States that have ratified this Convention in Europe that limits the possible conflict situations somewhat[30].

9.1.5 Potential for future conflicts: Article 26 RR

Due to the unimodal plus approach laid down in Article 26 RR, a significant number of potential conflicts with the existing transport regimes will surface if this new 'maritime plus' regime enters into force. When for instance a carrier undertakes to carry by road and sea whereby the goods remain on the road vehicle 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 Rotterdam Rules will then require application. Since the draughtsmen of the new maritime plus Convention also noticed this potential for conflict Article 82 RR was entered into the treaty text, not to prevent conflict apparently, but rather to clarify matters of precedence relating to 'international conventions governing the carriage of goods by other modes of transport'. The effect of Article 82 RR will be discussed more thoroughly a little farther along the line.

Equally, conflicts between the CMR and the Rotterdam Rules occur when a court of law interprets the scope of the CMR in Article 1 differently than the designers of the Rotterdam Rules seem to do. Evidently the limited network system of the Rotterdam Rules is based on the concept that the CMR, besides via Article 2 CMR, cannot apply to any part of a multimodal transport autonomously[31]. If one holds this to be true, a conflict with the road carriage convention will not come about if mode-on-mode carriage is excepted from the equation[32].

[29] See Section 9.2.3.4 of this Chapter on Article 82 RR.

[30] The limited number does however entail a number of States with a prominent role in European inland waterway transport such as Austria, the Czech Republic and Hungary. Whether these States also adhere to the CMNI is irrelevant as Article 2 CMNI provides that for application it needs only the port of loading, the place of taking over of the goods, the port of discharge or the place of delivery of the goods to be located in a Member State, whereas the Hamburg Rules apply according to Article 2 if either the port of loading or the port of discharge is situated in a Member State, the document evidencing the contract of carriage by sea is issued in a Member State or if said document provides that the provisions of the Hamburg Rules or the legislation of any State giving effect to them are to govern the contract.

[31] 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 Rotterdam Rules is inevitable. UNCITRAL A/CN.9/621, p. 50; UNCITRAL A/CN.9/616, p. 54. Adherents to the same view regarding the CMR are mostly found in Germany and Italy. Koller 2003, p. 45; Czerwenka 2004, p. 302; Berlingieri *Liber Amicorum Roger Roland* 2003, p. 42; Spiegel & De Vos 2005.

[32] The drafters of the Instrument intended to prevent any conflict between the Rotterdam Rules and the CMR in case of mode on mode carriage. To accomplish this they created a conflict of convention provision, Article 82 RR. This conflict of conventions Article is meant to prevent, besides conflict with Article 2 CMR, conflict with the air carriage conventions, the CMNI and the COTIF-CIM. For more details on this provision and whether it can be considered successful see Section 9.2.3.4 of this Chapter.

The opposite view has at least as much, if not more, support in Europe however[33]. Based on *Quantum* and other judgements the concept that the CMR does apply to international road stages of a multimodal transport can be said to have taken root in at least a number of legal systems[34]. And even though Article 26 RR causes its provisions to give way when the issue relates to the carrier's liability, limitation of liability or time for suit, this still leaves room for conflict. As we have seen in the Section on conflicts enabled by Article 2 CMR, the 'less important' provisions may still cause significant conflict situations[35].

The other non-sea carriage conventions are also at risk of coming into conflict with the Rotterdam Rules [36]. That is to say, if they contain mandatory provisions concerning other issues than the carrier's liability, limitation of liability and time for suit that are incompatible with those of the Rotterdam Rules. Unfortunately there seems to be no clarity on what exactly the terms carrier's liability, limitation of liability and time for suit comprise and thus the potential for conflict is not always clear. The problem can be illustrated by pointing out that the CMR, the COTIF-CIM and the air carriage regimes contain provisions on jurisdiction. However, since the jurisdiction provision in the Montreal Convention is placed within the Chapter on carrier liability, it is unclear whether it is 'incorporated' into the Rotterdam Rules by Article 26 and given precedence over the jurisdiction provisions of the Rotterdam Rules or not. Then again, it is highly unlikely that such a fate is meant to befall the jurisdiction Articles of the CMR and the COTIF-CIM since both these Articles are placed beyond the respective convention's Chapter on carrier liability[37].

9.1.5.1 Jurisdiction

On the whole, the matter of jurisdiction seems to provide at least some potential for conflict. As was said, of the international conventions governing the carriage of goods by other modes of transport the CMR, the COTIF-CIM and the air carriage regimes contain provisions that regulate at which courts or tribunals actions arising from the respective convention may be brought. Almost all of these provisions, that is to say all except those in the air carriage conventions,

[33] This is the case at least in England, Wales, The Netherlands, Belgium, France *et cetera*. See Chapter 4, Section 4.1.1 on the different interpretations of the scope of application of the CMR as found in Article 1 CMR. See also Clarke *CMR* 2003, p. 46; Clarke *JIML* 2003; Haak 1986, p. 98-99; Messent & Glass 2000, p. 45; Van Beelen 1994; Thume 1994, p. 92; Putzeys 1981, p. 103-104; R. Asariotis *et al*, *Intermodal transportation and carrier liability*, study for the European Commission June 1999.

[34] *Quantum Corporation Inc. and others v Plane Trucking Ltd. and Another,* [2002] 2 *Lloyd's Rep.* 25, *ETL* 2004, p. 535-560; *Datec Electronic Holdings Ltd v UPS Ltd.,* [2006] 1 *Lloyd's Rep.* 279; Cour de Cassation 25 November 1995, *BACC* 1995, IV, p. 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 28 September 2005, I-18 U 165/02, www.justiz.nrw.de. Although some of the lower German courts seemed to support this view as well, the German BGH decided in July 2008 that the CMR does not autonomously apply to the international road stages of multimodal transports by means of Article 1 CMR. For more information see Chapter 4 on the scope of application of the CMR concerning multimodal carriage.

[35] See Section 9.1.1 of this Chapter on conflicts enabled by Article 2 CMR.

[36] Of course the Hague Rules, the Hague-Visby Rules and the Hamburg Rules do not run that risk as they are to be denounced when a State becomes party to the Rotterdam Rules according to Article 89 RR. Due to the new instrument's generous geographical scope a conflict may still occur in theory; courts of countries that still adhere to one or more of the 'old' sea carriage conventions may find that the new instrument applies. In such a case they are not bound to apply it however, as the State they are situated in has not ratified or acceded to the Rotterdam Rules. Such a court of law is bound only by the mandatory rules of the 'old' sea carriage regime to which its State is party.

[37] Article 33 MC is placed in Chapter 3 of the Montreal Convention which is named 'Liability of the Carrier and Extent of Compensation for Damage', whereas Article 31 CMR is placed in Chapter 5 of the CMR on claims and actions and Article 46 of the COTIF-CIM is placed in Title 4 of the Convention which is named 'The assertion of rights'.

permit a choice of court agreement by the contracting parties if they choose a forum in a State that is party to the treaty in question[38]. Yet, if no court has been chosen the options digress and conflict appears on the horizon.

Both the CMR and the COTIF-CIM permit actions in the place where the goods were taken over by the carrier or the place designated for delivery is situated. The Rotterdam Rules on the other hand choose the place of receipt agreed upon in the contract of carriage and the place of delivery agreed to in the contract of carriage as possible *fora*. Where the road and rail regime indicate the actual place of taking over, the sea carriage regime subtly deviates by attaching to the contractually agreed place of receipt. Thus, if damage or loss occurs during the non-sea stage of a contract which involves international sea and rail or road carriage and the place where the goods were actually taken over is not the place designated thereto in the contract, a conflict between the jurisdiction provisions arises. Of course, practically speaking this conflict is only likely to be a problem when the contractual and actual places of taking over are situated in different States.

Another issue that may generate conflict in relation to jurisdiction is the fact that the Rotterdam Rules provide far more options than either the CMR or the COTIF. Logic dictates that neither the rail nor the road regime provides the option to start proceedings in the State of 'the port where the goods are initially loaded on a ship' or the State of 'the port where the goods are finally discharged from a ship'.

The last difference between the provision in the Rotterdam Rules and the COTIF or CMR rules on jurisdiction to be mentioned here is the fact that both non-sea carriage regimes attach significance to the place of residence of the defendant whereas the new maritime convention confers meaning on the domicile of the carrier. Since carriers often know of any damage or loss before the consignor or consignee does, it has become standard practice in CMR carriage, at least in The Netherlands, for the carrier to approach a court of law for a declaration of non-liability[39]. In those cases the role of the defendant is not played by the carrier but rather by the consignor or consignee, and thus a conflict ensues concerning jurisdiction under the inland and sea carriage treaties.

9.1.5.2 Other conflicts that may occur despite Article 26 RR

Despite the earnest efforts of Article 26 RR, the combination of sea carriage and stages of international carriage by other modes of transport in a single contract does not restrict itself to matters of jurisdiction. For instance, the quandary concerning the placement of Article 33 MC on jurisdiction in the Convention's Chapter on carrier liability equally applies in relation to Article 18(4) MC. This paragraph is mandatory according to Article 49 MC and despite of its location it is not certain that it concerns any of the three subjects that would cause the Rotterdam Rules to step aside. Therefore, in theory, a conflict might occur between the Rotterdam Rules and the Montreal Convention if a carrier performs a contract of carriage by sea and air[40]. A conflict

[38] Article 31(1) CMR, Article 46(1) COTIF-CIM, Articles 66 and 67 RR. That the air carriage regime lack the option of a such choice of court agreement means that if such a choice has been made by the parties regarding a contract involving international sea and air carriage a conflict will occur if they have not chosen the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made or before the court at the place of destination. All in all this does not seem a large problem as the combination of air and sea carriage hardly ever occurs.

[39] Haak & Hoeks 2005, p. 98.

[40] Although the combination of sea and air carriage under a single contract is not common it does occur, see Rb Rotterdam 5 January 2005, *S&S* 2005, 87.

would for instance arise if loss occurs during the (international) sea stage while the goods are still within the airport's confines. The existence of a maritime port within the confines of an airport seems an unlikely arrangement however, but would be needed for such conflicts to arise. Then again, if the loss remains unlocalized, a conflict might ensue, since the Montreal Convention as well as the Rotterdam Rules apply if the sea carriage concerns loading, delivery or transhipment[41]. Again the chance of actual conflict seems negligable, since the Rotterdam Rules require the sea stage of the transport to be international in order to apply[42].

Another, more recent addition to the list of uniform provisions that may collide with the Rotterdam Rules is embodied by the CMNI. As was mentioned above, conflicts between the new maritime plus Convention and the uniform inland waterway rules will ensue when a carrier carries goods, without transhipment, 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 shortest. In those situations both the CMNI and the Rotterdam Rules govern the whole transport[43]. An added complication to this extension of the CMNI scope to the entire transport is that in such a case unlocalized loss is equally a cause for conflict.

Furthermore, the COTIF-CIM deserves to be mentioned yet again. Besides the potential for conflict created by its jurisdiction clause, another promise of conflict is waiting in the wings *vis-à-vis* the combination of sea and rail carriage. As was already mentioned under the Section on conflicts generated by Article 1 COTIF-CIM, both sea and the rail carriage are covered by the COTIF-CIM as well as the Rotterdam Rules if certain carriage by sea supplements carriage by rail Luckily the potential for conflict here is held in check rather tightly; by means of Article 82 RR and requirement of the COTIF-CIM that the sea carriage be listed[44].

For additional incompatibilities between the various carriage regimes document A/CN.9/WG.III/WP.29 can be consulted at the website of the United Nations. In this note by the United Nations Secretariat stemming from 2003, a detailed list regarding the possible conflicts generated by the new Convention is taken up. This list includes the differences between the various carriage conventions and the new Rotterdam Rules on subjects such as the obligations and liability of the shipper for damage caused by the goods, the obligations of the shipper to furnish information, transport documents, freight, the right of control, the delivery of the goods and the transfer of rights[45].

9.1.5.3 Damage which occurred during more than one stage of transport

Given the above it may seem that the amount of potential conflict situations is largely held in check through the priority given by Article 26 RR to certain provisions of the 'conflicting' regime. *Prima facie* only those aspects of the claim that do not concern the carrier's liability, limitation of liability or the time for suit may lead to conflict as Article 26 RR causes the provisions of the conflicting regime on these subjects to prevail over those of the Rotterdam

[41] Czerwenka 2004, p. 302.

[42] In the event that a conflict should in fact ensue, Article 82 RR is likely to avert it. See Section 9.2.3.4 of this Chapter on Article 82 RR.

[43] See Section 9.1.4 of this Chapter on conflicts enabled by Article 2 CMNI. The provisions of the Rotterdam Rules will not prevail over those of the CMNI which mandatorily regulate the carrier's liability, limitation of liability, or time for suit when the loss has occurred during the inland waterway carriage however.

[44] In 2007 only 20 lines were registered, two of which are inland waterway routes.

[45] A/CN.9/WG.II/WP.29, www.uncitral.org, p. 21-27.

Rules. If the loss, damage or delay occurred partly during the non-sea stage and partly during the sea stage however, this rule of priority no longer applies, because Article 26 RR requires the damage, loss or delay to have occurred solely before loading on to the ship, or solely after discharge from the ship[46]. If for instance a leaky container caused the fabrics for the Paris fashion week within to be partly destroyed, and the leakage occurred during the sea stage as well as during the road stage, the entire set of rules of both the CMR and the Rotterdam Rules apply to the claim stemming from the damage which occurred during the road stage.

9.1.5.4 Volume contracts

It seems as though, when we discount the situations involving damage which occurred during more than one stage of transport, Article 26 is at least a partly effective weapon in the battle against conflict between the regimes of uniform transport law. Apparently, Article 26 succeeds with regard to most types of carriage contracts to a certain – if perhaps not adequate – extent in acting as a check and balance to the very wide scope of application set by the definition of 'contract of carriage' in Article 1(1) RR as being a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another and which shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage. In the previous Section it has become clear that even though Article 26 RR does not prevent all possible conflicts with the international conventions on carriage other than by sea, it does deflect a lot of potential conflict by incorporating the provisions on carrier liability, limitation of liability and time for suit of the other conventions into the sea carriage plus regime.

When it comes to volume contracts however, Article 26 RR again fails to achieve its goal. The reason for this is that volume contracts, which are defined by Article 1(2) RR as contracts of carriage which provide for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time, may derogate from the Convention according to Article 80. Through this Article the contracting parties are permitted to derogate from the rules of the Convention if (a) the volume contract contains a prominent statement that it derogates from the Convention, (b) the volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations, (c) the shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this Article and (d) the derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.

Thus, volume contracts, which currently make up the vast majority of contracts of carriage with ocean carriers, especially in trade involving the U.S., may derogate from nearly all provisions of the Convention. Based on Article 80(4) only the due diligence in Article 14, the shipper's obligation to provide information, instructions and documents in Article 29, the special rules on dangerous goods in Article 32 and the rules in Article 61 on the loss of the benefit of limitation of liability are mandatory law and cannot be derogated from when it comes to volume contracts. This means that although the volume contract is covered by the new Convention, Article 26 does not necessarily apply since it is not mandatory in this context. If this is the case the result is that the rules of the new Convention that are left intact regulate the carriage as do the contractual provisions which have been negotiated by the contracting parties. If such a volume contract involves international road, air, inland waterway or rail carriage in addition to carriage

[46] Nikaki 2006, p. 534.

by sea, these stages are also covered by the contractual provisions and the rules of the new Convention which the parties have not derogated from besides possibly being covered by either the rules of the CMR, the Montreal Convention, the CMNI or the COTIF-CIM. Thus, the freedom of contract provided for volume contracts may lead to full blown conflict situations between the new regime and the various other carriage conventions if such a contract derogates from Article 26 and involves international inland or air carriage in addition to the carriage by sea.

9.1.5.5 Criticism and matters of precedence

When considering all of the above, the potential for conflict in addition to the 'splitting' and 'mixing' of carriage regimes, it becomes clear that the limited network system of the Rotterdam Rules is likely to generate complicated practical problems. It creates obscurity rather than clarity concerning which rules apply to multimodal carriage contracts involving a sea stage, and perhaps more importantly, which of these rules should be followed.

As a defence against the criticism concerning the practical operation of the limited network system of the Rotterdam Rules, the UNCITRAL secretariat protested that this approach is also employed in the BIMCO Combiconbill[47]. 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 Rotterdam Rules is however that the BIMCO rules are no more than contractual provisions and therefore subject to any compulsory applicable rules of either national or international law. They are merely meant to act as a supplement to the existing legal framework. Whenever the rules of the bill and the applicable mandatory national or international rules are not compatible, the latter will always prevail[48].

In an attempt to answer the question which of the applicable rules are to be applied, or in other words, which of these rules deserve precedence, the new sea carriage convention contains a special Article, Article 82. Although this Article influences the scope of application of the uniform instrument, it is not placed at the beginning of the Convention's text. Neither is it placed in proximity of Article 26 which, besides also influencing the Convention's scope of application, provides certain directions as to which rules of another uniform instrument may prevail over those of the Rotterdam Rules. Instead the Article dealing with the possible 'conflict of conventions' that may ensue from the application of the new sea carriage 'plus' instrument is placed almost at the bottom of the text. Article 82, which is a typical 'conflict of conventions' provision, is meant to clarify the order of precedence of the new sea carriage 'plus' convention and the 'international conventions governing the carriage of goods by other modes of transport'.

The consequences of such a provision regarding the above-mentioned potential conflicts and the manner in which precedence of rules should be determined if such a provision is not present in successive treaties dealing with the same, or at least partially the same subject matter will be discussed in the next Section.

[47] UNCITRAL A/CN.9/WG.III/WP.78, p. 8-9.
[48] Hoeks 2008, p. 272-274.

9.2 The hierarchy

The judiciary does not seem to be fond of conflicts between international instruments. This is no wonder as such conflicts may raise complex problems. These problems do not restrict themselves to the legal sphere; since treaties are agreements between States the application of one and not another may lead to incidents in the international political arena. The result is that many a court of law will first attempt to interpret the coinciding regimes in such a manner that they can be applied alongside each other. Generally an effort is made to reason away the conflict. Unfortunately this is not feasible in all conflict situations. In such cases the legal difficulties commence with the general consensus in international law that there is in principle no hierarchy between conventions[49].

Due to the need for guidelines in this area certain rules of unwritten customary law evolved concerning the application of successive conventions or norms relating to identical subjects. One of the rules that apply in special cases only is the adage *lex specialis derogat legi generali*[50]. Where the object and purpose of a later convention or provision of a convention is to regulate a matter or matters already regulated by an earlier convention in greater detail and where two States are parties to both conventions, there may be room in the interpretation and application of the two conventions to let the *lex specialis* prevail over the *lex generalis*. In appropriate cases and unless the later convention provides otherwise, where there is incompatibility between the overlapping provisions of two conventions, the *lex specialis* should prevail[51]. In relation to the creation of a new multimodal transport regime it has been argued that rules governing multimodal transport are to be deemed *legi speciali* compared to unimodal transport rules that are *legi generali*. Following this reasoning any liability regime specifically governing multimodal transport would automatically take precedence over unimodal transport law[52]. The completely opposite view seems just as plausible and is at least as convincing however. The view that the unimodal transport regime is the *lex specialis* and the multimodal regime the *lex generalis* as this covers all rather than one single mode of carriage may to some seem more easily defendable. In addition, it seems that the actual content of the multimodal regime to be qualified may also influence matters[53]. For application to conflicts between the existing unimodal carriage law conventions the *lex specialis* rule seems even less suited. For one, it is rather difficult to determine which of the conflicting rules of carriage law constitutes the general rule and which the more specific one. If for instance a contract of carriage provides for domestic carriage by road preceding and subsequent to a stage of international rail carriage in Europe, for which the goods are loaded on board the train while remaining inside the road

[49] Conclusion by AG Mok concerning HR 10 November 1989, *NJ* 1991, 248; *RvdW* 1989, 254; Conclusion by AG Strikwerda concerning HR 30 March 1990, *NJ* 1991, 249; Report on the fifty-fourth session of the UN's International Law Commission in 2002, Supplement No. 10 (A/57/10) to the 57th session, p. 240. An exception is made for *jus cogens* however. *Jus cogens* consists of fundamental principles of international law which are accepted by the international community as norms from which no derogation is ever permitted and is generally thought to have priority over all other types of rules.

[50] This adage is for instance applied by Article 25 of the Rome I Regulation in order to grant precedence to more specialized conventions to which a State may be party. See Chapter 3, Section 3.3.2 on Article 25 of the Rome I Regulation.

[51] Sinclair 1995., p. 3.

[52] Schommer 2005, p. 30-31. Although this approach has the benefit that, if generally followed, it would determine which of the incompatible rules is to be applied when multimodal transport results in claims to which conflicting conventions apply, it does not prevent conflicts from coming into being. The regime that is not granted precedence remains in effect and is thus breached when the prevailing treaty is applied.

[53] A pure network system might be qualified differently than a completely uniform multimodal regime.

vehicle – also known as mode-on-mode transport – both the COTIF-CIM and the CMR apply. But which of these regimes should be considered the more special one? In such cases the *lex specialis* approach brings us no further; there is still a choice to be made of which the outcome can only be determined by weighing the interests involved if no other guidelines are to be found.

There are other rules relating to precedence however, some of which are codified by the Vienna Convention on the Law of Treaties of 1969 while others are laid down in specific treaty clauses which aim to resolve conflict, the so-called 'conflict of convention' provisions.

It has been argued that the Vienna Convention as an instrument of international public law should not be applied to uniform private law such as the carriage conventions because these conventions are focused on regulating the relations between private parties[54]. However, a public international law approach is at least partially justified by the twofold legal nature of the transport conventions. Although the carriage regimes consist for the most part of rules of private law, they generally also contain a number of provisions entailing public international law. These rules relating to issues such as ratification or accession, the modification of the treaty[55], denunciation or the convention's relation to other treaties confer rights and impose obligations on their Contracting States under international law. These public international law aspects and the idea that a valid and ratified convention directly imposes an obligation on Contracting States to duly implement the agreed uniform rules make that the public law character of the Vienna Convention does not invalidate it for application to the precedence issues in international carriage law[56]. Especially not since the question of precedence itself is one of international public law. Therefore the Vienna Convention may and should, where possible, be instrumental in establishing which of the incompatible conventions applicable to a certain carriage law claim is to have precedence. This view is supported by the fact that the precedence rules of the Vienna Convention are in essence a codification of principles of already existing customary law.

9.2.1 The Vienna Convention on the Law of Treaties

In Article 26 of the Vienna Convention one of the basic principles of contract law can be found: *Pacta sunt servanda*. In other words, every treaty in force is binding upon the States party to it and must be performed by them in good faith. However, if a State has entered into more than one agreement and the agreements are not compatible this principle does not provide much solace.

In order to resolve the difficulties which arise from such conflicts between conventions the Vienna Convention contains several Articles dealing with the relationship between overlapping and incompatible treaties. Article 59 VC for instance establishes that a treaty can under certain listed circumstances suspend or even terminate an earlier treaty. Articles 64 and 53 VC have an effect similar to that of Article 59[57]. They declare a treaty void if it conflicts with

[54] A failure to apply the Vienna Convention based on the concept that rules of private law are predominant in a convention would undermine the Convention excessively according to De Meij, as a very large group of conventions are structured thus. De Meij 2003, p. 8-9.

[55] For instance Article 49 CMR

[56] Kropholler argues against distinguishing between public and private law approaches in relation to uniform international law as conventions should be seen as a whole; in the main the private law rules of a convention also affect the public law provisions and *vice versa*. Kropholler 1975, p. 237.

[57] Article 53 VC reads: "*A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.*" Article 64 VC reads: "*If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.*"

'peremptory norms of general international law' or *jus cogens*[58]. These norms may either be older, in which case Article 53 VC applies, but also younger, which causes Article 64 VC to come into effect. In a nutshell, Articles 59, 53 and 64 VC have the ability to affect the very existence of a treaty; if these Articles are applied they void entire instruments, not just the parts of the instrument that cause the conflict[59].

Since the conflicts between the carriage law conventions do not involve *jus cogens*, there is generally no reason to impose such strict measures in relation to the conflicts detailed in the previous Sections. And although Article 59 VC does not base the threatened suspension or termination of a treaty on rules of *jus cogens*, it does restrict its application to situations in which all the parties to a certain treaty conclude a later treaty relating to the same subject matter. As this has as yet not occurred in carriage law, not even in air carriage law, Article 59 VC is not suitable for application to uniform carriage law conflicts.

Fortunately the Vienna Convention contains more than the rather uncompromising Articles promising suspension, termination or invalidation. The Convention also contains provisions that deal less harshly with conflicts. Articles 40 and 41 VC which deal with the amendment and modification of multilateral conventions are an example of such provisions. To be specific, Article 40 relates to the amendment of treaties between all parties to a convention and Article 41 VC recounts the options for modification of multilateral treaties when not all members are involved. Regarding uniform carriage law it seems the latter is of more interest than the former due to the aforementioned lack of carriage law instruments which are concluded between the exact same group of States as are member to the original treaty[60].

In Article 41(1)(b) VC is laid down that any provisions on modification of a treaty in the treaty itself take precedence over the general rules laid down in the Vienna Convention. Article 1(5) CMR is an example of such a provision. It shows that contracting parties may even agree to surrender or diminish their treaty making ability. In this provision the States party to the CMR consent not to vary any of the provisions of the Convention by special agreements between two or more of them, except concerning two specifically mentioned issues. This stipulation is meant to ensure that the CMR regime will not be splintered into a number of bilateral agreements and is based on the idea that all Contracting States are entitled to the application of the complete CMR by the other Contracting States[61]. The consequence of such a rule in the Convention is that if States party to the CMR were to engage in a bilateral agreement such as is mentioned by Article 1(5) CMR, this agreement will be void from the outset. After all, by becoming party to the CMR the State gave up the authority to deviate from its rules apart from the two mentioned exceptions in Article 1(5) CMR. Therefore the 1978 SDR Protocol should, in theory at least, be deemed void. In Germany it is argued that this modification of Article 23(3) CMR is viable as it is based

[58] *Jus* (or *ius*) *cogens*: Latin for 'compelling law'. A peremptory norm or a norm of *jus cogens* is a fundamental principle of international law which is accepted by the international community as a norm from which no derogation is ever permitted. There are no simple criteria which determine whether a rule is j*us cogens* or not. Penal provisions concerning the prohibition of genocide, piracy, slavery, war crimes, crimes against humanity and the crime of aggression are generally thought to be of such importance that they can be considered *jus cogens*. The concept of *jus cogens* seems to be intended to enable natural law ideas to override international treaties.

[59] Sadat-Akhavi 2003, p. 49 and 54. "*Rules of jus cogens are of so fundamental a character that, when parties conclude a treaty which conflicts in any of its clauses with an already existing rule of jus cogens, the treaty must be considered totally invalid.*" ILC Yearbook 1966, vol. II, p. 239. See also Article 44(5) VC which determines that in cases falling under Articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

[60] Not even the 1978 SDR Protocol to the CMR gained the same group of adherents as the CMR. In 2007 the accession of Albania brought the total number of States party to the Protocol to the CMR to 36, whereas the accession of Azerbaijan in 2006 brought the number of States party to the CMR to 50. This information can be found at www.unece.org.

[61] J. Basedow, *Münchener Kommentar zum Handelsgesetzbuch. Band 7*, München: Beck 1997, p. 902.

on Article 49 CMR which permits modifications if a certain procedure is followed. A conference requested by the Secretary-General of the United Nations such as prescribed by Article 49 CMR was never held however, which makes the continued existence and the application of the Protocol somewhat sketchy. In practice the judiciaries of those States that are party to the 1978 Protocol deem the Protocol to be of the same echelon as the CMR. By applying the *lex posterior derogat legi priori* rule[62] they validate their application of the CMR as amended by the 1978 Protocol, since the Protocol is of more recent origin than the CMR itself[63].

Thus, the rules on how uniform may and how they may not be modified are not always complied with. Apparently those calling the shots in the area of carriage law are somewhat defiant at times, or perhaps they can be said to propagate a practical rather than a formal approach to treaty modification. All in all, this disregard for Article 41 VC has no great impact concerning the main issue to be discussed in this Chapter. The Article is only of minor relevance in relation to the incompatibilities between the carriage conventions which may surface in multimodal transport, such as have been reviewed above. Nevertheless, it does seem to illustrate the general attitude in the uniform carriage law arena regarding some of the rules of public international law ensconced in the Vienna Convention.

The potential conflicts between the transport conventions flowing from multimodal carriage are exempt from Article 41 VC's reach, since they do not concern conflicts between original treaties and their modification agreements, but rather involve clashes between independent instruments of carriage law[64].

9.2.2 Article 30 VC: successive treaties relating to the same subject matter

Up until here none of the discussed Articles of the Vienna Convention seem to be of any help in relation to the conflicts that may occur between the carriage conventions when the contract of carriage concerns multimodal transport. Either the Articles discussed were of no use as the incompatibility did not involve *jus cogens* (Article 53 and 64 VC), not all parties to the old treaty exchanged it for the new convention (Article 59 VC) or it is a rule that is meant to prevent the creation of incompatibilities rather than to solve any conflict situations after they have occurred (Articles 40 and 41 VC).

There is however one Article that does attempt to regulate the consequences of the encroachment of one treaty on the territory already covered by another even if there is no *jus cogens* involved. This Article also provides rules in case the incompatible regimes do not share the same group of members. When it comes to the summed up incompatibilities between the carriage conventions, Article 30 VC is the most relevant Article of the Vienna Convention[65]. The

[62] This adage is sometimes regarded as a 'general principle of law recognized by civilized nations', sometimes as a customary law principle of interpretation. UNILC, 'Fragmentation of International Law: difficulties arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, 58th session 2006, A/CN.4/L.682, p. 116. This rule is codified by Article 30(3) VC, but this provision cannot be applied to the SDR Protocol as the Protocol is not ratified by all the States party to the CMR.

[63] Rogov 2005, p. 187.

[64] Nonetheless, in air carriage law Article 41 VC may have a part to play as the various instruments of the Warsaw system except the actual Warsaw Convention are almost all modification agreements.

[65] Although Article 4 VC states that the Vienna Convention is non-retroactive, or in other words that it applies only to treaties which are concluded after the entry into force of the Vienna Convention, Article 30 does no more than repeat rules of general international law. Thus its scope of application is not restricted to instruments such as the new Rotterdam Rules, which will have entered into force after 27 January 1980 if they do so, but also – indirectly – covers the older carriage conventions such as the CMR. Cheng 2004, p. 858. The rules now maintained

reason for the relevance of this Article in relation to conflicts of carriage law is that this Article provides guidelines concerning the application of successive treaties relating to the same subject matter[66].

Nevertheless, several objections can be made against the application of Article 30 VC to conflicts between the carriage conventions. The first is that the carriage conventions may not all concern the same subject matter. Since according to its title Article 30 VC only provides rules on precedence in relation to the application of successive treaties relating to the same subject matter this point of view causes conflicts between carriage conventions dealing with carriage by different modes to be excluded from the scope of Article 30 VC. Whether the carriage conventions contain the same subject matter or not is debatable however. Although it has been commented that the terms 'the same subject matter' should be interpreted strictly[67], the difference between the subject matters of the carriage conventions seems rather small, perhaps even non existent. The differences between the subjects road and rail carriage for instance, are not nearly as large for instance as those between the subjects human rights and the geographical demarcations of States. Basically the carriage conventions all regulate international carriage contracts and mainly feature rules on carrier liability. Moreover, they all have the same purpose, which is to standardize the conditions governing contracts of carriage, particularly with respect to the carrier's liability. It is therefore arguable that their subject matters are on the whole quite similar. Admittedly, this basis for application of Article 30 VC is somewhat tenuous[68].

In addition, the application of specifically Article 30(3) and (4) VC presents some practical problems. Since the scopes of the carriage law conventions attach to the starting- and end-points of the transports and are not influenced by the nationality of the parties contracting for carriage, the application of the Vienna Convention can lead to complicated and sometimes rather puzzling scenarios. The more so since the Convention generally grants rights to or offers rules pertaining to the States that have ratified the Conventions in question and not to the private parties involved in the claim. These difficulties will be expounded upon later on in this Section.

Despite these difficulties however application of Article 30 of the Vienna Convention seems to offer at least a modicum of uniformity. The only alternative is to let courts of law decide each case involving conflict strictly based on the circumstances of the case and the interests involved. This may lead to fair judgements, but it is not likely to grant legal certainty in the form of predictability. If these objections were to lead to the non-application of Article 30 VC the application of the Article by analogy may still be an option however. Since the Article codifies customary law such as the *lex posterior derogat legi priori* principle this might not meet with as many objections[69].

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in Article 30 VC largely codify the approaches of general law that existed anterior to the Convention and which continue to provide the rationale and the perspective for their application. UNILC A/CN.4/L.682, p. 118.

[66] A strict interpretation of the words 'the same subject matter' would leave conflicts arising from conventions with different *foci* but overlapping issue areas to fend for themselves. Borgen 2005, p. 603.

[67] Aust 2000, p. 183. Regarding this issue Sir Humphrey Waldock, Expert Consultant of the International Law Commission stated that: "*…concerning the words 'relating to the same subject-matter',* [*I agree*] *that those words should not be held to cover cases where a general treaty impinges indirectly on the content of a particular provision of an earlier treaty; in such cases, the question involves such principles as* generalia specialibus non derogant." United Nations Conference on the Law of Treaties 1969, p. 253.

[68] One could of course reason that since there is apparently a conflict possible between the treaties they at least concern the same subject matter in this area. Although it would enlarge the scope of application of Article 30 VC considerably – when interpreted thus all possible conflicts between treaties are covered by the Article – it also means cutting up the treaty into convenient pieces which seems contrary to the header of the Article.

[69] The *lex posterior* principle considers the evolving intent of the parties and favours the most recent treaty by the same parties. It has been argued that there are five requirements for the *lex posterior* principle to work: (1) the later treaty has the same subject as the earlier treaty; (2) the later treaty covers the same parties as the earlier treaty; (3) the later treaty is on the same level as or a higher level than the earlier treaty; (4) the scope of the later treaty is of

Article 30(1) VC contains a reference to Article 103 of the Charter of the United Nations. This Charter Article determines 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. The drafters of the Vienna Convention deemed this rule to be of such pre-eminence that they expressly recognized the overriding character of Article 103 with respect to any other treaty obligations taken on by the United Nations members[70].

Whereas Article 30(1) VC is an introductory note concerning the frame of reference in which the Article operates, the provisions that form the core of the Article can be found in Article 30(2) through (4) VC. It is these provisions that provide the guidelines to be used in case of actual conflict. Article 30(2) VC recognizes the right of treaty makers to determine its relation with other treaties by means of a conflict of conventions or conflict resolving clause. Thus, like Article 40 VC provides drafters with the possibility to regulate the options for amendment of a convention themselves, Article 30 VC grants those designing a new convention the opportunity to regulate matters of precedence. This is in line with the concept that international law is consensual in nature; States are only bound by what they freely commit themselves to, because conventions are no more than bi- or multilateral contracts between States instead of between private parties. Some of the uniform carriage law regimes drafted over the years feature explicit examples of the mentioned conflict of conventions clauses, although not all of these regimes have actually entered into force. The MT Convention for instance, contains not one but two conflict resolving clauses. And of course the – forthcoming – Rotterdam Rules boast the rather detailed conflict provision Article 82 RR. As these clauses potentially have a resounding impact on the carriage law rules applicable to 'multimodal' claims, especially the last one mentioned, they will be more thoroughly discussed in the ensuing Section.

After Article 30(2) VC with its – enlarged international – freedom of contract rule granting the contracting parties the option to regulate matters of precedence as they see fit, Article 30(3) and (4) VC can almost be said to contain residuary rules[71]. These last mentioned paragraphs are used only if the treaty does not regulate the priority issue itself. Article 30(3) and (4) VC contain a codification of what are deemed general principles or customary law concerning priority[72]. By means of a subdivision into two paragraphs instead of one the Vienna Convention distinguishes between treaties where all the parties to the earlier treaty are also parties to the later treaties relating to the same subject matter, and those where only some of the parties to the earlier treaty are parties to the later treaty relating to the same subject matter. The former category is regulated in Article 30(3) VC which codifies the *lex posterior derogat legi*

the same degree of generality as the earlier treaty; and (5) the legal effect or effects of the later treaty are different from the earlier. Borgen 2005, p. 587-588. The result of these five requirements is that for instance in case both treaties do not have the same members the principle cannot be applied. Under these circumstances analogous application of Article 30 VC may offer a solution.

[70] The precise effect of the provision in the relations between members of the United Nations and non-members is not entirely clear however. Draft Articles on the Law of Treaties 1967, p. 342.

[71] Since he regards Article 30 VC as not entirely satisfactory Sinclair counsels to interpret its rules as being residuary, thus leaving negotiators of treaties relatively free to determine for themselves the relationship between the text which they are seeking to draw up and previous or future treaties in the same field. Sinclair 1984, p. 98. Due to Article 30(2) VC this seems a reasonable and obvious interpretation. Vierdag even goes so far as to establish that all of the Vienna Convention's Articles except Articles 18,19c, 26, 34, 46 and 53 VC have such a residuary character. Vierdag 1995, p. 33.

[72] As a result these principles equally apply to conflicts involving international regimes which are older than the Vienna Convention in spite of the non-retroactivity of the Convention laid down in Article 4 VC.

priori[73] rule, as the paragraph determines that more recent law prevails over inconsistent earlier law:

> "*When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.*"[74]

It is easy to accept the pragmatic preference of today over yesterday conferred by the *lex posterior* rule. The newer rules are likely to reflect current circumstances and the present will of the relevant actors more concretely. Moreover, contracting parties are generally free to modify an agreement or treaty by a later one.

Nevertheless, indiscriminate application of the *lex posterior* rule would lead to unwarranted results. Notwithstanding any issue of *jus cogens*, it may often seem unacceptable to allow later commitments to override earlier ones, especially if those later commitments are to different parties – which is generally the case in international carriage law – or have different beneficiaries than the earlier commitments[75]. It is for these situations that Article 30 VC contains paragraph 4. This paragraph determines precedence in conflict situations where not all parties to the earlier convention are party to the later regime. Pertaining to the above-mentioned conflicts between international carriage law regimes this seems the most likely scenario. It is safe to assume that the current transport conventions do not have exactly the same pool of members, nor are any future transport conventions likely to attract the exact same array of adherents as one of the existing transport treaties. Not even the Montreal Convention on air carriage, which was intended to replace the Warsaw regime with all of its protocols, has gathered all of the members of its air carriage law predecessor[76], nor has the latest COTIF revision based on the 1999 Vilnius Protocol been able to entice all members of the 1980 COTIF[77].

Article 30(4) VC determines that when the parties to the later treaty do not include all the parties to the earlier one that:

> "*(a) as between States parties to both treaties the same rule applies as in paragraph 3;*
> *(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.*"

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[73] In relation to the precedence issues resulting from the new Rotterdam Rules Delebecque propagated the application of the *lex posterior* motto by saying: "*It must be noted, in passing, that there is no question of abrogating these conventions. It has simply, but very accurately, been stated that in the relations between Contracting States the provisions of the new instrument will prevail over those of an earlier treaty*". Delebecque 2003, p. 228.

[74] "*The paragraph has to be read in conjunction with Article 56 which provides that in such cases the earlier treaty is to be considered as terminated if (a) it appears from the treaty or is otherwise established that the parties intended that the matter should thenceforth be governed by the later treaty, or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time. The second paragraph of that Article provides, however, that the treaty is only to be considered as suspended if it appears from the treaty or is otherwise established that such was the intention. The present Article applies only when both treaties are in force and in operation: in other words, when the termination or suspension of the operation of the treaty has not occurred under Article 56.*" ILC Yearbook 1966, vol. II. Of course, in the 1966 draft version of the Vienna Convention the content of what is now Article 59 was contained by Article 56.

[75] UNILC, 'Fragmentation of International Law: difficulties arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, 58th session 2006, A/CN.4/L.682, p. 117.

[76] Up to date information on the members of the air carriage regimes can be found at www.icao.int.

[77] 'Legal consequences of the entry into force of COTIF 1999 if not all States have ratified the Vilnius Protocol in due time', 7th General Assembly of the OTIF on 24 November 2005, AG 7/9 – Annex 2, p. 2.

Normally speaking the States involved would be the State where the claimant has residence and the State where the addressed party has residence, which can of course be the same State. In carriage law this is different. Pertaining to international carriage the States meant by Article 30 are determined by certain characteristics of the contract rather than by the characteristics of the contracting parties. In order to shed some light on the how and why of this special treatment of international carriage a parallel may be drawn between Article 30(4) VC and Article 30(4) MTC. Like Article 30(4) VC, Article 30(4) MTC mentions the term States in relation to incompatible treaty provisions[78]. Article 30(4) MT Convention, which contains 'conflict of conventions' provisions, determines that for States party to certain regimes of uniform carriage law the multimodal convention will not apply to specific types of carriage:

> "*Carriage of goods such as carriage of goods in accordance with the Geneva Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road in Article 2, or the Berne Convention of 7 February 1970 concerning the Carriage of Goods by Rail, Article 2, shall not for States Parties to Conventions governing such carriage be considered as international multimodal transport within the meaning of Article 1(1) of this Convention, in so far as such States are bound to apply the provisions of such Conventions to such carriage of goods.*"

It is regarding the use of the phrase "for States" in this provision that Diamond puts his finger on the sore spot. He identifies a troublesome predicament inherent to the provision's attachment to certain 'States' that is also evident in Article 30(4) VC:

> "*In my view these conditions present some difficulties of construction. Presumab1y it is not intended to restrict the exemption under Article 30 para. 4 to the single case where contracting States are themselves parties to the relevant contract of carriage. But, if not, what connection, if any, is required between one or both the private parties to the contract of carriage and one or more of the contracting States to the CMR or CIM Conventions? Does one ask where the private party has its 'principal place of business' (see Article 30 para. 2 dealing with a different type of exemption from the 1980 Convention). Or does one apply some broader test of residence? Or does one ignore all questions of citizenship, domicile or residence and look to see simply in what States the transit begins or ends?*"[79]

When it comes to international carriage law, the option that Diamond mentions last seems the most feasible solution. The reason for this is that the application of uniform carriage law depends first and foremost on the geographical elements of the agreed carriage[80]. The carriage conventions' scope of application rules generally attach to international contracts of carriage, whereby 'international carriage' literally means carriage which starts in one country and ends in another. In other words, in order for conventions such as the CMR, the COTIF-CIM, the Montreal Convention and so on to apply the place of taking over of the goods and the place designated for delivery are to be situated in two different States. Some carriage law treaties, such as the CMR and the COTIF-CIM even add *expressis verbis* that they attach to the place of taking over and delivery "*irrespective of the place of residence and the nationality of the parties*" or

[78] Although Article 30(2) MTC explicitly determines that the States mentioned in this provision are the States where the contracting parties have their principal place of business, this does not reflect on the meaning of the term States in Article 30(4) as Article 30(2) relates to matters of jurisdiction and arbitration, not to matters of carrier liability.

[79] Diamond 1980, p. C6-7.

[80] Cheng 2001, p. 169-170.

"*irrespective of the place of business and the nationality of the parties to the contract of carriage*"[81]. Thus these conventions will apply even if the contract of carriage is concluded between two nationals of a State or States not party to the conventions, and who are domiciled in a State or States not party to the conventions, as long as either the place of taking over or of delivery is located in a Contracting State. Practically speaking this means that for instance the CMR applies if the contracted road carriage is to start in Spain and end in Poland, even if the shipper and the (paper) carrier are both domiciled in Canada. And, since the nature of the contract is determined objectively by reference to the subject matter itself because it attaches to the carriage and not to the contracting parties, it stands to reason that the States mentioned in Article 30(4) of the Vienna Convention should also attach to the subject matter and not to the contracting parties when it comes to the carriage conventions. This point of view is supported by the manner in which is dealt with the question as to which air carriage regime applies. As Koning clarifies, the quandary whether the Montreal Convention or one of the versions of the Warsaw system applies to a certain contract of carriage is solved by determining the exact regimes to which the State where the place of departure is located and the State where the place of destination is situated are party[82]. Of these regimes the most recent regime that the States have in common is applied to the air carriage[83].

All things considered however, the procedure to be followed as a result of Article 30 VC, especially when applying Article 30(4), can be characterized as being quite out of the ordinary. This is perhaps most effectively shown by means of an example.

When for instance the carriage of a shipment of cigars is contracted for and the cigars are to be carried over the Bodensee by barge from Romanshorn in Switzerland to Friedrichshaven in Germany and from thereon by rail to Plzen in the Czech Republic, both the COTIF-CIM and the CMNI apply to any damage or loss which may occur during the barge carriage[84]. If such damage or loss is realized, application of Article 30(4) VC means that first the conventions held in common by Switzerland and Germany as place of taking over and place of delivery for the inland waterway stage should be determined. Since both these States are party to the CMNI and the COTIF-CIM, it is then necessary to establish which of these regimes can be deemed the later treaty. Between the COTIF-CIM and the CMNI, the CMNI is the later treaty but only just barely[85]. This means that in relation to the inland waterway stage the CMNI rules take precedence. That this is actually the regime meant to cover inland waterway carriage is more coincidence than intent however. The *lex posterior* rule would just as easily have caused the rail carriage regime to apply to the damage or loss that occurred during the barge carriage, all it would have taken was for the rail carriage treaty to have entered into force more recently than the inland waterway rules. This outcome seems somewhat random and does not seem to fit in well with the generally accepted 'network' view of multimodal contracts. If both the State where the carriage by barge started and where it ended are party to the CMNI, and it is clear that the

[81] Article 1(1) CMR and COTIF-CIM. According to Cheng conflicts in uniform carriage law primarily arise because the carriage systems apply irrespective of the nationality of the carrier, the consignor and the consignee. Cheng 2004, p. 858.

[82] Koning 2007, p. 75-77. See also Chapter 5, Section 5.1.1. In relation to the air carriage regimes both the mentioned States are required to be Member States as the air carriage regimes only apply if both the place of departure and the place of destination are situated in a Member State.

[83] As regards the relation between the Warsaw regime and the Montreal Convention this is determined by Article 55 MC which contains rules on priority.

[84] See Section 9.1.3 of this Chapter on the conflicts enabled by Article 1 COTIF-CIM.

[85] The question is whether the date of signature, the date of ratification or accession or the date the regime came into effect is decisive when determining which is the later treaty. On all three counts the CMNI was a little later in both Germany and Switzerland than the COTIF-CIM.

damage or loss occurred during the inland waterway carriage it would be more in line with the network idea to apply the rules of the CMNI, whether this is the most recent convention or not.

Thus, in this case things work out; the result is that any claim concerning damage to or loss of the cigars which occurs during the transport across the Bodensee is to be settled based on the rules of the CMNI. The unusual aspect of this result is that it is not based on the nature of the segment where the damage or loss occurred but merely on the fact that the CMNI was the newest regime of the two regimes involved, and even that only just. Obviously the idea that this should indeed be the applicable regime would carry more weight if the regimes had both been intended to regulate the exact same subject matter. The example shows that when applied thus, Article 30(4) VC provides somewhat arbitrary answers. This seems all the more so when one considers the fact that international carriage is in this day and age often commissioned or carried out by parties that are not connected to the place of taking over or the place of delivery at all. The shipper in question could just as easily have been Russian as Swiss, German or Czech, while the same more or less applies to the carrier. This is an oddity that all carriage regimes share however, and which is not caused or even aggravated by the application of the *lex posterior* rule of Article 30(4) VC.

Another singularity which crops up when applying Article 30(4) VC, or even when attempting to apply merely the *lex posterior* rule, is that it is in fact incompatible with some of the rather extensive scopes of application of the current carriage conventions. If for instance goods were to be carried by road from Syria to Turkey and from thereon by air to Panama, Article 30(4) VC would not even acknowledge that the CMR might have a claim on damage that occurred within the Turkish airport but before the goods are delivered into the hands of the airline that is to fly them to Canada. According to Article 1 CMR and Article 18 MC both road and air carriage conventions apply to such damage[86]. If Article 30(4) VC is applied however, the CMR is no longer thought relevant since Syria is not a Member State of the CMR. Based on Article 30(4)(b) VC, the Montreal Convention applies to damage or loss which occurred during the road carriage and not the CMR since "*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.*"

These examples show that although Article 30 VC can be applied in case of conflicts between carriage conventions which arise from multimodal transport, it is not the most ideal solution.

The uncomfortable relationship between Article 30 VC and uniform carriage law may be the reason why the drafters of some of the carriage conventions decided to take matters into their own hands. These attempts to solve matters, these 'conflict of conventions' provisions for which Article 30(2) VC leaves room and their rate of success will therefore be discussed next.

9.2.3 Conflict of convention provisions

As was mentioned above, the Vienna Convention allows the drafters of treaties the freedom to take a hand in establishing their treaties' place in the hierarchy in the event that its rules are incompatible with those of another convention. In carriage law a relatively large number of conventions contain provisions meant to solve questions of precedence. This phenomenon is most likely a consequence of the relatively long history of international transport law. Uniform

[86] See Section 9.1.2 of this Chapter on the conflicts enabled by Article 18 WC or MC.

carriage law dates back more than a hundred years, the first version of the COTIF-CIM, the CI[87], entered into force in 1893, and many of the carriage regimes have since then been overhauled or modified by means of protocols or some such instruments. Since these modification protocols and the overhauled, new versions of conventions can generally not help but lead to conflict with the originals if no measures are taken to prevent this, conflict of convention or conflict resolving provisions are sometimes entered into a new protocol or treaty. Unlike Article 30 VC, these conflict of conventions clauses may actually prevent conflicts instead of merely pointing out which of the conflicting regimes deserve precedence. They can do this because they are in fact veiled scope of application rules. It should be noted however that only those provisions causing the scope of application of the instrument they are in to narrow, so as to make room for the potentially conflicting treaty, can truly prevent conflict. Provisions in the newer instrument granting the more recent regime precedence over the older do not cause either one of the incompatible regimes to stop having effect, they are merely intended to provide guidelines as to which set of rules are to be applied in case of conflict just as Article 30 VC does.

Examples of conflict of convention provisions can be found in the Montreal Convention (Article 55), the MT Convention (Article 30), in the 'wet' carriage conventions (Article 27 CMNI, Article 6 Visby Protocol, Article 8 Hague Rules, Articles 8 and 9 Hague-Visby Rules, Article 25 Hamburg Rules and Articles 82, 83, 84 and 86 Rotterdam Rules) and in the COTIF-CIM (Article 2).

Not all of these provisions deal with their instrument's precedence in relation to other carriage law regimes. Article 2 COTIF-CIM for instance exists to clarify that rules of public law, such as prescriptions relating to the carriage of dangerous goods, customs and the protection of animals are to have priority over the rail carriage regime[88]. In addition there are rules that grant priority to provisions of international conventions or national laws governing liability for nuclear damage in the CMNI, the HVR, the Hamburg Rules and the Rotterdam Rules. Since these specific provisions do not touch upon the potential of conflict between conventions of carriage law they will not be considered in depth. For the same reason other provisions such as those allocating priority to national or international rules relating to the limitation of liability of owners of vessels in the water carriage regimes will also not be considered further.

9.2.3.1 Article 55 MC

In relation to conflicts of carriage law especially Article 55 MC, Article 82 RR, Article 30(2) and (4) MTC and the very similar Article 25(2) and (5) of the Hamburg Rules are of interest.

Article 55 of the Montreal Convention is specifically designed to clarify the hierarchy in international air carriage law[89]. It establishes the relation between the newer Montreal Convention and the various parts of the Warsaw system. In short, it establishes that the Montreal regime prevails over any of the Warsaw instruments as long as the carriage is international and the place of taking over and the place of delivery are both situated in States which are party to

[87] The 'Convention internationale sur le transport de marchandises par chemins de fer' was signed by 10 (European) States in 1890 and entered into force in 1893. The CI is, or was, the oldest convention in the field of transport law. Bruins-Slot 2006, p. 20.

[88] Article 2 COTIF-CIM, Article 27(2) CMNI, Article 9 HVR, Article 25(3) Hamburg Rules, Article 86 RR.

[89] Article 55 MC reads: "*This Convention shall prevail over any rules which apply to international carriage by air: 1. between States Parties to this Convention by virtue of those States commonly being Party to*" (a) the Warsaw Convention, (b) the Hague Protocol, (c) the Guadalajara Convention, (d) the Guatemala City Protocol, and (e) the Montreal Protocols; or "*2. within the territory of any single State Party to this Convention by virtue of that State being Party to one or more of the instruments referred to in sub-paragraphs (a) to (e) above.*"

the Montreal Convention. As a result Article 55 MC is rather limited as conflict of convention provisions go. If the conflict of carriage law concerns anything other than air carriage law, like a conflict between Montreal and CMR, the rules of the Vienna Convention on the law of treaties are still necessary to determine which of the rules has priority. And even if the conflict concerns only air carriage rules, the Article fails to have any effect if only one of the States involved is party to the Montreal Convention.

Furthermore, the Article is also quite ineffectual as a weapon against the fragmentation in air carriage law. Although the Montreal Convention was meant to replace the somewhat outdated and confusing Warsaw system, Article 55 MC does not help in this regard as it allows the various air carriage instruments to coexist alongside each other indefinitely. This inevitably results in a multiplicity of parallel legal regimes, confusion and most likely disputes[90].

9.2.3.2 Article 6 VP

The sixth Article of the Visby Protocol (VP) is not a very straightforward provision. It provides that:

> "*As between the Parties to this Protocol the Convention and the Protocol shall be read and interpreted together as one single instrument. A Party to this Protocol shall have no duty to apply the provisions of this Protocol to Bills of Lading issued in a State which is a Party to the Convention but which is not a Party to this Protocol.*"

The second sentence is the core of the Article and shows that the States party to the Hague Rules did not denounce them by signing the Visby Protocol. The results of applying Article 6 VP largely parallel the results generated by the application of Article 30(4)(b) VC[91]. The general idea seems to be that between States which both joined the Visby Protocol the Hague-Visby Rules are to apply and between States of which only one has signed the Protocol, but both are party to the Hague Rules, the Hague Rules are to apply. Thus, in conflict situations the Hague Rules take precedence[92]. This is as it should be aacording to public international law and conforms to Article 41 VC, since no modification agreement is allowed to frustrate the effective execution of the object and purpose of the original treaty as a whole.

Although both Article 55 MC and Article 6 VP deal with conflicts between instruments in carriage law, they do so from a strictly unimodal perspective. Article 55 MC only relates to uniform air carriage law and Article 6 VP is only meant to clarify precedence issues regarding uniform sea carriage regimes. In relation to the conflicts as listed in Section 9.1 of this Chapter they do not seem to be of much help.

Since there is no international convention for multimodal carriage it is hardly surprising that the conflict of conventions provisions that would affect the potential conflicts ensuing from multimodal transport are largely found in conventions that have not or have not yet entered into force. The relevant Articles in these non-operative regimes are Article 30 MTC and Article 82 RR. There is only one Article to be found in the carriage conventions currently in force which regulates matters of precedence in relation to conflicts of uniform carriage law which may result

[90] Cheng 2004, p. 857-858.

[91] If not all parties to the original instrument sign the modification agreement and the agreement does not provide rules on precedence itself Article 40(4) VC determines that Article 30(4) VC regulates these matters.

[92] Only if both States involved joined the Visby Protocol no conflict exists since in such a case both parties have agreed to amend the treaty so that the original Hague Rules no longer apply in this relation.

from multimodal carriage and that Article is Article 25 of the Hamburg Rules. This Article will be discussed next together with Article 30 MTC which shows many similarities to Article 25 Hamburg Rules. After this, Article 82 RR will be analyzed. Article 82 RR may not be in force at this time, but the Convention may come into effect in the future and thus it would be unwise to leave it out. Especially since this Article is expressly tailored to prevent conflicts generated by certain types of multimodal transport.

9.2.3.3 Articles 30 MTC and 25 Hamburg Rules

As regards Articles 30 MTC and 25 Hamburg Rules it should be noted that the Articles of the MT Convention and the Hamburg Rules seem very alike. This is unsurprising as they were meant to complement each other and were both drafted by the United Nations within the same time frame[93]. The second paragraph of both Articles contains a conflict provision which gives priority to incompatible mandatory rules on jurisdiction or arbitration in any other international or multilateral convention. Where the MT Convention does so regarding all such conventions the Hamburg Rules on the other hand only take a step back for conventions that were already in force in 1978. This means for example that the MT Convention would grant priority to both Article 31 CMR and Article 33 MC on jurisdiction in case of a conflict, whereas the Hamburg Rules would let Article 31 CMR prevail, but not Article 33 MC, as the air carriage convention did not yet exist in 1978[94]. Both conventions are similar in that they may grant precedence to incompatible rules on arbitration in other conventions, they do try to enforce the application of the MT Convention respectively the Hamburg Rules in case the dispute is in fact settled by means of arbitration. If the overlapping other convention also contains guidelines on the rules to be applied during arbitration conflicts will evidently still ensue.

Article 30(4) MTC and Article 25(5) Hamburg Rules deal with potential uniform transport law conflicts. The provision in the Hamburg Rules determines that nothing contained in the Hamburg Rules prevents a Contracting State from applying any other international convention which was already in force on 30 March 1980 and which applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than transport by sea. Any possible conflicts between the CMR through Article 2 CMR and the Hamburg Rules as mentioned above are resolved by this rule; the CMR rules are simply given right of way[95]. Unlike paragraph 2 of the same Article however, this provision ends with stating that this also applies to any subsequent revision or amendment of such an international convention. This may still not cause the Montreal Convention or the CMNI to gain any advantage from the provision, but at least it clarifies that the newer versions of the COTIF-CIM are covered by the rule. The result is that the potential for conflict between the Hamburg Rules and the COTIF-CIM through the extension of the CIM's scope of application to sea carriage in Article 1(3) COTIF-CIM as mentioned previously is in fact averted. When an international contract of carriage involves carriage by sea as a supplement to carriage by rail and both sets of rules apply the COTIF-CIM rules are given precedence by the Hamburg Rules.

[93] The Multimodal Transport Convention of 1980 was drawn up by the UNCTAD and the Hamburg Rules of 1978 were designed by the UNCITRAL. Driscoll & Larsen 1982, p. 194.

[94] A combination of air and sea carriage is rare however and although the Hamburg Rules as well as the air carriage regimes explicitly mention that they may apply to parts of a multimodal contract, they both strictly adhere to either carriage by sea or by air alone, the only exception being the relatively small extension of the air carriage regimes beyond air carriage in Article 18 WC/MC, which is unlikely to extend to sea carriage.

[95] For the potential conflict between the CMR and the Hamburg Rules see Section 9.1.1 of this Chapter on the conflicts enabled by Article 2 CMR.

Notwithstanding the overall similarity between the Hamburg Rules and the MT Convention, Article 30(4) MTC deals somewhat differently with potential carriage law conflicts than the Hamburg Rules do. Instead of aiming at a broad target by granting priority to any incompatible mandatory international convention in force in 1978 or amended thereafter, the provision in the MT Convention is more of a scope of application rule. In truth, Article 30(4) MTC is not a conflict of convention provision at all. Instead of granting precedence to certain incompatible rules it excludes certain specific types of multimodal carriage, such as the mode-on-mode carriage of Article 2 CMR, from the MT Convention's scope of application[96]. As clarifications go however, this rule, which was meant to demarcate the boundaries of the MT Convention's scope, is not completely satisfactory. It raises a myriad of questions, such as whether the Convention applies if a multimodal transport includes more than just road and roll-on, roll-off carriage, and if so, to what parts of the contract? If for example after the roll-on, roll-off and road carriage stages an international part of the carriage is performed by rail, does that make the carriage fall within the scope of the Convention? After all, such a contract would constitute "*carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country*" as is required for application by Article 1 MTC. If this is the case, does that mean that the MT Convention's rules are only to be applied to the rail stage as Article 30 MTC excludes Article 2 CMR carriage from the regime's scope, or does that mean that the Convention applies to the entire transport and Article 30 is to be ignored? Clearly, the mere mention of the exclusion of 'carriage in accordance with Article 2 CMR' leads to confusion. Of course, since the MT Convention never entered into force the predicament ensuing from Article 30(4) MTC will never actually rear its ugly head. It may however do so in the future if the new Rotterdam Rules enter into force. In this instrument the conflict of convention Article, Article 82, attempts to grant the CMR priority in case of carriage of goods by road to the extent that such a convention – read CMR – according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship.

9.2.3.4 Article 82, the conflict of convention Article in the Rotterdam Rules

Like Article 30(4) MTC, Article 82 RR is an Article that is meant to prevent the regime it is part of from colliding with the existing unimodal carriage regimes. Similar to Article 30 MTC, Article 82 RR aims to achieve this by specifically targeting certain types of carriage. Rather than excluding these types of carriage from the scope of application of the convention however, Article 82 RR 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:

> "*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:*

[96] The paragraph also excludes Article 2 COTIF-CIM carriage from the MT Convention's scope of application but Article 2 COTIF-CIM no longer has the same content it did during the drafting of the MT Convention. Currently the second Article of the COTIF-CIM merely gives precedence to certain rules of public law over the rules of the COTIF-CIM.

> *(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 RR grants precedence instead of taking it for itself, which is rather chic[97]. In this it follows the line set out by Article 26 RR which is in fact a mixture of a scope of application and a conflict of conventions provision. The conflict of conventions aspect of Article 26 RR is of course embodied by the fact that the provisions of the Rotterdam Rules do not prevail over those mandatory provisions of another international instrument that specifically provide for the carrier's liability, limitation of liability, or time for suit. Like Article 82 RR Article 26 RR causes the regime to take a back seat regarding certain matters.

Besides the parallel with Article 26 RR, a parallel with Article 25(5) Hamburg Rules can also be drawn, since Article 82 RR equally refers to conventions 'in force at the time this Convention enters into force' and likewise includes 'any future amendment to such conventions'. With the Article the drafters of the new instrument intended to accommodate the continued application of the "*normally applicable inland conventions for the carriage of goods*"[98], and to avoid conflicts such as the drafters thought possible. At some point during the deliberations a suggestion was made that, to remedy the perceived problems concerning potential conflicts the conflict of convention Article could be redrafted along the following lines:

> "*Nothing in this Convention prevents a contracting State from applying the provisions of any other international convention regarding the carriage of goods to the contract of carriage to the extent that such international convention according to its provision applies to the carriage of goods by different modes of transport.*" [99]

Had this solution been taken up very nearly all potential conflicts hitherto mentioned in relation to the new sea carriage convention would have vanished[100]. The only obstacle left would have been the question as to what is meant exactly by international conventions which according to their provisions apply to the carriage of goods by *different* modes of transport. In view of the history of Article 82 it is very likely that this phrasing was intended to restrict the scope of the

[97] 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.*" A.A. Yusuf, presentation for the First session of the Intergovernmental Meeting of Experts on the Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, UNESCO, 23 September 2004. Compared to clauses claiming priority the effects of conflict clauses providing for priority of other treaties are admitted with less difficulty since these target the treaty containing the clause. Only conflict clauses of this type are 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.*"

[98] 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.

[99] UNCITRAL A/CN.9/642, p. 52.

[100] It would, among other things, have made Article 26 superfluous.

provision to carriage conventions regulating carriage by other modes than sea, which is logical since the new instrument is meant to replace the existing sea carriage regimes. The words "*according to its provision applies to the carriage of goods by different modes of transport*" could be interpreted as meaning that only those rules of these conventions which relate to carriage other than carriage by sea are to gain priority. When interpreted thus, the Article would still fail to prevent the potential conflicts between the new sea carriage convention and the rules of the CMR and the COTIF-CIM which explicitly extend their scope of application to sea carriage under certain circumstances.

The above-mentioned solution to the perceived threat of conflict in relation to ferry traffic, roll-on, roll-off traffic to be precise was not taken up however[101]. To accommodate those States with concerns on this issue provision was made by adding the uniform rules relating to very specific types of carriage to the list of rules to be granted priority. A list which had until then been restricted to the Montreal and Warsaw Conventions[102]. The reason for the previous restriction to the air carriage conventions was the fact that these were considered unique in their intention to include multimodal transport to such an extent that a conflict between those conventions and the new sea carriage instrument was inevitable[103]. A strange assumption, as most of the above-mentioned possible conflict situations – some of which clearly result from a quite different view on the scope of application of conventions such as the CMR – had by that time already been brought to the attention of the drafters more than once[104].

After many a deliberation the result was Article 82 RR, an Article which causes other conventions to prevail over the Rotterdam Rules in four sharply outlined situations. The first, found in Article 82(a), concerns the situation in which one of the air carriage conventions applies to part or parts of the carriage contract. Due to this provision no conflict crops up if damage or loss occurs during the air stage of a multimodal transport including a sea stage, nor does one arise when the claim is covered by Article 18(4) MC in relation to loading, delivery or transhipment under such a contract.

The second situation in which the Rotterdam Rules take a back seat pertains to the ferry transport which various States had voiced concerns about and is described in paragraph (b). It is likely that the provision is meant to refer to the whole of a roll-on, roll-off carriage of goods as described by Article 2 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*"[105]. The result is that the provision can be read to mean that its scope is restricted to roll-on, roll-off carriage in the strict sense only. If interpreted thus, the provision excludes the operation of the Rotterdam Rules only for the period that the

[101] Neither was the French proposal approved which would have prevented many of the potential conflicts the final version of the instrument has to contend with in much the same way as the proposal found at UNCITRAL A/CN.9/642, p. 52. The French suggested the following text for the first paragraph of the conflict of convention Article: "*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*". UNCITRAL A/CN.9/WG.III/WP.89. Nevertheless, this proposal would not have solved the problems relating to the difference in interpretation of the scope of application of certain carriage conventions as the final version of the instrument does.

[102] The combination of sea and air carriage may be uncommon but it is not altogether non-existent; in the Far East apparently containers are sometimes unstuffed at the port and the goods then palletized for air movement. Glass 2006, p. 309. *Cf.* OLG Düsseldorf 1 July 1993, *TranspR* 1995, p. 77-80.

[103] UNCITRAL A/CN.9/621, p. 50.

[104] UNCITRAL A/CN.9/WG.III/WP.78, p. 4.

[105] Diamond 2008, p. 142-143.

goods are actually loaded on a vehicle while it is being carried by a ship, which is very unlikely to have been the intent of its drafters[106]. If the provision is taken literally, 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[107], are covered by the Rotterdam Rules in addition to the CMR, as the damage did not occur during the period of time when the 'maritime plus' convention grants all rules of the CMR precedence[108]. This seems an unwarranted consequence as it aggravates an already complex situation instead of alleviating it.

Article 82(c) seemingly suffers a similar defect. The provision is obviously intended to grant priority to the COTIF-CIM in its entirety in situations where it applies to carriage of goods by sea which supplements carriage by rail. As the provision fails to include the rail stage however, the peculiar situation ensues in which the 'maritime plus' instrument applies to the rail segments of the transport in addition to the COTIF-CIM, although the COTIF-CIM's rules prevail in relation to the carrier's liability, limitation of liability and time for suit, while during the sea segment only the rules of the COTIF-CIM apply.

Like the second and third rules under Article 82(b) and (c), the conflict of convention rule in Article 82(d) is also meant to prevent conflicts with a unimodal regime where it extends its scope of application beyond the mode of carriage that is its main focus. The fourth rule in Article 82 is meant to prevent conflicts between the Rotterdam Rules and the CMNI in situations where there is carriage of goods without transhipment both by inland waterways and sea to which the inland waterway convention applies. Unlike the provisions under Article 82(b) and (c) however, Article 82(d) is rather successful. The reason for this is that this provision includes the inland waterway segment of the carriage by referring to "*carriage of goods without trans-shipment both by inland waterways and sea*". The result is that the Rotterdam Rules do not apply to the sea carriage performed under such a contract, but neither do they apply to the inland waterway stage.

Although Article 82 RR prevents some of the considerable list of conflicts that may ensue from the application of the Rotterdam Rules, it is not even close to being an adequate remedy for all of the observed conflict potential. This inadequacy is only partly due to the existing schism concerning the interpretation of the scope of application of carriage conventions such as the CMR, the COTIF-CIM and the CMNI when it comes to road, rail or inland waterway carriage which is part of a multimodal contract. The other part of the cause for Article 82's shortfall is that it also fails to prevent the potential conflicts that are acknowledged by the drafters of the new instrument, such as the potential conflict regarding ferry transport, through the use of wording that is prone to misinterpretation, to say nothing of the fact that the issue of the volume contracts has failed to get any attention during the drafting of Article 82.

9.2.4 Do the Rotterdam Rules prevail?

Because of the failure of Articles 26 and 82 RR to prevent or regulate all of the conflicts the Rotterdam Rules may generate if they enter into force, it is necessary to find out whether it is the

[106] Hancock 2008, p. 493.

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

[108] Not even the rules on the carrier's liability, limitation of liability or time for suit of the CMR are granted precedence by means of the limited network system of the Rotterdam Rules, since the road stage in the U.K. alone does not concern a stage of the carriage in relation to which the provisions of the CMR '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 the carriage', as meant in Article 26 RR.

new 'maritime plus' regime that prevails in conflict situations or whether it is the older carriage convention.

It may be so that the drafters of the new regime have left open the possibilities for conflict on purpose. Obviously they do not want the Rotterdam Rules to give way excessively, as this would decrease the uniformity that is to be generated by the instrument. Perchance the opinion prevailed under the drafters that in practice, the remaining conflict situations are not likely to cause that much commotion, as the three main issues in carriage law are 'networked' into the new regime and the remaining issues are thought to play only a minor part in litigation. And even if these 'secondary issues' are the focus of a dispute, research into the matter may very well show that the Rotterdam Rules take precedence over the older carriage conventions, for instance based on the adage *lex posterior derogat legi priori*[109].

Given the ample list of conflicts that are generated by the extensive scope of application of the new Convention as established above, the inability of Articles 26 and 82 to smooth over all these wrinkles and the somewhat arbitrary nature of the *lex posterior* rule, it seems that the choice made by the drafters may not work out as neatly as they planned[110].

As was mentioned above the prevailing opinion in international law is that there is no hierarchy between treaties. This is unsurprising as the granting of precedence of one convention over another by a court of law is on the whole not something to be desired; it violates the principle of *pacta sunt servanda*, one of the pillars of contract law. If a State ratifies or accedes to the new sea carriage 'plus' regime however it is likely to be confronted with one of the situations listed above where it cannot fulfil both its obligations under the Rotterdam Rules and those stemming from one – or more – of the current non-sea carriage conventions it adheres to. As was discussed above, Article 30 VC, which determines the rights and obligations of States that were party to successive treaties relating to the same subject matter, supplies guidelines under those circumstances as to which treaty is to have priority. That is to say if we assume that Article 30 VC equally applies if the subject matter of the successive treaties overlaps only partly.

The most likely scenario is that the remaining conflict situations between the Rotterdam Rules and the other carriage conventions are covered by Article 30(4) VC. It should be safe to assume that not all parties to all the existing carriage conventions will immediately ratify the new sea carriage 'plus' regime. Article 30(4) 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[111]. Thus, the Rotterdam Rules will take precedence in situations where both States are party to them, and the conflicting rules of the elder carriage convention apply when only one of the States is party to the Rotterdam Rules 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. In such a case however one could say that no conflict actually exists. Which regime is applied then largely depends on which jurisdiction is chosen by the claimant. If the Forum State is party to the Rotterdam Rules it will

[109] Either on its own merits or as it is embedded in Article 30 VC.

[110] For an overview of the possible conflicts see Section 9.1.5 of this Chapter on the potential for future conflicts generated by the Rotterdam Rules and Section 9.2.3.4 of this Chapter on Article 82 RR which clarifies that not nearly all conflicts are prevented by this conflict of conventions provision.

[111] In carriage law the States mentioned are the States where the place of taking over of the goods is located and the State where the place of delivery is situated. See Section 9.2.2 of this Chapter on Article 30 VC.

apply the Rotterdam Rules and if it is party to another applicable convention and not to the Rotterdam Rules it will apply the other convention.

It is conceivable that the drafters of the sea carriage 'plus' system did not consider the conflicts generated by the Rotterdam Rules to be insurmountable when approached practically. 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[112].

The possibilities for conflict are there however, and it is by no means certain that they will cause no more than minor disputes. Contracting parties confronted with these incompatibilities are not likely to deem them inconsequential, 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 fulfil 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 perhaps than is displayed by the Rotterdam Rules.

Nonetheless, the largest stumbling block is one that concerns conflicts generated by multimodal transport in general, and is not reserved for conflicts stemming from the entry into force of the Rotterdam Rules alone. A rather substantial problem is embodied by the fact that the system of Article 30 VC – which can at this point be said to be used only for want of a better solution – is not exactly tailor made for the uniform carriage regimes in general and is at most a very uncomfortable fit when it comes to multimodal transport specifically.

For starters, the rules of Article 30 VC are not meant to attach to the starting point and end-point of a transport as was established earlier on; they are meant to attach to the contracting parties rather than to geographical aspects. This attaching to places rather than people is an eccentricity of uniform carriage law which, even without Article 30 VC, sometimes leads to situations in which the applicable regime and the domicile or residence of the parties have no discernable connection. The wording used by Article 30 VC, especially in paragraph 4, therefore results in the eerie situation in which one of the incompatible regimes is indicated as regime with priority 'between States'. These States mentioned are the States where the transport commences and the State where the transport finishes, so that between these 'States' a certain regime is given priority over another. The contracting parties on the other hand – who may have no connection to either of these States except in that they have contracted for the carriage of goods from one of these States to the other – and the regime which is to have priority regarding their contractual relation are not even mentioned. In addition to making the suitability of the Convention for application in uniform carriage law conflicts at the very least disputable, the result also shows that the Vienna Convention is indeed by nature an instrument that is oriented more towards public law than towards private law.

Be that as it may, the most pressing reason not to depend overmuch on the rules of the Vienna Convention when the conflict stems from multimodal transport specifically, is another sort of difficulty altogether. In relation to multimodal transport it is the arbitrary basis on which the *lex posterior* rule found in Article 30 VC operates that is the biggest impediment. In multimodal transport the network approach is generally applied when it comes to determining

[112] Haak 'Jurisdictieperikelen' *ETL* 2004. Of course, this has recently changed somewhat as there is now a case pending before the ECJ on this matter. ECJ (Case 533/08) reference for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands), lodged on 3 December 2008 *(TNT Express Nederland BV v AXA Versicherung AG).*

the applicable law. This means that it is commonly accepted that rail carriage law applies to the rail carriage stage of a multimodal transport, the road carriage stage is covered by road carriage law *et cetera*. For instance, if there is no international instrument such as the CMR that applies based on its scope of application provisions when damage occurs during the road carriage stage of a multimodal transport, then the rules for road carriage of the applicable national law are generally applied. When the *lex posterior* rule is applied however, this network approach is evaded completely. Under 'the old is set aside by the new' rule the mode of carriage used while the damage or loss occurred is no longer of consequence. By the example given in Section 9.2.2 of this Chapter on Article 30 VC involving the carriage of goods by road from Syria to Turkey and from thereon to Panama by air is shown that by applying the *lex posterior* rule, precedence may be given to the applicable air carriage law in relation to damage which occurs during the road stage of a multimodal transport even when the CMR also applies, simply because the Montreal Convention is the younger set of rules. Nevertheless, the fact that the damage or loss must occur within the airport area for this situation to arise hardly seems sufficient reason to apply air carriage rules rather than road carriage rules, especially since the damage or loss is localized in these situations. Moreover, the rules of the air carriage regime which expand its coverage beyond actual air carriage are in principle only meant to insure that uniform law applies in such cases. It seems most unlikely that the drafters of the air carriage rules would not have given precedence to the uniform rules of the CMR had they been acquainted with the possibility of the aforementioned conflict.

Hence, it seems fair to say that Article 30 VC is not the ideal solution for conflicts engendered by multimodal transport, or perhaps even any kind of transport.

9.3 A solution?

To succinctly reiterate all of the above, the problem is that when a conflict between two or more applicable regimes of uniform carriage law is established it becomes necessary to determine which of these regimes takes precedence and should be applied to the dispute. Although this precedence can be established by various means, the conclusion can be drawn here that only the conflict of convention provisions in some international treaties are feasible instruments to prevent uniform carriage law conflicts. The other options such as the adage *lex specialis derogat legi generali*, the *lex posterior derogat legi priori* rule or Article 30 VC which is designed to regulate the application of successive treaties relating to the same subject matter all fall short in one way or another.

On the other hand, the only alternative to the application of Article 30 VC or the generally accepted principles mentioned does not seem very desirable either. If there is no conflict of convention provision to grant precedence then it is up to the court that is addressed to weigh all interests involved and to decide which of the conventions is to be granted priority. As was said above this may result in fair decisions, but it is unlikely to generate predictability and the legal certainty that accompanies it.

One could argue that the analogous application of the part of Article 30 VC that entails the *lex posterior* rule therefore has at least some merit. At least then some predictability is ensured. Or perhaps it is more accurate to say that an expansion of the coverage of the *lex posterior* rule in its pure form seems the most efficacious manner to solve matters of precedence in carriage law conflicts, even if this means that some arbitrariness will enter the equation because the subject matters of the conventions are not completely identical and the parties to the later treaty do generally not include all parties to the earlier instrument. It may just be the lesser

evil to simply apply the most recent regime. After all, did not the drafters of the latest instrument have the opportunity to take into account all the benefits and pitfalls the previous regimes had to offer and thus have made the most educated choice as to the content of their regime? This seems somewhat weak as arguments go however, as conventions are generally showcases of political compromise rather than legal brilliance.

So what then? Specifically for cases relating to multimodal transport it would be best to apply a simulacrum of the network approach; to simply apply the set of unimodal transport rules that corresponds with the mode of transport used during the occurrence of the damage or loss. The result would be that if an accident occurred during the international rail stage of a *Huckepack* transport – which is mode-on-mode carriage where the road vehicle including cargo is carried by a train – the rules of the COTIF-CIM are to be applied and if the accident occurs during either of the preceding or subsequent domestic road stages the rules of the CMR are to be chosen even though both sets of rules claim coverage regarding both accidents[113]. Admittedly, this is not a solution when the damage or loss can be attributed to more than one stage of transport, if the stages concern different modes of transport that is, but for these cases no general guideline seems feasible as an evaluation of the exact circumstances of each individual case is necessary under those circumstances.

The question is how such a rule should be given shape. Its specific nature prevents it from fitting in a general convention such as the Vienna Convention. Neither is incorporating the rule into one or more of the unimodal carriage conventions a feasible option as not all – or indeed any – of them are likely to be revised in the future, and even if the rule were to be incorporated in some of them, it would not cover all possible instances in which it may be needed. This leaves the options of incorporation in a future multimodal transport regime or an existence as a rule of unwritten law. Although neither of these options is enforceable, one can always hope that at some point either of them will turn into a reality.

It seems advisable to take the stage of the transport to which the damage or loss can be attributed into account as there are specially tailored rules for each mode of transport and large amounts of detailed accompanying case law. The *lex posterior* rule can still play a part, even in this scenario, as it can be used to supplement the network approach to conflicts. When the loss remains unlocalized for instance, conflicts are not as likely to crop up, but if they do, the lesser evil would then be to apply the *lex posterior* rule. Even situations involving loss or damage which can be attributed to more than one stage of the transport may be served by the *lex posterior* method.

9.4 Conclusions

Since it is by nature a mix of various modes of carriage, multimodal carriage offers more possibilities for the overlap of applicable regimes than unimodal carriage does. These overlaps are mainly caused by the provisions of the carriage conventions that annex other modes of carriage when specific requirements have been met, and by the failure of the various carriage law regimes to attune their exact scopes of application to each other. Both these causes are in essence the same, but only the first is straightforward about it. Examples of the first cause are Article 2

[113] See Section 9.1.1 of this Chapter on conflicts enabled by Article 2 CMR and Section 9.1.3 on conflicts enabled by Article 1 COTIF-CIM. As can be read in Section 9.1.1 the CMR does claim coverage through Article 2 CMR when damage occurs during the *Huckepack* stage but it grants precedence to the COTIF-CIM in relation to liability issues. This does not mean that the possibility of conflicts is thus resolved; there are issues besides liability to which the CMR and the COTIF-CIM may both apply and which are regulated rather differently in both regimes.

CMR and Article 1(3) and (4) COTIF-CIM. These provisions clearly mention that they extend the regime they are part of beyond the mode of carriage that is its main target under certain circumstances. The second cause for conflict, the discordant scope of application of the various carriage conventions, is somewhat less obvious, yet it is in fact identical to the first in that it also enlarges the coverage of the convention it is part of beyond the mode of carriage that is its principal objective. Article 18(4) of the Montreal Convention is an example of such a covert enlargement of the scope of application. Read *a contrario* the first sentence of this paragraph enlarges the scope of the air carriage regime to all other types of carriage as long as said carriage occurs within the confines of the airport[114].

If a claim is covered by more than one carriage regime because these regimes overlap it is safe to assume that a conflict has arisen since the carriage conventions all mainly regulate the liability of the carrier and all set a limit to the amount of compensation he is liable for. The problem is that the amounts at which these limits are set differ greatly, and where the amount does not differ other aspects vary such as for instance the circumstances under which the carrier loses the right to invoke the limit set by the regime, the rules on jurisdiction or the time limit set on actions under the regime. To resolve these conflicts and to prevent them, various options have been discussed in this Chapter. For the purpose of preventing or solving conflict situations some instruments have embedded conflict of convention provisions as guidelines. The general consensus in international law is that these provisions do indeed establish whether the regime they are part of has priority or rather grants it to the conflicting regime. Due to the fact that conventions are agreements and the conflicting 'agreements' have generally not been concluded by the exact same parties, only the provisions granting the other regime precedence prevent conflict. Whenever the provision causes the instrument it is in to gain priority, the conflict with the other regime will remain.

This is also the case when international law principles such as *lex specialis derogat legi generali* and *lex posterior derogat legi priori* are applied to determine the hierarchy between the overlapping regimes. Furthermore, the *lex specialis* principle is not really suited for establishing precedence between the carriage conventions as it is rather difficult to determine which of the regimes is the special one and which the general regime. The *lex posterior* rule offers a little more guidance, even if it is not always easy to determine which of the regimes is the elder and which the younger. This rule is also not without its drawbacks however as it can only be applied without the air of arbitrariness if the regimes relate to the same subject matter and are concluded by the same parties. Especially this last requirement is unlikely to be met in relation to overlapping carriage conventions[115].

The last existing means mentioned that may be used to determine precedence when a conflict occurs between carriage conventions is Article 30 of the Vienna Convention. This Article codifies the legitimacy of the above-mentioned conflict of conventions provisions and provides some rules on priority in case such a provision is lacking in either of the regimes. The Article contains a codification of the *lex posterior* rule in its intended form, and an analogous version of said old adage to be applied if the parties to the later treaty do not include all the parties to the earlier one. Unfortunately, even this means of determining precedence between

[114] Article 18(4) first sentence of the Montreal Convention states: "*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.*" The second sentence of the paragraph on the other hand is an example of the first mentioned cause for overlap of carriage regimes.

[115] If the requirements for the legitimate application of the *lex posterior* rule have been met it can be said that no conflict remains after its application as the newer regime can be deemed to have replaced the older regime which in fact has been terminated. This generally accepted concept has been codified by the Vienna Convention on the Law of Treaties in Article 59.

conflicting carriage conventions has rather serious shortcomings, especially the application of the provision found in Article 30(4) VC. For one, Article 30 VC is meant for conflicts between regimes relating to the same subject matter. Whether the carriage conventions can be considered to contain the same subject matter is debatable[116]. For another, the Vienna Convention regime is one of public international law and is meant to regulate the relationships between States. As the carriage conventions are systems of private law, and since they do not even attach to the nationality or domicile of the actors involved, the application of Article 30 does not necessarily lead to obvious results. The example given concerning this issue in the preceding Section on Article 30 VC attests to the often rather tenuous connection between the aspects the procedure of Article 30(4) attaches to and the dispute or the parties involved[117].

If none of these solutions is able to disentangle the knot created by the overlap of the various carriage conventions, there is currently only the alternative of letting courts of law decide matters of precedence on a case by case basis. Although this is likely to lead to decisions which meet everyone's sense of justice as all interests involved are carefully weighed in each individual case, it would also mean unpredictability of the outcome, which is generally deemed undesirable in trade law. Moreover, such proceedings are likely to take more time and effort on all sides, which makes them more costly, which is also regarded as rather objectionable.

As a possible solution to this quandary the application of a network approach was suggested regarding conflicts that are engendered by multimodal transport. It would fit in rather well with the generally accepted view of multimodal carriage contracts as mixed contracts as contracts which can, when it comes to the applicable law, be dissected into different transport stages based on the mode of transport used. The network approach would pick the uniform carriage regime for application that matches the stage of transport to which the damage or loss can be attributed, and not any other uniform carriage convention that also applies, simply because it has extended its scope of application beyond the mode of transport that is its main focus. The form in which such a network rule is to be moulded is somewhat problematic however, as the regimes of uniform carriage law are in general fairly rigid; revisions are unlikely to occur in the near future. And of course a new multimodal regime almost seems an unattainable ideal by now. In cases where a matching regime cannot be found the *lex posterior* rule may perhaps be able to serve as a supplement to offer at least some semblance of predictability.

[116] See Section 9.2.2 of this Chapter on Article 30 VC.
[117] See the last part of Section 9.2.2 of this Chapter on Article 30 VC.

10 DETERMINATION OF THE APPLICABLE LAW: NATIONAL REGIMES

> "*The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court or lawyer is quite lost when engulfed and entangled in it.*"[1]

To gain a complete picture of the law applicable to international multimodal carriage contracts the preceding Chapters dealing with the international transport law conventions do not suffice. Although the carriage conventions are a good place to start, since they take precedence over any national rules of law or contractual provisions that may apply, and they determine their scope of application autonomously, the international carriage regimes do not cover all carriage contracts, or even all aspects of the contracts they do cover[2].

Although contracts for the international carriage of goods by air are generally covered by the Warsaw or Montreal Conventions for instance, these conventions do not regulate all aspects of such contracts. The method of calculating the period of limitation under the Warsaw Convention for example is not determined by the Convention itself, but is to be determined by the law of the court seized of the case, the *lex fori*[3]. This rule caused a claim regarding damage to a shipment of mobile telephones which were carried from Frankfurt in Germany to Johannesburg in South Africa by road and air to be admissible, even though the action was brought after more than two years had passed[4]. During the proceedings the defendant was prevented from placing full reliance on the rule in Article 29(1) WC – which determines that the right to damages is extinguished if an action is not brought within two years – by the German domestic law principle of good faith. The reason for this additional application of German national law was that the parties had reached a legally binding agreement regarding the extension of the period of two years mentioned in Article 29 WC.

It should be noted here that there is always a national regime applicable to the contract, even to the contracts that are governed by one of the uniform carriage regimes[5]. The above-mentioned example of the OLG Frankfurt shows that even when a carriage convention applies, the rules of this national law may be needed to complement the uniform law in some matters[6]. In

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[1] Prosser 1953, p. 971.

[2] Czerwenka 2001, p. 278.

[3] Article 29(2) WC HP 1955. If the rules of the CMNI had been at issue instead of those of the Warsaw Convention the matter would not have caused as much difficulty as it did. In Article 24(3) CMNI the inland waterway Convention specifically states that the suspension and interruption of the limitation period are governed by the law of the State applicable to the contract of carriage. This is not necessarily the same law as the *lex fori* however. Nevertheless, based on Article 32(3) CMR the *lex fori* does govern the extension of the period of limitation and the fresh accrual of rights of action in international road carriage.

[4] OLG Frankfurt/Main 15 September 1999, *TranspR* 2000, p. 183-184. Another example of legal proceedings in which the national law applicable to the contract was applied to complement uniform carriage law is Rb Haarlem 6 July 1999, *S&S* 2000, 88. In this judgement Article 8:1722 BW was applied to complement the CMR and the Warsaw Convention as neither of these regimes contained a provision on prescription in cases concerning multimodal carriage. Article 8:1722 BW specifically regulates matters of prescription in relation to multimodal carriage. Whether the *Rechtbank* was correct in perceiving this as a gap in these conventions is discussed at the end of Section 10.1.2 of this Chapter on gaps in convention law.

[5] This is illustrated by provisions such as Article 24 CMNI which refers to 'the law of the State applicable to the contract of carriage' and Article 48(5) COTIF-CIM which states that 'the suspension and interruption of periods of limitation shall be governed by national law'. See also Ferrari *ICLQ* 2002, p. 694.

[6] It is not always necessary however. A judgement in which the national law applicable to the contract may have been determined in vain is OLG Frankfurt 23 December 1992, *TranspR* 1993, p. 103-105, which involved strictly

instances where the contract of carriage is not covered by an international instrument of carriage law however, determining the applicable domestic regime becomes an absolute necessity. Many motives for the attribution of a private law system or systems to a multimodal carriage contract can be imagined. The most basic of them is to enable the parties to acquaint themselves with the rights and obligations stemming from the international contract they have entered into, and to enable them to enforce these rights. Contracts are after all incapable of existing in a legal vacuum. As Diplock LJ put it in *Amin Rasheed Shipping Corp v Kuwait Insurance Co*:

> "*Contracts are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words and prescribes the remedies enforceable in a court of justice for failure to perform any of those obligations…*".[7]

Thus, when there is no applicable international convention, a judge is automatically forced to seek farther a field; under those circumstances he can no longer avoid determining the applicable national legal regime.

That the international carriage conventions are meant to regulate only certain aspects of carriage contracts, most specifically the liability of the carrier, should not come as a surprise after the previous Chapters. After all, the fact that all of the carriage conventions have a 'scope of application' indicates that their sphere of influence is not unlimited. In addition, the names of some of the conventions are somewhat of a give-away. For one, the full name of the Montreal Convention is 'Convention for the Unification of *Certain Rules* for International Carriage by Air', and for another the Hague Rules are in fact named the 'International Convention for the Unification of *Certain Rules of Law* relating to Bills of Lading' (emphasis added). By describing the rules of the instruments as merely 'certain rules' regarding a certain issue and not as 'all rules' the denomination of the regimes clarify that they are not meant to be comprehensive. The CMNI illustrates this same fact, not in its name but rather by means of Article 29 CMNI[8]. This Article states that in cases not provided for by the Convention, the contract of carriage is governed by the law of the State agreed upon by the parties. Or, in the absence of such an agreement, the law of the State with which the contract of carriage is most closely connected is to be applied.

Clearly, the uniform carriage conventions are not comprehensive, but then again, logic and political reality dictate that no legislative effort can ever hope to be. Hill once commented that no matter how well a convention is drafted, it can only cover limited aspects of freight movement, and at some point it will be necessary to refer to national laws to determine the rights and liabilities of the parties[9]. If one were to look at the amount of provisions in for instance the Hague-Visby Rules, and compare this to the amount found in most national legislation regarding

unimodal carriage by air of carpets from Kathmandu in Nepal to Frankfurt in Germany. In this case the OLG determined which national regime applied to the contract even though there was no doubt that the Warsaw Convention applied to the claim. Mankowski criticizes this inefficiency of the procedure followed by the OLG. He deems it a waste of time to establish the applicable national law when the dispute is covered by an international convention as these take precedence over incompatible rules of domestic law. Mankowski 1993, p. 213. The issue of efficiency in this context is also discussed in Chapter 3, Section 3.3 on the path to the applicable law.

[7] *Amin Rasheed Shipping Corp v Kuwait Insurance Co*, [1984] 1 *AC* 50, [1983] 2 *All ER* 884, [1983] 3 *WLR* 241, [1983] 2 *Lloyd's Rep.* 365 *(Al Wahab)*.

[8] Mankowski 2008, p. 178-179.

[9] Hill 1975, p. 617-618. This is confirmed by for instance Hof Den Haag 22 March 2005*, S&S* 2005, 113 under 8.7(i) "…*the Hague Visby Rules (HVR), since they do not regulate consequential damage*...". Most of the conventions limit themselves to the core issues of carriage law, such as the liability of the carrier.

the carriage of goods by sea, one would see that the national regimes are far more elaborate[10]. In addition, domestic law regimes generally also include elaborate regulations on contracts in general and many other subjects which may be of relevance. The international carriage conventions on the other hand are limited to a certain set of subjects and as such are unable to regulate every aspect of the contractual relationship between the parties involved. Since all-encompassing legislation is impossible and most likely not even something to be aspired to, especially not on an international level[11], there will always be subjects that fall outside the scopes of application of international instruments.

The result of the restriction of the carriage conventions to certain issues is that disputes relating to the (multimodal) carriage of goods that are not regulated by the international carriage regimes occur on a regular basis. According to Basedow[12], courts traditionally filled the lacunas by having recourse to national law systems, being either the *lex fori*, or more correctly the *lex causae*[13]. Currently it is settled law that procedural matters are governed by the law of the place where the action is brought, the *lex fori*, whereas matters of substance are governed by the proper law of the transaction, the *lex causae*. When it comes to the multimodal contract of carriage, or any other international contract for that matter, the *lex causae* is found by making use of the rules of private international law of the *lex fori*[14]. For courts in the European Union – excepting Denmark – these are found in the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, or in short the Rome I Regulation[15]. The concept behind both the CMNI and the Rome I Regulation is that this is the national law with which the contract of carriage is most closely connected. Since Article 2 establishes that the Rome I Regulation has a 'universal scope of application' this means that the law that is deemed most closely connected to the contract is not limited to the domestic regimes of EU States. The conflict of law rules of the Rome I Regulation can just as easily lead to the applicability of non-EU regimes[16]. In addition, the Rome I Regulation is universal in that it applies not only to the nationals of Member States and to persons domiciled or resident within the European Community, but also to the nationals of third States and to persons domiciled or resident therein[17].

In the following first the situations in which no uniform carriage law applies are discussed in Section 10.1 of this Chapter. Besides situations of unlocalized loss, the gaps in the

[10] See for instance the Dutch regulations concerning carriage by sea in Articles 8:370-598 BW and the German regulations in §§ 556-663b HGB.

[11] An argument for not harmonizing all rules is that regional or national rules may sometimes be better suited to solve regional or national issues and that local legislation may sometimes be better equipped to comply with local preferences. Van den Berg & Visscher 2006, p. 18.

[12] Basedow 'Globalization' 2000, p. 7.

[13] See for instance *Hamlyn & Co. Appellants v Talisker Distillery and Others Respondents*, [1894] *AC* 202, in which Hamlyn & Co. agreed to purchase all grains made by the Kemp & Co and to supply and erect at the Talisker Distillery in Scotland a patent grain-drying machine. Concerning this case the English House of Lords determined that the agreement between the Scottish and English contractants was to be governed by Scottish law as the contract was to be performed in Scotland. See also Thume 1995, p. 1-2.

[14] Wagner 2009, p. 105.

[15] The Rome Convention – the predecessor the Rome I Regulation was modelled after – was created "*to prevent this 'forum shopping', increase legal certainty, and anticipate more easily the law which will be applied*" thereto its drafters thought "*it would be advisable for the rules of conflict to be unified in fields of particular economic importance so that the same law is applied irrespective of the State in which the decision is given*". Words of Mr T. Vogelaar, Director-General for the Internal Market and Approximation of Legislation at the Commission, in his opening address as chairman of the meeting of government experts on 26 to 28 February 1969. An exact quote of these words can be found in Giuliano & Lagarde 1980, introduction under 2. The Rome Convention is still relevant for Danish courts as Denmark is not bound by the Rome I Regulation.

[16] The same applied pertaining to the Rome Convention. Van Beelen 1996, p. 48.

[17] Giuliano & Lagarde 1980, introduction under 8.

carriage conventions will be tackled and, consequently, the trend of filling these gaps by extrapolating from the uniform regime instead of by applying rules of domestic law will be addressed. The matter of exclusivity will also be discussed in this part of the Chapter. Secondly, the influence of the rules of legal procedure in this area is considered. In Section 10.2 of this Chapter the circumstances under which a court of law will consider the applicability of a foreign law regime are examined.

The third topic will be the procedure to be followed when the applicable national regime has to be determined. The relevant rules of international private law of the Rome I Regulation, and its predecessor the Rome Convention of 1980, will be discussed and the specific questions multimodal carriage gives rise to in this context will be given due attention in Section 10.3 of this Chapter[18].

Since there are only two European domestic regimes of multimodal carriage law – one in Germany and one in The Netherlands – the last part of this Chapter, Section 10.4, contains an overview of these regimes.

10.1 Situations to which no applicable uniform regime applies

Besides the complementing part national law played in the mobile phones claim detailed above, there are various other situations thinkable in which a court is compelled to determine which national law regime applies in multimodal transport disputes. The most obvious one of these situations is the situation in which no international conventions apply directly to the carriage contract, because the disputed matter falls outside of the scope of application of the carriage conventions altogether. This generally occurs when the part where the damage or loss occurs is a domestic transport stage which is not covered by any of the scope-extensions in the uniform carriage regimes or when the loss of or the damage to the goods cannot be localized[19]. The carriage of microprocessors by air and road from Hoofddorp in The Netherlands, to Bedford and Crewe in the United Kingdom, to Dublin in Ireland and twice to Cornaredo in Italy by TNT in 2000 resulted in such unlocalized loss[20]. Because it was unclear where the losses had occurred – employees of TNT were suspected to have stolen the cargo – the *Rechtbank* Rotterdam applied Article 4(4) of the Rome Convention and found Dutch law to be applicable[21]. Based on the multimodal carriage rules of the Dutch Civil Code, the rules of the CMR were applied indirectly. Reason for this was that the CMR, of those regimes that applied to the stages of the transport where the loss might have been caused, was the regime from which the highest amount of compensation resulted[22].

[18] In Section 10.3 of this Chapter it will be pointed out that although the Rome Convention was replaced by the Rome I Regulation as of 17 December 2009, the general similarity when it concerns contracts for the carriage of goods between the Convention and the Regulation causes much of the existing academic writing and case law on the Convention to be equally relevant with regard to the Regulation.

[19] For the unlocalized loss situations that are covered by uniform law see Section. 10.1.1 of this Chapter on unlocalized loss. The provisions extending the scope of application to domestic carriage are Article 2 CMR, Article 1(3) and (4) COTIF-CIM, Article 18 WC and MC and Article 2 CMNI. For more information on these extensions see Chapters 4 through 8. Normally domestic carriage is not covered by uniform carriage law, see Rb Haarlem 15 October 2008, *LJN* BG1240.

[20] Rb Rotterdam 3 May 2006, *S&S* 2007, 114.

[21] Currently the *Rechtbank* would have applied Article 5(1) of the Rome I Regulation.

[22] Article 8:43(1) BW reads: "*If the combined carrier is liable for the damages resulting from damage, total or partial loss, delay or any other damaging fact, and if it has not been ascertained where the fact leading thereto 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.*"

In addition to the disputes involving unlocalized or domestic loss, there are other situations thinkable in which the applicable national regime may need to be found because the matter is not covered by the scope of a carriage convention. When it comes to multimodal carriage the difficulties presented by gaps in the uniform regimes are the runner up behind those generated by unlocalized loss. Some gaps in the uniform carriage regimes were created intentionally. Specific circumstances to which the carriage convention would have otherwise applied are expressly excluded from the instrument's scope. A dispute brought before the *Rechtbank* Amsterdam involving bundled wood which was carried on deck from Kotka in Finland to Hakodate in Japan for instance, involved precisely such an exclusion[23]. The *Rechtbank* Amsterdam considered the Hague-Visby Rules directly applicable to the contract of carriage, since it was performed based on a bill of lading that was issued in Finland, which is party to the Rules. As Article 1(c) HVR excepts the carriage of live animals and cargo which is contractually stated to be carried on deck, and which is in fact so carried, from the scope of application of the Hague-Visby Rules however, the *Rechtbank* was forced to resolve the matter based on the applicable national regime. Since the liability rules of the Hague-Visby regime did not apply, it was the applicable domestic law which had to determine whether the carrier had lawfully exempted himself from liability for the deck cargo. If Finnish law were deemed applicable, a general exemption of liability for deck cargo would not be admissible, while Dutch law on the other hand does grant the contracting parties the freedom to exempt the carrier from liability in such circumstances, by virtue of Article 8:382(2) BW. Because no specific national law regime was chosen by the parties – only the general paramount clause contained choice of law provisions but these related to the Hague Rules or the HVR alone – the *Rechtbank* used Article 4 of the Rome Convention to establish the applicability of Dutch national law.

These examples show that not nearly all claims stemming from multimodal carriage contracts are covered by uniform carriage law. Of the matters relating to multimodal carriage that are beyond the scope of application of the carriage conventions, the issue concerning unlocalized loss is the most prominent, followed on its heels by the various gaps in uniform carriage law. These gaps are not always intentional or even foreseen by the regime's drafters. Especially the unintentional and unforeseen gaps in the international carriage regimes are cause for some reserve when it comes to filling them with rules of domestic law. As regards unlocalized loss however, the identification and application of domestic rules is unavoidable.

10.1.1 Unlocalized loss

Situations involving unlocalized loss necessitate the determination of the applicable national legal regime. As we have seen in Chapter 1 of this work, the term unlocalized loss does not refer to the loss per se, it refers to the circumstance in which damage to, or loss of the carried goods has come about, but the exact place and time where the damage or loss was caused cannot be established[24]. When speaking of unlocalized loss, it is therefore the cause of the loss that is unlocalized rather than the loss itself[25]. Unlocalized loss is a common phenomenon, especially when the transport involves containers[26]. When the cause of the damage or loss cannot be

[23] Rb Amsterdam 5 February 2003, *S&S* 2003, 86. Another example is OLG Frankfurt 23 December 1992, *TranspR* 1993, p. 103 *et seq*.

[24] See Chapter 1, Section 1.3.2.3 on 'unlocalized loss'.

[25] Van Beelen 1996, p. 143.

[26] OLG Hamburg 16 May 2002, *TranspR* 2002, p. 355-357; Hof Den Haag 26 November 1996, *S&S* 1998, 61; Rb Rotterdam 28 October 1999, *S&S* 2000, 35 (*Resolution Bay*).

connected to a specific stage of the transport, none of the unimodal conventions will apply, except in very specific circumstances[27]. These circumstances when one (or more) of the carriage conventions applies occur when unlocalized loss results from a contract of carriage entailing:

1. an Article 2 CMR transport;
2. an air carriage transport which is combined with carriage by land, by sea or by inland waterway performed outside an airport for the purpose of loading, delivery or transhipment as described by Article 18(4) of the Montreal Convention[28];
3. a transport involving additional modes of carriage besides rail carriage as meant in Article 1(3) and (4) COTIF-CIM, or
4. a transport which involves carriage by inland waterway combined with a shorter segment of sea carriage for which no 'maritime' bill of lading has been issued as described in Article 2(2) CMNI.

A decision by the OLG Hamburg in May 2002 concerned unlocalized loss which had arisen during a transport consisting of a domestic road carriage stage and an international rail carriage stage[29]. This is a typical example of circumstances which would currently fall within the third mentioned category. Under the current COTIF-CIM the entire transit would have been covered by the uniform rail regime due to Article 1(3) COTIF-CIM. As the carriage was performed in 1999 and 2000 however, the OLG had to base its decision on the 1980 version of the COTIF-CIM. This version did not contain a provision such as the new Article 1(3). Therefore the partial loss of a shipment of cigarettes which was carried by road from the consignor's place of business in Langenhagen to the railway station of Hannover, from where it was transported by rail to Bishek in Kyrgyzstan, was not covered by the international rail regime. In Kyrgyzstan it was discovered that the container in which the cigarettes were shipped contained a hollow space at its centre. Unclear was where and when the cigarettes that had filled this space had gone missing. Since the loss remained unlocalized, the 1980 CIM did not apply. Moreover, the older version of the CIM required the carriage by rail to be performed by a railway, and since the rail carriage at hand was not performed by such an entity, the 1980 COTIF-CIM would not have applied even if it could be proven that the loss had occurred during the rail stage.

In instances of unlocalized loss or damage which do not fulfil the requirements of any of the provisions listed above, none of the carriage conventions apply. Although the carriage involved may be international in nature, the carriage conventions fail to cover such claims as they cannot be tied to any of the segments of the carriage specifically. In such cases the rights and obligations of the contracting parties are based on the national rules of law that apply to the contract. In principle this is the regime that is most closely connected to the contract. The BGH decision of 30 March 2006 illustrates this[30]. The case involved 13 different incidents where damage had occurred during the performance of multimodal carriage contracts. Every time the goods – mostly computer parts – were carried by road from the carrier's depot in Germany to the airport in Brussels, from where they were subsequently shipped by air to the United Kingdom or to other destinations overseas. In none of the incidents the loss could be localized. As the

[27] Chan, Ng & Wong 2002, p. 434. See for instance: BGH 29 June 2006, *TranspR* 2006, p. 466-468; Rb Haarlem 6 July 1999, *S&S* 2000, 88; OLG Düsseldorf 12 March 2008, I-18 U 160/07, www.justiz.nrw.de; Hof Amsterdam 6 May 1993, *S&S* 1994,110; OLG Stuttgart 26 November 2003, 3 U 50/03, www.justiz.nrw.de; OLG Karlsruhe 21 February 2006, *TranspR* 2007, p. 203-209.

[28] The air carriage convention did not apply for instance in OLG Karlsruhe 21 February 2006, *TranspR* 2007, p. 203-209, since the OLG did not deem the pre- and end haulage by truck to and from the airports loading, delivery or transhipment services as meant in Article 18 WC or MC.

[29] OLG Hamburg 16 May 2002, *TranspR* 2002, p. 355-357.

[30] BGH 30 March 2006, *TranspR* 2006, p. 250-254.

carriage by road concerned quite a distance and was international as well, it did not meet the requirements of Article 18 WC/MC. The road carriage did not concern loading, delivery or transhipment operations and thus the air carriage conventions did not apply to the unlocalized loss[31]. The BGH resolved all 13 claims based on German law since no uniform carriage regime applied. Although the decision does not mention why the BGH deemed German law applicable, the most likely reason is that the carrier had his principal place of business in Germany. Since the place of loading of all shipments was situated in Germany, Article 4(4) of the Rome Convention would have caused German law to be applicable if either the carrier or the consignor had his principal place of business on German soil[32].

10.1.2 Gaps

> "*More in general the Court comments that, in order to do justice to the autonomous character of this Convention and its purpose to unify international road carriage, the concepts contained by the CMR should be interpreted autonomously, whereby, with regard to the importance of uniform application, the case law and legal doctrine of other CMR Member States should be taken into account. Only when the CMR fails to regulate a certain matter, and the lacuna cannot be filled with the aid of the rules on interpretation of the Vienna Convention on the Law of Treaties, can the national law that applies based on the rules of private international law be resorted to.*"[33]

With this comment in a decision regarding a stolen shipment of notebooks carried from Taipei in Taiwan to Dortmund in Germany via Maastricht Airport, the *Hof* Den Bosch shows that the autonomous character of the uniform carriage conventions is currently given more thought and importance than a few decades ago. This observation by the *Hof* in light of the question whether the place of taking over as meant in Article 31 CMR was or was not situated at the beginning of the road stage of the multimodal transport neatly illustrates the idea that recourse to national law should only be had if filling the gap by autonomous interpretation is not an option[34]. Plugging the holes in uniform law with national concepts should only be considered as a last resort[35]. This contemporary trend to start from the presumption that a transport regime that looks complete and self-contained is indeed complete and self-contained, and that courts should not actively look for gaps through which to bring in national law, is not restricted to the Dutch legal sphere.

In the past it has been argued by English authors that in some cases interpreting uniform law to fill perceived gaps should not be taken too far[36]. This 'finding of law' by autonomous

[31] Likewise OLG Karlsruhe 21 February 2006, *TranspR* 2007, p. 203-209.

[32] More on Article 5(1) Rome I Regulation can be found in Section 10.3.5 of this Chapter.

[33] "*Meer in het algemeen merkt het hof op dat, teneinde recht te kunnen doen aan het autonome karakter van dit verdrag en zijn doelstelling om het internationale wegvervoer te unificeren, de in het CMR vervatte begrippen verdragsautonoom dienen te worden uitgelegd, waarbij, gelet op het belang van uniforme toepassing, in voorkomend geval mede rekening moet worden gehouden met opvattingen in de rechtspraak en/of de doctrine van verdragsstaten. Slechts in het geval dat het CMR een bepaalde kwestie niet regelt en met behulp van de in het zgn. Weens Verdragenverdrag neergelegde interpretatieregels de leemte evenmin kan worden opgevuld, mag zo nodig worden teruggevallen op het op grond van het internationaal privaatrecht toepasselijke nationale recht.*" Hof Den Bosch 2 November 2004, *S&S* 2006, 117 under 4.5.

[34] Since the *Hof* deemed the place where the goods were taken over by the carrier to be the place where the multimodal carriage had begun initially, which was in Taiwan, and not the place where the road carriage stage had commenced, it decided that it did not have jurisdiction over the case based on Article 31 CMR.

[35] Ferrari 2004, p. 170; Haak 1986, p. 19; Fischer 1999, p. 262.

[36] Clarke *CMR* 2003, p. 12.

interpretation was considered a completely natural phenomenon in continental Europe but apparently was somewhat frowned upon in England. In the Court of Appeal phase of *Buchanan v Babco*, Salmon LJ makes his objections to this type of practice quite clear in reaction to the views brought forward by Denning LJ in first instance. Per Salmon LJ:

> "*Nor can I agree that if there had been such a gap, it could have been filled in by assuming that the intention of the Article must have been to thrust the responsibility upon the [defendants] although, according to Lord Denning, there was nothing in its language which did so. For a Court to construe a statute is one thing but to graft a provision on to it on the ground that the Court thinks it is reasonable to do so would bring the law into chaos and introduce a like chaos into the business of international carriers and those who contract with them to carry goods by land from one country to another.*"[37]

In addition Rix LJ pointed out in *Merzario v Leitner* that, as there is no international court to ensure a uniform approach throughout the Contracting States for any of the carriage conventions, the autonomous interpretation of these uniform regimes therefore has uncertain status[38]. Haak on the other hand reasons that exactly the lack of such international courts should incite national courts to take on the international responsibility that working with international law entails. Rather than seeking salvation in national law, it is the autonomous approach that offers the possibility of developing uniform law in conformity with its nature[39]. There are also those who champion autonomous interpretation in England however. Indeed, the autonomous method seems to be gaining in popularity in the English environs. According to Clarke, English courts that tended in the past to be biased towards a common law interpretation – especially in decisions on the Hague Rules – seem currently keen to promote the main purpose of the transport conventions, which is uniformity of law[40]. Denning LJ's words in the fist instance of *Buchanan v Babco* seem to have had more effect than the objections uttered by Salmon LJ, albeit somewhat belated:

> "*We ought, in interpreting this convention, to adopt the European method. ... They adopt a method which they call in English by strange words – at any rate they were strange to me – the 'schematic and teleological' method of interpretation. It is not really so alarming as it sounds. All it means is that the Judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit – but not the letter – of the legislation, they solve the problem by looking at the design and purpose of the legislature – at the effect which it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means that they fill in gaps, quite unashamedly, without hesitation.*"[41]

[37] *Buchanan and Co. Ltd. v Babco Forwarding and Shipping (U.K.) Ltd.*, [1978] 1 *Lloyd's Rep.* 119.
[38] Clarke cites Rix LJ in *Andrea Merzario v Leitner*, [2001] 1 *Lloyd's Rep.* 490. Clarke *CMR* 2003, p. 13.
[39] Haak 1986, p. 17 and 19.
[40] Clarke *Gaps* 2006, p. 633. "*So, in 2006, unlike 1977, when gaps appear, English courts will tread the path of teleology and purpose – but cautiously.*" Ibid. at p. 636. In relation to the rise of the purposive approach to construction in the English courts see also *Fothergill v Monarch Airlines Ltd.,* [1980] 2 *Lloyd's Rep.* 295, [1981] *AC* 251.
[41] *Buchanan and Co. Ltd. v Babco Forwarding and Shipping (U.K.) Ltd.*, [1978] 1 *Lloyd's Rep.* 119. See also Haak 1986, p. 30-31.

In Germany the concept that unintentional gaps in uniform carriage law can be filled by extrapolating the system of international law that leaves the gap is also known[42]. Whether Article 29 of the Warsaw Convention contains a gap to be filled by national law regarding prescription has for instance been questioned. The necessity of the autonomous interpretation of uniform law is generally accepted in Germany[43]. Kropholler even argues that since a sharp line between interpretation and '*Rechtsfortbildung*' (creating new law) cannot be drawn, the filling of gaps in uniform law is nothing more than an extension of the interpretation process under another name[44].

Intentional gaps in uniform carriage law such as the exception of deck cargo or live animals from the Hague and Hague-Visby Rules are another matter. These are obviously not meant to be filled by extrapolating uniform law[45]. Neither are the matters that are expressly brought under the national influence of for instance the *lex fori* by the carriage conventions themselves, such as the question what is considered to be equivalent to wilful misconduct under the CMR via Article 29 CMR, and the fact that questions of procedure are to be governed by the law of the court seized of the case under the air carriage conventions according to Articles 28 WC and 33 MC. These matters generally concern issues that the drafters of the convention could not reach a consensus or compromise on or that they simply did not want to harmonize. Therefore these subjects are purposely left to differing national opinions. Intentional gaps it seems, have a political basis which causes them to be unfit for autonomous interpretation[46]. It is obvious that filling gaps of this nature should not be a matter of autonomous interpretation of the convention at stake[47]. The political gaps can therefore be distinguished from the other types of lacunae in uniform carriage law in that they do not merit filling by means of autonomous interpretation under any circumstances.

To reiterate, this means that only regarding the non-political gaps attempts are to be made to fill them by means of interpretation or extrapolation of the uniform regime under scrutiny. The political gaps are to be plugged by means of national law, which means either the law referred to by the convention containing the gap such as the *lex fori*, or the law applicable to the contract based on rules of private international law if the convention makes no such referral. Yet, the above-mentioned quotation from the *Hof* Den Bosch also shows that not all gaps, and most likely

[42] Tunn 1996, p. 405.

[43] Concepts that are used but not defined in the CMR Convention are to be made concrete and to be interpreted autonomously, meaning without being influenced by national ideas. Fischer 1996, p. 409; Koller 2007, p. 1127, Article 1 CMR, No. 5; Brandi-Dohrn 1996, p. 57. For more details on the need for uniform interpretation of international law see Chapter 3, Section 3.5 on the need for uniform interpretation of scope of application rules.

[44] Kropholler 1975, p. 292. *Rechtsfortbildung* can be translated as the creative process of establishing the meaning of a text by transcending the literal meaning of the words.

[45] Koller 2007, p. 1127, Article 1 CMR, No. 5.

[46] However, it seems that the group of political exceptions to the objective of uniformity of law is not restricted to gaps that originated during the drafting process. The existence of politically oriented 'gaps' that evolve during the life cycle of an international instrument is also suggested. These are apparently gaps that do not occur because the system contains an omission in relation to its purpose and sphere of operation. Rather, they evolve due to the changing political climate the system operates in. Such a 'gap' crops up when application of the uniform regime leads to results that were deemed acceptable before, but are considered undesirable at present. An example is perhaps the shift from the concept that the CMR applies directly to international road stages of a multimodal transport propagated by the BGH in 1987 to the view that the CMR does not apply to such road stages directly, but can only be of consequence indirectly via the German *Handelsgesetzbuch* in 2008[46]. The BGH does not consider these two decisions to represent a shift in its views however. In its 2008 decision the BGH establishes that the 1987 decision also applied the CMR indirectly, namely via German law, as both contracting parties in that case were German, although this was not mentioned in the text of the decision. The question is whether political 'gaps' such as this one are acceptable in light of the unifying purpose of the carriage conventions.

[47] De Meij 2003, p. 45-46.

not even all non-political gaps, can be filled through interpretation[48]. In those instances where interpretation fails to present a feasible solution, the domestic legal regime applicable to the contract comes to the fore, even for these gaps.

In Germany multimodal carriage is – currently – seen as one of the subjects that is intentionally excepted from most of the carriage conventions. Aside from by means of the special provisions in the carriage regimes such as Article 2 CMR and Article 1(3) and (4) COTIF-CIM *et cetera*, no carriage convention except the air carriage regimes covers any part of a multimodal transport according to German legal doctrine and case law[49]. Since the gap in this area was intentional it is the German domestic law on multimodal carriage in §§ 452 HGB *et seq*. that can be used to plug the hole[50], at least, if the rules of private international law determine that German law is applicable[51].

In The Netherlands and England the concept is supported that the unimodal carriage conventions do cover parts of multimodal contracts, especially the CMR. If a part or stage of a multimodal carriage fulfils the scope of application requirements of a carriage convention if this is the only carriage that is contracted for, it equally meets the requirements if the contract allows for additional aspects such as other stages of carriage by the same or even by other means. Provisions like Article 31 WC and 38 MC which clarify that the convention applies to stages by the means of transport the convention is meant to cover may erase doubt, but they are not strictly necessary to create this effect.

Since the unimodal carriage conventions, even those that do expressly cover international air stages which are part of a multimodal contract, mainly focus on one mode of carriage, application of these regimes on parts of multimodal contracts uncovers that the carriage regimes contain gaps in relation to this type of carriage. At first glance the *Rechtbank* Haarlem appeared to have found such a gap in relation to a case brought before it in 1999[52]. A shipment of flowers was sent from Miami to London by air and from there by road to Amsterdam. Because the temperature of the shipment had gone up to more than 31 degrees Celsius during the transport, the flowers had withered by the time they arrived at their destination. The cause of this mishap remained unknown however. Although the scopes of application of the carriage conventions are generally deemed to exclude application to situations of unlocalized loss, the *Rechtbank* Haarlem considered the CMR to be directly applicable to the road stage between London and Amsterdam and the Warsaw Convention to the air stage between Miami and London. And, since neither of these regimes contains rules on prescription in case of multimodal transport the *Rechtbank* applied the Dutch rule on prescription in multimodal transport, Article 8:1722 BW, as Dutch domestic law applied to the contract via Article 4(4) of the Rome Convention[53].

Whether this decision does in actual fact concern a gap in either of the conventions is debatable. Because the loss could not be localized neither of the carriage conventions applied to the claim for damages and thus the prescription aspect of the claim did not fall into a gap. A gap is only there when a certain situation would normally have been governed by a convention since it falls within the reach of its basic scope of application rules but does not do so in the instance at hand due to provisions of the convention which specifically except it or due to an interpretation

[48] Hof Den Bosch 2 November 2004, *S&S* 2006, 117 under 4.5.

[49] See Chapters 4 through 8 on multimodal carriage in relation to the various carriage conventions. The Hamburg Rules are identical to the air carriage conventions when it comes to this issue, but Germany is not a party to them.

[50] Koller 2004, p. 361-363.

[51] This point of view may be fortuitous if the rules of private international law cause German law or perhaps even Dutch law to be applicable to the contract, it is however less fortunate if a domestic regime applies to the contract that does not contain specific rules on multimodal carriage.

[52] Rb Haarlem 6 July 1999, *S&S* 2000, 88.

[53] Currently Article 5(1) of the Rome I Regulation.

of the treaty rules which excepts it[54]. In case of unlocalized loss, the occurrence falls outside of the basic scope of application of the carriage conventions altogether except in the very specific circumstances summed up above in Section 10.1.1 of this Chapter on unlocalized loss[55].

On the other hand, the contract of carriage itself is still covered by the two carriage regimes. Is it then not far more logical to conclude that the consignor or consignee should at least enjoy the minimum protection offered by either of these regimes? A parallel can be drawn with the conclusions of the BGH in 1989 concerning purposive deviation from the contract terms[56]. Although this would seem a reasonable approach to unlocalized loss, it would also cause some thorny issues to arise. For one, there is the question why the consignor or consignee deserves such a minimum protection, and if he does, why the minimum and not rather the maximum? For another, it should then be established what exactly the 'minimum' protection entails. And, of course, the issue of conflicting convention law would crop up.

10.1.3 Exclusivity

The concept behind the term exclusivity has been discussed mainly in light of the air carriage conventions[57]. What is meant precisely by the term 'exclusivity' is perhaps best explained by the words of Hope LJ in *Sidhu v British Airways*[58]:

> "*The Convention describes itself as a 'Convention for the Unification of Certain Rules relating to International Carriage by Air'. The phrase 'Unification of Certain Rules' tells us two things. The first, the aim of the Convention is to unify the rules to which it applies. If this aim is to be achieved, exceptions to these rules should not be permitted, except where the Convention itself provides for them. Second, the Convention is concerned with certain rules only, not with all the rules relating to international carriage by air. It does not purport to provide a code which is comprehensive of all the issues that may arise. It is a partial harmonization, directed to the particular issues with which it deals.*"

In *Sidhu* passengers who had been on an international flight from the United Kingdom to Malaysia were captured by Iraqi forces as the plane was being refuelled in Kuwait. The plane had landed in Kuwait about five hours after the Gulf War had started and the Iraqi military had therefore just begun its invasion of Kuwait. The appellants claimed damages against the air carrier, British Airways, for the consequences of their captivity. They made their claims for personal injury at common law, since they had no remedy in this regard under Article 17 of the Convention. No 'accident' causing the damage had taken place on board the aircraft and the

[54] Establishing whether a certain situation actually involves a gap generally causes difficulties as it depends on the exact meaning that is attached to the term. Wagner mentions that the answer can only be found through interpretation. Wagner 2009, p. 105.

[55] The question is whether the *Rechtbank* Haarlem should perhaps have based its decision on Article 8:43 BW rather than on Article 8:1722 BW. The relation between these two Articles is somewhat unclear as Article 8:43 BW may also lead to the regime sporting the time bar most favourable to the claimant. Rb Rotterdam 3 May 2006, *S&S* 2007, 114. For more details on Article 8:1722 BW see Section 10.4.1 of this Chapter on the Dutch legislation on multimodal transport.

[56] BGH 17 May 1989, *TranspR* 1990, p. 19-20, *NJW* 1990, p. 639-640, *ETL* 1990, p. 76-80. For more details on the BGH decision see Chapter 2, Section 2.3.3.1.1 on deviation.

[57] Both air carriage conventions contain provisions which establish either the exclusivity of all of the Convention's provisions concerning actions for damages – Article 29 MC – or the exclusivity of certain specifically named Articles of the Convention – Article 24 WC.

[58] *Abnett (known as Sykes) v British Airways Plc. & Sidhu v British Airways Plc.,* [1997] 2 *Lloyd's Rep.* 76. Hope LJ referred to the Warsaw Convention as amended at The Hague in 1955 in this decision.

injury sustained by the pursuer – the stress resulting from her captivity and the pain of separation from her family, absence from work and loss of income due to the psychological consequences of the captivity – did not fall within the scope of 'bodily injury' for the purposes of Article 17 WC[59].

The *Sidhu* decision gave the claimants no solace. The House of Lords decided that regarding the particular issues the 'Certain Rules' of the Convention deal with the Convention was intended to be comprehensive. So although claims relating to international carriage by air can be made under common law or national law if they concern topics not regulated by the Convention, such as the liability of passengers in relation to the carrier or the carrier's insurance obligations, any claim relating to a subject that is covered by the Convention cannot be supplemented by rules of national law. The issues that are covered by the Convention are identified in the principal Chapter headings and concern documents of carriage and the liability of the carrier.

According to the House of Lords claims concerning purely psychological injuries are covered by Article 17 based on textual, teleological and systematic construction[60]:

> "*On the one hand the carrier surrenders his freedom to exclude or to limit his liability. On the other hand the passenger or other party to the contract is restricted in the claims which he can bring in an action of damages by the conditions and limits set out in the Convention. The idea that an action of damages may be brought by a passenger against the carrier outside the Convention in the cases covered by art. 17 – which is the issue in the present case – seems to be entirely contrary to the system which these two Articles were designed to create.*"[61]

As a result, Article 24 WC, which states that any action for damages covered by Article 17, however founded, can only be brought subject to the conditions and limits set out in the Convention, excludes the application of national law to the claim.

In *El Al v Tseng* the U.S. Supreme Court arrived at a similar conclusion concerning a claim made by plaintiff Tseng who was subjected to an intrusive security search by El Al before boarding an El Al Israel Airlines flight from New York to Tel Aviv[62]. She sued El Al for damages in a New York State Court, asserting a state-law personal injury claim for, *inter alia*, assault and false imprisonment, but alleging no bodily injury.

Although there are other carriage conventions which contain 'certain rules' relating to a certain type of carriage, namely the Hague Rules and the Hague-Visby Rules relating to carriage by sea, it is unclear whether these regimes are 'exclusive' in nature. This may be caused by the peculiar disposition of the concept of exclusivity as sketched in *Sidhu*.

It seems that the exclusion of all claims of liability relating to international air carriage that are not covered by Articles 17, 18 and 19 of the Warsaw Convention is a rather extreme interpretation of the Convention. If tenable, such an interpretation should, as Koning mentions, be justified by a strong textual foundation, by the objectives of the instrument or by the drafting

[59] Article 17 WC determines that the carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

[60] Certain types of psychological injuries that are correlated to physical injuries can be eligible for compensation under Article 17 WC and MC. Koning 2007, p. 308 fn. 50; Dempsey & Milde 2005, p. 124-134; *Eastern Airlines, Inc v Floyd,* 499 *U.S.* 530 (1991).

[61] *Abnett (known as Sykes) v British Airways Plc. & Sidhu v British Airways Plc.,* [1997] 2 *Lloyd's Rep.* 76. See also Rowan 2008, p. 178.

[62] *El Al Israel Airlines Ltd. v Tsui Yuan Tseng*, 525 *U.S.* 155, 1999 *S.Ct.* 662 or 1999 *WL* 7724 or 67 *U.S.W.L.* 4036. For a German summary and analysis see Schmid 2000, p. 74.

history of the regime. Whether such justification can be found concerning the exclusivity doctrine seems doubtful at best however[63]. The question is whether the concept of exclusivity genuinely adds something in light of international law theory. After all, rules of uniform international law are generally considered of a higher order than rules of national law, which means that they cannot be deviated from either by national law or by contract if they are mandatory. Therefore, if psychological injury is covered by Article 17 but this Article does not grant a basis for compensation relating to such injuries, is it not so that deviating national law cannot be applied merely because Article 17 WC/MC is mandatory?

It may be that the merit of the concept of exclusivity is to be found in the resulting extensive interpretation of provisions such as Article 17 WC/MC. Could it be that without the excuse of the exclusivity principle such an Article could not be deemed to cover more than is actually specified by the text? It seems that in the end it is the interpretation of the scope rules of the uniform regime that is decisive, whether there is an exclusivity principle or not.

The carriage conventions relating to carriage by road, rail and inland waterway do not according to their title contain 'certain rules'[64]. Yet, this does not mean that they are comprehensive. The CMNI for instance, is by no means meant to regulate all aspects of the contract for the carriage of goods by inland waterway as is proven by Article 29 CMNI[65]. Since Article 29 CMNI relates to cases not provided for by the Convention – in which case the contract of carriage is governed by the law of the State agreed upon by the parties, or, in the absence of such agreement, the law of the State with which the contract of carriage is most closely connected – the Article shows that the CMNI is not meant to be all-inclusive. On the other hand, the Article does not merit the conclusion that the CMNI is not exclusive in nature. That cases that are not provided for by the Convention are governed by national law does not necessarily mean that national law can play a part concerning claims that do relate to a subject that is covered by the Convention.

As regards the CMR the question of the exclusivity of the *lis pendens* rule in Article 31 CMR and the rules on the enforcement of judgements in relation to the Brussels I Regulation is currently debated. In two recent judgements the Dutch *Hoge Raad* explained that it is of the opinion that in situations involving the concurrence of the Brussels I Regulation and Article 31 CMR the Brussels I Regulation only gives precedence to Article 31 CMR if the rules of Article 31 CMR are exclusive[66]. The *Hoge Raad* does however not deem this Article with its jurisdiction and enforcement provisions to be of an exclusive nature and thus the *favor executionis* principle is to be applied. When the Brussels I Regulation and Article 31 CMR coincide the *Hoge Raad* is of the opinion that the party requesting enforcement is entitled to choose to apply the regime that is most favourable to it. Nevertheless, the *Hoge Raad* shows itself to be aware that this point of view is debatable and at the same time of great importance in the European Community. Therefore the *Hoge Raad* has asked the Court of Justice of the European Communities to clarify the matter by means of a preliminary ruling[67].

[63] Koning 2007, p. 312. Although the drafting history of the Warsaw Convention reveals that the initial intention of the Convention was the protection of the vulnerable air carriage industry, it also shows that this goal was to be reached by means of the limited liability of the carrier.

[64] CMR: Convention on the Contract for the International Carriage of Goods by Road; CMNI: Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway; COTIF-CIM: Uniform Rules Concerning the Contract of International Carriage of Goods by Rail – Appendix B.

[65] Article 29 CMNI is unique in that none of the other carriage conventions contain such a provision. Mankowski 2008, p. 178.

[66] HR 28 November 2008, *S&S* 2009, 24; *NJ* 2008, 623 and HR 28 November, *S&S* 2009, 25; *NJ* 2008, 624. See also Haak *NTHR* 2009, p. 85-97.

[67] Case 533/08 *(TNT Express BV v Axa Versicherung AG)*. Although the Court of Justice is not authorized to give preliminary rulings on the interpretation of the CMR as such the *Hoge Raad* establishes that according to the report

On the whole, the concept of exclusivity seems to have been mainly brought to life to expand the influence of the Warsaw Convention in order to prevent the carrier from being held liable for psychological injuries of passengers. It is the – somewhat artificial – means by which the *a contrario* interpretation of Article 17 WC is justified.

10.2 The applicable national law

If it is clear that a claim resulting from a multimodal carriage contract is not covered by uniform law, the need arises to determine which rules of national law govern the dispute[68]. There are many factors that may influence which national law applies. The first of these factors is the choice of forum as was discussed in Chapter 3[69]. By choosing to address a certain court of law, a well informed plaintiff may be able to influence the law that is applied to the claim. If there is a choice between a German and an English court for instance, the plaintiff may be able to avoid the application of uniform law such as the CMR to the part of the multimodal contract from which the claim resulted by choosing to address the German judiciary. The previous Chapters dealing with multimodal carriage in relation to the various unimodal carriage conventions show, that to influence matters in this way knowledge of the differences in interpretation of the relevant regime of uniform law by the courts that may be addressed is necessary. Besides influencing whether or not uniform law is applied, the choice of one forum over another may also be a means to influence which national or domestic regime is applied to the claim. The reason for this is that although the ultimate goal in private international law is to cause the same legal regime to apply to a certain set of circumstances no matter which forum is chosen, this ideal has not yet been accomplished, and may perhaps not ever be. In cases where a national regime is to apply a general predilection for the *lex fori,* the law of the State in which the case is being litigated, can be discerned[70]. Even a number of the carriage conventions refer to the *lex fori* to fill in blanks[71]. Especially matters of legal procedure are to be governed by the law of the court seized of the case according to the carriage conventions[72]. This is no different when no uniform law applies; it is universally accepted that in lawsuits involving a conflict of laws, questions of procedure – as opposed to questions of substance – are always determined by the *lex fori*[73]. Since there may be differences in the rules of legal procedure applied by the various courts the plaintiff can choose to address, these rules may

to the Brussels I Regulation by Schlosser the rules on jurisdiction and enforcement of a convention that coincide with the Regulation based on Article 71 of the Regulation should be considered provisions of the Regulation and as such fall within the scope of the authority of the Court of Justice. See Schlosser, no. 240.

[68] Fischer 1999, p. 262.

[69] See Chapter 3, Section 3.2 on jurisdiction and forum shopping.

[70] Due to the unfamiliar qualities of law foreign to the court mistakes are easily made in its application. As a result of this phenomenon and the fact that he does not deem all national regimes to be interchangeable, De Boer for instance promotes the opinion that foreign law should be applied only if application of the *lex fori* leads to unmistakable injustice. When reviewing several hundred international cases brought before Dutch tribunals he found that a predilection for the application of the *lex fori* indeed exists in practice; of the reviewed cases about two thirds were decided based on the *lex fori*. De Boer 2004, p. 208 and 228.

[71] Article 29 CMR for instance refers to the law of the court or tribunal seized of the case, as does Article 22(6) MC and Articles 21(1), 22(1) and (4) WC (HP 1955/MP4). The CMNI on the other hand tends to refer to the law of the State applicable to the contract of carriage instead. See Articles 16(2) and 24(4) CMNI.

[72] See for instance Article 33(4) MC and Article 28(2) WC (Hague 1955/MP4). Courts applying the rules of private international law generally display a preference for the *lex fori*. De Boer 2004, p. 209-210.

[73] The principle that matters of procedure are governed by the *lex fori* is universally accepted. Dicey & Morris 2006, p. 177; Carruthers 2004, p. 691. This universal acceptance seems largely due to a lack of debate; convenience is a strong argument for the application of the *lex fori* to procedural matters. As the law applicable to the claim is unknown at the outset of the procedure the forum is forced out of necessity to apply its own rules. See for example Rb Rotterdam 19 May 2004, *S&S* 2005, 64.

also influence which national regime is applied. As this means of influence has not been discussed as yet, the next Section of this Chapter will offer more details on how the rules of legal procedure of the *lex fori* may affect which law is applied.

10.2.1 The influence of legal procedure

The first thing triggered by the choice of a specific forum is the application of the procedural law of the State where the forum is located. Only in second instance does such a choice trigger the application of the private international law of said State[74]. Therefore the rules on legal procedure that may influence the law applicable to the contract need to be assessed before the rules of private international law are reviewed.

The rules on legal procedure of the *lex fori* determine the manner in which legal proceedings are conducted[75]. The contemporary rules on legal procedure in Europe are not uniform however. In many European States, such as Germany, The Netherlands, Austria, Switzerland, Italy, Spain and most of the Eastern European countries the procedural rules of the *lex fori* prescribe that the rules of private international law are to be applied *ex officio* by courts of law[76]. It is reasoned that since the private international law rules are a part of the domestic law of the court they ought to be applied regardless of whether the contending parties invoke the applicability of a foreign legal regime or not[77]. Thus, these continental courts are forced to apply a foreign legal regime to any conflict brought before them if the rules of private international law of the *lex fori* demand this[78]. An almost natural extension of the continental *ex officio* application of foreign legal regimes is the *ex officio* determination of what the unfamiliar regime entails[79]. Since the court is to subject the foreign law rules to the same procedure as it would internal law, it is obligated to research the area of the foreign law in question.

The English system on the other hand significantly deviates from the continental approach[80]. Indeed, its starting point is quite the opposite; the English law does not commit itself to the principle *iura novit curia*[81], to the application of the *lex causae* as a matter of public

[74] Rennert 2005, p. 119; Ferrari *ICLQ* 2002, p. 694-697; Firsching &Von Hoffmann 1997, p. 11.

[75] In lawsuits involving a conflict of laws, questions of procedure as opposed to substance are always determined by the *lex fori*. Rb Rotterdam 19 May 2004, *S&S* 2005, 64; BGH 27 June 1984, *NJW* 1985, 552. See also Briggs 2008, p. 37; Dicey & Morris 2006, p. 177; Firsching & Von Hoffmann 1997, p. 63.

[76] Mostermans 1996, p. 21; Frohn 1999, p. 76; Fischer 1999, p. 262. Nevertheless, the Dutch judiciary has found various techniques to circumvent this obligation, especially in maritime cases. Boonk 2009, p. 102.

[77] According to the Dutch *Hoge Raad* (HR 16 June 1961, *S&S* 1964, 40 and *NJ* 1963, 520) however, a judge does not have to determine which legal regime applies when he is of the opinion that the outcome will be the same whatever regime he applies. This is called the '*anti-kiesregel'* which can be roughly translated as the anti-choice rule. Boonk 1998, p. 25-32. This approach is also applied by courts in Germany, see for instance OLG Stuttgart 1 July 2009, *TranspR* 2009, p. 309-315.

[78] In France, they follow a course that is less strict to some extent. Officially, French courts are obligated to apply foreign law *ex officio*, but when the contending parties are not bound by mandatory rules, either national or international, the court has the authority to apply foreign law at its discretion. Mostermans 1996, p. 22.

[79] Even the Dutch *Hoge Raad* has the tendency to research the content of the relevant rules of foreign law even though this Supreme Court is in theory not allowed to do so. Boonk 2006, p. 195; Frohn 1999, p. 77.

[80] The continental approach is less coercive than it may seem, especially with regard to conflicts of which the focal point is a contractual relationship such as a multimodal transport contract. As will be discussed further on, the *ex officio* approach does not prevent the litigants from influencing the applicable national law in relation to contractual conflicts since the rules of private international law of the Rome Convention which apply to contractual relations allow contracting parties the freedom to choose the national law applicable to their contract.

[81] *Iura novit curia* means that the contending parties can assume that the court knows the law, including foreign law.

policy, nor does it commit to the doctrine of parity between local and foreign laws[82]. Instead it holds to the position that the doctrine of judicial notice extends to English law only[83]. Consequently, the only manner in which foreign laws can be introduced in legal proceedings is to treat them as facts. It is up to the contending parties rather than up to the court to decide whether the 'fact' of an applicable foreign regime is presented[84]. As the contending parties play a leading role in the English legal process this course of business does not seem that unnatural. It fits in with the common law tradition in which the judge plays the part of a passive referee in civil proceedings of a contentious nature. The result is that when a party wants its complaint or defence to be judged before an English court according to other rules than those of the *lex fori*, it is forced to request the court to apply the foreign rules[85]. Since the foreign law rules are treated as facts in the English legal process however, English judges are not allowed to research them *ex officio*. Therefore the content of the foreign law that is invoked is to be supplied and proven by the party invoking it[86]. It seems obvious that the resulting decisions will not always entail a proper interpretation or application of the foreign law in question[87]. If the parties do not elect to prove the content of the allegedly applicable foreign law, English domestic law will be applied as though the case were wholly domestic[88].

The English seek the justification for this manner of conduct in their rules on jurisdiction. These rules, the court is obliged to apply *ex officio*, as opposed to the rules of foreign law. An English court will only determine that it has jurisdiction when the case has enough connections with England and its legal regime, in other words, when the English forum is a *forum conveniens*[89]. In recent jurisprudence of the European Court of Justice (ECJ)[90] however, the possibility for the court to decline to hear based on the principle of *forum non conveniens* – when

[82] Fentiman 1998, p. 5. It has been suggested that the method adopted in practice by English courts does correspond in general with the method suggested by Savigny. Friedrich Carl von Savigny was the first to articulate the multilateral approach to choice of law. Savigny divided the body of law into broad categories (such as contracts, property and family law), which he linked to a given legal system by means of connecting factors (such as the place of transaction, the *situs* of a thing or the domicile of a person). In this fashion he devised a set of 'multilateral' precepts, rules that evenhandedly, without forum bias, invoke either foreign or domestic law. By allocating every conceivable legal relationship to the jurisdiction with which it has the closest connection, its 'seat' or 'home' as Savigny put it, he created a system which could, in theory, resolve any choice of law problem that might present itself and yield identical results in international cases, irrespective of the forum in which a particular dispute is adjudicated. Juenger 1998, p. 536-537.

[83] In marked contrast to the legal diversity that prevailed on the European Continent, England – where legal fragmentation had yielded to the unifying force of the common law – contributed nothing to the legal area concerning the conflict of laws before the 18th century. The reason for this lack of activity in the area of private international law is that initially, the English courts simply dismissed actions arising out of the realm, while later on judges resorted to the fiction that what happened abroad had occurred in England, so that common law could be applied. Juenger 1998, p. 528.

[84] In non-contentious litigation the court can apply foreign law *ex officio* however. Mostermans 1996, p. 23 fn. 14.

[85] In The Netherlands this system also has supporters. It has for instance been fiercely defended by De Boer. De Boer 1996, p. 316 *et seq*.

[86] Dicey & Morris 2006, p. 256-269.

[87] *Sayers v International Drilling Company N.V.*, [1971] 3 *All ER* 163. In this case the Court of Appeal applied Dutch law regarding employer's liability in a faulty manner. Mostermans 1996, p. 27. Foreign law must even be proved if a previous English decision exists in which the same rule of foreign law has been before the court. Therefore it is possible that an English court reaches different conclusions in different cases as to the effect of a given rule of foreign law. Dicey & Morris 2006, p. 257.

[88] Dicey & Morris 2006, p. 255. For the few exceptions to this rule see p. 257-259.

[89] *Owners of Cargo on Board the Morviken v Owners of the Hollandia*, [1983] 1 *Lloyd's Rep*. 1 (*Hollandia* and *Morviken*).

[90] In *Owusu v Jackson (trading as Villa Holidays Bal-Inn Villas) and others* (ECJ Case C-281/02, [2005] 2 *All ER* (Comm) 577, 1 March 2005), the ECJ held that the Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that Convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State.

the court chosen by the plaintiff is inconvenient for witnesses or poses an undue hardship on the defendants – has been barred[91], which creates an imbalance in the system.

It is said that the English system which requires the parties to invoke the applicability of a foreign legal regime is a source of legal uncertainty. True enough, parties cannot be certain when entering into a contract which (national) legal regime will eventually apply when a dispute arises, but that is only because they themselves can choose to abstain from invoking foreign law. This leaves them with the possibility that either a certain foreign regime will be applied, which they may even have chosen by contract, or English law if this suits the parties better[92]. As a result, the uncertainty is only minor, and it may very well be outweighed by the positive aspects of being able to exert influence on the outcome of the proceedings when push comes to shove.

Nevertheless, the implications of the fact doctrine are ambiguous. Whether or not foreign laws are facts, the circumstances in which they are to be applied are defined by the rules of private international law found in the Rome I Regulation[93]. But although the language of the Rome I Regulation suggests that the court is bound to apply its rules, it is these rules, more precisely those found in Article 1(3) and Article 18 Rome I, that show that an exception is made for rules of procedure, while the law of the forum is to determine whether a particular rule falls within this category[94].

10.3 The Rome Convention and the Rome I Regulation

10.3.1 Convention or Regulation?

After the discussion on the peculiarities of legal procedure, it is time to take a closer look at the private international law rules of the Rome I Regulation. It is this Regulation that establishes uniform rules concerning the law applicable to contractual obligations in the European Union, although for the present excepting Denmark. This Regulation replaces the Rome Convention of 1980. Since the Regulation does not deviate overmuch from the Convention as regards contracts of carriage, the provisions of the Rome Convention are discussed below. The reason for this is that much of the case law and academic writing on this subject has the provisions of the Rome Convention as its starting point. The largest part of the considerations on the subjects to be discussed here are still valid due to the small amount of change the Regulation offers concerning contracts for the carriage of goods. There where there are relevant changes they will be addressed and analyzed.

Since both the Rome Convention and the Regulation apply to contractual obligations in situations involving a choice of laws the international multimodal contract of carriage generally falls within their reach.

The core provisions of the regimes are deceptively simple: a contract is in principle governed by the law chosen by the parties. If the parties have not made such a choice, it is

[91] Some commentators argue that the *forum non conveniens* rules may still apply to cases where the other proceedings are not in a EU Member State but this remains uncertain.

[92] This may happen if for instance the parties are of the belief that the interests of justice will be better served if the judges apply the law with which they are most familiar, which is generally the *lex fori*.

[93] The U.K. enacted the Rome Convention by virtue of the Contracts (Applicable Law) Act 1990. In May 2006 the U.K. chose to opt out of the 2005 version of the Rome I Regulation. As the final version was considered much improved by the U.K. government, it notified the European Commission and Council of its desire to opt in on 23 July 2008. The Commission adopted a decision to extend the application of the Regulation to the U.K. on 22 December 2008 and this was made official on 16 January 2009.

[94] Dicey & Morris 2006, p. 259.

governed by the law to which it is most closely connected. Thereto Articles 3 and 4 RC or 3 and 5 Rome I play an important part when the circumstances necessitate the establishment of the national regime applicable to a multimodal contract[95]. Article 3 RC/Rome I gives the contracting parties a choice as to which law will govern their contract, while Articles 4 RC and 5 Rome I determine by which law the contract shall be governed if the parties fail to make a choice of their own. As was established in the previous Chapters and the previous Section, these two basic principles only come to the fore when the dispute does not concern one of the exceptions such as those regarding procedural law and evidence in Article 1 RC and Article 1 Rome I, or when it is not governed by another convention. If it is governed by another convention, a *lex specialis* as it were, then Article 21 RC and/or 25 Rome I may cause the other convention to take precedence[96]. However, according to Wagner Article 25 of the Rome I Regulation does not relate to the scope of application rules of the uniform carriage law regimes. He asserts that these scope rules are special rules of '*Kollisionsrecht*' which demarcate the reach of the provisions of a certain convention, not rules that determine which State law applies to a contract which are meant to be granted precedence by Article 25 Rome I[97]. As a result the scope of application rules of the carriage conventions are left untouched by Article 25 Rome I regulation.

For now, it does not matter much whether one follows Wagner's way of thinking or grants the scope of application rules of the carriage conventions precedence by means of Article 25 Rome I Regulation. Unless the carriage convention in question has come into force in the Forum State after the entrance into force of the Rome I Regulation[98] and it has not become Community law because the EU has ratified it for all its Member States at once[99], the relation between Rome I and the uniform carriage regime is clear. The carriage convention governs the contract insofar as it falls within its scope of application[100], while the Rome I Regulation determines which body of State law either supplements the uniform law where necessary, or governs the entire contract if no uniform law applies to it.

In the following both the concept of the freedom of choice as well as that of the 'law most closely connected to the contract' will be discussed as will the remaining concept of importance which has heretofore remained unnamed, which is the concept of the *ordre public*. These principles and the exception created by the *ordre public* have received ample attention in legal literature. Therefore the review of these subjects will, aside from a few introductory remarks, be limited to the repercussions they may have for international multimodal carriage contracts specifically.

[95] Ramming *TranspR* 2007, p. 289.

[96] Van Beelen 1996, p. 49. If a contract is covered by an instrument of uniform law the conflict of law rules of the Rome Convention only serve in a ancillary capacity. Streng 2005, p. 156. Article 25 of the Rome I Regulation differs from Article 21 RC in this respect. Only those 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 are granted precedence under the Regulation. Unlike the Rome Convention, the Rome I Regulation does not grant precedence to conventions that come into effect after the mentioned time however. Van der Velde 2009, p. 14. In addition the Rome I Regulation does not grant the mentioned precedence if the members of the convention are all also party to the Regulation. Wagner 2009, p. 106.

[97] Wagner 2009, p. 108. For more details on Wagner's views see also Chapter 3, Section 3.3.2 on Article 25 Rome I Regulation.

[98] However, this is something which, given the signature of the Rotterdam Rules in September 2009, is something that may occur in the near future.

[99] Which it did concerning the Montreal Convention by means of Regulation (EC) No 889/2002.

[100] That this may change depending on how the European Court of Justice interprets Article 25 Rome I Regulation can be read in Chapter 3, Section 3.3.2 on Article 25 Rome I Regulation or in Smeele 'Implicaties Rome II' 2009, Hartenstein 2008 or Wagner 2009.

10.3.2 The freedom of choice under the Rome Convention

The basic principle that contracting parties are free to choose the law applicable to their contract if such a contract has multinational aspects can boast of a global appreciation[101]. Essentially, all legal regimes recognize the principle according to which the parties may choose the law that is applicable to an international contract under civil or commercial law[102]. Nevertheless, this principle is somewhat less prominent in transport law than it may be in other areas of contract law, as regarding carriage contracts it generally is very much hemmed in by the multitude of compulsory uniform transport regimes. Even so, above it was established that the uniform regimes leave room for the application of other types of rules such as national law here and there, and thus a choice of law may under certain circumstances be of consequence.

The freedom of contracting parties to choose which law governs their contract is called the doctrine of autonomy or party autonomy[103]. It is substantiated by its propagation of legal certainty and is one of the pillars of the Rome Convention[104]. Therefore the choice of law principle has been codified by the Rome Convention in Article 3 RC, which states in paragraph 1:

> "*1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.*"

The second sentence of the paragraph provides some rules on the form in which the choice of law must be moulded; to be valid the choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case[105]. Some translations of the Convention seem to be more flexible than others in this area – instead of '*with reasonable certainty*' and '*mit hinreichender Sicherheit*' in the English and German version, the French version asks for a '*façon certaine*' – and it is not impossible that it is this difference that lies at the root of the divergent interpretations in the countries concerned[106].

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[101] It should be noted here that the choice for a certain national law regime excludes the rules of private international law of said regime so as to avoid problems of *renvoi*. See Article 15 RC. Strikwerda 2004, p. 90.

[102] Explanatory report COTIF-CIM, www.otif.org, p. 10.

[103] Koppenol-Laforce (ed.) 1996, p. 141.

[104] Martiny 2004, p. 64, No. 55. The widespread use and recognition of choices of law did not start with the Rome Convention. Even before the Rome Convention entered into force, the private international law of its members already recognized the right of parties entering into an international contract to choose to replace the legal system that would have applied to their agreement otherwise. Such a choice was recognized to replace the otherwise applicable domestic law lock, stock and barrel, including the regime's mandatory provisions, with another legal system. According to the Guiliano/Lagarde report the rule stated in Article 3(1) under which the contract is governed by the law chosen by the parties simply reaffirms a rule currently embodied in the private international law of all the Member States of the European Community and of most other countries. Giuliano & Lagarde 1980, Article 3, No. 1. The concept is supported that party autonomy in the selection of the applicable law amounts to a general principle; it appears to be among the "*general principles of law recognised by civilized nations*" within the meaning of Article 38 of the Statute of the International Court of Justice. Plender & Wilderspin 2001, p. 87.

[105] Courts are known to discern a choice of law even from the mere fact that the litigants have based their claims on the rules of a certain national regime. See for instance Rb Rotterdam 18 November 1999, *S&S* 2000, 39; Rb Rotterdam 14 September 2005, *S&S* 2006, 26; Rb Haarlem 6 July 1999, *S&S* 2000, 88.

[106] Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, Brussels, 14.1.2003 COM(2002) 654 final, p. 23. The document can be found at www.europa.eu.

Although it was the international legislator's intention to admit clear choices only, this does not mean that the regime the parties intend to be applicable always has to be designated literally and beforehand. It is generally permitted to leave open which regime will eventually apply, as long as the manner in which to find it has been established[107]. An example of how to achieve this can be found in *Bhatia Shipping v Alcobex Metals Ltd*[108]. The twelfth clause of the multimodal transport document issued in this case stated that:

> "*... the liability of the [MTO] in respect of such loss and damage shall be determined by the applicable Indian law if the loss and damage occurs in India [sic] or by the provisions of the applicable law of the country where the loss or damage occurred...*"

The transport concerned bronze tubes which were carried on board of the *Percy* from Mumbai to Avonmouth and discharged there. Despite the fact that the carrier had appointed an agent to effect on-carriage to Stafford however, the receivers arranged with the ship's agents that the goods should be released to them in Avonmouth, without production of the bill of lading. Consequently, the shipper advanced a claim against the carrier alleging misdelivery. Based on clause 12 of the multimodal transport document which contained a choice of law, Flaux QC ruled that, because the complaint related to alleged misdelivery in England, English law applied as the law of the country where the loss or damage occurred.

Besides having the freedom to incorporate a choice of law clause in a contract which merely establishes the manner in which the legal regime which is to apply is to be found, the contracting parties also have the liberty to choose any regime of State law they desire; the chosen law is not required to have any geographical, economical or legal ties to the contract or the parties[109]. The Rome Convention has settled the discussion on this matter in favour of the parties' choice, which cannot be set aside by the court on the grounds that the parties have selected a system regarded by the court as arbitrary[110]. The temporal extent and the permission to change a choice of law in Article 3(2) RC equally show that the drafters of the Rome Convention set great store by the principle of party autonomy. A choice of law may be made at any given time and it may also be changed by the parties at any moment.

Article 3(3) RC contains an important restriction to the concept of party autonomy. To prevent parties from evading mandatory rules whenever they feel like it, this paragraph restricts the possibility of a legitimate choice between conflicting regimes to international contracts[111]. Only the 'multinationality' of the contract substantiates the option to choose. A choice of law has no effect when all the elements relevant to the situation at the time of the choice are connected with one country only. When the only aspect connecting the case to a foreign State is the choice of its legal regime, the rules of the chosen regime cannot set aside the mandatory rules of the law of the State with which all the other aspects of the case connect[112]. A choice of law made in relation to a strictly national contract can only be of a supplementary nature; it is merely a choice

[107] The Rome Convention does not prescribe in what form a choice of law has to be made, Article 3(4) RC leaves the existence and validity of the consent of the parties as to the choice of the applicable law to be determined by the law which would govern it under this Convention if the contract or term were valid. Strikwerda 2004, p. 93.

[108] *Shipping and Agencies PVT Ltd v Alcobex Metals Ltd.,* [2005] 2 *Lloyd's Rep.* 336.

[109] Streng 2005, p. 154; Briggs 2008, p. 165-166; Mankowski 'Stillschweigende Rechtswahl' 2004, p. 86. There are regimes with different views however; pursuant to New York law, "[*a*]*bsent fraud or a violation of public policy, a court is to apply the law selected in the contract as long as the state selected has sufficient contacts with the transaction.*" U.S. District Court for the Southern District of New York, 19 July 2004, *ETL* 2005, p. 85-94.

[110] Plender & Wilderspin 2001, p. 89.

[111] In Germany this rule can be found in Article 27(3) EGBGB, while in States that are not party to the Rome Convention it is usually accepted as a rule of unwritten law.

[112] HR 13 May 1966, *NJ* 1967, 3; *S&S* 1966, 50 (*Alnati)*.

of material or substantive law[113], or in other words a secondary choice, which is restricted to the replacement or cancellation of dispositive rules of law pertaining to the contract[114]. Such a choice of law is grounded in the applicable national regime and is thus not considered to be actual private international law[115].

As a result it seems unlikely that the Dutch *Hoge Raad* would deviate from this course. Nevertheless, it appeared to do so in 2001 in relation to a choice made by the contracting parties to apply the CMR to domestic road carriage based on a contract that had no foreign aspects[116]. In this case the *Hoge Raad* determined that the CMR rules did override any conflicting provisions of the applicable State law. Needless to say, the *Hoge Raad* had a legitimate reason to decide in this manner. A reason which can be found in Article 8:1102(1) BW[117]. Article 8:1102BW allows parties to deviate from the compulsory rules on carrier liability in relation to road carriage found in Article 8:1095 BW, if they expressly agree to do so in relation to the intended carriage, and this agreement is laid down in a separate contract[118].

10.3.2.1 Paramount and 'network' choice of law clauses

Although Article 3 RC does not explicitly mention this, the range of legal regimes which can be chosen legitimately is also limited. The general opinion holds that Article 3 of the Rome Convention only allows for the choice of national law regimes as a whole, the choice for the body of law of a certain State[119]. The choice of a law which is not State law, such as a convention, has consequently been regarded as a '*materiellrechtliche Rechtswahl*', a secondary choice of law, and as such acceptable only insofar as it is allowed by the State law which is otherwise applicable[120]. This is unlikely to be different under the Rome I Regulation[121]. That

[113] A '*materieelrechtelijke rechtskeuze'* in Dutch and a '*materiellrechtlichen Verweisung'* in German. Such a choice is an expression of the parties' contractual autonomy within the limitations set by the internal public order of the law applicable to the contract. Sarcevic & Volken (eds) 1986, p. 388.

[114] HR 26 May 1989, *S&S* 1989, 94 or *NJ* 1992, 105 (*Zerstegen/Van der Harst*). As regards the CMR: "*The provisions of CMR may, by agreement between the parties, be made applicable to situations to which they are not automatically applicable under Article 1 of the Convention; ... Article 41 does not prohibit the application of CMR in such cases. However, this application can be effected only within the limits of the right of disposal of the parties and may not therefore be contrary to the peremptory rules of the national law which would apply in the absence of agreement between the parties.*" Loewe *Commentary on the CMR* 1975, p. 12. Odd as it may sound, this is the favoured approach of the Italian courts in regard to the entire sphere of application of the CMR. Sarcevic & Volken (eds) 1986, p. 388.

[115] Strikwerda 2004, p. 85 and 94-96; De Meij 2003, p. 88 *et seq*.; Haak 1998, p. 18.

[116] HR 5 January 2001, *NJ* 2001, 391 or *S&S* 2001, 61 (*Overbeek/Cigna*).

[117] See Parlementaire geschiedenis Boek 8, p. 1177.

[118] Contrary to this judgement by the *Hoge Raad* the *Rechtbank* Rotterdam stated in a judgement as recently as 2006 that the rules of the CMR could not set aside mandatory rules of the applicable national law if the contract in question entailed no international aspects, thus overlooking the option provided by Article 8:1102 BW. Rb Rotterdam 18 January 2006, *S&S* 2009, 4. Other even more recent judgements by the *Rechtbank* Rotterdam do concur with the views of the *Hoge Raad* on this subject however. See for instance Rb Rotterdam 18 January 2009, *LJN* BH3368. The Dutch Civil Code contains a similar option in Article 8:889 BW. The option found in this Article is narrower than the one in Article 8:1102 BW however, Article 8:889 BW only allows parties to set aside the mandatory rules on inland waterway transport found in the *Burgerlijk Wetboek* by choosing to apply the rules of the CMNI instead.

[119] Firsching & Von Hoffmann 1997, p. 383. The choice for the legal regime of a certain State includes the treaties this State is party to. OLG Dresden 14 March 2002, *TranspR* 2002, p. 246

[120] Mankowski 'Transportverträge' 2004, p. 1219, No. 1672 and Mankowski 'Stillschweigende Rechtswahl' 2004, p. 87-88. There are those who plead for a more expansive interpretation of Article 3 RC so as to cause the choice for uniform law instruments such as the CMR or even non-State law such as the Principles of European Contract Law (PECL) or the 1994 UNIDROIT Principles of International Commercial Contracts to be real choices of law which do set aside any incompatible mandatory rules of the otherwise applicable national law. Boele-Woelki 1995, p. 17;

national regime will then define whether the choice is permissible and the way in which the law of 'secondary choice' is to be interpreted[122].

> "*Le contrat qui comporterait un choix d'un ordre juridique non étatique serait régi, semble-t-il, au sens de la convention, par la loi applicable à défaut de choix et c'est à cette loi qu'il appartendrait de définir la place qu'elle consent à accorder aux règles non étatiques choisies par les parties.*"[123]

This means that the principle of party autonomy does not create a buffet of rules for the contracting parties from which they may pick and choose the choicest morsels. As was said above it also means that the choice to apply a treaty such as the Hague or Hague-Visby Rules generally made in paramount clauses – which are common choice of law clauses when the carriage involves a sea segment – is thus no more than a material or substantive choice of law; it cannot set aside the mandatory rules of the national law applicable unless said State law determines otherwise[124]. At least, not concerning those parts of the carriage that are not maritime. The combination of the scope rules in Article 10 HVR and the explanation of what is considered a contract of carriage in Article 1 HVR cause a paramount clause contained in a bill of lading choosing the Hague-Visby Rules as applicable law to be effective: such a choice does indeed cause the sea carriage stage to be governed by said uniform regime, since these Articles state:

> "*Article 10 HVR*
> *The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if*
> *...*
> *(c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract;*
> *...*"

and:

> "*Article 1 HVR*
> *In these Rules the following words are employed, with the meanings set out below:*
> *...*

Juenger 2000, p. 306. Strikwerda propagates the view that Article 21 RC causes the choice for convention law to be successful if the Forum State is party to the chosen convention and the convention allows for such a choice, which the CMR for instance does in his opinion. Strikwerda 2004, p. 201 and *NJB* 1996, p. 410-412 at p. 411; De Meij 2003, p. 90. Boonk is of the opinion on the other hand that the CMR does not clarify one way or the other whether 'opting in' should be allowed and is therefore not convinced that the CMR provided the basis for the judgement by the *Hoge Raad* in 1989 (HR 26 May 1989*, S&S* 1989, 94) mentioned by Strikwerda. In Boonk's opinion the *Hoge Raad* anticipated the coming of the Rome Convention in this judgement and based the application of the CMR in the judged case on the concept that Article 3 RC does allow the choice for uniform law and regards such a choice as a primary and not a secondary choice of law. Boonk 1998, p. 240.

[121] Recital 13 of the Rome I Regulation provides that it does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention, but that does not mean that the choice to do so is granted the same consequences as the choice for a State body of law as established by Article 3 Rome I. Boele-Woelki & Lazić 2007, p. 27-30; Magnus & Mankowski 2004, p. 149-153; Vernooij 2009, p. 71-76.

[122] Part of the answer of The Netherlands to question 8 posed in the Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, Brussels, 14.1.2003 COM(2002) 654. The document can be found at http://ec.europa.eu.

[123] Lagarde 1991, p. 301. See also Reinders 2005, p. 250.

[124] Mankowski 1993, p. 218. Hof Amsterdam 2 August 2007, *S&S* 2008, 114 (*Leliegracht*).

(b) 'Contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea,
..."

Thus the Convention itself gives authority to the choice to apply the Hague-Visby Rules, even if they are not applicable based on any of the other provisions[125]. Of course, such a paramount clause only entails a real choice of law which sets aside mandatory national law in the eyes of the courts of the States party to the Hague-Visby Rules. Other courts may honour the choice made by the parties based on the fact that choosing the Hague-Visby Rules as applicable law in paramount clauses is a deeply ingrained custom in international trade or they may not. When the law of a convention is chosen as the law applicable to – part of – the contract it is the *lex fori* which determines whether such a choice is permitted or not.

Most paramount clauses contain a choice for the Hague or Hague-Visby Rules although choices for the English or American COGSA or the Hamburg Rules also occur, and at times even combinations of various regimes are chosen[126]. The paramount clause derives its name from the fact that such clauses originally chose the Hague or the Hague-Visby Rules to be paramount, meaning that any terms in the bill of lading conflicting with the Rules were to be deemed void[127]. Such a clause would for example state the following:

"*This bill of lading shall have effect subject to any national law as enacted in the country of shipment, making the Hague Rules or the Hague Rules as amended by the Protocol signed at Brussels on 23 February 1968 (the Hague Visby Rules) compulsorily applicable to this bill of lading. If any term of this bill of lading be repugnant to the said legislation to any extent, such terms shall be void to that extent, but no further. Neither the Hague Rules nor the Hague Visby Rules shall apply to this contract where the goods carried hereunder consist of live animals or cargo which by this contract is stated as being carried on deck and is so carried. If no such national law shall be compulsorily applicable the carrier shall be entitled to the benefit of all privileges, rights and immunities contained in the United Kingdom Carriage of Goods by Sea Act 1924, but without prejudice to his right to rely on the terms, conditions and exceptions set out herein notwithstanding that they may confer wider or more beneficial rights, liberties or immunities upon the carrier than those set out in the said Convention.*"

Besides showing that the drafter of this particular clause deemed the Hague and the Hague-Visby Rules to be solely applicable through national law, the clause also shows that it is clearly drafted by someone who had the carrier's best interests in mind, and not especially those of the consignor. The clause contains a choice for either the Hague or the Hague-Visby Rules, from which the other terms of the bill of lading may not deviate under pain of invalidation, but only if

[125] Such a choice does need to be explicit however, an implicit choice of law is not sufficient to cause the scope of application provision found in Article 10(c) HVR to come into effect. If the HVR or the legislation of any State giving effect to them has been explicitly chosen however the HVR govern the contract *ex proprio vigore*, meaning that they set aside any incompatible rules of the otherwise applicable national regime. Mankowski 1995, p. 340 and 347.

[126] Mercadal 2001, p. 261-262. In Hof Den Haag 30 August 2005, *S&S* 2006, 13 the contracting parties chose the Hague-Visby Rules as applicable law but they also chose Dutch law; in such cases the national law chosen is meant to supplement the chosen regime of uniform law.

[127] According to De Wit there are authoritative decisions and commentaries in continental as well as in common law that establish that even partial incorporation of the Hague Rules in the contract of carriage results in the compulsory application of the whole regime. De Wit 1995, p. 342. If such a view would be generally accepted the contractual provision causing terms of the bill of lading which are incompatible with the Hague Rules to be void would be superfluous.

the Rules cannot be avoided. If the Rules can be deflected they are. Then a choice is made for the application of the United Kingdom's 1924 COGSA, but only insofar as it does not conflict with any of the terms, conditions and exceptions found in the bill of lading, which may be more beneficial to the carrier. It seems as though the drafter of the clause has forgotten that the Rules will also apply if the bill of lading has been issued in a Contracting State, and that not all States party to the Rules consider them to apply only through national law[128]. Denning J deemed the primary function of the paramount clause to be the protection of the carrier's co-contracting party. In 1957, in *Anglo-Saxon v Adamastos* he commented concerning these types of clauses that:

> "*…when a paramount clause is incorporated into a contract, the purpose is to give the Hague Rules contractual force: so that, although the bill of lading may contain very wide exceptions, the rules are paramount and make the shipowners liable for want of due diligence to make the ship seaworthy, and so forth . . .*"[129]

Yet, not all of the clauses in bills of lading choosing the application of the Hague or Hague-Visby Rules currently in use can be said to be as 'paramount' as the clause presented as an example[130]. The clause stemming from the bill of lading issued in the leading American case *Finagra v Africa Line* for instance referred to the Hague or Hague-Visby Rules but only insofar nothing else was provided in the bill of lading[131]. This last part of the provision did not quite sort the effect that was intended by the carrier however. The bill was made out to cover the entire carriage of a shipment of cocoa by sea from Lagos in Nigeria to Rotterdam in The Netherlands and by road from there to Amsterdam. The damage that occurred could not be attributed to either stage and as such remained unlocalized. One of the clauses in the bill of lading provided that if the contract concerned combined carriage the multimodal carrier was to be liable for the loss or damage which occurred during the carriage based on the Hague Rules if the stage where the loss or damage occurred was not known. Due to this choice of law by the contracting parties the Court applied the twelve month time bar of the Hague Rules. Although the bill also contained a clause shortening the time bar to nine months this clause failed to have any effect as it was – which the clause stated literally – subject to the liability clause which referred to the Hague Rules.

The choice of law clause in the bill of lading in *Finagra v Africa Line* contained more than only a choice of law for the situation that the loss could not be attributed to any of the transport stages. It also contained, as is quite common in contemporary bills of lading that are also meant to cover multimodal carriage, a choice of law for those situations in which the loss can be localized. In its entirety the choice of law part of the 'carrier's responsibility' clause in the *Finagra* bill read as follows:

> "…
> *(B) Combined Transport*

[128] For more information on the quandary as to whether the Hague and Hague-Visby Rules apply based on their own merits or rather merely through the application of the domestic law of Member States see Chapter 8, Section 8.1.1 on the two options in the Protocol of Signature.

[129] *Anglo-Saxon Petroleum Co. v Adamastos Shipping Co*., [1957] 1 *Lloyd's Rep.* 271.

[130] An example of a less 'paramount' clause is for instance Article 7 of the FBL, the FIATA multimodal transport bill of lading.

[131] *Finagra (U.K.) Ltd v Africa Line Ltd.,* [1998] *All ER* (D) 296.

Where the Carriage called for by this Bill of Lading is Combined Transport then, save as is otherwise provided in this Bill of Lading, the Carrier shall be liable for loss or damage occurring during Carriage to the extent set out below
(1) Where the stage of Carriage where loss or damage occurred is not known, the Hague Rules contained in the International Convention for the unification of certain rules relating to Bills of Lading dated 25th August 1924 to apply. Where compulsorily applicable by any national law the Hague Rules as amended by the protocol signed at Brussels 23rd February 1968 the so called Hague Visby Rules to apply.
(2) Where the stage of Carriage where loss or damage occurred is known
Notwithstanding anything provided for in sub-clause (B)(1) above and subject to clause 14 (Deck Cargo and Livestock), where it is known during which stage of Carriage the loss or damage occurred the liability of the Carrier in respect of such loss or damage shall be determined:
(a) if Carriage by sea, the Hague rules contained in the International Convention for the unification of certain rules relating to Bills of Lading dated 25th August 1924 to apply. Where compulsorily applicable by any national law the Hague Rules as amended by the protocol signed at Brussels 23rd February 1968 the so called Hague Visby Rules to apply.
(b) if Carriage by road, by the Convention on the Contract for the International Carriage of Goods by Road, dated 19th May 1956 (CMR)
(c) if Carriage by rail, by the International Agreement on Railway Transport, dated 26th February 1961 (CIM)
(d) if Carriage by air, by the Convention for the unification of certain Rules relating to International Carriage by Air, signed Warsaw 12th October 1929, as thereafter amended.
…"

Such extensive choice of law clauses are common in modern day door-to-door transport. They generally cause the law of any mandatory international convention or national law covering the stage where the loss or damage occurred to apply, or a default liability regime if the loss remains unlocalized[132]. These clauses are popularly called 'network' provisions[133]. That which applies regarding the choice for treaty law in regular paramount clauses equally applies to the 'network' choice of law clauses. In principle the choice for uniform law in these clauses is seen as a material or substantive choice of law only. Of course, whenever a network or paramount provision entails a choice for uniform law in a situation which already falls within the convention's scope of application, the chosen uniform rules do set aside any conflicting compulsory rules of the applicable national regime. This is not caused by the contractual choice for these rules however, but by the status of the uniform regime as law of a higher order.

By stating that the contracting parties can select the law applicable to the whole or a part of the contract only, the last sentence of Article 3 RC shows that the 'network' clauses common in multimodal carriage are permitted. Thus the contracting parties are allowed to choose per

[132] In *Hartford v Orient Overseas Container Lines* for example, a containerized shipment of bicycles moving under a through bill of lading from Wisconsin to The Netherlands, via Chicago, Montreal, and Antwerp, was stolen by thieves when the inland trucker left the container unattended in Belgium. The bill of lading extended the American COGSA's application to the pre-tackle and post-tackle periods, '*except as otherwise provided herein*'. Another clause in the same bill stipulated that each stage of the transport would be '*… governed according to any law and tariffs applicable to such stage'*. By establishing that the CMR therefore governed the road stage as both Belgium and The Netherlands are Member States the Court of Appeals reversed the judgement of the district court. Thus, based on a combination of the choice of law clauses in the bill of lading, the Court of Appeals deemed the CMR rather than the COGSA to be the law applicable to the stage of transport during which the theft occurred. *Hartford Fire Insurance Co. v Orient Overseas Container Lines (U.K.) Ltd*., (2nd Cir. 2000), *ETL* 2001, p. 212 (*Bravery*). Although these 'network' clauses are common in modern day transport they have been around for a long time. The 1973 ICC Rules for a combined transport document for instance contained a similar network approach.

[133] Crowley 2005, p. 1482.

segment or '*Teilstrecke*' which rules of law are to be applied. Moreover, besides choosing uniform regimes as applicable law within certain restrictions, the contracting parties may even choose to cover each part of the carriage by a different regime of national law.

10.3.2.2 Depeçage *and* 'Teilstrecken'

As was briefly touched upon above a choice of law is generally made for the entire contract, even when it concerns a contract of multimodal carriage, but deviation from this standard is made possible by the inclusion of the words 'or a part only' in the last sentence of Article 3 RC[134]. As Article 3 RC therefore states that 'by their choice the parties can select the law applicable to the whole or a part only of the contract', it is possible that the contracting parties cause different laws to apply to different parts of a contract. This concept is called *depeçage* or severability. Experts have observed that *depeçage* should be considered possible only when a contract is severable[135]. A contract is considered severable when it consists of several contracts or parts which are separable and independent of each other from legal and economic points of view. And even then, when the contract can be deemed severable, the choice of law must be logically consistent, it must relate to elements in the contract which can be governed by different laws without giving rise to contradictions[136]. If these conditions are met however, *depeçage* can also occur in situations in which no choice of law has been made[137]. Article 4 RC which appoints the applicable law in the absence of a choice of law made by the parties determines that, although the contract shall in such situations in principle be governed by the law of the country with which it is most closely connected, it is possible that a severable part of the contract, which has a closer connection with another country, may by way of exception be governed by the law of that other country.

As a result of the TRG and the mixed nature of the multimodal contract which consists of different stages, a difference of opinion on the possibility of *depeçage* in relation to multimodal transport contracts has arisen in German legal literature. Mankowski for instance is of the opinion that a '*Durchfrachtvertrag*' which relates to door-to-door carriage including a sea stage is an organic whole which cannot be severed into independent parts, which means that *depeçage* is not an option[138]. Ramming on the other hand does not deem *depeçage* completely impossible when it comes to multimodal contracts – he deems it possible in relation to '*bestimmte Gegenstände*' although what those are exactly remains unclear – but he does subscribe to

[134] See for instance Rb Haarlem 22 May 2001, *S&S* 2002, 42 in which the court stated that since the parties agreed that the combined carriage contract was governed by Dutch law this meant that in principle all parts of the contract were so governed. In addition see OLG Düsseldorf 1 July 1993, *TranspR* 1995, p. 77-80 and OLG Hamburg 19 December 2002, *TranspR* 2003, p. 72-74. In which last judgement the OLG said: "*Sind bei einem multimodalen Transport beide Vertragsparteien deutsche Unternehmen und liegt ihrem maßgeblichen Rahmenvertrag deutsches Recht zugrunde, dann entspricht es ihrem Willen, auch die Beurteilung des Teilstreckenrechts nach deutschem Recht vorzunehmen.*"

[135] Giuliano & Lagarde 1980, Article 3, No. 4.

[136] The same experts rebutted the argument that *depeçage* might be used to avoid certain mandatory provisions by pointing out that Article 7 RC would prevent this where necessary. Giuliano & Lagarde 1980, Article 3, No. 4.

[137] See for instance *Kahler v Midland Bank LD.,* [1950] *AC* 24. Per Macdermott LJ: "*If then, as I would hold, the proper law of the contract is to a substantial extent that of Czechoslovakia, must it be said on that account, and notwithstanding the circumstances, that that law is also the proper law of the mode of performance in London? Though there is no authority binding your Lordships to the view that there can be but one proper law in respect of any given contract, it is doubtless true to say that the courts of this country will not split the contract in this sense readily or without good reason. In my opinion, however, there is good ground for so doing in the somewhat unusual and, as I think, compelling circumstances of the present case.*"

[138] Mankowski 1995, p. 23.

Mankowski's idea that choosing to vary the applicable law per transport stage is not admissible. Even paramount clauses are ineffectual in his opinion. In his view, exceptions are possible, but only insofar as the legislator has provided for them[139]. Drews also adheres to the idea that a choice of law for a stage of the transport is not an option. He bases this concept on the existence of § 452d(2) HGB which gives the contracting parties the option to deviate from § 452a HGB in cases of localized loss by choosing to apply domestic German law to all stages of the transport or to one or more stages if the damage or loss occurs during these[140]. When reasoned *a contrario* Drews says it is this provision that provides the contracting parties with their only option to deviate from § 452a HGB. Although this may seem to be a valid argument within the German legal sphere, it does not provide a suitable method of approach for multimodal contracts on an international scale. § 452d HGB is a rule of national law and as such it is inadequate to serve as an argument for excluding *depeçage* for all multimodal contracts, including those to which German national law does not apply. Drews' *a contrario* argument does therefore not seem sufficient to consider the party autonomy regarding the choice of law for only parts of a contract envisioned by Article 3 RC – which is a provision of uniform law rather than of domestic law – barred for multimodal carriage contracts in general. Basedow however agrees with Ramming, Mankowski and Drews on the grounds that preventing *depeçage* promotes uniformity of decisions, which is one of the ultimate goals of private international law. Although denying the parties the option of *depeçage* may at first glance not seem to be in accord with the network approach propagated by Basedow, he attempts to persuade his readers into believing that adhering to both these views is not as incongruous as it seems. He argues to this end that the network approach and *depeçage* are based on two very different principles; the network approach is based on '*sachrechtliche Ebene*', whereas *depeçage* is based on '*kollisionsrechtliche Ebene*'[141]. On the whole, this distinction between substantive and conflict law does not seem convincing enough to deny the independent character of the separate transport stages of a multimodal carriage contract when it comes to the parties' freedom to choose the law applicable and yet to grant it when the applicable law is to be determined by national or international legislation.

Hartenstein for one is of the opinion that the multimodal carriage contract is severable, and does not see any contradictions arising from the application of different regimes to the

[139] One such an exception is the law applicable in case of localized loss as regulated by § 452a HGB or the choice of law that can be made based on § 452d(2) HGB. Ramming 1999, p. 338. In a later article Ramming determines that a choice of law concerning a single transport stage is void. "*Eine einzelne Teilstrecken betreffende Rechtswahl ist unbeachtlich*". Ramming *TranspR* 2007, p. 281.

[140] § 452a HGB reads: "*If it has been established that the loss, damage or event which caused delay in delivery occurred on a specific stage of the carriage, the liability of the carrier shall, contrary to the provisions of the first subsection, be determined in accordance with the legal provisions which would apply to a contract of carriage covering this stage. The burden of proving that the loss, damage or event which caused delay in delivery occurred during a particular stage of the carriage is borne by the person alleging this.*" § 452d HGB reads: "*1. Deviation from the rules of Article 452b(2) first sentence is possible only by an agreement which is negotiated specifically, even when such an agreement is entered into multiple similar contracts between the same contracting parties. Deviation from the other provisions of this subsection is possible through contractual agreement, but only insofar as the rules to which the other provisions of this subsection refer allow such deviation. 2. Notwithstanding paragraph 1 it is possible to agree by means of standard contract terms in situations involving localized loss (Article 452a) that matters of liability are governed by the first subsection (1) regardless of where the damage occurs, or (2) in case the damage occurs during a stage of the transport indicated in the agreement. 3. Agreements which exclude the application of the rules of an international convention to which the Federal Republic of Germany is party which are compulsory pertaining to a certain stage of the transport are void.*" For more details on the German multimodal transport legislation see Section 10.4.2 of this Chapter.

[141] '*Sachrechtliche Ebene*' can roughly be translated as meaning principles of substantive law and '*kollisionsrechtliche Ebene*' can be considered to mean principles of conflict law. Basedow 1999, p. 39.

various stages or '*Teilstrecken*' of a multimodal contract[142]. In his opinion the uniformity of decisions is also not jeopardized by *depeçage*, since all EU States are forced to uphold the *depeçage* doctrine. To this can be added that the uniformity of decisions – besides being only one of the goals of private international law – is more of an ideal than an actually attainable goal in any case, and should therefore be treated as such. Otherwise the entire concept of having the freedom to choose the law applicable to a contract would be rather pointless, and *depeçage* would be more of a hindrance than an asset.

In the same breath as the question regarding the severability of multimodal contracts the question is asked in German academic writing whether a choice of law for the entire multimodal contract of carriage should also be considered a choice of law for all stages of the carriage. The fact that this question is even posed would seem to point towards the idea that said contract should indeed be considered severable.

The reason that this question arises in Germany – as it has succinctly in The Netherlands, but not in England[143] – are the provisions on multimodal transport in the German HGB[144]. According to Basedow the determination of the law applicable to – all parts of – a multimodal contract elicits three questions, the last of which is posed by the German multimodal legislation[145]. The first question is of course whether any regime of uniform carriage law applies to the contract. The second question is which national legal regime applies to the contract, by which is meant the contract as a whole. If this is German law a third query comes up. This third question is posed by § 452a HGB, which governs situations where the loss is localized. Under those circumstances this Paragraph prescribes that the law applicable to the contract that would have been entered into by the consignor and the multimodal carrier if the carriage had only involved the stage of the transport where the loss occurred be determined[146]. This may be a convention if the relevant transport leg involves international carriage, but this may also be a national regime. It is this last step that causes discussion in the German academic scene. Can § 452a HGB cause a part of the contract that is in its entirety governed by German law – otherwise § 452a HGB would not have any effect – to be subjugated partly to another domestic regime? Or is this Paragraph meant only to ensure that the international conventions such as the CMR to which Germany is party may be applied to international stages of multimodal transports?[147]

When a choice of law has been made concerning the entire transport, Basedow – and with him Mankowski, Ramming and Hartenstein – is of the opinion that this should be deemed

[142] Hartenstein 2005, p. 10.

[143] In 1993 Van Beelen addressed this dilemma in an article. See Van Beelen 1993.

[144] These can be found in §§ 452 through 452d HGB. The question whether a choice of law for the entire multimodal contract of carriage should also be considered a choice of law for all stages of the carriage is answered by a simple yes, in The Netherlands at least. A choice of law is deemed to have been made by the parties for the contract of carriage as a whole and thus also applies to each separate stage of the transport unless the contracting parties agreed otherwise. Rb Rotterdam 18 January 2006, *S&S* 2009, 4.

[145] These are not questions of private international law according to Basedow but rather questions of substantive law, even though they do not in fact differ from the '*Rechtanwendungsfrage des Internationalen Privatrechts*'. Basedow 1999, p. 40-42.

[146] That it is indeed the hypothetical contract between the consignor and the multimodal carrier which should be appraised, and not for instance the actual contract between the multimodal carrier and the subcontracting carrier or even the hypothetical contract between the subcontracting carrier and the consignor, is the outcome of an extensive discussion. In 2007 the BGH judged this to be so; BGH 25 October 2007, *I ZR* 151/04. Parallels can be drawn between this discussion and the one on the Dutch multimodal transport regime but also between this one and the discussion concerning which contract to appraise in light of Article 2 CMR carriage. For the German discussion on whose hypothetical relationship is meant by § 452a HGB, see Rabe 2000, p. 194; Koller *VersR* 2000, p. 1189; Basedow 1999, p. 41-42; Ramming 1999, p. 340. For a Dutch discourse on the same matter see Van Beelen 1996, p. 97-103. For more information on the comparable discussion regarding Article 2 CMR see Chapter 4, Section 4.3.5 on the hypothetical contract under Article 2 CMR and the conditions prescribed by law.

[147] See also Section 10.4.2 of this Chapter on the German multimodal carriage legislation.

to apply to the separate stages as well[148]. The reason for this is that the question regarding the law applicable to the hypothetical contract, the third question in the sequence, is governed by the normal German –read European – private international law, which is the Rome I Regulation, which allows choices of law. A choice of law for the entire contract is meant to govern the relationship between the contracting parties says Ramming, and is thus equally applicable to issues which relate to specific transport stages. Rabe and Drews on the other hand do not share this point of view[149]. They are convinced that the general choice of law should not be treated as a choice for the separate transport stages as well. Rabe bases this opinion on the fact that he deems the hypothetical contract as meant by § 452a HGB to be between the consignor and the local subcontracting carrier. A choice of law made by the consignor together with the multimodal carrier should therefore not influence the law applicable to the hypothetical contract. In 2007 the BGH put an end to this line of thought, when it determined that the hypothetical contract as meant in § 452a HGB involves the same contracting parties as the multimodal contract, namely the consignor and the multimodal carrier[150]. Drews does not base his rejection of the effect a general choice of law may have on the separate transport stages on the grounds mentioned by Rabe. He deems the general choice of law clause of no use concerning the determination of the law applicable to the separate legs of the carriage because he does not consider the contracting parties free to choose the law applicable to the separate stages. The law applicable to each stage can only be determined objectively by applying § 452a HGB, not by means of *depeçage*, nor by choosing the same law for the entire contract, excepting only the choice for German law offered by § 452d(2) HGB. Once again this seems a very nationally oriented view concerning a contract that is not nearly always governed by German law. Since other legal systems generally do not concern themselves with the applicable – national – law a second time like § 452a HGB does[151] it is questionable whether the many layered path to the applicable law under German domestic rules should be considered a reason to bar the choice of law parties have made based on Article 3 RC/Rome I for the entire carriage contract from having effect regarding its separate stages, except perhaps where it concerns multimodal contracts that are actually governed by German law.

The real problem complicating the German discussion is of course the additional private international law question posed by § 452a HGB. Herber puts his finger exactly on the sore spot by commenting that:

> "*When the contracting parties choose German law for the main contract one should generally assume that they meant to let the entire contract be governed by the German legislation, including its conflict of law provisions. The core question is therefore whether*

[148] Mankowski 'Transportverträge' 2004, p. 1223, No. 1680; Ramming 1999, p. 341; Hartenstein 2005, p. 13.

[149] Rabe 2000, p. 194; Drews 2003, p. 15.

[150] BGH 25 October 2007, *I ZR* 151/04; BGH 18 June 2009, *I ZR* 140/06. In The Netherlands Van Beelen extensively addressed this dilemma in her dissertation. Like the BGH she also came to the conclusion that the fictional contracts – each entailing one of the stages of the transport – hinted at by the Dutch legislation on multimodal transport (Articles 8: 41, 8:42 and 8:43 BW) are the contracts between the consignor and the multimodal carrier as they would have been concluded had these parties contracted for each transport stage separately. Van Beelen 1996, p. 98 *et seq*. For the discussion on this subject in light of Article 2 CMR see Chapter 4, Section 4.3.5 on the hypothetical contract hinted at by Article 2 CMR.

[151] The applicable national law for the entire contract including the separate stages is generally only determined once, if that. In some situations it is determined before the applicability of the relevant uniform carriage conventions is checked, but based on efficiency considerations it is mostly determined afterwards, if necessary.

> *the separate stages of the contract are also governed by German law when the applicability of the German legislation is assumed.*"[152]

All in all, it seems that the opinion held by Basedow and Ramming should be deemed the '*herrschende Meinung*' as it is adhered to on a wider scale than the views held by Rabe, and later Drews[153]. Like in The Netherlands the general opinion in Germany seems therefore to be that a choice of law for the contract as a whole should – in principle – also be considered a choice of law for each separate stage of the transport[154]. An important argument in favour of this view is Article 20 of the Rome I regulation[155]. In Article 20 the Rome I Regulation clarifies that the application of the law of any country specified by the Regulation means the application of the rules of law in force in that country other than its rules of private international law[156]. Since the provision found in § 452a HGB is for all intents and purposes a rule of private international law, a choice for German law based on Article 3 RC/Rome I excludes § 452a HGB. The result is that the entire contract, including the separate stages are governed by German law. In 2003 and in 2004 the OLG Hamburg demonstrated its support of this view[157]. That is to say, at least when the contracting parties are both German businesses[158]. In the 2004 decision the OLG established that:

> "*Since the contract of carriage entered into by the parties concerns carriage by different means of transport as meant in § 452 HGB and the loss is localized in accordance with § 452a HGB, German law is also authoritative in the determination of the hypothetical law applicable to the relevant stage of the transport as meant in § 452a HGB. Under these circumstances a choice of law as meant in Article 27 EGBGB means that the parties also clearly assume that German law applies to this matter. In addition, the Court holds to its position (TranspR 2003, 72) in that it deems German law to be the law applicable to the relevant stage of the transport when – as is the case – both parties to the main contract are German businesses who have chosen to apply German law to said main contract.*"[159]

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[152] "*Wenn die Parteien für den Hauptvertrag deutsches Recht wählen, muß man wohl in der Regel davon ausgehen, daß sie den Vertrag insgesamt so behandelt sehen möchten, wie das deutsche Gesetz ihn ausgestaltet, einschließlich seiner kollisionsrechtlichen Bezüge. Die Kernfrage ist deshalb, ob bei angenommener gesetzlicher Geltung deutschen Rechts die Teilstrecke notwendig auch nach deutschem Recht anzuknüpfen ist.*" R. Herber, 'comment on OLG Hamburg 19 August 2004, *TranspR* 2004, p. 402-404', *TranspR* 2004, p. 404-406.

[153] Koller *VersR* 2000, p. 1189.

[154] See for instance Rb Rotterdam 5 January 2005, *S&S* 2005, 87; Rb Rotterdam 16 February 2005, *S&S* 2007, 102; Rb Rotterdam 19 July 2006, *S&S* 2007, 52; Rb Haarlem 22 May 2001, *S&S* 2002, 42.

[155] Article 35 EGBGB. See also Article 4(2) EGBGB which causes a choice of law to be no more than a choice for the law in question minus its conflict of laws or private international law rules. Hartenstein 2005, p. 13.

[156] In the Rome Convention the same is specified by Article 15.

[157] OLG Hamburg 19 December 2002, *TranspR* 2003, p. 72-74; OLG Hamburg 19 August 2004, *TranspR* 2004, p. 402-404. See also OLG Düsseldorf 12 December 2001, *TranspR* 2002, p. 33-36. The OLG Dresden supported a different opinion however. It did not deem a choice of law clause choosing the law of the country of loading, which was Germany, to cause German law to apply automatically to all '*Teilstrecken*'. OLG Dresden 14 March 2002, *TranspR* 2002, p. 246. Before the *Transportreformgesetz* a general choice of law was also deemed to apply to the separate transport stages, see OLG Düsseldorf 1 July 1993, *TranspR* 1995, p. 77-80.

[158] This seems rather innocuous as in such a case the law most closely connected to the contract will most likely be German law any way, so even if the '*Teilstreckenrecht*' is determined based on the rules of Article 28 EGBGB (Article 4 RC) instead of based on the choice of law made by the parties the outcome is still prone to be German law.

[159] "*Da es sich bei dem zwischen den Parteien geschlossenen Frachtvertrag um einen solchen über die Beförderung mit verschiedenartigen Beförderungsmitteln im Sinne von § 452 HGB handelt und der Schadensort gemäß § 452 a HGB bekannt ist, ist auch für die Ermittlung des hypothetischen Teilstreckenrechts im Sinne von § 452 a Satz 1 HGB deutsches Recht maßgeblich. Denn in diesem Zusammenhang läßt sich ebenfalls eine Rechtswahl im Sinne von Art. 27 EGBGB damit begründen, daß die Parteien auch insoweit von der Geltung deutschen Rechts ausdrücklich ausgehen. Darüber hinaus hält der Senat an seiner Ansicht (TranspR 2003, 72) fest, wonach deutsches*

10.3.3 The freedom of choice under the Rome I Regulation

According to recital 11 of the Regulation's Preamble, the parties' freedom to choose the applicable law remains one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations. Whether the Regulation should allow choices of law for non-State law such as conventions was a point of discussion however. The result of the discord on this subject is that the considerations on the effect of paramount clauses under the Rome Convention – or of any type of clause that chooses non-State law as the law applicable to the contract for that matter – still appear to be relevant under the new Regulation.

Some wanted to extend the choice of law offered by the Rome Convention to include non-State law when the drafting process of the Rome I regulation commenced, as is evidenced by the choice of law provisions in the 2005 proposal by the Commission[160]. In this proposal, Article 3 on the freedom of choice authorizes the parties to choose as the applicable law a non-State body of law to 'further boost the impact of the parties' will'. Thereto it contained the following text:

> "*2. The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community. However, questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation.*"

As can be read in the report by Dumitrescu this part of the proposal did not make the cut. According to this report it was "*considered appropriate to refer to the use of such bodies of non-State law as UNIDROIT in a recital, rather than in the enacting terms*"[161]. As a result the referral to non-State law was withdrawn from Article 3 and a somewhat ambiguous reference to the possibility to incorporate non-State law into a contract was proffered in recital 13 of the Preamble of the Regulation, which determines:

> "*(13) This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.*"

Whether this means that the choice of non-State law such as a convention can be deemed a choice that sets aside the mandatory rules of the (domestic) law that otherwise applies to the contract is uncertain. It is likely therefore that it is still the *lex fori* that determines whether such a choice of law is a choice that sets aside the mandatory provisions of the otherwise applicable State law[162].

Teilstreckenrecht gilt, wenn – wie hier – beide Parteien des Hauptvertrages deutsche Unternehmen sind und für diesen Hauptvertrag die Geltung deutschen Rechts vereinbart ist." For more details on the German multimodal transport legislation see Section 10.4.2 of this Chapter.

[160] COM/2005/650/FINAL .

[161] Report I, 21 November 2007, on the proposal for a regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), (COM(2005)0650 – C6-0441/2005 – 2005/0261(COD)), Committee on Legal Affairs, Rapporteur: Cristian Dumitrescu, p. 11 of 52.

[162] Hartenstein 2008, p. 150-151; Van der Velde 2009, p. 27. Boonk on the other hand is of the opinion that at least the choice for the Hague or the Hamburg Rules should set aside mandatory law. Boonk 2009, p. 101. See also Section 10.3.2.1 of this Chapter on paramount and 'network' choice of law clauses.

10.3.4 The absence of choice under the Rome Convention

Article 4 of the Rome Convention determines which law applies to the contract when no choice of law has been made by the contracting parties. For carriage contracts the most important provision is Article 4(4) which determines:

> "*4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.*"

This provision specifically designed for carriage contracts emphasizes the importance of the principal place of business of the carrier. The more generic provision in Article 4(2) RC on the other hand, attaches to the place where the party 'who is to effect the performance which is characteristic of the contract' has, at the time of conclusion of the contract, his habitual residence. This non-specific provision is excluded from application concerning contracts of carriage however. The obvious reason for this exclusion is that carriers do not always actually perform the (entire) carriage themselves. If the rule of Article 4(2) were to be applied to contracts of carriage it is likely that the law of the State where the actual (subcontracting) carrier has his habitual residence would apply. This is not necessarily the same State where the main carrier who contracted with the consignor has his principal place of business however, which would make the law applicable to the contract less predictable for said consignor at the outset.

10.3.4.1 The carrier and the consignor

The *lex specialis*[163] of Article 4(4) RC for carriage of goods contracts – which equally applies to multimodal carriage contracts[164] – shows that the four connecting factors for determining the applicable law are the countries where the carrier and the consignor have their principal places of business and the countries where the place of loading or discharge are situated. Of these four the country where the carrier has his principal place of business plays the central part; if one or more of the other three mentioned places is situated in the same country, it is the law of this State which applies to the contract. A decision by the OLG Köln in 2004 illustrates the importance that is attached to the whereabouts of the principal place of business of the carrier[165]. Although the entire carriage of two containers stuffed with computer monitors was meant to be performed within the boundaries of a Dutch industrial estate, in other words completely within The

[163] "*After a long and animated discussion the Group decided to include transport contracts within the scope of the convention. However, the Group deemed it inappropriate to submit contracts for the carriage of goods to the presumption contained in paragraph 2, having regard to the peculiarities of this type of transport. The contract for carriage of goods is therefore made subject to a presumption of its own, namely that embodied in paragraph 4.*" Giuliano & Lagarde 1980, Article 4, No. 5.

[164] BGH 29 June 2006, *TranspR* 2006, p. 466-468; BGH 3 November 2005, *TranspR* 2006, p. 35-37; OLG Dresden 14 March 2002, *TranspR* 2002, 246; OLG Celle 24 October 2002, *TranspR* 2003, p. 253-255; Rb Rotterdam 3 May 2006, *S&S* 2007, 114; Mankowski 'Transportverträge' 2004, p. 1219, No. 1673; Koller 2007, p. 700, § 452 HGB, No. 1a.

[165] OLG Köln 18 May 2004, *TranspR* 2005, p. 263-265. See also Rb Rotterdam 3 May 2006, *S&S* 2007, 114.

Netherlands, the OLG determined that the contract of carriage was governed by German law since both the carrier and the consignor had their principal place of business on German soil.

The result is that it is of primary importance to identify the carrier, which is not always as easily done as said, especially not if the multimodal transport contracted for includes a sea stage. There are different reasons for this. To begin with there are many agents operating in the door-to-door carriage industry, which makes it difficult to discern whether one enters into a carriage or a freight forwarding contract at times[166]. The confusion in this area is somewhat aggravated by the fact that multimodal carriage is often partly subcontracted to 'actual carriers'. It often happens that the party the shipper enters into a contract with does not carry the goods itself, but rather arranges for a third party to do so. Nonetheless, whether or not a party performs the carriage itself, any party or person who, on his own behalf or through another person acting on his behalf, concludes a multimodal transport contract and who acts as a principal, not as an agent of or on behalf of the consignor or of the carriers participating in the multimodal transport operations, and who assumes responsibility for the performance of the carriage contracted for, is considered the – contractual – carrier[167].

Unfortunately, this clarification hardly means that all the hurdles pertaining to the identity of the carrier in multimodal carriage have been taken[168]. When the contract includes a sea stage for instance the bill of lading may include all sorts of confusing clauses concerning the identity of the carrier, such as 'identity of carrier' clauses[169] or 'demise' clauses[170]. In this context the Dutch legislation on the identity of the carrier 'under a bill of lading' apparently adds insult to injury by establishing in Article 8:461 BW that, depending on the circumstances, more than one party may be considered to be such a carrier[171]. This – and the inextricable circle one would get mired in if one were to make use of national law to fill in the concept of the carrier – shows that the term 'carrier' as found in Article 4(4) RC is better interpreted autonomously instead of by means of national principles.

When the carrier is known the identification of the consignor should on the other hand not pose that many problems. Especially not if one accepts Dicey and Morris' explanation that only the original co-contracting party of the carrier, the person that entered into the contract with the carrier should be deemed to be the consignor under Article 4 RC, and not, as is assumed in some legal systems, also the person who actually delivers the goods to the carrier[172]. Yet, the

[166] See Chapter 2, Section 2.2.4 which discusses the differences between these and several other similar contracts.

[167] Rb Rotterdam 2 January 1976, *S&S* 1977, 66; Rb Rotterdam 19 March 1998, *S&S* 1999, 42. See also Giuliano & Lagarde 1980, Article 4, No. 5 and Chapter 1, Section 1.2.1 on subcontracted carriage.

[168] Indeed, the subject has been the topic of elaborate studies, see for instance Smeele 1998.

[169] Rb Rotterdam 18 July 1996, *S&S* 1997, 51.

[170] The clause intends to relieve the time or voyage charterer of a ship from the obligations of a 'carrier' under the Hague or Hague-Visby Rules, by simply declaring that the charterer is only an agent of the ship owner, who should be deemed the sole carrier, and this even where the charterer in fact issues the bill of lading, collects the freight and performs most or all of the duties of a carrier under the contract of carriage evidenced by the bill. The clause is generally regarded as invalid in civilian jurisdictions. Tetley 'The Demise of the Demise Clause' 1999. Because the validity of such a clause is to be determined based on the legal regime applicable to the contract, which in turn depends on the identity of the carrier in many a case, this makes for an inextricable circle. A solution can perhaps be sought in Article 10 of the Rome I Regulation under which the validity of such a clause is determined by the law which would govern it under the Convention if the clause were indeed valid. Dicey & Morris 2006, p. 1773. Furthermore, under Dutch law, carriage based on a bill of lading can produce more than one party that is to be considered to be the contractual carrier according to Articles 8:461 and 8:462 BW.

[171] See Rb Rotterdam 18 July 1996, *S&S* 1996, 113.

[172] Dicey & Morris 2006, p. 1774-1775. In the 'Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), Brussels 15 December 2005', Article 4 on the applicable law in the absence of choice determined in paragraph 1(c) that a contract of carriage would be governed by the law of the country in which the carrier has his habitual residence. The consignor as a connecting factor was

Guiliano/Lagarde Report shows that the drafters of the Rome Convention did mean the term 'consignor' in Article 4(4) RC to refer to any and all persons who actually consign goods to the carrier, in other words the *afzender, aflader, verzender, mittente, caricatore, et cetera*. Thus the scope of Article 4(4) is drawn a little wider than when a narrow interpretation of the term consignor had been envisioned[173]. The result is that more contracts for the carriage of goods fall within the reach of Article 4(4). If for instance the contracted for carriage starts in Badajoz (Spain) and ends in Meppel (The Netherlands) and the carrier has his place of business in Elvas (Portugal) while his co-contracting party has his principal place of business in The Netherlands, the narrow view of the term 'consignor' will cause paragraph 4 to be ineffective. If the wider interpretation is used however, paragraph 4 will appoint Portuguese law as the law applicable to the contract if the '*aflader*' – the party actually handing over the goods to the carrier in Badajoz – also has his principal place of business in Portugal. Of course, the wider view will only marginally enhance the scope of application of Article 4(4) since the '*aflader*' will generally have his principal place of business in the State where the goods are loaded and in those circumstances the more expansive interpretation of the word 'consignor' will sort no effect.

10.3.4.2 The principal place of business

The next thing to be determined if both the carrier and the consignor have been identified, is what is considered to be their 'principal place of business'. The Guiliano/Lagarde Report establishes on this account that in order to prevent the changing of the place of business after the conclusion of the contract from confusing matters Article 4(4) RC clearly states that the reference to the country in which the carrier has his principal place of business must be taken to refer to the carrier's place of business 'at the time the contract is concluded'[174]. Whether this is also true of the three other connecting factors is not mentioned by the Report.

The principal place of business of the multimodal carrier is not always easy to determine. Again the difficulties are largest when the carriage also involves carriage by sea, since in sea carriage the 'principal place of business clause' tends to crop up to complicate matters. If the place pointed out in such a clause does not coincide with the principal place of business as meant by Article 4(4) RC, the difficult question arises whether or not third parties may have justifiably relied on the information provided by the clause and its consequences concerning the applicable law.

In addition it seems unrealistic to equate the (sea) carrier's principal place of business with the place where he is incorporated, given the propensity of ship owners to incorporate in havens such as Panama to gain a 'flag of convenience'[175]. One would be hard pressed to consider the shipping company's office address in States such as Monrovia or Liberia their principal place of business, to actually be the place where the main body of operations by the shipping company

expunged. This departure from the Rome Convention's text was not preserved however. The final text of the Rome I Regulation refers to the 'habitual residence' of the consignor in Article 5(1).

[173] In Boonk's opinion it is the shipper mentioned in the bill of lading, whether this is the co-contracting party of the carrier, the party actually handing over the goods to the carrier or both, that should be considered the 'consignor' as meant by Article 4(4) RC if the carriage in question concerns carriage by sea. Only when the party actually handing over the goods, the '*aflader*', plays no part whatsoever in the contract of carriage, like under charter parties, does he deem the term 'consignor' restricted to the carrier's co-contracting party. Boonk 1993, p. 189.

[174] Giuliano & Lagarde 1980, Article 4, No. 5.

[175] Dicey & Morris 2006, p. 1773; Hartenstein 2005, p. 11. A 'flag of convenience' can be described as any country allowing the registration of foreign owned and foreign controlled vessels under conditions which, for whatever reasons, are convenient and opportune for the persons who are registering the vessels.

is performed, especially if Lloyd's Register mentions a company in for instance Rotterdam or Piraeus to be the manager[176]. The most daunting stumbling blocks in this context may be the single-ship companies whose main activities are performed on board the ship. However, this is not directly a problem in multimodal carriage as single-ship companies generally do not provide multimodal carriage services. Instead of attaching to the place where the carrier is incorporated or registered it is much more likely, according to Dicey and Morris, that the principal place of business of the carrier is determined according to the principles that are used to determine where a company may be served with process in proceedings. It seems however that using these rules may cause the carrier's principal place of business to be situated in several countries at the same time, which appears to be somewhat extensive and confusing in light of Article 4(4) RC. More important is however that if the carrier is deemed to have multiple places of business this could cause the provision in Article 4(4) RC to appoint more than one legal regime as the law applicable to the contract. This in particular seems something to be avoided.

The carrier's principal place of business is also referred to in the jurisdiction provisions of both the Warsaw and the Montreal Conventions[177]. According to Giemulla and Schmid 'the principal place of business' meant by these provisions is the place in which the air carrier has his '*zentrale Verwaltung*' and where the '*tatsächliche Leitung der Geschäfte konzentriert*', which does not necessarily coincide with the seat of the company[178]. In Article 54 the Consolidated version of the Treaty on the Functioning of the European Union (TEC)[179] also refers to the principal place of business. This Article differentiates between (1) a company's registered office, (2) its central administration and (3) its principal place of business by which is meant respectively (1) the place where the company is formally registered, (2) the place where the decisions are formed and made and (3) the place where the company's main activities are performed and where its principal capital assets such as staff, resources and funds are situated. The TEC's concept of what is to be considered the principal place of business of a company seems to fit Article 4(4) RC rather well. Therefore if the place can be located where the (multimodal) carrier's main capital assets reside is also the place where he mainly performs his day-to-day business – which in relation to carriage cannot be considered to be the actual carriage as this is obviously not performed in one place, but it could for instance concern contact with clients, administrative work *et cetera* – this place is likely to be considered the carrier's place of business under Article 4(4) RC.

On the whole, it seems that the determination of the 'principality' of the place of business of the carrier mainly depends on where the main shipping operations are managed and where the

[176] Boonk 1993, p. 189. In *Owners of Cargo Lately Laden on Board the Rewia v Caribbean Liners (Caribtainer) Ltd*., [1991] 2 Lloyd's Rep. 325 (Rewia) Leggatt LJ determined concerning a 'single ship company' incorporated in Liberia, of which the shareholders, directors and mortgagee banks were German; the meetings of directors took place in Hamburg; charters were authorized from Germany; funds were remitted there ultimately and everything about the charter was German while the day-to-day management took place in Hong Kong, that " *... the plaintiffs argue that 'principal' means 'main'. I disagree: in my view it means, in this context as well as generally, 'chief' or 'most important'. The principal place of business is not necessarily the place where most of the business is carried out. ... In my judgment there is nothing uncommercial or inapposite about the conclusion that the principal place of business is in Hamburg of a company registered in Liberia owning a ship, the earnings of which would ultimately be remitted to Germany, and about which most important decisions would be taken in Germany*", to which he added that: "*... the managers were always answerable, and subject, to the control and direction of the German officers of the company*." For a more detailed explanation of the feasibility of a choice of forum by means of a 'principal place of business of the carrier' clause see Smeele 1997.

[177] Article 28 WC and Article 33 MC.

[178] Dettling-Ott 2006, Article 28 WC, No. 11. See also *Owners of Cargo Lately Laden on Board the Rewia v Caribbean Liners (Caribtainer) Ltd.,* [1991] 2 *Lloyd's Rep.* 325 (*Rewia*).

[179] Official Journal of the European Union C 115/47. Article 54 TEC was Article 48 TEC before consolidation.

main capital of the company is located, which is a matter of fact and degree[180]. Or, as a Dutch court of law would say, of which the outcome 'depends on the circumstances of the case'.

10.3.4.3 The place of loading and the place of discharge

As with the other factors mentioned by Article 4(4) RC, it appears that for purposes of the application of this paragraph the places of loading and unloading are those agreed at the time when the contract is concluded[181]. Although this clarifies the temporal aspect of the matter and the fact that the places meant are the contractually agreed places, and not the actual places of loading and discharge if these were to differ, it fails to answer the primary question that arises when dealing with a mixed carriage contract such as the multimodal carriage agreement. In that context, the main question is whether these terms attach to the separate transport stages, as the terms 'place of taking over' and 'place of discharge' do when the scopes of application of the various carriage conventions are considered, or whether they attach to the start and finish of the entire transport. If they attach to the start and finish of each separate stage that means that Article 4(4) RC is to be applied as many times as there are transport stages for each multimodal contract, which may cause a different regime of national law to apply to each stage of the transport. Sturley is apparently of the opinion that this is indeed the case[182]. He thereto provides the example of a multimodal transport from Berlin in Germany to Chicago in the U.S. via Canada by road, sea and rail:

> "*Under our original Berlin-to-Chicago hypothetical, therefore, as many as six different legal regimes could govern each of the six distinct segments of the single multimodal journey under a single contract of carriage: (1) The European CMR would govern any cargo damage that occurred during the Berlin-to-Rotterdam road leg. (2) The bill of lading would probably govern any cargo damage that occurred in the port of Rotterdam after delivery by the trucker before loading on the vessel (although the bill of lading terms could be displaced by mandatory Dutch law to the extent applicable). (3) The Hague-Visby Rules would govern any cargo damage that occurred during the Rotterdam-to-Montreal sea leg. (4) The bill of lading would probably govern any cargo damage that occurred in the port of Montreal after discharge from the vessel before delivery to the railroad. (5) The mandatory Canadian law governing domestic rail carriage would govern any cargo damage that occurred on the train before crossing the U.S. border. (6) The U.S. Carmack Amendment might (or might not) govern any cargo damage after crossing the U.S. border (depending on the U.S. court in which the dispute was heard).*"

Based on the decisions by various Dutch and German courts it appears that Sturley is incorrect in his assessment of the applicable national regimes, or at least does not portray the law applicable to this multimodal contract as a Dutch or German court of law would establish it. That is to say, not if there are no reasons for the Dutch court to consider any of the stages to have such a strong

[180] When it comes to the specific circumstances in which the ship owning company owns the vessel exclusively through the control of another company it seems likely that the principal place of business of the managing company will be treated as the relevant place of business. Dicey & Morris 2006, p. 1773.

[181] Giuliano & Lagarde 1980, Article 4, No. 5.

[182] Sturley 2007. Basedow has also supported this concept for which he appoints Van Beelen and Herber as co-supporters. Basedow *TVR* 2000, p. 107 and Basedow 1999, p. 32.Van Beelen does not support this concept however as she deems the multimodal carriage to be one single contract. The hypothetical unimodal contracts therein she determines are just that; hypothetical. They do not cause more than one relationship to exist, they do not cause more than one national regime to apply. Van Beelen 1996, p. 99-116.

connection to the legal sphere of a country different from the State of which the law governs the (rest of the) contract so as to give rise to the exception in Article 4(1) RC[183]. In general both Dutch and German courts deem the law to be determined by Article 4(4) to be applicable to the entire contract[184]. That means that the place of loading and the place of discharge as meant by Article 4(4) RC are the places where the loading at the very beginning of the transport and the discharge of the goods after the entire carriage that was contracted for has been completed. This seems the correct approach as Article 4(1) RC determines that:

> "*1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected…*"

As a result it is clear that the Article is meant in principle to discern the law applicable to the contract as a whole. It is not for naught that the option of *depeçage* offered is phrased as an exception; it is the law applicable to the entire contract that is the norm. This equally applies to multimodal contracts since one of the defining characteristics of such a contract is that it is a single contract despite its mixed nature. In addition Article 4(4) RC itself attaches importance to the moment the contract is concluded, thereby emphasizing the contract as a whole as the subject of the provision[185].

10.3.4.4 When Article 4(4) of the Rome Convention fails to provide an answer

Sometimes the requirements of Article 4(4) of the Rome Convention cannot be met, for instance when the place of loading and the place of discharge cannot be determined, or none of the places mentioned are situated within the same State[186]. Under those circumstances the basic rule of Article 4(1) RC still applies[187]. As can be read in the previous Section, this rudimentary rule determines that a contract shall be governed by the law of the country with which it is most closely connected. Article 4(2) RC cannot be used to specify which country this is however, since the presumption found in this paragraph is expressly barred from application in relation to contracts for the carriage of goods by Article 4(4) RC[188]. Nevertheless, even if the requirements of Article 4(4) cannot be met, the factors mentioned there can still offer some purchase[189]. As a result it is still often the principal place of business of the carrier that is deemed the decisive

[183] The last sentence of Article 4(1) RC reads: "*Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.*"

[184] LG Hamburg 9 August 2002, *TranspR* 2003, p. 209-211; OLG Hamburg 16 May 2002, *TranspR* 2002, p. 355-357; OLG Köln 30 July 2002, *TranspR* 2003, p. 116-119; Rb Rotterdam 3 May 2006, *S&S* 2007, 114; Hof Amsterdam 2 August 2007, *S&S* 2008, 114 (*Leliegracht*); Rb Haarlem 22 May 2001, *S&S* 2002, 42 *et cetera*. See also Van Beelen 1998, p. 333-345 at p. 337.

[185] The fact that the terms 'loading' and 'discharge' have a slight maritime connotation and do not entirely coincide with the beginning and end of the carrier's period of responsibility under the non-maritime conventions is corrected under the Rome I Regulation. Article 5 Rome I uses the terms 'place of receipt' and 'place of delivery' which coincide with beginning and ending of the carrier's period of responsibility under the majority of the carriage conventions. See also Section 10.3.5 of this Chapter.

[186] Hof Arnhem 5 August 2003, *S&S* 2004, 80.

[187] HR 28 March 2008, *S&S* 2008, 80; Hof Amsterdam 2 August 2007, *S&S* 2008, 114 (*Leliegracht*); Rb Arnhem 8 April 1999, *S&S* 2004, 78; Rb Rotterdam 15 May 2004, *S&S* 2005, 134; Rb Rotterdam 5 September 2007, *S&S* 2009, 41; Rb Rotterdam 26 August 1999, *S&S* 2000, 12; Rb Rotterdam 5 September 2007, *S&S* 2009, 41; OLG Frankfurt am Main 18 April 2007, *TranspR* 2007, p. 367-373. See also Rb Rotterdam 14 September 2005, *S&S* 2006, 26. Boonk 1998, p. 190.

[188] Rb Rotterdam 7 April 2004, *S&S* 2005, 75; Mankowski 1993, p. 224.

[189] Dicey & Morris 2006, p. 1775. Rb Rotterdam 14 September 2005, *S&S* 2006, 26.

connecting factor, since the carrier is the party effecting the performance which is characteristic of the contract[190]. Of course if neither the place of loading or discharge, nor the consignor's principal place of business is situated in the same country as the principal place of business of the carrier, the court assessing the case may also have regard to other connecting factors than those mentioned in Article 4(4) RC. Other such factors are for instance the language of the contract, the currency in which the freight is to be paid and the place where the bill of lading was issued[191].

10.3.5 The absence of choice under the Rome I Regulation

The law applicable to contracts of carriage when no choice of law has been made by the contracting parties is governed by Article 5 under the Rome I Regulation. Article 5(1) Rome I relates to the carriage of goods whereas Article 5(2) concerns the carriage of passengers. Article 5(1) does not differ much from its predecessor Article 4(4) RC and contains the following text:

> "*Article 5 Contracts of carriage*
> *1. To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.*"

Through the addition of the place of delivery as the principal connecting factor for those situations in which neither the place of habitual residence, nor the place of receipt or delivery of the goods coincides with the country of habitual residence of the carrier, the emphasis on the habitual place of residence of the carrier is somewhat lessened. Where under the Rome Convention the law of the State where the carrier had his 'principal place of business' was likely to be the law applicable to the contract based on Article 4(1) RC if Article 4(4) RC did not provide an answer, the Regulation chooses differently. Under the new regime it is the place of delivery that has gained in importance.

That said, it is still true that the core concept of the provision has not changed much[192]. The factors mentioned by Article 5 Rome I are largely the same as those mentioned by Article 4(4) RC. The terminology used differs somewhat from that used in the previous instrument however. Instead of speaking of the 'place of loading' and the 'place of discharge' the Regulation refers to the 'place of receipt' and the 'place of delivery'. As a result the terminology of the Regulation is more in harmony with the terms used in the various uniform carriage law regimes.

In addition the 'principal place of business' of the carrier and the consignor are now referred to as 'habitual residence'[193]. The reason for the change of the words 'principal place of business' into 'habitual residence' is that the Rome II Regulation of 11 July 2007 on the law applicable to non-contractual obligations, Rome I's sibling as it were, also attaches to the

[190] Hartenstein 2005, p. 11; Mankowski 1993, p. 225.
[191] Hof Amsterdam 9 October 2003, *S&S* 2006, 64.
[192] COD/2005/0261: 20/11/2007 - EP: decision of the committee responsible, 1st reading/single reading.
[193] Van der Velde 2009, p. 19.

habitual residence of persons or parties – in particular for legal persons – in Articles 4, 5, 10, 11, 12 and 23[194].

In Article 19 Rome I the exact meaning of the words habitual residence is clarified in terms of companies and corporate or unincorporated bodies of any kind and of natural persons acting in the course of their business activity. In this Article the place of central administration – and not the principal establishment as proposed by the Commission – is established as habitual residence for legal persons such as companies. Article 19 also shows that the principal place of business is not completely expunged from the Regulation as this place of business is pointed out as being the habitual place of residence of natural persons undertaking commercial endeavours[195].

As regards the identification of the carrier and the consignor the Regulation provides some guidelines in recital 22 of its Preamble. In this recital the Regulation establishes that:

> "*... For the purposes of this Regulation, the term 'consignor' should refer to any person who enters into a contract of carriage with the carrier and the term 'the carrier' should refer to the party to the contract who undertakes to carry the goods, whether or not he performs the carriage himself.*"

Pertaining to the identification of the carrier this does not change much; the habitual residence, the place of central administration or principal place of business, of the contractual carrier – even if he is only a 'paper carrier' and does not perform any part of the carriage himself – is the connecting factor as it was under the Rome Convention.

In contrast, the group of actors that can be labelled consignor has shrunk somewhat. Under the Rome Convention the Guiliano/Lagarde Report clarified that the drafters of the Convention intended the term consignor to also include any and all persons who actually consign goods to the carrier, in other words the *afzender, aflader, verzender, mittente, caricatore, et cetera*, besides the contractual shipper. Article 19 of the Regulation shows that under the new regime only the co-contracting party of the carrier is to be considered the consignor. Although this means that the scope of the first set of connecting factors mentioned by Article 5 Rome I is somewhat narrower than that of Article 4(4) RC, this is compensated by the added 'safety net' in the form of the place of delivery as supplementary connecting factor. Moreover, it prevents the confusion that may be caused by the existence of more than one consignor in relation to a single contract of carriage that could ensue from the inclusion of the parties actually consigning the goods but lacking any contractual bond with the carrier.

As regards the supplementary connecting factor in the last part of Article 5(1) Rome I it should be noted that, instead of attaching to the actual place of delivery, the drafters have chosen the place of delivery as agreed by the parties. The reason for this was the possibility that the goods are lost during the carriage and thus will never actually be delivered, which would deprive the contracting parties of this safety net. It seems the existence of this possibility weighed more heavily on the shoulders of the drafters than the idea that matters of evidence would be less easily dealt with if the rules of law applicable to the contract and the rules of law of the place of actual delivery do not match[196].

[194] Regulation (EC) No 864/2007.
[195] COD/2005/0261: 20/11/2007 - EP: decision of the committee responsible, 1st reading/single reading.
[196] Van der Velde 2009, p. 19.

10.3.6 The exception of the 'ordre public', or overriding mandatory provisions

As was discussed above, essentially all legal regimes recognize the principle according to which the parties may choose the law that is applicable to an international contract under civil law or commercial law. Furthermore, it is clear that if no such choice is made in relation to a contract of carriage, the law applicable to the contract is currently determined by the rules of Article 5 Rome I. The freedom of substantive choice or the applicability of the law found through Article 5 Rome I may be restricted by the fact that the mandatory provisions of the substantive law of a State, which may or may not be the *lex fori*, cannot be set aside. The question of whether and, if applicable, to what extent this is the case must be appraised in accordance with Article 9 Rome I (formerly Article 7 RC), which determines:

> "*1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.*
> *2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.*
> *3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.*"

As Article 9(3) Rome I speaks of the idea that 'effect may be given' whereas Article 9(2) states that 'nothing in the Convention shall restrict the application' it seems that the mandatory rules of 'another country' concern a more limited category of rules than the mandatory rules of the forum as meant by Article 9(2)[197]. This may be the reason that the two categories have traded places: under the Rome Convention the 'mandatory rules' of another country were accommodated in the first paragraph and the 'the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract' were contained by Article 7(2) RC.

To the question whether Dutch law contains any such 'mandatory rules' as meant in Article 9(1) Rome I concerning carriage contracts Van Beelen responds with a negative answer[198]. When it comes to the 'mandatory rules' of the *lex fori* however, Boonk determines that these include all scope of application rules of international conventions the Forum State is party to. No other 'mandatory rules' are mentioned as regards Dutch carriage law, except perhaps Article 8:371 BW which is an almost exact replica of Article 10 HVR. The status of

[197] Boonk 1998, p. 214. The famous *Alnati* judgement confirms this as in this judgement the Belgian Hague Rules were not acknowledged as being mandatory rules as meant in Article 7(1) RC by the Dutch judiciary whereas a Belgian court of law would have been forced to apply them. HR 13 May 1966, *NJ* 1967, 3 (*Alnati*). Article 7 RC is a codification of the concept that there may be mandatory rules of law that must be applied in the law of a country with which the situation has a close connection regardless of the law applicable to the contract. In the *Alnati* judgement the Dutch *Hoge Raad* expressed a similar view by stating that: "*although the law applicable to contracts of an international character can, as a matter of principle, only be that which the parties themselves have chosen, it may be that, for a foreign State, the observance of certain of its rules, even outside its own territory, is of such importance that the courts must take account of them, and hence apply them in preference to the law of another State which may have been chosen by the parties to govern their contract.*" See also Giuliano & Lagarde 1980, Article 7, No. 1.

[198] Van Beelen 1996, p. 50.

Article 8:371 BW has never been satisfactorily clarified in the Dutch legal literature and may or may not be a 'mandatory' *lex fori* rule in light of Article 9(2) Rome I[199].

In the German legislation a *lex fori* rule which is not a scope rule of an international convention may be found however, although there seems to be some dissent on the matter. The rule in question is Article 6 EGHGB. This Article determines when and to what extent § 662 HGB applies[200]. § 662 HGB contains rules on the compulsory application of certain rules of sea carriage law in the HGB. There are also those who support the view that Article 6 EGHGB is simply a normal provision and contains no special conflict of laws rule. Therefore, the court must first apply German conflict of law rules to determine if German law applies to the contract of carriage. If it does, Article 6 EGHGB applies and its provisions determine whether or not § 662 HGB applies. According to others, Article 6 EGHGB applies regardless of the proper law of the contract of carriage, although there is no actual consensus on the actual results of the Article. This second theory establishes that Article 6 EGHGB itself contains an overriding conflict of law rule, a 'mandatory rule' as meant by Article 9 Rome I. If this is the case, German courts of law are forced to apply Article 6 EGHGB whenever they are dealing with a carriage contract involving sea carriage regardless of the proper law of the contract. This last point of view accords more closely with the text and purpose of Article 6 EGHGB, and is supported by the dominant academic opinion[201]. Furthermore, since the rules that § 662 HGB refers to are modelled after the Hague and Hague-Visby Rules and Article 6 EGHGB refers to both the Hague as well as the Hague-Visby Rules it might even be argued that the Article is some sort of scope of application rule.

10.4 National multimodal transport law

After the law applicable to the multimodal contract has been established the moment arrives that its rules have to be applied. There are only two domestic regimes in Europe which include rules specifically designed to regulate multimodal transport contracts. The first is the Dutch Civil Code, the BW, which regulates multimodal carriage in Articles 8:40 through 8:52 BW, and the second is the German Commercial Code, the HGB, which contains the multimodal §§ 452 through 452d HGB. Both of these regimes will be summarily discussed in the following.

10.4.1 The Dutch system

In The Netherlands the multimodal transport agreement is seen as a mixed contract which is subject to an accumulation of regulations. Articles 8:40 through 8:52 BW reflect this view. A description of what is deemed to be a contract for the multimodal carriage of goods under Dutch law is provided by Article 8:40 BW, which states that:

[199] The introduction of Article 8:371 BW was meant by the drafters of Book 8 BW to end the speculation whether the Hague-Visby Rules applied directly or only via Dutch law. For more details on said discussion see Chapter 8, Section 8.1.1 on the two options in the Protocol of Signature of the Hague-Visby Rules.

[200] These German sea carriage rules are based on both the Hague and the Hague-Visby Rules and can be found in §§ 559, 563(2), 606-608, 611, 612, 656, 658, 659 and 660 HGB.

[201] Prüßmann & Rabe 2000, p. 707.

> "*Article 40*
> *The contract of combined carriage of goods is a contract for the carriage of goods whereby the carrier (multimodal carrier) binds himself towards the consignor, in one and the same contract to the effect that the carriage will take place in part by sea, inland waterway, road, rail, air, pipeline or by means of any other mode of transport.*"[202]

The Article speaks of combined transport which is no more than a synonym in this context for the internationally more popular term multimodal transport[203]. The overture of the Dutch rules to the network approach, or 'chameleon' system, can be found in Article 8:41 BW which simply establishes that:

> "*Article 41*
> *In a contract of multimodal carriage, each stage of the carriage is governed by the legal rules applicable to that stage.*"[204]

It is arguable that this Article is superfluous, since its existence does not appear to affect the legal reality in any way. It merely describes what is. Unlike for instance Article 26 RR, Article 8:41 BW cannot cause a convention to apply to a certain stage of the transport if the scope of application rules of said convention do not cause it to apply themselves[205]. That means that in order to apply to the legal relationship between the consignor and the multimodal carrier which is the focal point of Article 8:41 BW, the various requirements set by the scope of application rules of the relevant uniform carriage regimes must be met, particularly where documentation is concerned. Article 8:46 BW, which is one of Articles 8:44 through 8:52 BW that relate to the documentation generally used in multimodal carriage, the CT or Combined Transport document, offers support in this area. Pertaining to the application of the uniform carriage regimes the legal fictions found in Article 8:46(1) and (3) BW are relevant. Especially the first paragraph is of import since the Hague and Hague-Visby Rules require a bill of lading to be issued in order to apply. Article 8:46(1) BW causes the CT document to fulfil the documentary requirements of the H(V)R by establishing the following:

> "*Article 46*
> *1. For that part of the carriage which, according to the contract entered into by the parties, will take place as carriage by sea or by inland waterway, the CT document shall be deemed to be a bill of lading.*"

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[202] "*De overeenkomst van gecombineerd goederenvervoer is de overeenkomst van goederenvervoer, waarbij de vervoerder (gecombineerd vervoerder) zich bij een en dezelfde overeenkomst tegenover de afzender verbindt dat het vervoer deels over zee, over binnenwateren, over de weg, over spoorwegen, door de lucht of door een pijpleiding dan wel door middel van enige andere vervoerstechniek zal geschieden.*"

[203] The drafters were of the opinion that the term combined transport was more commonly used in the transport industry and thus decided to use this instead of the term multimodal transport which they described as 'a term of bastard Latin'. Parlementaire geschiedenis Boek 8, p. 85.

[204] "*Bij een overeenkomst van gecombineerd goederenvervoer gelden voor ieder deel van het vervoer de op dat deel toepasselijke rechtsregelen.*"

[205] Article 26 RR refers to "*provisions of such international instrument that 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*" and as such can cause rules of an international instrument to apply to one or more stages of the transport even if the court addressed would normally deem them inapplicable to a part of a multimodal contract. For more information on this Article see Chapter 8, Section 8.3 on the Rotterdam Rules.

The result is that when Dutch law applies to a multimodal carriage contract a CT document is considered a bill of lading in relation to the sea stage of the transport. If the CT document could not be deemed a bill of lading without this Dutch provision this means that the Hague-Visby Rules may still apply but by means of Dutch domestic law rather than directly[206]. Article 46(3) BW provides the same service for CT documents that do not fulfil the requirements set by the Warsaw Convention for air consignment notes. Although this Convention may still apply to the air carriage stage of a multimodal contract if no air consignment note meeting the listed requirements is issued, the carrier is not entitled to avail himself of the provisions of the Convention which exclude or limit his liability[207]. For the application of the other carriage conventions, including the Montreal Convention on air carriage, there is no (longer) need of the legal fictions of Article 8:46 BW as these conventions apply regardless of whether transport documents have been issued[208]. What should not be forgotten here, is that the carriage conventions contain a large amount of mandatory rules. The result is that if they are the law applicable to one or more of the transport stages as meant by Article 8:41 BW, the contracting parties may not legally exclude their effect[209].

The emphasis put on the existence of various stages and the suggestion that different rules may apply to them in Article 8:41 BW suggest that the general consensus in The Netherlands is that the multimodal contract is the sum total of the various unimodal stages involved rather than an undividable whole. Although the Article is ambiguous to such an extent that the opposite idea could also fit under its wings quite snugly, the reference to transport stages entices the reader towards the network approach. Based on the '*Parlementaire Geschiedenis*,' the drafting history of the Dutch legislation, the chameleon approach was indeed the groundwork on which this Article was founded and indeed of the entire system found in this Section of the Civil Code. The multimodal transport contract is seen as a mixed contract which can be separated into several unimodal contracts[210].

In relation to the liability of the carrier under the Dutch system Van Beelen establishes that the standard liability of the multimodal carrier is identical to that of many other carriers; it is a contractual liability based on presumed fault or negligence. Article 8:42 BW thereto lays down the '*obligation de resultat*' which results in the liability of the multimodal carrier even if the loss is not localized, if he does not prove that all (potentially) applicable legal regimes relieve him of liability:

> "*Article 42*
> *1. If the combined carrier does not deliver the goods to the destination on time in the state in which he has received them, and if it has not been ascertained where the fact causing the loss, damage or delay has arisen, he shall be liable for the damage resulting there from,*

[206] For more information on the peculiarities of the scope of application of the Hague and Hague-Visby Rules in relation to carriage in general and to multimodal carriage in specific see Chapter 8, Section 8.1.

[207] See Article 9 WC which requires among other things that the air consignment note contains a warning that the Warsaw Convention may be applicable. The Montreal Convention no longer contains such a reservation which means that in the future Article 8:46(3) BW will most likely lose its meaning in relation to the application of uniform air carriage law in multimodal carriage.

[208] The COTIF-CIM as revised by the 1999 Vilnius Protocol no longer requires a transport document for application.

[209] Van Beelen 1998, p. 337.

[210] In the drafting histories the choice for the chameleon system was justified by making reference to common practice as laid down in the International Chamber of Commerce's Uniform Rules for Combined Transport Documents, and provisions such as Article 2 of the CMR and Article 31 of the Warsaw Convention. As benefits of the network system were mentioned the lack of recourse problems and conflict with the existing carriage conventions such a system was thought to generate. Parlementaire geschiedenis Boek 8, p. 91-92.

unless he proves that he is not liable therefore on any of the stages of the transport where the loss, damage or delay may have occurred.
2. Any stipulation derogating from this Article is null."

Article 8:42(2) BW shows that the provision is compulsory; there is no contracting out of the burden the Article lays on the shoulders of the carrier[211]. The burden lies on the shoulders of the multimodal carrier alone however, only he can be held liable based on the contract by the consignor whether or not the multimodal carrier transports the goods himself, or has them transported by others such as servants or independent subcontractors[212]. If there is damage, loss or delay the carrier is liable based on the law applicable to the stage where the damage was caused, which can be a stage different from the one during which the damage becomes apparent[213]. That it is indeed the stage where the damage or loss was caused that is significant under Dutch law can be deduced from the wording of Article 8:42 and the ensuing Article, Article 8:43 BW. Since the place where the loss or damage was caused is decisive as to which legal regime governs the exact conditions of the carrier's liability under the Dutch legislation, the problem of unlocalized loss needed a solution. Article 8:43 BW provides a rather cargo claimant friendly solution by stating that:

"*Article 43*
If the combined carrier is liable for the damages resulting from damage, total or partial loss, delay or any other damaging fact, and if it has not been ascertained where the fact leading thereto 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.
2. Any stipulation derogating from this Article is null."

Contrary to Article 8:41 BW, the effect of Articles 8:42 and 8:43 BW is limited to the carrier's liability. These Articles do not therefore apply, at least not directly, to those cases where the multimodal carrier holds the consignor liable for loss or damage[214]. Van Beelen offers a concise rendering of the procedure to be followed when determining the carrier's liability when the loss remains unlocalized in her 1998 report on the Dutch multimodal transport rules:

"*Sections 42 and 43 provide an arrangement in which three steps can be distinguished. The first step is the selection of those stages of the carriage where damage or loss may possibly have occurred. All other stages are not counted. In the second step, the multimodal carrier, if possible, exempts himself from liability for the remaining stages. If the multimodal carrier fails to exempt himself from liability, and several regimes remain under which the carrier would be liable, then Section 43 – the third step – stipulates that the multimodal carrier is liable according to the regime most favourable to the consignor. In my opinion, Section 43 entails more than a mere comparison of the amounts to which liability is limited; the sum of Sections 42 and 43 entails a comparison of the regimes as a whole. The method for calculating damage or loss, for example, must also be included in this comparison.*" [215]

One of the factors influencing the height of the compensation to be paid by the carrier is the time bar on actions. Since transport law sports an array of invariably short time bars – they vary

[211] Hof Den Haag 8 April 2003, *S&S* 2003, 116.
[212] Van Beelen 1998, p. 334.
[213] Rb Rotterdam 4 April 1996, *S&S* 1996, 93 (*Jana*).
[214] Van Beelen 1998, p. 339.
[215] Van Beelen 1998, p. 339-340.

approximately from 9 months to 3 years – it is evident that the time bar is of major import when claiming compensation based on a carriage contract. When confronted with 5 combined transport shipments of microprocessors gone awry the *Rechtbank* Rotterdam showed itself to be of a similar mind as Van Beelen by stating that:

> "*If it cannot be established where the occurrence that lead to the stated shortage of (a part of) the shipments arose, TNT's liability will 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. This is the liability regime of the CMR, which is the only regime under which Amdiss cs's claim has not expired insofar as the 3 year time bar meant in Article 32 CMR applies.*"[216]

There is one Article in the Dutch legislation which seems to complicate matters somewhat. This Article, Article 8:1722 BW, determines concerning the time bar applicable in combined carriage cases that:

> "*Article 1722*
> *1. Articles 1710 to 1721 inclusive shall apply to contracts of combined carriage of goods, provided that the consignor shall also be construed to mean the holder of a CT document, and that the day of delivery is the day of delivery under the contract of combined carriage of goods.*
> *2. If, in a contract of combined carriage of goods, the person instituting the action does not know where the fact giving rise to the action has occurred, of the relevant statutes of limitation the most favourable one to him shall be applied.*
> *3. Any stipulation derogating from paragraph 2 of this Article is null.*"

As opposed to Articles 8:42 and 8:43 BW, which are strictly beneficial to the consignor or consignee, Article 8:1722(2) BW points towards the regime most favourable for the claimant in general. A carrier seeking a declaration of non-liability may therefore also perhaps benefit from this rule. That is to say, if declarations for liability are even subject to prescription. Recently the *Hof* Den Bosch determined that although the right to commence proceedings expires, the right itself does not. In relation to a declaration of non-liability the *Hof* established:

> "*At stake is not a claim on the part of the party alleging to have a certain right, it is a claim on the part of the opposing party demanding that the Court establish that the right alleged by the firstmentioned party does not exist.*"[217]

However, if the declaration of non-liability is subject to prescription, Article 8:1722 BW may necessitate some strenuous mental exercise. The question is whether the application of Article 8:1722 BW would actually affect the outcome of liability actions, instigated by the carrier or not. When the carrier does instigate an action the result of applying Article 8:1722 BW by the court is

[216] "*Indien niet is komen vast te staan waar de omstandigheid die leidde tot het gestelde tekort van (een deel van) de zendingen is opgekomen, wordt de aansprakelijkheid van TNT bepaald volgens de rechtsregelen die toepasselijk zijn op dat deel of die delen van het vervoer, waarop deze kan zijn opgekomen en waaruit het hoogste bedrag aan schadevergoeding voortvloeit. Dit is het aansprakelijkheidsregime van de CMR, het enige regime waaronder de vordering van Amdiss cs - indien en voor zover de in artikel 32 CMR bedoelde verjaringstermijn van drie jaar van toepassing is - niet is verjaard.*" Rb Rotterdam 3 May 2006, *S&S* 2007, 114.

[217] "*Het gaat hier niet om het instellen van een eis van de zijde van degene die een recht pretendeert, maar om een eis van de zijde van de wederpartij welke eis er toe strekt in rechte te doen vaststellen dat de door de gerechtigde gepretendeerde vordering niet bestaat.*" Hof Den Bosch 22 May 2007, *S&S* 2008, 135. See for an analysis of this issue Haak *NTHR* 2009, p. 96-97.

likely to avail him none. Generally speaking one could say that the time bar most favourable to the carrier will always be the shortest, especially if this means that the window for an action has expired. But is this really the case? If for instance a carrier addresses the court to gain such a declaration and the court applies the shortest time bar based on Article 8:1722(2) BW and declares the action barred, this may not be in the carrier's best interest. After all, such a course of events would mean that the carrier has no defence if the consignor or consignee decides to commence proceedings after this based on Article 8:43 BW. These proceedings would then lead to an application of Article 8:1722 BW with the consignor or consignee as the claimant which could force the court to apply the time bar of a regime different from the one it applied to the claim of the carrier. The result may be that the carrier is deemed liable. Of course, if the court had not deemed the carrier's suit time barred the outcome should be no different[218].

10.4.2 The German system

On 1 July 1998 German transport law underwent a substantial change. On that date the TRG came into effect which, among other things, instituted §§ 452 through 452d HGB to regulate 'carriage of goods performed by various modes of transport on the basis of a single contract of carriage of which can be said that, had separate contracts 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'[219]. The meaning of 'different legal rules' is not restricted to different national legal regimes; it also refers to the difference of rules within a certain national legal regime.

The result is that the German regime does not apply to multimodal transport as such, but is restricted to specific multimodal carriage contracts. §§ 452 HGB *et seq*. only apply if at least two of the transport stages would have been covered by dissimilar rules if they had been contracted for separately. According to Ramming, the hypothetical '*Teilstreckenrecht*' of § 452 HGB is restricted to German substantive law, which includes the international conventions Germany is party to such as the CMR, as well as for instance the general transport law found in § 407 HGB *et seq.* and the rules of sea carriage law in §§ 556 *et seq*.[220]. Due to the structure of the German transport legislation, the condition set by § 452 HGB that at least two transport stages

[218] If the consignor addresses a court in a different country however this may be different, even if this court also applies the rules of the Dutch legislation. See for more information on this topic Haak *NTHR* 2009. See also Haak *TranspR* 2009.

[219] The leading opinion seems to be that this fictional contract is the contract that would have been entered into by the consignor and the multimodal carrier and not the contract that would have been concluded by the consignor and the subcontracting carrier for the relevant stage of the transport. The reasons given for this point of view are the concept that the multimodal carrier may grow careless when he can have complete recourse against the subcontracting carrier and the idea that the multimodal carrier may otherwise have the opportunity to manipulate matters. Drews is sceptical concerning the legitimacy of these reasons. He argues that it seems somewhat uncalled for to employ a construction that will generally lead to the application of the German HGB via Article 28 EGHGB (Article 4 RC), especially not when the damage or loss occurred during a non-German stage of the transport. In his opinion the matter should be solved by following Article 2 CMR. The liability of the multimodal carrier as regards the consignor should be governed by the rules applicable to the contract between the multimodal carrier and the subcontracting carrier whenever it can be proved that the damage or loss was not caused by act or omission of the multimodal carrier. Drews 2003, p. 17. Nevertheless, Drews' opinion would be somewhat more convincing if the contract as a whole was not already governed by German law in situations where this question arises and it was not the liability of the multimodal carrier based on his contract with the consignor (or consignee) that was at stake. In addition, it seems that following the path of Article 2 CMR would add another uncertain factor to the mix, which is generally deemed undesirable in commercial law. See also the discourse on this issue in Section 10.3 of this Chapter on *depeçage* and '*Teilstrecken*'.

[220] Ramming *TranspR* 2007, p. 281.

should hypothetically be governed by different rules means for instance that domestic multimodal carriage which involves road, rail, inland waterway and/or air carriage may not be governed by the rules of §§ 452 through 452d HGB. The reason for this is that these types of transport are all covered by the general provisions of the '*erster Unterabschnitt*' of the HGB's Book 4, Section 4 which contains the German legislation on the carriage of goods, §§ 407 through 450 HGB[221]. As long as no other rules apply to any of the transport stages, or if they do, as long as these additional rules apply to all of the transport stages, §§ 452 through 452d HGB do not apply to the multimodal contract in question[222].

If the multimodal contract in question does fulfil the requirements set by § 452 HGB, the Article in principle causes the '*erster Unterabschnitt*', or in other words the first subsection of the German Commercial Code's transport Section, to apply to the multimodal transport contract. This uniform approach is only the starting point however, as the subsection is applicable to the contract only insofar as the Paragraphs following § 452 HGB – §§ 452a through 452d HGB – or any of the international conventions do not provide otherwise. This is the case when the loss cannot be attached to any of the transport stages for instance[223]. § 452 HGB determines the following:

> "*HGB § 452*
> *If carriage of goods is performed by various modes of transport on the basis of a single contract of carriage, and if, had separate contracts been concluded between the parties for each part of the carriage which involved one mode of transport (leg of carriage), at least two of these contracts would have been subject to different legal rules, the provisions of the first subsection shall apply to the contract, unless the following special provisions or applicable international conventions provide otherwise*[224]*. This also applies if part of the carriage is performed by sea.*"

The unexpected result is that sea stages of a multimodal transport governed by German law are in some situations not governed by sea carriage law but are governed by the general German transport law meant for road, rail, air and inland waterway carriage in the first subsection instead. This may seem peculiar, but § 452a HGB and the international carriage conventions

[221] The first subsection provides a relatively comprehensive set of provisions covering issues such as loading/ unloading, delivery, calculation/payment of freight, lien, consignment note, its contents and evidentiary effect, consignment bill, its characteristic as a document of title, delivery without presentation of consignment bill, shipment of dangerous goods, liability, time bar, jurisdiction, liability of the sender, notice of damage, assessment of compensation for loss or damage, actual carrier, successive carriers. UNCTAD 2001, p. 44-47 at p. 46.

[222] It is argued that the fact that no difference in the applicable legal rules may exist means that all rules applicable to all stages should be identical. If one of the stages is covered by additional rules which do not apply to the rest of the transport for instance this means that different legal rules apply to the various stages which causes §§ 452 through 452d HGB to apply to the contract. There is some discussion as to whether the combination of domestic road and inland waterway carriage falls within the parameters of §§ 452 HGB *et seq*. since the domestic inland waterway carriage will also be covered by the BinSchG while the road carriage will not be. Koller 2007, p. 710, § 452 HGB, No. 18. Ramming on the other hand does not see the applicability of the BinSchG as a reason for the application of §§ 452 HGB *et seq*. since the BinSchG does not entail '*frachtrechtliche Vorschrifte*'. Nevertheless, he is of the opinion that the applicability of the *'Verordnung über die Lade- und Löschzeiten sowie das Liegegeld in der* Binnenschifffahrt' (BinSchLV) to the inland waterway transport causes §§ 452 through 452d HGB to govern such a contract. Ramming 'Zur BinSchLV' *TranspR* 2004, p. 345. Bydlinski and Puttfarken do not deem a combination of domestic road and inland waterway carriage to be covered by the rules of §§ 452-452d HGB. Bydlinski & Puttfarken 2000, p. 104.

[223] BGH 29 June 2006, *TranspR* 2006, p. 466-468; OLG Hamburg 16 May 2002, *TranspR* 2002, p. 355-357.

[224] The fact that the Article attaches to carriage of goods performed by various modes of transport on the basis of a single contract of carriage means that if a carrier decides to perform the carriage by means of more than one mode of transport even if this is '*vertragswidrig*', in other words not allowed under the contract, §§ 452-452d HGB apply to the carriage. Bydlinski & Puttfarken 2000, p. 105.

keep the scope of the first subsection within acceptable parameters[225]. Although most of the unimodal carriage conventions do not apply directly to stages of a multimodal transport according to German legal doctrine, some writers are of the opinion that they should be applied unchanged anyway, in the interest of legal certainty[226]. It has therefore been suggested that when the damage or loss can be localized, the rules that would have applied to the relevant stage of the transport come to the fore in such a manner that they at the very least should be applied to the pecuniary losses ensuing from the mishap[227]. To achieve such a result § 452a HGB was drafted. This Article incorporates a network approach into the German legislation for situations involving localized loss[228]. If the damage, loss or delay can be attributed to a certain stage of the transport the liability of the carrier is governed by the rules that would have applied if the consignor had contracted with the multimodal carrier for this stage alone[229]. That means that if the damage or loss occurred during the sea stage of a multimodal transport, § 452a HGB will cause sea carriage law to govern the carrier's liability or lack thereof[230]. It should be noted that § 452a HGB restricts its network approach to the issue of carrier liability, while all other issues concerning the contract will still be governed by the first subsection even if the loss is localized. The Article does so by stating:

[225] Although the international conventions take precedence over German national law they are hardly ever applied directly in Germany as the general consensus seems to be that only those provisions of the uniform carriage regimes that specifically deal with multimodal transport can apply to parts of a multimodal contract and thus warrant precedence. Koller 2003, p. 45. These provisions are Article 2 CMR, Article 1(3) and (4) COTIF-CIM, Article 2 CMNI and Articles 31 WC and 38 MC. But even if one of these Articles is relevant and grants the convention precedence over the rules of German national law it still happens that courts of law apply the rules of the convention via the national law. For an example involving the application of the Warsaw Convention via § 452a HGB, see OLG Köln 30 July 2002, *TranspR* 2003, p. 116-119 and perhaps BGH 29 June 2006, *TranspR* 2006, p. 466-468 depending on the extent of the road stage. Concerning the precedence of uniform air carriage law Herber commented that: "*Das internationale Luftrecht schreibt also zwingend die Anwendung des Network-Systems vor, sodaß bei einem Multimodaltransport unter Einschluß einer internationalen Luftstrecke – entgegen dem Prinzip der Einheitshaftung nach § 452 HGB – stets der Rückgriff auf das Luftrecht zulässig ist.*" Herber 2006, p. 439. Although Herber appears to acknowledge the priority of the uniform air carriage regimes the reason for the OLG's course of action may lie in Herber's 2001 article on multimodal transport including a sea stage in which he argues that only concerning Article 2 CMR and Article 2 CIM (currently probably Article 1(3) and (4) COTIF-CIM) contracts does uniform carriage law take precedence over the rules of §§ 452 through 452d HGB pertaining to the entire contract. Herber *TranspR* 2001, p. 102. This does not mean that the air carriage conventions do not take precedence over the rules of German law, but they only apply to part of the contract and thus may apply to a multimodal contract alongside the rules of §§ 452 through 452d HGB. Article 18(4) WC/MC elicited some discussion in this light as this Article may cause the air carriage convention in question to apply to the entire contract. Kirchhof allows that Article 18(4) can cause the air carriage regime to apply to the entire contract, in which case such a contract is an air carriage contract and not a mixed contract as meant by § 452 HGB. As a result the conclusion should be drawn that § 452a HGB can only lead to the application of air carriage law via Article 18(4) MC in very specific situations. In cases where the entire contract is governed by Article 18(4) the German rules on multimodal transport take second place because § 452 HGB grants precedence to uniform carriage law, and when it is not the entire contract that is covered by Article 18(4), in other words the contract entails more than an air stage and an accessory road stage for transhipment *et cetera*, then Article 18(4) MC can only cause the loss to be localized and covered by § 452a HGB if it is proven that the loss did not occur during the air stage or the road carriage accessory to the air stage. Kirchhof 2007, p. 134 and 137.

[226] Herber 1996, p. 882; Koller 1989, p. 770.

[227] Herber 1996, p. 885-886.

[228] The combination of the uniform approach in § 452 HGB and the network provision for localized loss in § 452a HGB are described as a reduced network system or '*reduzierten Netzwerksystem*'. Hartenstein 2005, p. 12.

[229] BGH 18 October 2007, *TranspR* 2007, p. 472-475; OLG Düsseldorf 12 December 2001, *TranspR* 2002, p. 33-36; OLG Dresden 14 March 2002, *TranspR* 2002, p. 246; OLG Hamburg 28 February 2008, *TranspR* 2008, p. 125-129; OLG Hamburg 19 June 2008, *TranspR* 2008, p. 261-264. That it is indeed the hypothetical contract between the consignor and the multimodal carrier which should be appraised and not for instance the actual contract between the multimodal carrier and the subcontracting carrier or even the hypothetical contract between the subcontracting carrier and the consignor is the outcome of an extensive discussion which was touched upon in Section 10.3 of this Chapter on *depeçage* and '*Teilstrecken*'.

[230] Herber 2006, p. 435.

"*HGB § 452a*
If it has been established that the loss, damage or event which caused delay in delivery occurred on a specific stage of the carriage, the liability of the carrier shall, contrary to the provisions of the first subsection, be determined in accordance with the legal provisions which would apply to a contract of carriage covering this stage. The burden of proving that the loss, damage or event which caused delay in delivery occurred during a particular stage of the carriage is borne by the person alleging this."

Under this Article the burden of proof seems to be pressing rather heavily on the shoulders of the claimant, especially if the claimant is the cargo owner and not the carrier. The reason for this is most likely that the German legislator does not deem the interests of the cargo claimants to weigh very heavily in this instance, since the claimant is already offered an adequate amount of protection by the '*erster Unterabschnitt*' which applies if the claimant cannot prove that the damage occurred during a stage of the transport to which other rules apply that may be more favourable to him. Since it is the claimant that derives added benefit from proving where the loss or damage occurred, but is unlikely to be severely disadvantaged if he fails to do so, there is apparently no cause to shift the burden of proof.

Due to the mentioned network system an international convention such as the CMR may be deemed applicable to the international road stage of a multimodal transport by a German court of law after all, even if the road carriage does not concern roll-on, roll-off or '*Huckepack*' carriage[231]. Although the German view is that the CMR does not apply to stages of a multimodal transport directly, meaning via Article 1 CMR, § 452a HGB can cause the CMR to apply to international road stages of multimodal contracts via the German domestic law[232]. Like § 452 HGB, § 452a HGB mentions a hypothetical contract which, according to the '*herrschende Meinung*' is the contract the consignor and the multimodal carrier would have entered into had the carriage covered only the stage where the damage or loss occurred[233]. As a result the only difference between the hypothetical contract and the actual multimodal contract in relation to the connecting factors mentioned by Article 5(1) Rome I (Article 28 EGBGB) is that the place of receipt and the place of delivery attach to the relevant transport stage instead of to the entire transport.

Although the hypothetical '*Teilstreckenrecht*' referred to in § 452 HGB is restricted to German substantive law according to Ramming, the hypothetical '*Teilstreckenrecht*' alluded to in § 452a HGB may not be. If the Article indeed entails a rule of private international or conflict law it may open up the opportunity for a part of the multimodal contract, which is governed in its entirety by German law, to be subjugated to a different domestic legal regime[234]. The OLG Dresden illustrated this in 2002 by stating that if § 452a HGB had been decisive in relation to the claim brought before them the question would have been whether German or American law

[231] This equally applies to the CMNI concerning international inland waterway stages which do not fall within the reach of Article 2(2) CMNI and the COTIF-CIM concerning rail stages which are not part of an Article 1(3) or (4) COTIF-CIM transport. The Warsaw and Montreal Conventions are deemed to be directly applicable to air stages and Article 2 CMR, Article 2(2) CMNI and Article 1(3) and (4) COTIF-CIM are also considered to be directly applicable to the multimodal carriage they envision. These directly applicable rules or conventions take precedence over the German rules on multimodal transport in §§ 452 through 452d HGB. Koller 2007, p. 710-711, § 452 HGB, No. 19; Herber 2006, p. 439; Herber *TranspR* 2001, p. 102.

[232] BGH 17 July 2008, *TranspR* 2008, p. 365-368. For more information on this judgement see Chapter 1, Section 1.6.1 and Chapter 4, Section 4.1.2.1. Herber 2006, p. 439.

[233] OLG Dresden 14 March 2002, *TranspR* 2002, p. 246; BGH 3 May 2007, *TranspR* 2007, p. 405-408; BGH 3 July 2008, *TranspR* 2008, p. 394-397.

[234] Bydlinski & Puttfarken 2000, p. 114.

applied based on this Article[235]. This second private international law question seems a little disproportionate; the legal regime applicable to the entire transport already is established by means of the Rome I Regulation once, but when the loss can be attached to one of the transport stages the rules of the Rome I Regulation are apparently to be employed for a second time[236]. The second time around they are not applied to the contract as a whole however but to the hypothetical '*Teilstrecke*' contract concerning the stage of transport where the loss or damage occurred. Still, it seems as Hartenstein establishes, that such a second choice goes against the grain of the uniform private international law of the Rome I Regulation, or even the German EGBGB[237]. Whenever a contract has international aspects the determination of the applicable legal regime is necessary. To this end German courts of law are forced to apply the Rome I Regulation, or at least the EGBGB. Both of these regulations contain rules that prevent the application of the rules of private international law of the law of the country that is pointed out as the law applicable to the contract, either by the Convention or based on a choice of law allowed by the Convention[238]. Article 20 Rome I and Article 35 EGBGB establish that the application of the law of any country specified by the Convention or the '*erster Unterabschnitt. Vertragliche Schuldverhältnisse*' of the EGBGB means the application of the rules of law in force in that country other than its rules of private international law. The Guiliano/Lagarde Report on the Rome Convention offers the following explanation concerning Article 15 RC, which has been replaced with the identical Article 20 of the Rome I Regulation:

> "*It is clear that there is no place for renvoi in the law of contract if the parties have chosen the law to be applied to their contract. If they have made such a choice, it is clearly with the intention that the provisions of substance in the chosen law shall be applicable; their choice accordingly excludes any possibility of renvoi to another law (52).*
>
> *Renvoi is also excluded where the parties have not chosen the law to be applied. In this case the contract is governed, in accordance with Article 4 (1), by the law of the country with which it is most closely connected. Paragraph 2 introduces a presumption that that country is the country where the party who is to effect the performance which is characteristic of the contract has his habitual residence. It would not be reasonable for a court, despite this express localization, to subject the contract to the law of another country by introducing renvoi, solely because the rule of conflict of laws in the country where the contract was localized contained other connecting factors. This is equally so where the last paragraph of Article 4 applies and the court has decided the place of the contract with the aid of indications which seem to it decisive.*" [239]

[235] Nevertheless, § 452a HGB was not decisive since the claim, stemming from a multimodal transport entailing a domestic American road stage, involved unlocalized loss. OLG Dresden 14 March 2002, *TranspR* 2002, p. 246.

[236] A second private international law question can be found in the Dutch multimodal transport legislation as well, albeit in a different guise. Under the Dutch rules it is the regime applicable to unlocalized loss that is to be determined because although it is clear in such cases that Dutch law applies, Dutch carriage law only entails a very sober set of general carriage rules. Because the bulk of Dutch carriage law is subdivided per means of transport as is uniform carriage law – which the Dutch legislator wanted to apply as much as possible – a second private international law question was necessary. Nevertheless, the Dutch second private international law phase does not offer the opportunity for a new regime to enter the fray. It does not cause the rules of the Rome I Regulation to be applied a second time but merely compels a choice for one of the regimes already applicable to parts of the contract, namely the regime of one of the stages where the loss or damage could have arisen that produces the highest amount of damages. See Section 10.4.1 of this Chapter on the Dutch multimodal carriage legislation.

[237] Hartenstein 2005, p. 13.

[238] These rules exclude *renvoi*, they prevent the applicable law's conflicts principles from applying because these may point the inquiring court back to the forum's law causing a vicious circle to form or to a third jurisdiction's law. See also Section 10.3.2.2 of this Chapter on d*epeçage* and '*Teilstrecken*'.

[239] Giuliano & Lagarde 1980, Article 15.

Thus only when the multimodal contract in question has no foreign aspects at all is the second private international law question of § 452a HGB warranted. In such cases however, for instance when all stages of the transport occur on German soil and the contracting parties are all German, there is no connection with other legal regimes and thus the question raised by § 452a HGB will always lead to the applicability of German law.

Apparently the conclusion that the private international aspect of § 452a HGB is not part of the law applicable to the contract if the contract has international aspects does not hinder the legal practice of applying the Article as a rule of private international law anyway[240]. Basedow justifies this practice by arguing that § 452a HGB entails a substantive or material norm, not a norm of private international or conflict law. The Article's rule of referral he deems a '*methodisches Unikum*'[241]. Others, such as Mankowski, conclude that since the rule is a '*sachrechtliche Vorschrift*' it can only lead to the application of different parts of German law – carriage conventions which Germany is party to amongst other things – not to the application of foreign law[242]. When the Article is applied as a '*Sachrechtnorm*', no conflict with the EGBGB or the Rome I Regulation ensues. Hartenstein comments that such a application is not contrary to the text of Article 452a as this text does not compel the application of foreign law[243].

The Article following the complex meanderings of § 452a HGB restricts its effect somewhat. § 452b HGB causes the time bar and the form and time limit prescribed for the notice of damage to be governed by § 438 HGB, regardless of what § 452a HGB points out as the rules governing the carrier's liability[244]. § 452b HGB is the third Article in a row that refers to a hypothetical contract. In this case the hypothetical contract covering the last leg of the carriage is singled out. One may assume that this is again a hypothetical contract between the consignor and the multimodal carrier, since otherwise the Article could potentially offer up yet another legal regime as the applicable one, especially when the damage or loss occurred during the last stage of the transport[245]. Nevertheless, in situations where the damage or loss did not occur during the last stage of the transport the law applicable to the time bar *et cetera* is likely to be different from the rules applicable to the rest of the claim. The text of the Article reads as follows:

[240] Hartenstein 2005, p. 14. See for instance OLG Hamburg 28 February 2008, *TranspR* 2008, p. 125-129.

[241] Basedow 1999, p. 32.

[242] Mankowski 'Transportverträge' 2004, p. 1222-1223, No. 1679. Ramming is also of the opinion that § 452a HGB does contain a '*sachrechtliche Vorschrift*', but like Mankowski does not think that this prevents '*internationalprivatrechtliche Sonderanknüpfung*' by means of which a choice of law for a certain regime of substantive law can be made for the stage of the transport in question, even via a paramount clause. Ramming *TranspR* 2007, p. 290.

[243] Hartenstein 2005, p. 15.

[244] Generally the rules on these subjects are deemed rules on the carrier's liability. Koller 2004, p. 361. If § 452 HGB causes the law applicable to the carrier's liability to be the first subsection, when for instance the loss remains unlocalized, § 438 HGB, as part of this subsection, would already be deemed applicable.

[245] If the loss can be attributed to the last stage of the transport and § 452a HGB leads to the application of for example the COTIF-CIM it may be that when the hypothetical contract is deemed to be the contract between the consignor and the subcontracting carrier or perhaps between the multimodal carrier and the subcontracting carrier instead of the contract between the consignor and the multimodal carrier that not the COTIF-CIM but instead the rules of §§ 407 through 450 HGB apply to the time bar. This is possible if the rail stage is international under the multimodal contract but the multimodal carrier has subcontracted it to more than one rail carrier causing one or more of them to be completely within German borders. Such a difference, although workable seems unnecessary and easily avoided. It should be noted that the combination of rail stages under the multimodal contract is indeed considered to count as one '*Teilstrecke*' since the transferral of the goods only end the '*Teilstrecke*' if they are transferred to another means of transport. Koller 2007, p. 706, § 452 HGB, No. 15.

"*HGB § 452b*
1. Article 438 applies irrespective of whether the place of damage is unknown, is known or becomes known later. The form and time limit prescribed for the notice of damage shall be deemed to have been observed as well if the corresponding provisions which would have been applicable to a contract of carriage covering the last leg of the carriage have been complied with.
2. When the limitation period for claims based upon loss, damage or delay in delivery runs from delivery, delivery to the consignee is the relevant point of time. Even if the place where the damage occurred is known, the claim shall be time-barred in accordance with Article 439 [of the general provisions] at the earliest."

Thus, the Article controls which rules determine the time bar on any actions, the form and time limit prescribed for the notice of damage and at which moments in time these periods are to start. § 452b HGB can do this without impunity, since any international law applicable to the carriage applies via the domestic rules found in §§ 452 or 452a HGB, and may therefore be set aside by another rule of domestic law[246].

The time bar is set to commence at the time of delivery to the consignee. This does not solve the situations in which the consignee fails to accept the goods however. Since the position of the carrier may not be compounded by this Bydlinski offers that in such cases the time bar should attach either to the day agreed for delivery by contract, or if such an agreement is lacking, the day the carrier actually offered the goods to the consignee[247].

After § 452b, § 452c HGB follows, which provides some rules specifically tailored to multimodal relocation or '*umzug*' transports. To these types of transports § 452a HGB applies only insofar as the '*Teilstreckenrecht*' it appoints to regulate the liability of the carrier concerns an international convention of which Germany is a Member State. To all other aspects of the contract the rules of the '*zweiten Unterabschnitts'* applies instead of the rules of the '*erster Unterabschnitt*'. The second subsection of the HGB's carriage law Chapter regulates relocation transports in general in §§ 451 through 451h HGB.

The last Article of the German 'multimodal transport' legislation is § 452d HGB. This Article manages to add even more complexities to the already intricate system:

"*HGB § 452d*
1. Deviation from the rules of Article 452b paragraph 2 first sentence is possible only by an agreement which is negotiated specifically, even when such an agreement is entered into multiple similar contracts between the same contracting parties. Deviation from the other provisions of this subsection is possible through contractual agreement, but only insofar as the rules to which the other provisions of this subsection refer allow such deviation.
2. Notwithstanding paragraph 1 it is possible to agree by means of standard contract terms in situations involving localized loss (Article 452a) that matters of liability are governed by the first subsection
(1) regardless of where the damage occurs, or
(2) in case the damage occurs during a stage of the transport indicated in the agreement.
3. Agreements which exclude the application of the rules of an international convention to which the Federal Republic of Germany is party which are compulsory pertaining to a certain stage of the transport are void."

[246] Of course, if any international regime such as one of the air carriage conventions applies directly instead of via § 452a HGB, § 452b cannot set aside its rules. In such a case German law may only serve in a supplementary capacity.
[247] Bydlinski & Puttfarken 2000, p. 116.

The drafters of the Article meant it to extend the concept behind § 449 HGB to multimodal transport[248]. As a result the Article grants the contracting parties the opportunity to deviate from §§ 452a and 452b HGB under certain conditions. In the first sentence of the first paragraph the contracting parties are offered the chance to deviate from § 452b(2) HGB, on the condition that they specifically negotiate these deviations; another time than the delivery to the consignee for the start of the limitation period or a shorter or longer time bar than prescribed by § 439 HGB cannot effectively be agreed by standard form contractual conditions. If the deviations are specifically negotiated however, they may be entered into multiple similar contracts between the same contracting parties.

The second sentence of the first paragraph is somewhat more challenging. This sentence provides the option to deviate from the other provisions of the subsection on multimodal carriage when specifically negotiated, but only insofar as the rules to which the other provisions of this subsection refer allow such deviation[249]. That means that if § 452a HGB causes the CMNI to apply to the carrier's liability it is Article 25 CMNI which determines whether deviations of the CMNI regime are allowed. The consequence is that, excepting the added possibility of deviation offered by § 452d(2) HGB, the application of a convention such as the CMNI through § 452a HGB provides the contracting parties with just as many options for deviation as it would have if it had applied directly[250].

§ 452d(2) HGB allows parties to agree, even in cases where the loss is localized that liability issues are to be governed by the general provisions of the first subsection, meaning §§ 407 HGB *et seq.*[251]. This second part of § 452d(2) HGB clearly derogates from its first part, since if the loss can be localized there may be other rules of law applicable from which the parties would otherwise not have been able to deviate based on the first paragraph.

In the third paragraph a last condition is set: the deviations proffered in the first and second paragraphs are admissible only when they do not purport to exclude the application of a mandatory provision of an international convention applicable to a leg of the carriage of which Germany is a Member State. Such a contractual deviation is '*unwirksam*', or in other words void.

[248] Koller 2007, p. 732, § 452d HGB, No. 1.

[249] "*Für Veränderungen der Haftungsregelung durch vorformulierte Bedingungen gelten jedoch die Einschränkungen des § 449 Abs. 2 HGB (§ 452d Abs. 1 Satz 2 HGB)*." Herber *TranspR* 2001, p. 104.

[250] The same applies to the rules that are referred to in § 452 HGB, in the other provisions of § 452b HGB and in § 452c HGB. The rules that establish to what extent can be deviated from the rules referred to by the multimodal transport provisions are for instance §§ 439(4) and 449 HGB, Articles 41 CMR, 25 CMNI, 23 WC, 26 MC and 5 COTIF-CIM.

[251] "*Nach der neuen Regelung könne bei multimodalen Transporten für die gesamte Strecke das neue Frachtrecht vereinbart werden; dies gelte auch bei Einschluß einer Seestrecke, wenn kein Konnossement ausgestellt werde, da dann im Sinne von § 451 Satz 1 HGB-E kein internationales Übereinkommen vorrangig wäre*." Bracker 1997, p. 413. See also Herber *TranspR* 1999, p. 94.

11 DIGEST AND RECOMMENDATIONS

11.1 Digest

The focus of this book is the question which rules of law apply to international contracts for the multimodal carriage of goods and how to ascertain them. Chapter 1 illustrates the relevancy of the question with a succinct description of the various problems generated by multimodal transport in the international legal arena. This Chapter also gives evidence of the long struggle to resolve the differences of opinion on this subject by summing up the attempts made by the international community to regulate multimodal transport uniformly. Largely for political reasons – although economic reasons have played their part as well – none of these attempts have been completely successful however.

After the finger is put on the 'multimodal' sore spot in Chapter 1, Chapters 2-10 of this book contain an analysis of how this sore spot is tended under the current rules of commercial law. Since the first step in the process of establishing the law applicable to a contract entails the determination of the character of the contract, Chapter 2 of this book demarcates the international multimodal contract for the carriage of goods. To this end it contains an overview of the difficulties one may be faced with when attempting to characterize a contract that may or may not be an international multimodal carriage contract. These difficulties are divided into three categories. The first category involves the distinction between actual carriage contracts and contracts such as the freight forwarding contract or the contract with the French '*commissionaire de transport'* which seem very similar to the multimodal carriage contract from a practical angle, but differ quite a lot from a legal perspective. Where for instance the contract of carriage is generally governed by mandatory law, the similar contracts may not be. The second category of difficulties that may arise when characterizing the contract at hand relates to the distinction between unimodal and multimodal carriage contracts. Questions such as what exactly constitutes a mode of carriage and when a certain part of the carriage is absorbed by the main carriage and when it is not are sometimes difficult to answer. Much depends on the circumstances of the case and there are a number of grey areas in which it is almost the whim of the court that determines whether the pendulum swings this or that way. This uncertainty, which seems part and parcel in multimodal transport, is even more apparent when a contract does not mention the mode or modes of transport that are to be used. Whether such an unspecified contract should be deemed unimodal or multimodal, or even whether it should be considered a contract of carriage at all, is also subject to different views[1]. The third and final category of difficulties discussed in this Chapter concerns the appraisal of whether the contract does in fact entail an international aspect. Only when it does entail such an element does the question which law applies become relevant.

Following the clarification of when a contract is in fact a multimodal contract of carriage the next steps toward establishing the law applicable to such a contract are taken in Chapter 3. In this Chapter the subjects of jurisdiction and forum shopping are discussed as the choice of forum may influence the law that is applied. The reason for this is that not all courts of law are of one mind concerning the scope of application of the various carriage conventions when it comes to multimodal carriage contracts. This problem and the somewhat inadequate means of addressing it by stimulating uniform interpretation is also addressed in Chapter 3 as are the reasons of efficiency which cause the scope of application rules of the international carriage conventions to be appraised before the path to the national law applicable to the contract is discussed.

[1] Hof van Cassatie 8 November 2004, *TBHR* 2005, p. 512 with a critical note by M. Godfroid; Glass 2006, p. 314.

Since it is not always necessary to determine the applicable national law due to its supplementary nature in relation to international law, it is generally more efficient for a court of law to hold the scope of application rules of the relevant uniform carriage regimes up to the light first and establish whether these govern the dispute that is brought before the court. To assess whether these regimes apply to multimodal carriage and, if so, to what extent, Chapters 4-8 of this work contain an analysis of the scopes of application of the various carriage conventions grouped per mode of transport. As a result Chapter 4 describes the multimodal ins and outs of the scope of the international road carriage law as embodied by the CMR, Chapter 5 focuses on the largely similar scopes of application of the Warsaw and Montreal Conventions on air carriage, Chapter 6 does the same for the rail carriage regime of the COTIF-CIM, Chapter 7 depicts the multimodal scope of the CMNI, the uniform law on inland waterway carriage and Chapter 8 portrays the multimodal aspects of the Hague Rules, the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules on maritime carriage.

When the scopes of application of all of these unimodal regimes are charted a ragtag carpet of poorly fitting pieces is the result: here and there pieces overlap but the fabric also shows an abundance of holes. Chapter 9 provides an overview of the overlaps and the conflicts of law that may ensue from them. The consequences of such conflicts are discussed and the question which of the conflicting uniform regimes applies in case of conflict is answered.

Chapter 10 expands upon the procedure to be followed when none of the carriage conventions govern a dispute arising from a multimodal contract of carriage, in other words, this Chapter discusses the particulars of the procedure to be followed when it becomes necessary to establish which national legal regime applies to the multimodal contract. In addition, the German and the Dutch legislation on multimodal carriage are explained.

11.2 Unsolved issues

The overview provided in the previous Chapters shows that the road to the law applicable to the multimodal contract of carriage is riddled with bumps and potholes. During the process of finding the applicable law, gaps and conflicts in the current 'multimodal carriage law' crop up. When taking stock of these defects it is clear that the most prominent ones are the failure of the uniform carriage regimes to govern the majority of situations involving unlocalized loss and the differences in interpretation of the scopes of application of the carriage conventions. But, even though the other unsolved difficulties may be mere runners up, they are still serious problems in their own right.

One of these 'runners up' is the conflicts of uniform law that may occur when dealing with multimodal contracts. The reason for these conflicts is the confiscation by the carriage conventions of parts of the territory of the neighbours so to speak. As Chapter 9 shows, the provisions in the current unimodal carriage regimes which extend their scope beyond the mode of transport that is their primary focus can cause more than one uniform regime to apply to claims arising from multimodal carriage. This causes confusion as to which of these regimes actually governs the dispute. Although it is true as Clarke states that the uniform carriage regimes are generally becoming simpler and perhaps more similar, which lessens the conflict issue, this most definitely does not apply to the 96 Articles of the Rotterdam Rules which may enter into force in the near future[2]. And, even though carriage regimes such as the CMR and the COTIF-CIM grow ever more alike, the devil is in the details, and these do not match entirely.

[2] Clarke *TranspR* 2002, p. 428.

Besides being governed by dissimilar conflicting provisions of carriage law, multimodal contracts are also often plagued by damage or loss that occurs at the point in time and space where one unimodal regime ends and another begins: usually the operations of loading and unloading or the transport between modes such as Mafi trailer transport within a port area. As was shown in Chapter 2 establishing to which stage of the transport the loss or damage is to be attributed can be quite problematic.

Another issue which is still lacking appropriate regulation is damage or loss brought about by multiple causes. In relation to the applicable law, situations involving multiple causes are especially troublesome in multimodal carriage if the causes are connected to different transport stages. Multiple causes may lead to more than one applicable uniform carriage regime if the damage cannot be divided or the parts cannot all be allocated to one specific transport segment.

Furthermore, there are a number of issues which are by and large problems stemming from the application of carriage law regimes that are tailored to fit contracts as a whole to only a part of a contract. These problems include the rights and obligations attached to delivery. There is for instance the difficult fit of the prescription and time for notice of damage provisions in a multimodal setting. The reference of some of the uniform law provisions to the place of taking over or the place or delivery of the goods or some such description creates problems as it is unclear whether these provisions attach to the start or end of the transport stage to which the uniform law in question applies, or whether they attach to the start or end of the entire transport. Under the CMR for instance, Article 1 CMR refers to the place of taking over of the goods and the place designated for delivery in light of its scope of application. Under this provision it would be illogical to deem these places to be the start and end-points of the entire carriage contracted for instead of the start and end-points of the road carriage stage alone. If one were to attach them to start and end-points of the entire carriage, this would extend the CMR's scope of application beyond its breaking point, as it would cause a convention meant to regulate international road carriage to be applicable to national road stages of an international multimodal transport as well. The same applies to the period during which a carrier can be held liable as defined by Article 17 CMR. Based on this Article the carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery. If the time of taking over and the time of delivery are attached to the entire multimodal transport instead of to the road stage, the period of responsibility provision of Article 17 CMR would also cause the reach of the CMR to overextend. The *communis opinio* is after all that the Convention was not meant to regulate carrier liability for non-road carriage apart from ro-ro transport. Then again, Article 32(1)(a) CMR also attaches to the delivery of the goods. It is this Article that causes the period of limitation to start to run from the date of delivery in the case of partial loss, damage or delay in delivery. If the CMR is applied to the road stage of a multimodal transport however, the time of delivery meant in Article 32 should not be deemed to refer to the end of the road stage if it does not coincide with the end of the entire transport and the delivery of the goods to the consignee. A similar difficulty arises pertaining to the period of time granted to the consignee for sending the carrier reservations giving a general indication of loss or damage found in Article 30 CMR. Thus the use of the term delivery in the CMR calls for differing interpretations if the road carriage to which the Convention is applied is part of a larger multimodal contract.

On the positive side, some of the past idiosyncrasies of multimodal contracts have been resolved due to changes in uniform carriage law. Because for instance the documentary requirements have been cleared from both air and rail regimes, one of the largest obstacles to the application of the

unimodal conventions on parts of a multimodal transport has been largely erased[3]. Only the sea carriage conventions still demand a document to be issued for application. Yet, even in sea carriage the requirement of a document will be a thing of the past if it comes to pass that the Rotterdam Rules are accepted globally. Whether or not it should be, based on its legal merits, is a difficult question.

11.3 Analysis of recent proposals

11.3.1 The Rotterdam Rules

The most recent in an 'unconventionally' long list of attempts to regulate multimodal transport uniformly are the Rotterdam Rules. As was demonstrated in the previous Chapters this Convention does not solve all the problems which currently exist in the multimodal arena, for starters because it is restricted to multimodal carriage including a sea stage. Nonetheless, it does contain a (partial) solution for some of them. As was noted above, the question whether it will improve the situation when it comes to multimodal transport is a difficult one. The limited network system as incorporated in Article 26 RR is a tremendously complicated arrangement, which is unlikely to work without at least a few glitches. The foremost of these is probably the fact that it does not take views on the applicability of carriage conventions such as the CMR to international road stages of multimodal contracts which are adhered to by both the Dutch and the English judiciary into account. On the contrary, it is the German view which does not deem conventions such as the CMR applicable to parts of a multimodal contract, unless this is specifically established by the convention, that is followed by the new regime. Only with regard to carrier liability, limitation of liability and time for suit do the Rotterdam Rules grant precedence to the possibly applicable unimodal carriage regimes, if the damage or loss occurred during a non-sea stage. Unfortunately, the exact demarcation of these terms, especially the scope of the term 'carrier's liability', seems somewhat open to debate. Is for instance time for suit not something that influences the carrier's liability and thus also covered by the term carrier's liability? Or should one follow the titles of the chapters of the uniform regimes in question and consider all provisions of for example Chapter IV 'Liability of the Carrier' of the CMR provisions concerning the carrier's liability? Yet Chapter IV of the CMR also contains Article 23 and 29 CMR which regulate the limitation of the carrier's liability. Other carriage conventions cause even more uncertainty when attaching significance to Chapter headings in this context. The Montreal Convention for instance shows in its heading of Chapter III that this Chapter contains provisions on carrier liability but also concerning the extent of compensation to be had in case damage occurs. This could be taken to mean that the Chapter includes provisions on both the carrier's liability and the limitation of liability. Chapter III MC also contains provisions on jurisdiction however. Are these to be considered provisions concerning the carrier's liability? They are not under the CMR as the CMR's jurisdiction provision, Article 31 CMR, can be found in Chapter V of the CMR entitled 'Claims and Actions'. If they are deemed carrier liability provisions under the Montreal Convention this creates an unwarranted discrepancy. Perhaps it is needful to judge whether certain provisions fall within the three categories which are granted precedence by Article 26 RR on a case by case basis, even though this is unlikely to generate predictability. Besides leading to problems of demarcation the restriction of the precedence of other possibly applicable carriage conventions to only three types of provisions also fails to prevent certain difficulties. As a result any other subjects regulated by more than one applicable convention will

[3] Van Beelen 1996, p. 121.

lead to conflicts of uniform law. To prevent such conflicts Article 82 RR was drafted. This Article seems to be prone to misinterpretation however, in addition to being too restricted to prevent all conflicts that were touched upon.

On the positive side, the new regime does plug part of the unlocalized loss gap in the current uniform carriage law, and it provides clarity in cases involving damage or loss with multiple causes. In such last mentioned situations the Rotterdam Rules apply, as the requirement by Article 26 that the damage or loss occurred strictly during the non-sea stage is not fulfilled.

All in all, it can be said that from a legal point of view the Rotterdam Rules are a far cry from being perfect. Their multimodal rules are complex, leave gaps and despite valiant attempts the Convention fails to prevent all envisioned conflicts with the existing uniform carriage law. However, one might ask whether perfection is ever attainable in international law, as it is inevitably the result of political compromise. One thing is certain, if the Rotterdam Rules do enter into force, the best we can do is hope that it is accepted globally instead of sporadically. Only then will the new regime add to the much sought-after uniformity of carriage law. If accepted globally, it will even cause the European transport conventions to generate more uniformity, as courts all around the globe are then forced to apply the provisions on carrier liability, limitation of liability and time for suit of these treaties through Article 26 RR. Whether the new Convention will be this successful in terms of acceptance is more likely to be subject to political considerations than to its legal accomplishments however. On the whole, the new regime cannot be considered completely recommendable from a purely theoretical juridical point of view.

11.3.2 The ISIC study on intermodal liability and documentation

In 2005 Clarke, Herber, Lorenzon and Ramberg presented a draft set of uniform intermodal liability rules on the behest of the Directorate-General for Energy and Transport of the European Commission, DG TREN in short[4]. This dispositive draft was meant to provide a basis for further discussion with all industries concerned. The draft rules "*concentrate the transit risk on one party and … provide for strict and full liability of the contracting carrier (the intermodal operator) for all types of losses (damage, loss, delay) irrespective of the modal stage where a loss occurs and of the causes of such a loss*"[5]. The reason for this is obviously the creation of uniformity of law and thus predictability for all parties involved in multimodal carriage contracts. The drafters presented their motives as follows:

> "*Cargo-interests do not want to be faced with legal complications of the kind described in paragraph 2. They should be offered a simple and foreseeable method of indemnification irrespective of such issues and also of the Transport Integrator's rights of recourse, if any, against sub-contractors. Moreover, this should be available to them whether or not the identity of the actual carrier and the mode of carriage are known in advance. Rights of the cargo-interests, as well as duties, should be known to them at the time that they conclude a contract of transport.*"

To produce such foreseeability for the cargo interests the proposed regime contains strict and uniform liability rules based on contracts currently in use in the transport practice where cargo interests have sufficient bargaining power. Under the proposed Regulation the multimodal carrier,

[4] Clarke, Herber, Lorenzon & Ramberg 2005.
[5] TREN/G3/25/2004, p. 7.

who is designated 'Transport Integrator' by the regime, is strictly liable for loss of or damage to the goods occurring between the time he takes over the goods and the time of delivery, as well as for any delay in delivery, unless and to the extent that he proves that it was caused by circumstances beyond his control. To offset this rather strict liability there is a high monetary limit of 17 SDR per kilogram which is very nearly unbreakable[6]. The rules are uniform, meaning that there is only one set of liability rules for all stages of the transport. Thus a simple and uniform regime is given shape, a regime which seems to cater to the most pressing wishes expressed both by the industry as well as in the court room.

Nevertheless, this proposal seems unlikely to generate the predictability it is intended to promote. For one, the fact that it is meant to be embodied by a European Regulation means that forum shopping remains an option. If an Italian consignor contracts for the carriage of goods from Santa Cruz, Bolivia to Arezzo, Italy by air and road with a Bolivian carrier the proposed regime would be applied by an Italian court of law if addressed, but a Bolivian court would not be compelled to do so. For another the regime offers contracting parties the possibility to opt out. This may indeed as the drafters suggest cause it to meet less resistance, but it also makes its application depend on the commercial 'muscle' of the parties to the contract of carriage. As a result it provides no real protection for those commercial parties without bargaining power, in other words, precisely those parties weak enough to need protection. Thirdly, the drafters may be somewhat nonchalant in relation to the conflicts the proposed regime may generate with the existing uniform transport law, and such conflicts will arise, as is shown in Chapter 9, even in those States where the scope of the CMR is not deemed to include road carriage under multimodal contracts. Whether a Regulation will supersede the existing carriage conventions if one of these is deemed applicable to a dispute alongside the proposed regime is far from certain. And even if it is, this only causes a new regional carrier liability regime to be added to the already densely populated carriage law arena. Much depends on the interpretation of the scope of application of the relevant instruments by the court addressed in such a case, a situation which does not propagate predictability. And lastly there is the objection to the high monetary limitation made by FIATA and CLECAT[7]:

> "*When one looks at the current differences of liability ceilings in the different transport modes (between 2 and 17 SDR's), the choice of the upper ceiling seems overambitious. No insurer would absorb extra liability at zero cost and this additional cost would simply be brought onto the end user's account. Since the cost is one of the key elements in the choice of a transport mode, this could lead to an increased use of the CMR and road transport, which is considered by many users as more simple and effective, to the detriment of intermodal (or comodal) solutions offered by MTI's.*"[8]

[6] The high monetary limit has been selected for the regime in order to avoid an inadequate monetary limit whenever integrated transport includes carriage by air or rail, while the increase from 2 SDR to 17 SDR is unlikely to be problematic as it will sometimes provide the Transport Integrator with a lower limit than the combined unit/per kilo limitation under the Hague-Visby Rules. For road carriers the 17 SDR limit is more than double the 8,33 SDR limit under CMR but the expectation is that the cargo interests are unlikely to commence legal proceedings as unlimited liability is restricted to the very exceptional case of personal fault of the Transport Integrator himself under the proposal's rules. The strict liability is expected to facilitate claim settlements, especially when compared with liability for presumed fault which often encourages fruitless efforts to rebut the presumption.

[7] European Association for forwarding, transport, logistic and customs services.

[8] Position paper by FIATA and CLECAT, in Joint ECMT/UNECE Working Party/Group on Intermodal Transport and Logistics Paris, 3 and 4 October 2006, Informal document No. 6 (2006), 7 September 2006, the document can be found at www.unece.org.

Still, the uniformity and the simplicity of the regime are commendable; it is an ideal worth striving for within a far from ideal situation. As the drafters mention themselves, the proposal is meant to function as a basis for discussion with the industry and other parties involved within and without the European Union. The question is whether such discussion is still meaningful at this point in time due to the possible entrance into force of the new Rotterdam Rules.

11.3.3 The 'unimodal plus' approach

In his valedictory lecture at the Erasmus University Van der Ziel sketched a possible future for multimodal transport law that gave the impression of being both elegant and industry oriented[9]. The concept he described required only minor tweaking of each of the existing carriage conventions to enable contracting parties to choose to apply one of them to an entire multimodal contract of carriage, while thus excluding the application of all other carriage conventions. Or perhaps, to cause the other convention to give the chosen convention right of way. This he called the 'unimodal plus' approach, an approach which shows a strong kinship with the 'maritime plus' vision of the Rotterdam Rules. Such a 'unimodal plus' approach would cater to those rooting for a uniform regime as well as to those fearing for a conflict of conventions. It would grant the industry leave to work with the rules they are most familiar with, while at the same time offering shippers the protection offered by one of the current carrier liability regimes. To be sure, a sea carriage regime may not in all respects be the ideal set of rules to apply when a dispute has arisen over damage which occurred during the rail stage of the transport, but it does provide the parties with the knowledge at the time of contracting of the extent of the financial risks involved. And when such risks are quantified, they can be weighed and insured if necessary.

Sadly, the adjustment of the existing transport regimes necessary for such a concept to become reality is unlikely to occur. In general uniform law is rather inert due to the large number of State Parties that generally need to be involved in any amendments, and even if adjustments are made it is likely that not all of the original parties accept the amended regime, which then creates diversity rather than uniformity.

In addition, there is the possibility of misuse of a such 'unimodal plus' system. A carrier with a strong bargaining position may force sea carriage rules with their low monetary limitation on his co-contractor and enter period of responsibility clauses into his contracts, exonerate himself from liability in case of fire or incorporate some other maritime peculiarity into the contract. But, as was mentioned above, if the risks can be quantified, they can most likely be insured. With such a low monetary limitation and the risk of maritime exonerations insurance premiums might go up, but this may be compensated by reduced freight rates.

[9] He also offers this system as a future solution in his comments on the ISIC Study. "*One such possibility is a system based on an extension of the applicability of all unimodal conventions to carriage with other modes of transport that is performed prior to or after the convention mode. Such system would elaborate on an already existing tendency in the modern unimodal transport conventions (…). In other words, just as the draft UNCITRAL convention is 'maritime-plus', also the other conventions should be made 'road-plus', 'rail-plus', etc. Overlaps of the various conventions may be avoided by appropriate conflict of convention provisions in each convention that, obviously, must be attuned to each other.*" G.J. van der Ziel, 'The ISIC Study on intermodal liability, some comments by G.J. van der Ziel', unpublished.

11.3.4 Do we really need uniform law?

At different instances the question has been raised whether there is actually a need for uniform law to regulate multimodal carriage contracts. In his comments on the ISIC Study Van der Ziel implies that the necessity of such uniform law is not felt by the transport industry:

> "*All parties involved, whether sellers, buyers or carriers, dislike intensely damage to the goods carried. When the goods arrive at destination in damaged condition, they often can no longer be used according to the parties' intention, which may create severe inconvenience for the cargo side (production or trade) and may spoil relations between a carrier and its customer.*
> *If such damage occurs, small claims tend to be settled commercially (irrespective of the applicable law) and larger claims are referred to insurers. Carriers refer such larger claims to their liability insurers and cargo interests to their transport insurers. Subsequently, such insurers handle the consequences of such claims amongst themselves, and they are perfectly aware of the applicable law even if it may be a complicated matter to sort out. Usually, recourse actions between carriers are also handled this way.*
> *To conclude, the policy and strategic impact of the problem is negligible. However, legal convenience would certainly be served (and friction costs reduced) by a legal system where a single set of rules would apply to a multimodal transport.*"[10]

The FIATA and the CLECAT are convinced that such uniform law in the form of an instrument of European law may even have a detrimental effect on the popularity of multimodal transport:

> "*Is there an identified need for such a regime? Our answer is simply no, for two reasons. First, although we acknowledge that there is no simple and unique rule to calculate liability in intermodal transport, clear rules and division of responsibility exist. The market offers solutions (e.g. FIATA Multimodal Bill of Lading, which has been in use for a couple of decades) that are tailored and suited to the most sophisticated shippers' demands. Second, we do not think that an EU-regime would enhance the use of intermodal transport, perhaps quite the opposite. Indeed, our experience tells us that the choice of the transport mode by the freight service provider AND his customer is rarely, if ever, made on the basis of the legal framework that governs it. The key factors are and will certainly remain the cost and quality of service. These ideas were expressed in clear terms by 100% of the stakeholders invited to participate as advisors in the project and to speak at the hearings where the Commission asked them to express their views.*"[11]

Indeed there are sometimes reasons to prefer national, regional law or even contractual rules over truly uniform law. One of these reasons is that regional preferences are better served with non-uniform rules, another that differing local regimes may lead to competition between these rules and allow the different areas to learn from one another's experiences, thus enabling the creation of better law[12]. Such differing contractual and national rules are abundantly present in

[10] G.J. van der Ziel, 'The ISIC Study on intermodal liability, some comments by G.J. van der Ziel', unpublished.
[11] Position paper by FIATA and CLECAT, in Joint ECMT/UNECE Working Party/Group on Intermodal Transport and Logistics Paris, 3 and 4 October 2006, Informal document No. 6 (2006), 7 September 2006, the document can be found at www.unece.org.
[12] Van den Berg & Visscher 2006.

multimodal transport[13]. As for the stimulation of competition between the regimes and the superior legislation that should be the result however, multimodal transport law does not show much promise. After decades of puzzling over the multimodal quandary no fitting regime has as yet been arrived at. The only tendency that is obvious is the proliferation of rules, on national and regional levels as well as in the form of standard contract terms. In an area as globally oriented as multimodal transport this does not seem desirable. In such an area there is no room for local preferences and it is clear after more than half a century of watching the market share of multimodal transports grow, and seeing the amount of non-uniform multimodal transport law increase, that uniform law is desirable in this area. Even if it is not deemed necessary by the carriage industry, there is the duty of governments in general to extend some protection to those parties, such as consumers or small businesses, which cannot bring enough bargaining power to bear in the international commercial arena to press for sufficiently favourable contract terms. In addition it would seem that the key factors of cost and quality of service that are valued by the industry only stand to gain from well balanced uniform rules, since these would provide legal certainty. As a result friction costs such as doubled up insurance premiums and the expenses of extensive litigation may be lessened or even eliminated. Such a reduction of costs and legal uncertainty would serve the customers as well as the carriage industry. It may just be, that the industry's lack of knowledge of the intricacies of the already existing mandatory uniform carriage law cause it to be loath to be bound by yet another regime of mandatory law. Nonetheless, the right set of rules will clarify and improve matters for all parties involved, since the right uniform legislation will streamline and lubricate international carriage by eliminating the hindrances created by the ill fit of multimodal transport under unimodal regimes.

11.4 Recommendations for the multimodal future

> "*For Fools rush in where Angels fear to tread*"
> Alexander Pope, An essay on criticism, 1709

Unless the Rotterdam Rules meet with global acceptance, it seems that even the brightest minds of our time, as those whom have gone before, have not been able to create a regime of carrier liability for multimodal carriage that has been received both as juridically unproblematic and politically acceptable. And even if the Rotterdam Rules do exceed all expectations, they still are only a partial solution to the multimodal problem, as they are restricted to multimodal carriage including a sea stage. I will therefore not have the audacity to suggest that I have single-handedly dreamt up the perfect solution to the multimodal quandary. I will leave such notions to those more brazen and perhaps also more courageous. What I will do is add an idea to the existing heap, plant a seed as it were, and hope that it will germinate and grow into something feasible, something both juridically and politically acceptable.

Since history shows that a truly uniform multimodal transport regime, in other words a truly global regime, whether it concerns a network approach, a uniform approach or a combination of both, does not seem to be feasible, and there is the possibility that the 'maritime plus' Rotterdam Rules gain sufficient acceptance, it seems less than productive to propose a

[13] See the regional regimes such as the rules enacted by the ALADI, MERCOSUR and ASEAN frameworks, the national legislation on this subject in The Netherlands, Germany, India, Argentina, China *et seq*. mentioned in Chapter 1, Section 1.3 and the contractual standard rules of the UNCTAD and ICC, FIATA, BIMCO and many more organizations.

comprehensive liability regime here. Attempting to add such a liability regime to the already considerable list seems relatively pointless, and perhaps even counterproductive. Another liability regime may just aggravate the situation by adding to the proliferation of regional law in this area. In order to solve the existing problems in multimodal transport law without adding any more options for conflict, an instrument of a supplementary nature might serve. Although such an instrument would not erase all difficulties in finding the rules of law applicable to a multimodal contract, it would be able to fill the gaps in the current legal framework without creating all sorts of conflicts with the existing carriage regimes. In addition, such a regime should be able to alleviate some of the discrepancies that have crept into the interpretation of the scope of application rules of carriage conventions such as the CMR between certain States by clarifying how to interpret such conventions or perhaps by declaring them applicable. A declaration that they are not applicable is not an option however, as this would cause the new regime to conflict with some of the elder carriage regimes according to the *communis opinio* in certain States.

For efficiency reasons a European Regulation seems to be the most appropriate form for a supplementary regime since the decision-making process of European law seems rather more efficient than that of treaty law in this area[14]. Although the creation of European legislation may take a few years, it is unlikely to take decades, whereas treaty law – if the Rotterdam Rules enter into force that is – will have taken approximately a century, give or take a few years, to create even a semi-multimodal regime[15]. Admittedly, the restriction of the scope of a new regime to Europe may not be ideal. Yet it is far more feasible and a lot less laborious than trying for global success, as history has clearly shown. On the upside, such a European regime may even occasion the adoption of its supplementary rules beyond the European Union if it happens to perform well. The benefit a Regulation has over a Directive is that it does not need to be 'translated' into national law, and is thus more likely to create truly uniform law, that is to say, within the European legal sphere at least. In addition, this goal of uniformity will also be greatly served by the possibility offered by European legislation to grant the European Court of Justice the last word on any disputes on the interpretation of the regime. When a Supreme Court of a Member State of the European Union is concerned with the interpretation of European Community Law, and it arrives at the conclusion that the language of the European rules is ambiguous or, that their application leads to an unacceptable result, it is obliged to transfer the specific interpretative issue to the European Court of Justice to get a final and binding decision on the correct interpretation. Such an approach has some crucial advantages. Firstly, it provides for uniform application of the European Community Law in question and secondly it creates a reliable and easily accessible source of information for other judges concerning the proper interpretation of such law.[16] Furthermore, other positive aspects of moulding supplementary multimodal transport rules into the shape of a Regulation are that (a) the geographical scope of application of a Regulation is rather extensive directly from the moment it enters into force and encompasses at

[14] An example of the expediency of the 'European road' is the concerted entrance into force of the Montreal Convention in the European Union. Under the auspices of the European Commission all Member States of the European Union at that time ratified the Montreal Convention on 29 April 2004 '*en bloc*' by means of a joint deposit of all instruments of ratification, acceptance, approval or accession at ICAO with the result that the Convention entered into force for the entire European Union on 28 June 2004. Koning 2007, p. 46.

[15] During its 1911 and 1913 conferences the CMI, the *Comité Maritime International* first devoted some attention to the subject of through carriage which resulted in the *Code international d'affrètement* which regulated multimodal carriage insofar as it included a sea leg. For a detailed overview of the attempts to create uniform multimodal carriage law, information on the contents of the various drafts and the reasons for their failure see De Wit 1995, p. 147-183.

[16] Rennert 2005, at p. 131.

least a few important players in the transport market; (b) a Regulation is more readily amended than a convention and, as part of the *acquis communautaire*, can be more rapidly extended to new Member States, and (c) a Regulation will afford a single instrument directly binding on national courts, whereas ratification of an international convention in many countries necessitates the adoption of national legislation in order to make the convention binding in domestic law[17].

In order to create some semblance of uniformity such a regime should not depend on the voluntary application of contracting parties. Since it is partly meant to provide the weaker parties in the transport game with at least a minor degree of protection it should be mandatory and there should be no opting out of it.

11.4.1 Proposal

Article 1 – Scope of application

1. This Regulation shall apply to the contract of carriage whereby a single (multimodal) carrier promises a consignor to carry goods, which either prescribes the use of at least two different modes of transport, or allows for the use of more than one mode of transport while two or more modes of transport are actually used during its performance.
2. When the contract of carriage does not mention the use of more than one mode of transport but does allow for it, and the agreed carriage is not or only partly performed this Regulation shall apply to the contract.
3. This Regulation shall not prejudice the application of any international convention to which a Member State is, or becomes, a party. The only exception to this rule is the Vienna Convention on the Law of Treaties done at Vienna on 23 May 1969.
4. If an international carriage convention would have applied to a single stage or a combination of stages of the agreed or allowed for multimodal carriage if this stage or stages of the carriage had been the sole subject of the contract of carriage then this convention is deemed to apply to said transport stage.
5. In relation to the scope of application of the provisions on jurisdiction of the convention mentioned in paragraph 4 the terms 'taking over of the goods', 'delivery', 'departure' or 'destination' or some such reference always attach to the start and/or finish of the stage or stages of the carriage mentioned in paragraph 4. In relation to other matters such as prescription or the time granted for notice of damage or loss these terms may attach to the start or finish of the entire multimodal transport that was contracted for.

Article 2 – Conflicts

If more than one international convention applies to loss, damage or delay of the goods resulting from a multimodal contract of carriage as mentioned in Article 1 it is the convention that has the mode of carriage of the transport stage during which the loss, damage or delay was caused as its primary focus that takes precedence. If all of the applicable conventions have the same mode of transport as their primary focus the newest convention takes precedence.

Article 3 – Unlocalized loss

[17] Report I, 21 November 2007, on the proposal for a regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), (COM(2005)0650 – C6-0441/2005 – 2005/0261(COD)), Committee on Legal Affairs, Rapporteur: Cristian Dumitrescu, p. 42 of 52.

1. If the multimodal carrier does not deliver the goods to the destination on time in the state in which he has received them, and if it has not been ascertained where the fact causing the loss, damage or delay has arisen, he shall be liable for the damage resulting there from, unless he proves that he is not liable therefore on any of the stages of the transport where the loss, damage or delay may have occurred.
2. If the multimodal carrier is liable for the damages resulting from damage, total or partial loss, or delay of the goods, and if it has not been ascertained during which stage of the carriage the cause of the damage, loss or delay has arisen, his liability shall be determined according to the regime which applies to that stage of the transport where this cause may have arisen and from which the highest amount of damages results.

Article 4 – Multiple causes
If the damage, loss or delay was caused during more than one stage of the transport and the resulting damages cannot be apportioned appropriately to these stages the regime which applies to that stage of the transport where at least part of the loss, damage or delay was caused and from which the highest amount of damages results applies.

Article 5 – Demarcation of transport stages
1. Transhipment or storage operations that are of insufficient substance to be considered separate commitments are to be attributed to the stage performed or to be performed by the (subcontracting) carrier under whose authority the transhipment or storage operations were performed or were to be performed. If this is the multimodal carrier these operations are to be attributed to the stage of the transport to which they are most closely connected.
2. A transhipment or storage operation is of sufficient substance to be considered a separate commitment only if it is proven that it required extraordinary effort or that it covered an extraordinary amount of time or distance.

Article 6 – Mandatory application
Any stipulation derogating from this Regulation is null and void.

11.4.2 Explanation of the proposal

Article 1 – Scope of application
1. Besides contracts that explicitly relate to multimodal carriage those contracts that merely allow for multimodal carriage are also governed by this Regulation. If a contract does not prescribe the use of more than one mode of transport but merely offers the carrier the option to use more than mode of transport the Regulation applies to such a contract only if the carriage is actually performed by more than one means of transport.
2. The second paragraph is meant as an expansion to the scope of application sketched by paragraph 1 of this Article. It covers those situations in which the carrier is offered the opportunity to use more than one mode of carriage during the performance of the carriage but the goods are not carried to the intended destination either at all or only partly. Such a situation may arise when for instance the consignor does not put the goods at the disposal of the carrier on time.
3. The Regulation is supplementary in nature; its rules apply only where international treaty law leaves room. The only exception to this rule is the Vienna Convention on the Law of Treaties done at Vienna on 23 May 1969 in order to enable Article 2 of this Regulation to provide a rule

of precedence in case of a conflict of conventions specifically tailored to multimodal transport, a *lex specialis* of sorts.

4. Paragraph 4 contains a rule concerning the interpretation of the scope of application of the current international carriage conventions which is loosely modelled after the German § 452a HGB. The provision is meant to take the sting out of the differences in interpretation of the scope of application rules which have cropped up in Europe. The provision causes carriage conventions such as the CMR to be applied, even if according to the views of the court addressed the Convention would not have applied to any stage of a multimodal contract based on its scope of application rules. Although the rule involves rather unconventional and perhaps even unorthodox methods, it seems the only means to ensure a semblance of uniform interpretation at this point.

5. Paragraph 5 clarifies that rules relating to the scope of application or jurisdiction in the carriage conventions attach to the places or moments in time at the beginning or end of the stage of the carriage that paragraph 4 – or the convention itself – causes it to apply to, and not to the start and finish of the entire multimodal transport if these do not coincide. The scope of application rules are to attach to these places or points in time since the Regulation is not meant to expand the scope of application of the carriage conventions beyond the mode of transport that they are meant to regulate without the help of the Regulation. A clarification was considered needed because a difference of opinion exists concerning whether jurisdiction should attach to the entire multimodal transport contracted for, or rather to the stage where the loss, damage or delay occurred[18]. If no guidelines are given it may occur that a claimant is rebuffed by both the court in the State where the stage of the transport where loss occurred commenced because it is not there that the entire transport commenced, and by the court in the State where the entire multimodal transport commenced because it is not in that State where the stage where the loss occurred commenced. A reason that can be given for attaching the jurisdiction provisions to the stage and not to the entire transport is that thus matters of recourse are more likely to be aligned. There are however also matters in relation to which it would not be fair to the consignee for instance if these were attached to the end of the transport stage if this is not the end of the entire transport, as this means that the 'delivery' will not grant the consignee control over the goods. Such matters concern, amongst other things, the start of the period of limitation for an action or the time granted for notice of damage or loss. In relation to such matters the terms mentioned may be deemed to attach to the start or finish of the entire multimodal transport that was contracted for at the discretion of the court addressed.

Article 2 – Conflicts

This provision provides a solution specifically tailored to multimodal transport for the conflicts of conventions that may arise from multimodal transport as described in Chapter 9 of this book. The mode of carriage that is the primary focus of a convention is air carriage for the Warsaw and Montreal Conventions, road carriage for the CMR, inland waterway carriage for the CMNI, rail carriage for the COTIF-CIM and sea carriage for the H(V)R, the Hamburg Rules and the Rotterdam Rules. In case more than one convention applies and all these applicable conventions have the same mode of transport as their primary focus the *lex posterior* rule is to regulate which of these regimes is granted precedence.

Article 3 – Unlocalized loss

[18] See for example Rb Rotterdam 28 October 1999, *S&S* 2000, 35 (*Resolution Bay*) and OLG Köln 25 May 2004, *TranspR* 2004, p. 359-361.

This Article is based on the solution for unlocalized loss found in Articles 8:42 and 8:43 BW. These provisions of Dutch law first determine that a carrier is liable even if the stage where the damage or loss occurred cannot be established. This is necessary because in such a case no uniform carriage law, except under very specific circumstances, applies to said damage or loss[19]. The carrier may escape liability only if he proves that he would not have been deemed liable under any of the liability regimes that could possibly have applied if the loss had been localized. If for instance goods arrive damaged after a journey by sea, rail and road, the carrier cannot avoid liability by claiming that the damage was caused by fire. Although the HVR may consider this reason to relieve the carrier of responsibility, the CMR and the COTIF-CIM do not (if the Member State of the forum has not incorporated the fire exception based on Article 38 COTIF-CIM that is). Secondly, the provisions give the carrier cause to try his best to clarify where the loss or damage arose since if he does not he is held liable based on the rules that result in the highest amount of compensation for the cargo claimant. This might mean for instance when goods are carried by air and road, while both stages cross one or more borders, that the carrier would be forced to pay 17 SDR per kilogram based on the Montreal Convention since that has the higher limitation of liability. It may also mean that the carrier would be held liable based on the CMR rules and would be obliged to compensate the cargo claimant in full for the loss or damage suffered if the loss or damage resulted from 'an act or omission done with wilful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seized of the case, is considered as equivalent to wilful misconduct' if this results in a higher amount of compensation for the cargo claimant. The reason for this is that the limit of liability under the Montreal Convention is unbreakable, whereas the liability limit found in the CMR is not due to Article 29 CMR.

This Article follows the example set in the Dutch legislation on multimodal carriage and not the example of the German legislation for a very simple reason. It is not that the Dutch rules are in any way superior, no, it is simply that the German legislation causes claims involving unlocalized loss to be governed by the basic German rules on carrier liability. As the proposed Regulation lacks such basic liability rules it is the Dutch example that is followed instead, as this does not require the existence of such basic rules.

Article 4 – Multiple causes

Article 4 provides a solution for loss or damage with multiple causes that runs along the same lines as the solution proposed for unlocalized loss for uniformity's sake.

Article 5 – Demarcation of transport stages

1. The attribution of supplementary transhipment or storage operations to either the transport stage before or after the operation is based on the German case law on this issue[20]. The attribution of the operations based on under whose authority they are performed is of a factual nature. When goods are for instance carried in a port area from a ship to a waiting truck, this carriage is attributed to the sea stage when it is performed under the authority of the subcontracting sea carrier, while it is attributed to the road stage when it is performed under the authority of the subcontracting road carrier. If the transhipment or storage occurs under the authority of the multimodal carrier such attribution may prove impossible however. In such a case the operations may perhaps be attributed to the sea stage if the multimodal carrier actually performs the sea stage and has hired a subcontractor to perform the road stage. As there are

[19] See Chapter 10, Section 10.1.1 on unlocalized loss.

[20] BGH 18 October 2007, *TranspR* 2007, p. 472-475; BGH 3 November 2005, *TranspR* 2006, p. 35-37.

many factors which may influence matters under those circumstances it seems the approach taken by the Dutch and German legislators is to leave the assessment of such cases to the judiciary so that they may be dealt with on a case by case basis.
2. The second paragraph establishes that transhipment or storage operations are considered part of the carriage commitment unless proven otherwise.

Article 6 – Mandatory application
The Regulation is mandatory since a dispositive system would not add legal certainty; a dispositive regime would only add another variable to the already murky multimodal pool.

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SUMMARY IN DUTCH

De kern van dit boek is de vraag welk recht van toepassing is op de overeenkomst voor het internationaal multimodaal vervoer van goederen volgens Duitse, Nederlands en Engelse opvattingen. Deze vraag wordt beantwoord in verschillende stappen. Allereerst wordt een beeld van de huidige situatie geschetst en van de juridische problemen die deze met zich meebrengt. Daarna wordt de internationale multimodale vervoerovereenkomst afgebakend. Vervolgens volgen er enkele hoofdstukken die een beeld geven van de procedure die gevolgd wordt om het toepasselijke recht op een dergelijke overeenkomst te achterhalen en de inhoud en knelpunten van dit recht. In het laatste deel van dit boek worden er dan ook nog enige aanbevelingen gedaan voor de multimodale toekomst.

Hoofdstuk 1 is een inleidend hoofdstuk dat een schets bevat van de huidige problematiek omtrent de internationale multimodale vervoerovereenkomst op juridisch gebied. Allereerst wordt daartoe het belang van de multimodale vervoerovereenkomst in de huidige consumptiemaatschappij aangestipt. Er wordt opgemerkt dat vrijwel geen enkel hedendaags produkt nog lokaal wordt geproduceerd; alledaagse dingen zoals kleding en elektronika worden doorgaans zelfs vanuit andere werelddelen aangevoerd. Door de opkomst van de container en de daarop aansluitende technische vooruitgang in de transportsector is het verwerken van deze enorme produktenstroom echter duidelijk vereenvoudigd. De overlading van goederen van het ene transportmiddel naar het andere is sneller en veiliger geworden. Het recht blijft echter achter bij de techniek.

Het internationale vervoerrecht is momenteel sterk gefragmenteerd. De verdragen die er zijn richten zich allen op een enkele vervoersmodaliteit. Zo zijn er verdragen voor lucht-, zee-, spoor, binnenwater- en wegvervoer. Er is in het verleden wel geprobeerd een verdrag met betrekking to multimodaal vervoer tot stand te brengen maar geen van deze pogingen heeft de eindstreep gehaald. Vanwege deze fragmentatie in het internationale vervoerrecht loopt men tegen verschillende problemen aan wanneer men probeert vast te stellen welk recht van toepassing is wanneer een enkele vervoerovereenkomst meerdere vervoersmodaliteiten omvat. Vanwege het ontbreken van een multimodaal verdrag werken we – bij gebrek aan beter – met een netwerk systeem. Het recht dat wordt toegepast op de schadevergoedingsvordering die voortvloeit uit een multimodale vervoerovereenkomst is volgens dit systeem het recht dat van toepassing is op dat deel van het transport waar de schade werd veroorzaakt. Is de schadeoorzaak niet te lokaliseren dan biedt het netwerk systeem echter geen oplossingen en is er – op een enkele uitzondering na – geen verdragsrecht van toepassing. Het toepasselijke recht ligt dan in de nationale rechtssfeer. Het gevolg is dat partijen in zulke gevallen minder goed in staat zijn om het op de overeenkomst toepasselijke recht te voorspellen. Dergelijke onzekerheid wordt in de handel weinig gewaardeerd.

Hoofdstuk 2 schetst een beeld van de eigenschappen van een internationale multimodale goederenvervoerovereenkomst in drie delen. In het eerste deel wordt de onstaansgeschiedenis van de vervoerovereenkomst aangestipt. Daarna worden de eigenschappen van de vervoerovereenkomst gedistilleerd uit de verschillende internationale vervoersrechtverdragen en nationale vervoerrechtcodificaties. Vervolgens worden deze eigenschappen afgezet tegen kenmerken van overeenkomsten die een sterke verwantschap met de vervoerovereenkomst vertonen zoals bijvoorbeeld de expeditieovereenkomst.

In het tweede deel van dit hoofdstuk wordt het speciale karakter van de multimodale vervoerovereenkomst belicht. Een defintie van de multimodale vervoerovereenkomst wordt gegeven en de verschillende manieren waarop in Nederland en Duitsland met een gemengde overeenkomst zoals de multimodale vervoerovereenkomst kan worden omgegaan worden beschreven. Ook worden verschillende praktische afbakeningsproblemen besproken. Een van deze vraagstukken betreft de status van de in de praktijk veel voorkomende optionele en niet nader ingevulde vervoerovereenkomsten. Er wordt in dit kader getracht een antwoord te geven op de vraag of, en zo ja onder welke omstandigheden, dergelijke overeenkomsten als multimodaal kunnen worden aangemerkt. Een ander vraagstuk betreft de afbakening van de deeltrajecten waaruit een multimodale vervoerovereenkomst bestaat. Kan bijvoorbeeld transport per Mafi trailer in de haven voldoende zelfstandigheid hebben om als apart vervoerstraject te worden aangemerkt en zo een zeevervoerovereenkomst multimodaal maken? En zijn stapelvervoer en/of doorvervoerovereenkomsten te typeren als multimodale vervoerovereenkomsten of niet? Deze vragen en enige andere afbakeningsvragen passeren in dit tweede deel van het hoofdstuk de revue.

In het derde en laatste deel van hoofdstuk 2 wordt het doorgaans internationale karakter van de overeenkomst voor multimodaal vervoer aan een onderzoek onderworpen. De geografisch georienteerde aanknopingspunten van de nationale en internationale vervoerregelgeving worden beschreven. Tegen de achtergrond van deze regelgeving wordt ook nogmaals de consensuele aard van de vervoerovereenkomst aangestipt. Een dergelijke overeenkomst is namelijk slechts als internationaal te bestempelen als grensoverschrijdend vervoer is afgesproken door partijen.

Hoofdstuk 3 is een inleidend hoofdstuk dat dient als opstap naar de hoofdstukken 4 tot en met 10 met hun analyse van het toepasselijke recht. In dit hoofdstuk worden de eerste stappen op de weg naar het toepasselijke recht beschreven. Allereerst wordt er aandacht besteedt aan de manier waarop forumkeuze de klager de mogelijkheid biedt het recht dat zal worden toegepast te beinvloeden. Omdat een rechter slechts gebonden is aan de verdragen waarvan de forumstaat lid is, en omdat niet alle rechters deze verdragen identiek uitleggen, kan de keuze voor een bepaald forum gevolgen hebben voor het recht dat toepasselijk wordt geacht op het aangebrachte geschil. In dit kader wordt speciale aandacht besteedt aan de uitleg van de begrippen ‘plaats van inontvangstname’ en ‘plaats van aflevering’. Het verschil in interpretatie van deze begrippen in Duitsland en Nederland en de gevolgen daarvan met betrekking tot de rechterlijke bevoegdheid worden nauwgezet belicht.

Ook wordt een verklaring gegeven voor het feit dat de aansluitende hoofdstukken als eerste de toepasselijkheid van het uniforme vervoerrecht bespreken en het toepasselijke nationale recht pas daarna. De internationale oorsprong van uniform recht brengt met zich mee dat het voorrang krijgt ten opzichte van regels van nationale origine. Dit is zelfs het geval in de dualistische Duitse en Engelse rechtssystemen, al is deze voorang in die systemen anders gefundeerd en misschien wat minder vanzelfsprekend dan in het monistische Nederland. De prioriteit die wordt verleend aan verdragsrecht in combinatie met het feit dat de vervoerverdragen de kernvragen met betrekking tot vervoerdersaansprakelijkheid beogen te beantwoorden leidt ertoe dat in veel gevallen de vaststelling van het aanvullend van toepassing zijnde nationale recht achterwege kan blijven. In de rechtzaal wordt dan ook ter wille van de efficiëntie doorgaans direct onderzocht of er verdragsrecht van toepassing is.

Hoofstuk 4 beschrijft het toepassingsbereik van het CMR in het kader van multimodaal vervoer. Van de verschillende vervoerrechtverdragen die momenteel van toepassing zijn in Europa kan

het CMR zeer waarschijnlijk bogen op het meest besproken toepassingsbereik. Deze discussies over het toepassingsbereik van dit wegvervoerverdrag gaan slechts bij hoge uitzondering over andere onderwerpen dan multimodaal vervoer. De reden hiervoor is tweeledig. Ten eerste omvatten verreweg de meeste multimodale transporten een wegdeel, terwijl het CMR geen duidelijke regels bevat omtrent haar toepasselijkheid op dit gebied. Artikel 1 CMR stelt niet meer dan dat het van toepassing is op 'overeenkomsten voor het vervoer van goederen over de weg'. Daarnaast is het zo dat het CMR het enige verdrag is dat haar toepassingsbereik uitbreidt met met betrekking tot stapelvervoer. De regels die deze uitbreiding van het bereik van het verdrag realiseren zijn te vinden in artikel 2 CMR en zijn gezien de rechtspraak op dit punt voor verschillende uitleg vatbaar.

Het grootste twistpunt is echter de betekenis van de woorden 'overeenkomst voor het vervoer van goederen over de weg' in artikel 1 CMR. Daarom worden in het eerste deel van hoofdstuk 4 de verschillende interpretaties van deze woorden in de literatuur en de jurisprudentie van Duitsland, Engeland en Nederland nader belicht. De *communis opinio* in Nederland en Engeland blijkt te zijn dat deze woorden betekenen dat het CMR van toepassing is op (internationaal) wegvervoer dat wordt uitgevoerd op grond van een multimodale vervoerovereenkomst. In Duitsland overheerst echter de visie dat een overeenkomst voor het vervoer van goederen over de weg niet méér mag omvatten dan vervoer over de weg alleen. Het gevolg is hier van dat het CMR in Duitsland niet wordt toegepast op delen van een multimodale vervoerovereenkomst, zelfs niet als het internationaal wegvervoer betreft. Zowel de redenen voor de Nederlandse en Engelse opvatting als de overwegingen die ten grondslag liggen aan de Duitse opvatting op dit gebied worden geanalyseerd. Op basis van het idee dat het handelsrecht gebaat is bij zoveel mogelijk uniformiteit in het recht wordt vervolgens de conclusie getrokken dat het CMR dient te worden toegepast op internationale wegsegmenten van multimodale vervoerovereenkomsten.

Naast het bovengenoemde struikelblok bevat artikel 1 lid 1 CMR nog meer toepassingsbereik bepalende kenmerken. Het vervoer dient bijvoorbeeld te geschieden met een voertuig en onder bezwarende titel. Gratis vervoer wordt dus niet door het CMR bestreken, evenmin als vervoer waarbij geen gebruik wordt gemaakt van een voertuig. Ook het vervoer van poststukken of lijken en het vervoer dat ten behoeve van verhuizingen wordt uitgevoerd valt buiten het bereik van het verdrag, dit zijn namelijk activiteiten die worden uitgesloten door lid 2 en 4 van artikel 1 CMR. Op de afbakeningsvragen die hierbij rijzen, zoals de vraag wat bijvoorbeeld precies een voertuig is en wat voor soort tegenprestatie een overeenkomst het predikaat 'onder bezwarende titel' geeft wordt in het tweede deel van hoofdstuk 4 ingegaan.

In het derde deel van hoofdstuk 4 wordt artikel 2 CMR behandeld. Dit artikel dat zogenaamd stapelvervoer ook onder de werking van het verdrag brengt is al tientallen jaren onderwerp van discussie. Ook met betrekking tot dit artikel is er door de jaren heen een aardig reservoir aan divergerende meningen en rechtspraak ontstaan. De Hoge Raad bijvoorbeeld, hanteert een objectieve uitleg om de inhoud van de hypothetische overeenkomst tussen de afzender en de niet-wegvervoerder te bepalen. De rechtbank Rotterdam volgde deze methode in haar latere uitspraak inzake de 'Duke of Yare' grotendeels, maar liet uiteindelijk haar beslissing toch van duidelijk subjectieve omstandigheden afhangen. Ook in Duitsland en Engeland bestaat er geen consensus op dit punt.

Hoofdstuk 5 beschrijft het toepassingsbereik van de luchtvervoerverdragen als het gaat om multimodaal vervoer. In tegenstelling tot het uniforme wegvervoerrecht is het uniforme luchtrecht vrij duidelijk in dit opzicht. Een complicerende factor in het luchtrecht is echter het feit dat het luchtrecht momenteel te vergelijken is met een lappendeken. Het Verdrag van

Warschau uit 1929 is in de loop der tijd verrijkt met een waslijst aan protocollen en aanvullende verdragen. Omdat niet alle oorspronkelijke verdragspartijen ook al deze aanvullingen hebben aanvaard raakte het recht enigszins versnipperd. Het Verdrag van Montreal van 1999 is bedoeld om deze versnippering tegen te gaan, maar omdat het lidstaten niet verplicht het oude regime op te zeggen is het voorlopig veeleer een extra set regels in plaats van de vervanging die het zou moeten zijn. Om te bepalen welke luchtrechtregels van toepassing zijn is het van belang te bepalen in welke landen het vertrekpunt en de bestemming van het transport liggen. De vraag is, als het gaat om multimodaal vervoer, of dit het vertrekpunt en de bestemming zijn van het gehele vervoer, dus inclusief het vervoer dat niet door de lucht geschiedt, of dat het hier om het begin en het eind van het luchtvervoersegment gaat. Aangezien de artikelen 31 WC en 38 MC duidelijk stellen dat de verdragen slechts van toepassing zijn op het vervoer door de lucht lijkt de aanname voor de hand te liggen dat hier direct aan het luchtsegment aangeknoopt dient te worden.

Er zijn echter bepalingen in het luchtverdragsrecht die het toepassingsbereik onder bepaalde omstandigheden verruimen. Niet alleen brengen het derde en vierde lid van artikel 18 van beide regelingen ook andersoortig vervoer binnen de luchthaven binnen het bereik van de verdragen, zelfs andersoortig vervoer buiten de luchthaven kan door het uniforme luchtrecht beheerst worden. Dit laatste is echter slechts het geval als de oorzaak van de schade niet gelokaliseerd kan worden en het andersoortige vervoer inlading, aflevering of overlading betreft. Ook rekken de bepalingen omtrent opvolgend vervoer het toepassingsgebied van het verdragsrecht op. Als partijen verschillende luchttransporten als één reis aanmerken dan is het verdragsrecht van toepassing op de gehele reis, zelfs als delen ervan op zichzelf niet grensoverschrijdend zijn.

Het één na laaste onderwerp dat besproken wordt in hoofdstuk 5 is het fenomeen genaamd ‘trucking’. Het vervangen van delen van het geplande luchttransport door transport over de weg is tegenwoordig schering en inslag in de luchtrechtsector. Wanneer deze substitutie is toegestaan is op grond van de overeenkomst heeft dit gevolgen voor het recht dat hierop van toepassing wordt geacht. Wanneer het contract echter andersoortig vervoer niet toestaat, is in beginsel ook op het vervoer dat niet door de lucht geschiedt (uniform) luchtrecht van toegepassing. Er wordt echter ook wel verdedigd dat dit beginsel enige nuancering verdient. Beide zienswijzen worden op hun merites beoordeeld.

Het laatste onderdeel van hoofdstuk 5 betreft een analyse van de probleempunten bij de toepassing van het uniforme luchtvervoerrecht op multimodale vervoerovereenkomsten. De revue passeren de tijdslimiet voor protest na ontvangst van de goederen door de geadresseerde, de verjaring van acties en de vraag of multimodale transportdocumenten aangemerkt kunnen worden als luchtvrachtbrief in het kader van het Verdrag van Warschau.

Hoofdstuk 6 behandelt de toepasselijkheid van het COTIF-CIM op multimodaal vervoer. De vorige versies van het spoorvervoerrechtverdrag waren meer gericht op het spoorvervoer door staatsbedrijven en verschilden daarom enigszins van de andere transportrechtverdragen. Omdat in deze versies als voorwaarde voor toepassing werd gesteld dat het vervoer door een spoorvervoerder moest worden uitgevoerd en over routes opgenomen in een bepaalde lijst, was de mogelijkheid dat het CIM toegepast werd op multimodale vervoerovereenkomsten klein. De bepalingen die het toepassingsbereik van het het huidige CIM zoals gewijzigd door het Vilnius Protocol van 1999 regelen zijn echter geschoeid op de leest van het CMR. Waar het CMR een ‘overeenkomst voor het vervoer van goederen over de weg’ vereist, vereist het huidige COTIF-CIM een ‘overeenkomst van spoorwegvervoer van goederen’ voor toepassing. Dit heeft als gevolg dat de discussie omtrent het wel of niet van toepassing zijn van het CMR op delen van een multimodale vervoerovereenkomst vrijwel in gelijke vorm ook over het COTIF-CIM zou

kunnen worden gevoerd. Er wordt daarom dan ook verwezen naar hoofdstuk 4 voor de details van deze discussie.

Deze discussie betreft echter slechts de basisregels; de verdragstypische restricties of uitbreidingen van het COTIF-CIM worden wel uitgebreid besproken in hoofdstuk 6. Artikel 1 lid 3 en 4 COTIF-CIM breiden bijvoorbeeld het bereik van het CIM uit met betrekking tot 'supplementair' weg-, binnenwater- of zeevervoer.

Hoofdstuk 7 beschrijft de rol van het CMNI in multimodale vervoerovereenkomsten met een deel binnenwatervervoer. Net als bij het COTIF-CIM zijn de regels die het basisbereik van het verdrag regelen gemodelleerd naar die van het CMR. De invloed van het CMR was bij het CMNI echter wellicht iets minder sterk dan bij het CIM aangezien ook de maritieme verdragen hun uitwerking op het uniforme binnenwatervervoer niet hebben gemist. Volgens artikel 2 lid 1 CMNI is het verdrag in principe van toepassing op vervoerovereenkomsten, waarbij artikel 1(a) CMNI verduidelijkt dat een vervoerovereenkomst elke overeenkomst is, ongeacht hoe deze wordt aangeduid, waarbij een vervoerder zich verbindt tegen betaling van vracht goederen te vervoeren over de binnenwateren. Het tweede lid van artikel 2 CMNI breidt het bereik van het verdrag uit tot zeevervoer dat onder dezelfde vervoerovereenkomst geschiedt als het binnenwatervervoer mits er geen 'zeecognossement' is uitgegeven en het zeevervoer een kortere afstand beslaat dan het binnenwatervervoer. Het gevolg van deze uitbreiding is dat van belang is wat precies bedoeld wordt met een zeecognossement en hoe men bepaalt waar het zeevervoer eindigt en het binnenwatervervoer begint en andersom.

Naast deze vragen komen ook een aantal andere onderwerpen aan bod. Ten eerste wordt de betekenis van de 4 geografische aanknopingspunten genoemd in artikel 2 lid 1 CMNI en hun verhouding tot artikel 3 lid 2 CMNI onderzocht. Artikel 3 lid 2 CMNI bepaalt dat, tenzij anders is overeengekomen, de inontvangstneming en aflevering van de goederen plaatsvinden aan boord van het schip. De combinatie van deze bepaling en de inhoud van artikel 16 lid 2 CMNI lijkt een gat in het CMNI te slaan. Een 'gat' dat opgevuld dient te worden met nationaal recht. Het lijkt hier om een codificatie van de 'before & after' clausules uit het zeevervoerrecht te gaan. Artikel 16 lid 2 CMNI bepaalt namelijk dat 'de aansprakelijkheid van de vervoerder voor schade door verlies of door beschadiging van de goederen die ontstaat vóór het ogenblik van laden in het schip of na het ogenblik van lossing, wordt geregeld door het op de vervoerovereenkomst toepasselijke recht van een Staat'. Echter, het CMNI regeert met deze bepaling enigszins over haar grenzen heen. Gezien het feit dat de inontvangsneming en de aflevering van de goederen zonder andere afspraak aan boord van het schip geschieden, dus ná inlading en vóór uitlading, en een vervoerovereenkomst doorgaans wordt geacht de periode tussen inontvangstname en aflevering te beslaan, is het CMNI helemaal niet van toepassing op deze 'before & after' periodes. Wanneer er echter afgesproken wordt dat de inontvangstname en/of aflevering voor het binnenwatervervoer voor inlading en/of na uitlading plaatsvinden is via het CMNI nationaal recht van toepassing op de tussenliggende periodes. Dit druist in tegen het streven naar uniformiteit van recht dat ten grondslag ligt aan verdragsrecht in het algemeen en legitimeert bovendien een praktijk overgenomen uit het zeevervoer waar al jaar en dag veel kritiek op is.

Enige aandacht wordt ook geschonken aan artikel 29 CMNI. Dit artikel is namelijk een vreemde eend in de bijt in het uniforme vervoerrecht. Het bevat een regel van internationaal privaatrecht die geen invloed heeft op het toepassingsbereik van het verdrag zelf. Het gevolg hiervan is dat er overlap bestaat met de Rome I verordening.

Hoofdstuk 8 laat zien dat het huidige zeevervoerrecht ver van uniform is. In dit hoofdstuk wordt onderzocht of, en zo ja wanneer de 3 vigerende zeevervoerverdragen van toepassing zijn op

multimodaal vervoer met een zeesegment en worden de gevolgen van het in werking treden van de Rotterdam Rules belicht.

Allereerst wordt de ongebruikelijke status van de Hague- en Hague-Visby Rules besproken. Omdat deze verdragen volgens de preambule ook geimplementeerd mogen worden in het nationale recht na ratificatie zorgen deze verdragen voor meer rechtsverscheidenheid dan men van internationaal verdragsrecht zou verwachten. Bovendien zijn de Hague regimes niet bepaald opgesteld met multimodaal vervoer in het achterhoofd. Ze vereisen bijvoorbeeld een cognossement voor toepassing en zijn dus bij lange na niet van toepassing op al het internationale zeevervoer. Vanwege dit vereiste wordt in het eerste deel van het hoofdstuk geanalyseerd of een multimodaal transportdocument gelijk gesteld kan worden met een cognossement, en zo dit mogelijk is, aan welke voorwaarden een dergelijk document daarvoor moet voldoen. Ook wordt aangestipt dat de Hague regimes slechts dwingend zijn van 'tackle-to-tackle', hetgeen enige gaten laat vallen in het dekentje van uniform recht dat over internationale multimodale vervoerovereenkomsten gespreid zou moeten worden. Toch is naar verluid de (multimodale) praktijk heel wel in staat om zich te redden met Hague- en Hague-Visby Rules. Uit de hoek van de vervoersindustrie klinken af en toe zelfs vragen naar de noodzaak van dwingend uniform recht op dit gebied.

De Hamburg Rules zijn, net als de luchtvervoerverdragen, helder over hun toepasselijkheid op internationaal zeevervoer dat deel uitmaakt van een overeenkomst die ook andersoortig vervoer behelst. In artikel 1 lid 6 stellen zij dat een overeenkomst inhoudende zeevervoer maar ook andersoortig vervoer wordt geacht een zeevervoerovereenkomst, zoals vereist voor toepassing van het verdrag te zijn, voorzover het het zeevervoer betreft.

In het laatste deel van hoofdstuk 8 worden de Rotterdam Rules en de gevolgen die hun inwerkingtreding heeft voor multimodale contracten toegelicht. Het 'maritiem plus' concept van de Rotterdam Rules, dat inhoudt dat het zeevervoerregime van de Rules tevens wordt toegepast op het transport voor en na het zeevervoer als dit op grond van dezelfde overeenkomst gebeurd, heeft hier en daar wat zwakke puntjes. Ten eerste is er het feit dat een dergelijk regime niet al het multimodale vervoer zal gaan regelen, omdat er geeist wordt voor toepassing dat op z'n minst één van de vervoersegmenten zeevervoer betreft. Acceptatie van de Rotterdam Rules op grote schaal zal de introductie van een verdrag dat wel alle soorten multimodaal vervoer beoogt te regelen in de weg staan. Ten tweede lukt het artikel 26 RR met haar 'gelimiteerde netwerksysteem' en artikel 82 RR dat prioriteit verleend aan enkele andere vervoerverdragen in specifiek beschreven situaties niet om alle mogelijke verdragsrechtconflicten te voorkomen.

De Rotterdam Rules bieden op multimodaal gebied echter ook potentiele voordelen. Ze regelen bijvoorbeeld ook gevallen van ongelokaliseerde schade. Daarnaast is het zo dat de kernbepalingen van 'Europese' vervoerverdragen zoals het CMR, het CMNI en het COTIF-CIM ook door rechters buiten Europa toegepast zullen gaan worden als de forumstaat lid is van de Rotterdam Rules. Dit betekent uitbreiding van de uniformerende werking van deze verdragen, al zou deze meer om het lijf hebben als het netwerksysteem van artikel 26 RR niet gelimiteerd was.

Hoofdstuk 9 illustreert het gefragmenteerde karakter van het huidige uniforme vervoerrecht. Wanneer de toepassingsbereiken van de transportrechtverdragen in kaart worden gebracht ontvouwt zich een tafereel dat vergelijkbaar is met een lappendeken van slechte kwaliteit. Hier en daar zitten gaten, maar er zijn ook plaatsen waar de lappen per ongeluk over elkaar genaaid zijn. Dit hoofdstuk geeft een overzicht van de plekken waar er sprake is van overlappende bepalingen in het uniforme transportrecht, of er daadwerkelijke conflicten optreden en wat de gevolgen van dergelijke conflicten zijn.

De meeste potentiële conflicten gerelateerd aan multimodaal vervoer worden mogelijk gemaakt door de 'multimodale' verdragsbepalingen. Deze bepalingen brengen specifiek omschreven vervoersoorten binnen het bereik van verdragen die in principe een andere vervoersmodaliteit beogen te regelen. Artikel 1 lid 4 COTIF-CIM bijvoorbeeld brengt zee- en binnenwatervervoer dat spoorvervoer aanvult binnen het bereik van het spoorvervoerverdrag mits uitgevoerd over een ingeschreven lijn. De conclusie dat een dergelijke bepaling kan zorgen voor een conflict tussen het CIM en uniform binnenwater- of zeevervoerrecht is snel getrokken. De gevolgen van een dergelijk conflict zijn wellicht iets minder voor de hand liggend. Het Weens Verdragenverdrag regelt welk verdrag voorrang krijgt in het geval bepalingen van verschillende verdragen incompatibel zijn. Deze regeling bepaalt om te beginnen dat wanneer een verdrag zelf conflictsituaties voorziet het mag bepalen dat een eerder of later verdrag voor gaat. Vervolgens geeft het aan dat wanneer alle partijen bij het eerdere verdrag ook lid zijn van het latere verdrag dit latere verdrag voorrang heeft. Dit is eigenlijk niets anders dan een codificatie van het adagium *lex posterior derogat legi priori*, zij het op verdragsniveau. In het vervoerrecht is echter gebleken dat doorgaans niet alle verdragspartijen van een ouder verdrag het nieuwere verdrag ratificeren. Voor die situaties is er een wat genuanceerdere regeling. Er dient dan te worden bepaald van welke verdragen beide betrokken staten wel beide lid zijn. Helaas is deze regeling minder geschikt voor toepassing op de vervoerrechtverdragen, omdat het in het vervoerrecht doorgaans niet gaat om conflicten tussen staten, maar om conflicten tussen contractspartijen, wiens nationaliteit of domicilie geen rol speelt bij de toepasselijkheid van het conflicterende uniforme vervoerrecht. De vraag is dus aan welke staten het Weens Verdragenverdrag in dit kader refereert. Aangenomen mag worden dat dit de staten zijn waar het vervoer begint en eindigt, aangezien het Verdrag van Montreal een vergelijkbare regeling bevat om de rangorde van dit verdrag en het Warschausysteem in al haar facetten te bepalen die ook aanknoopt bij deze staten.

Feit is dat de regels van het verdragenverdrag in ieder geval lichtelijk wringen als het gaat om verdragsconflicten in het kader van multimodaal vervoer. Het voorbeeld dat volgens het *lex posterior* beginsel zoals gecodificeerd door het Weens Verdragenverdrag spoorvervoerrecht van toepassing is op schade die ontstaat op het laatste wegdeel van een stapelvervoer transport van Londen naar Parijs, als dit gevolgd wordt door spoorvervoer naar Roemenië onder dezelfde overeenkomst, illustreert dat deze aanpak minder geschikt is voor multimodaal vervoer. Als de schade gelokaliseerd is lijkt een netwerk aanpak passender.

Hoofdstuk 10 schetst de stappen die nodig zijn om het toepasselijke nationale recht te achterhalen als geen van de verdragen het opgekomen dispuut regelt. Dit kan zelfs het geval zijn als het wel internationaal transport betreft maar er sprake is van ongelokaliseerde schade of wanneer het toepasselijke verdragrecht verwijst naar nationaal recht. Ook regelen de verdragen niet alle meningsverschillen die kunnen ontstaan naar aanleiding van internationaal vervoer. De Hague Rules heten bijvoorbeeld niet voor niets voluit 'Verdrag ter vaststelling van *enige* eenvormige regelen betreffende het cognossement'.

Wanneer de rechtsstelsels van Duitsland, Nederland en Engeland naast elkaar gezet worden dan blijkt dat de rechters in de eerste 2 genoemde landen van rechtswege op zoek gaan naar het recht dat toepasselijk is op de aan hen voorgelegde overeenkomst wanneer deze internationale aspecten bevat. De rechter in Engeland doet dit echter niet. Volgens de regels van Engels procesrecht moeten de procespartijen de mogelijkheid dat niet-Engels recht van toepassing is te berde brengen en vervolgens de inhoud van het vreemde recht bewijzen.

Wanneer duidelijk is dat er buitenlands recht van toepassing zou kunnen zijn op de vervoerovereenkomst die ten grondslag ligt aan het dispuut wijst de Rome I verordening aan

welk recht de overeenkomst beheerst. Voor vervoerovereenkomsten is er in deze verordening een speciale bepaling opgenomen. In artikel 5 lid 1 Rome I wordt bepaald dat indien de partijen voor de overeenkomst voor het vervoer van goederen geen rechtskeuze hebben gemaakt, de overeenkomst beheerst wordt door het recht van het land waar de vervoerder zijn gewone verblijfplaats heeft, mits de plaats van ontvangst of de plaats van aflevering of de gewone verblijfplaats van de verzender ook in dat land is gelegen. Wanneer niet aan deze voorwaarden is voldaan, wordt de overeenkomst beheerst door het recht van het land waar de plaats van aflevering, als door de partijen overeengekomen, is gelegen.

Een rechtskeuze kan bijvoorbeeld worden gedaan door middel van een zogenaamde 'paramount' clausule. Dit is doorgaans een keuze voor uniform zeevervoerrecht. Welke consequenties een keuze voor dergelijk niet statelijk recht heeft verschilt, afhankelijk van het nationale recht dat van toepassing is op de overeenkomst.

In sommige gevallen zijn er bepalingen van bijzonder dwingend recht die, ondanks een rechtskeuze of in afwijking van het recht dat door artikel 5 Rome I wordt aangewezen, de overeenkomst of deel daarvan beheersen. In het vervoerrecht zijn er echter niet veel van deze bepalingen.

Het laatste onderdeel van hoofdstuk 10 bevat een korte uitleg van zowel de Duitse als het Nederlandse nationale regelgeving voor multimodaal vervoer. Deze twee systemen wijken in zoverre van elkaar af dat de Nederlandse regels een volledig netwerk systeem behelzen met een aanvullende regeling voor ongelokaliseerde schade en enige regels omtrent CT documenten, terwijl het Duitse systeem meer lijkt op het regime van de Rotterdam Rules. De Duitse wetgever ging er van uit dat niet alle transportrechtverdragen directe werking hebben waar het gaat om multimodaal vervoer en heeft dus een regeling ingevoerd op grond waarvan de aansprakelijkheidsregels van deze verdragen alsnog via het Duitse recht toegepast worden. Dit gebeurt wanneer het verdrag in questie direct van toepassing zou zijn geweest als alleen het vervoersegment waar de schade is veroorzaakt was overeen gekomen.

Hoofdstuk 11 is het sluitstuk van het onderzoek en beschrijft wat de grootse juridische knelpunten van de huidige situatie zijn. Vervolgens worden de voor- en nadelen van enkele voorstellen voor uniform multimodaal vervoerrecht gedaan in het verleden op een rij gezet. Ook wordt er een antwoord gezocht op de vraag of er daadwerkelijk uniform dwingend recht nodig is op dit gebied. Als laatste onderdeel bevat dit hoofdstuk tevens een voorzichtige aanbeveling voor toekomstige regelgeving vanuit Europa. Het voorgestelde systeem bevat regels ter aanvulling van het huidige gefragmenteerde uniforme recht. Deze regels zijn bedoeld om een aantal van de kernproblemen zoals die uit het voorgaande zijn te destilleren aan te pakken.

CURRICULUM VITAE

Marian Hoeks was born in 1975 in Hengelo (Overijssel), the Netherlands. After obtaining her VWO diploma in 1993 she studied industrial design at the Design Academy in Eindhoven (the Netherlands). In 1998 she made her entry into the legal arena at the University of Leiden from which she graduated with a Master of Laws in 2002. During 2002 and 2003 she worked as a notary at law in Breda but returned to the academic environment in 2004. Since 2004 she has been attached to the department of Commercial and Company Law of the Erasmus University Rotterdam as a teacher and researcher. She started working on this doctoral thesis under the supervision of Professor K.F. Haak in June 2005. Her research has been published in journals such as *European Transport Law*, the *Journal of International Maritime Law* and *Transportrecht*.

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