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# Transporting goods in the EU: an interplay of international, European and national law

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**Abstract** This article investigates the extent to which international transport conventions for the carriage of goods are reliant on European and national law. As will be seen, since the international convention must be recognised by the applicable law, which in turn is determined by the forum hearing the dispute, the question of whether a particular transport convention is to be applied depends on considerations beyond the mere scope of application of the convention. European and national law provide the legal background within which the convention rules apply and by which they are complemented.

**Keywords** Carriage of goods · Transport · Jurisdiction in transport matters · Applicable law

## 1 Introduction

Whilst the transportation of goods is mostly regulated by international transport conventions, these conventions must be part of, or recognised by, the applicable law in order to apply. Any gaps left by the provisions of the convention must be filled by the domestic rules of the applicable law or the law of the forum. Determining the

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applicable law is left to the forum that assumes international jurisdiction which for a court of a European Union Member State is generally defined by European law.<sup>1</sup>

## 2 Introduction to transport conventions in force in EU Member States

Each mode of transport has different conventions regulating the rights and duties of the carrier and shipper and some also include the consignee in its provisions.

### 2.1 Sea carriage

In sea carriage there are now four different carriage conventions; three of which are in force at present, with the new Rotterdam Rules awaiting ratification.

#### 2.1.1 *Hague/Hague-Visby Rules*

The Hague Rules of 1924<sup>2</sup> were largely based on the American Harter Act of 1893, and are a set of Rules burdening the carrier with certain non-delegable duties (i.e. to provide a seaworthy (and cargoworthy) vessel at the beginning of the voyage and to care for the goods whilst on board and during loading and discharge) in return for which he is able to avail himself of an extensive list of grounds for exemption from liability and can also claim limitation of liability. The list of exclusions is based on clauses typically found in contracts of carriage, with provision for exclusion of liability even for fault in navigation and management of the vessel,<sup>3</sup> which, at the time was justifiable by the lack of communication and control of the ship owner over the vessel and the crew on board, as well as the prevailing view that an ocean voyage was a joint venture of ship and cargo owners. Time of suit under the Rules is limited to one year. The Hague Rules were amended by the Brussels Protocol of 1968<sup>4</sup> by increasing the limit of liability of the carrier, but also in order to include the servants and agents of the carrier in the protection of the Rules, to give extra time of suit to the person liable under the rules for claims of indemnity and to ensure that the regime of the Rules could not be avoided by claiming in tort rather than contract. The Additional Protocol of 1979<sup>5</sup> incorporated a change of calculation of the limits

<sup>1</sup>Issues of liberalisation of international freight traffic or issues of competence between the European Union and its Member States, and intergovernmental organisations are not included in the ambit of this paper. Please see Arts 2, 3.2, 4, Title IV (Arts 90–100) and Art 218 TFEU (Treaty on the Functioning of the European Union; in force since 1<sup>st</sup> December 2009) (2008/C 115/01) (9.5.2008) and also the CIT (International Rail Transport Committee) study, '*COTIF law and EC law relating to international carriage by rail: areas of conflict and options for solutions*'.

<sup>2</sup>International Convention for the Unification of Certain Rules Relating to Bills of Lading, Brussels, 1924 (Hague Rules); in the following abbreviated as HR.

<sup>3</sup>The so-called 'nautical fault' exception.

<sup>4</sup>Brussels Protocol amending the Hague Rules Relating to Bills of Lading 1968 (also called Visby Protocol), resulting in the Rules as amended to be called the Hague-Visby Rules, in the following abbreviated as HVR.

<sup>5</sup>Also referred to as the SDR Protocol of 1979.

of liability with reference to Special Drawing Rights as defined by the International Monetary Fund.

The Hague and Hague-Visby Rules apply to all bills of lading where the goods have been shipped from a contracting state or where the bill of lading was issued in a contracting state or where the contract contained or evidenced in the bill of lading provides for their application,<sup>6</sup> but do not apply to deck cargo and the carriage of live animals.<sup>7</sup>

As can be seen, the Hague/Hague-Visby Regime was never intended to be a complete code; it only regulates certain limited areas, leaving all other issues to be determined by the applicable law.

### 2.1.2 *Hamburg Rules*

The Hamburg Rules of 1978<sup>8</sup> were developed due to the dissatisfaction mostly of exporting countries with the low level of protection available to the shipper. The change in approach was radical. The Hamburg Rules introduced a ‘presumed fault’ regime, where the carrier can only escape liability for loss or damage to the goods in his charge if he can prove that he or his servants undertook all measures that could reasonably be required to avoid the occurrence and its consequences. The burden of proof is reversed in case of fire, where the claimant has to prove the fault of the carrier in causing or extinguishing the fire. Otherwise the carrier is only excused from liability for loss, damage or delay caused by attempts to save life or caused by reasonable measures to save property at sea. The limits of liability were increased and time for suit was extended to two years, compared to the single year provision under the Hague-Visby Regime. The Hamburg Rules explicitly permit parties to agree to arbitration, which otherwise might not be possible under certain legal systems, and provide a number of places where judicial or arbitral proceedings may be brought.<sup>9</sup>

The application of the Hamburg Rules extends the scope to any transport document,<sup>10</sup> includes deck cargo and covers international carriage from or to a contracting state.<sup>11</sup> Damages for delay are explicitly included in the Rules,<sup>12</sup> provision is made for liability of an actual carrier and the issue of through carriage is addressed, only enabling the contractual carrier to exclude liability if the actual carrier can be sued in an appropriate forum as provided for by the Rules.<sup>13</sup>

<sup>6</sup>See Arts I (b) and X HVR.

<sup>7</sup>Art I (c) HVR; deck cargo means cargo which is carried on deck AND where this is so clearly stated in the bill of lading, as opposed to only giving a liberty to carry the goods on deck; see *Svenska Traktor AB v Maritime Agencies (Southampton)* [1953] 2 Q.B. 295; [1953] 2 Lloyd’s Rep. 124, Queen’s Bench Division.

<sup>8</sup>United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules), hereafter abbreviated as HambR.

<sup>9</sup>Arts 21 & 22 HambR.

<sup>10</sup>Rather than limiting it, as in the Hague/Hague-Visby regime, to bills of lading only.

<sup>11</sup>Arts 2 with the definitions as provided for in Art 1 HambR.

<sup>12</sup>Art 9 HambR.

<sup>13</sup>See Arts 10 & 11 HambR.

However since the Hamburg Rules failed to gain widespread acceptance, and were rejected by major ship-owning nations for being too ‘shipper friendly’, the result was a further fragmentation of the laws relating to carriage of goods by sea.

### 2.1.3 *The Rotterdam Rules*

In 2008 the United Nations adopted the Convention on Contracts for the International Carriage of Goods wholly or partly by sea. The convention was opened for signature in September 2009 in Rotterdam.<sup>14</sup> The Rotterdam Rules reverted back to allocating specific duties to the carrier, namely to exercise due diligence to provide a seaworthy and cargoworthy vessel and to do so continuously throughout the voyage, to care for the cargo and to deliver the cargo at destination.<sup>15</sup> Whilst fault is presumed, the carrier can, alternatively to proving that the loss, damage or delay is not attributable to his fault, avail himself of a number of events, similar to the ones under the Hague/Hague-Visby regime, yet with the notable omission of the nautical fault exception and a much narrower fire exception. These events act as rebuttable presumptions that the carrier is not at fault.<sup>16</sup> Where other causes, not attributable to the carrier, have contributed to the loss, liability is on a pro rata basis.<sup>17</sup>

The Rotterdam Rules apply to all contracts of international sea carriage, apart from charterparties, for any goods whatsoever, as long as either receipt of the goods, loading, discharge or delivery takes place in a contracting state.<sup>18</sup> The Rules apply throughout the period from taking over the goods until delivery. However they do not seek to impinge upon the application of any other unimodal convention carriage regime insofar as these apply to an element of the movement other than by sea<sup>19</sup> or insofar as such regime also covers the sea transport element.<sup>20</sup>

Similarly to the Hamburg Rules, the Rotterdam Rules are not limited to the contracting carrier and in particular regulate the liability of the maritime performing party.<sup>21</sup> Liability is increased from that of the Hamburg Rules and time for suit is equally two years.<sup>22</sup> For the first time for sea carriage conventions, the Rules regulate the transfer of rights of suit and liabilities to the merchant, yet under a negotiable transport document only, electronic or otherwise.<sup>23</sup> To this effect domestic legislation

<sup>14</sup>United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 (Rotterdam Rules), in the following abbreviated as RR.

<sup>15</sup> Arts 11, 13 and 14 RR; by comparison the Hague/Hague-Visby regime do not mention a duty to deliver the cargo and moreover the duty to exercise due diligence to provide a sea/cargo worthy vessel is limited to the time before and at the beginning of the voyage.

<sup>16</sup>See Article 17.4 and 17.5 RR.

<sup>17</sup>Art 17.6 RR.

<sup>18</sup>Art 1.24 and Arts 5 and 6 RR.

<sup>19</sup>See Articles 26 RR, applying only the provisions for liability and limitations including time for suit of such convention.

<sup>20</sup>Art 82 RR, applying the full convention to such cases.

<sup>21</sup>Arts 1.7 and Arts 19 and 20 RR.

<sup>22</sup>Chapters 12 and 13 RR.

<sup>23</sup>See chapter 11 RR.

will be superseded, but will remain necessary insofar as other transport documents are concerned.

Similarly to the Hamburg Rules, the Rotterdam Rules permit arbitration and determine places for bringing arbitral or judicial proceedings. These provisions however only apply where the contracting state specifically opts into the chapters containing these rules.<sup>24</sup>

It is hoped that the intended uniformity of sea carriage rules will finally be achieved by a widespread adoption of the Rotterdam Rules.

## 2.2 Inland waterways: the Budapest Convention of 2001

Based on the cross-border links of the Rhine and Danube, negotiations for a convention for the carriage of goods by inland waterways were undertaken and culminated in the adoption of the Budapest Convention (CMNI)<sup>25</sup> in 2001 and its entry into force on 1<sup>st</sup> April 2005, with 13 Parties in November 2009.<sup>26</sup>

The convention applies mandatorily to international inland waterways carriage to or from a contracting state<sup>27</sup> where the port of loading or the place of taking over the goods and the port of discharge or place of delivery are in two different states. The CMNI also applies to contracts of carriage which, without transshipment, are on both inland waterways and in waters to which maritime regulations apply, unless a maritime bill of lading has been issued in accordance with the maritime law applicable, or unless the distance to which maritime regulations apply is greater.<sup>28</sup>

The CMNI has much in common with the Hague-Visby Rules, but also deals with a wider range of issues, such as liability of the actual carrier,<sup>29</sup> the duty to deliver the goods to the consignee and liability of the consignee,<sup>30</sup> rights of disposal of the goods,<sup>31</sup> the details to be included into transport documents<sup>32</sup> and the question of which law should determine any issues not covered by the Convention.<sup>33</sup>

<sup>24</sup>See chapters 14 & 15 RR and Arts 91, 74 and 78 RR. The opt-in, which can be declared at any time, is hoped to enable EU Member States to ratify the Convention more quickly (see travaux préparatoires to the Rotterdam Rules, Report of Working Group III of its 20<sup>th</sup> session, paragraph 203); for EU Member States to become parties to an international convention containing jurisdiction provisions, agreement of the Council of the EU is required (Art 218 TFEU).

<sup>25</sup>Convention on the Contract for the Carriage of Goods by Inland Waterway, Budapest, 2001 (CMNI).

<sup>26</sup>Bulgaria, Croatia, Czech Republic, France, Germany, Hungary, Luxembourg, Moldova, The Netherlands, Romania, The Russian Federation, Slovakia and Switzerland. Furthermore Belgium, Poland, Portugal and the Ukraine have signed the Convention but not yet taken the necessary steps for ratification.

<sup>27</sup>Art 2.1 CMNI.

<sup>28</sup>Art 2.1 CMNI.

<sup>29</sup>Art 4 CMNI.

<sup>30</sup>Art 3.1 CMNI.

<sup>31</sup>Arts 14 and 15 CMNI.

<sup>32</sup>Chapter III CMNI.

<sup>33</sup>Art 29 CMNI.

### 2.3 Rail Carriage

The oldest transport convention appears to be the Convention for the International Carriage by Rail (COTIF) of 1890, which in its current version is ‘COTIF 1999’, or ‘COTIF 1980 as amended by the Vilnius Protocol of 1999’ and is nowadays simply referred to as COTIF.<sup>34</sup> Part of COTIF is a set of Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV), the Contract of International Carriage of Goods by Rail (CIM), the International Carriage of Dangerous Goods by Rail (RID), the Contract of Use of Vehicles in International Rail Traffic (CUV) and the Contract of Use of Infrastructure in International Rail Traffic (CUI). In the context of liability regimes for the transportation of goods the CIM Uniform Rules have a prominent position.

CIM 1999 applies to contracts of carriage for reward by rail between two Member States.<sup>35</sup> The Uniform Rules allow for extension of the application of CIM by contract where the carriage involves one Member State only<sup>36</sup> and can extend to other forms of transport as supplement to the rail carriage, insofar as it does not impinge on other mandatory convention regimes or insofar as it is performed on registered services.<sup>37</sup> The carrier is liable for loss, damage or delay of the goods occurring between the time of taking over the goods until delivery, but he can avail himself of a limited number of exonerating events.<sup>38</sup> The limits of liability with 17 SDR<sup>39</sup> are comparable to those under the amended air conventions<sup>40</sup> and the time for suit is generally one year.<sup>41</sup>

CIM has an eastern counterpart, which is the SMGS Agreement on International Freight Traffic by Rail of 1951 with 23 contracting states.

### 2.4 Carriage by road

Whilst CIM 1999 claims to have been modelled on the 1956 CMR<sup>42</sup> Convention, CMR itself had been inspired by many of the provisions of the version of the then applicable CIM Uniform Rules. Similarly to CIM (as part of COTIF), CMR has achieved wide acceptance within Europe, North Africa, the Near East and beyond. The convention is applicable to every contract for the carriage of goods by road in vehicles for reward, with the exclusion of postal dispatch, funeral consignments and furniture removals. Carriage must be between two different states, at least one of

<sup>34</sup>Where reference is made to the previous version of 1980, it is clarified as COTIF 1980; see also OTIF list of acronyms and abbreviations Central Office Report of 1<sup>st</sup> October 1999; the same applies for CIM.

<sup>35</sup>Art 1.1 CIM.

<sup>36</sup>Thus with the potential to extend to the whole Eurasian economic area.

<sup>37</sup>Art 1.2, 1.3 and 1.4 CIM.

<sup>38</sup>Article 23 CIM; the list of events is considerably shorter than the equivalent under the HR, HVR or RR.

<sup>39</sup>Arts 30 and 32 CIM.

<sup>40</sup>The Warsaw Conventions as amended by the Montreal additional Protocols and the Montreal Convention; the latter however now has a limit of 19 SDR.

<sup>41</sup>Art 48 CIM.

<sup>42</sup>Convention on the Contract for the International Carriage of Goods by Road, Geneva, 1956 (CMR).

which must be a contracting state.<sup>43</sup> The CMR application, within limits, is extended to multimodal carriage where part of the journey is by sea, rail, inland waterways or air, as long as the goods are not unloaded from the vehicle.<sup>44</sup> The carrier is liable similarly to CIM, but the level of liability is considerably lower.<sup>45</sup>

## 2.5 Air Carriage

Air Carriage is governed by the Warsaw Convention and its many variations and more recently by the Montreal Convention of 1999.

The Convention on the Unification of Certain Rules relating to International Carriage by Air, Warsaw, 1929 (Warsaw Convention) was amended in 1955 by the Hague Protocol<sup>46</sup> and in 1975 further amendments were made by the Montreal Additional Protocols Numbers 1–4.<sup>47</sup> Protocols Nos 1 and 2 introduced Special Drawing Rights for the calculation of the limits of liability of the Warsaw and Warsaw-Hague Conventions respectively, yet No. 2 is mostly superseded by the subsequent coming into force of Protocol No. 4 which additionally includes further alterations to the Warsaw-Hague Convention. Protocol No. 3, amending the Warsaw-Hague Convention as amended by the Guatemala Protocol of 1971<sup>48</sup> never came into force.

The Guadalajara Convention<sup>49</sup> of 1961 extends the liability regime and protection under the Warsaw regime<sup>50</sup> to the actual carrier, if different from the contracting carrier. In order for the Guadalajara Convention to apply, the convention must be recognised by the applicable law and the carriage must be subject to one of the Warsaw Conventions. Similar provisions to those of the Guadalajara Convention are incorporated in the most recent air convention, the Montreal Convention of 1999.<sup>51</sup> This is a new Convention, rather than yet another amendment of the Warsaw regime, even though modelled on the Warsaw approach. The Montreal Convention entered into force in November 2003 and, where applicable replaces and unifies the Warsaw system.

The air conventions apply to contracts of international carriage between two contracting states, or where carriage is between two points in the territory of a single contracting state, but in the latter case only if there is an agreed stopping place in

<sup>43</sup> Art 1 CMR.

<sup>44</sup> Art 2.1 CMR.

<sup>45</sup> Art 23 CMR.

<sup>46</sup> Hague Protocol of 1955 to amend the Convention on the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12<sup>th</sup> October 1929.

<sup>47</sup> Also abbreviated as MP, e.g. MP4 for the Additional Montreal Protocol No. 4.

<sup>48</sup> Which never entered into force.

<sup>49</sup> 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, Guadalajara, 1961.

<sup>50</sup> Whether this is the Warsaw and Warsaw-Hague Convention as set out in Art I of the Guadalajara Convention, or by means of Art XII of MP1 and 2 or Art XXIII of MP4.

<sup>51</sup> Montreal Convention for the Unification of Certain Rules for International Carriage by Air, Montreal 1999.



another state.<sup>52</sup> The carrier is liable for any destruction or loss of or damage to the goods sustained during the carriage by air, but subject to the occurrence of certain exonerating events, and for delay.<sup>53</sup> Liability is limited<sup>54</sup> and time for suit is two years.<sup>55</sup>

### 3 Identifying jurisdiction

The law applicable is determined by the forum and thus by the rules of choice of law in force in the forum country. Firstly however, the forum called upon to hear the dispute must decide on its jurisdiction. Some transport conventions include provisions as to jurisdiction and/or the recognition of an agreement to arbitrate.

The courts of the Member States of the European Union are bound to apply the Brussels I Regulation<sup>56</sup> to questions of jurisdiction in civil and commercial matters, but Article 71 of the Regulation gives priority to any specialised convention to which the Member States are parties and which in relation to particular matters, governs jurisdiction or the recognition or enforcement of judgments.<sup>57</sup> This is even the case where the defendant is domiciled in another Member State which is not a party to that convention.<sup>58</sup> Examples of such rules on jurisdiction in specialised conventions are:

- Article 21 Hamburg Rules;
- Article 46 CIM;
- Article 31 CMR; and
- Articles 28 Warsaw and 33 Montreal Conventions.

For matters not governed by the specialised convention however, the Brussels Regulations rules remain binding, so for example for issues regarding *lis pendens*<sup>59</sup> and

<sup>52</sup> Arts 1 Warsaw and Montreal Conventions.

<sup>53</sup> Arts 18 and 19 Warsaw and Montreal Conventions.

<sup>54</sup> Arts 22 Warsaw and Warsaw-Hague (250 francs/kg), Warsaw-MP1 or Warsaw-Hague-MP4 Conventions (17 SDR/kg) and Montreal Convention (19 SDR/kg).

<sup>55</sup> Arts 29 Warsaw and 35 Montreal Conventions.

<sup>56</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (OJ L12, 16.1.2001, p. 1). The Regulations is currently undergoing review; see Commission Report of 21.4.2009, COM(2009) 174 (final) and the Green Paper on the Review of Council Regulation (EC) no 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 21.4.2009 COM(2009) 175 (final) and Study JLS/C4/2005/03 by B Hess, T Pfeiffer and P Schlosser 'Heidelberg Report on the Application of Regulation Brussels I in the Member States'.

<sup>57</sup> Art 71 Brussels I Regulation only covers conventions existing at the time of entry into force of the Regulation. New conventions require approval by the Council (Art 218 TFEU; see also Art 3.2 TFEU). Cf Art 59 Brussels Convention, which gave priority to any specialised convention, whether new or existing—at a time before the European Communities had competence over matters of justice and home affairs.

<sup>58</sup> Art 71.2 Brussels I.

<sup>59</sup> C-406/92 *The Tatry* [1994] ECR I-5439.

jurisdiction derived from the specialised convention is treated as derived from the Regulation itself.<sup>60</sup>

Where the transport convention does not provide rules on jurisdiction, the rules of the Brussels I Regulation will apply.<sup>61</sup> The most relevant provisions in this context are Articles 23 on choice of jurisdiction, Article 2 for jurisdiction at the place of domicile of the defendant and, alternatively to domicile jurisdiction, Article 5 providing for special jurisdiction in the courts of another EU Member State.

Where the claim is brought in contract, Article 5.1 refers to the place of performance of the obligation in question. Where this place of performance is situated is determined autonomously under the Brussels I Regulation,<sup>62</sup> whereas under the Brussels Convention, it needed to be determined by the applicable law to the contract.<sup>63</sup>

For claims in tort, delict or quasi-delict, Article 5.3 refers to the place where the harmful event occurred. Both the concept of ‘tort or delict’<sup>64</sup> and the meaning of ‘place where the harmful event occurred’<sup>65</sup> must be interpreted autonomously.

By virtue of Article 4.1, for defendants domiciled outside the EU and subject to exclusive jurisdiction within Article 22 or a jurisdiction agreement in favour of a Member State’s court within Article 23, a court seised shall determine international jurisdiction by applying its own Member State’s domestic rules of private international law.

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<sup>60</sup>C-148/03 *Nurnberger Allgemeine Versicherungs AG v Portbridge Transport International BV* [2004] E.C.R. I-10327.

<sup>61</sup>For the EU and EFTA States, the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 1988 (OJ L 319, 25.11.1988, p. 9) applies and from 1 January 2010 the revised Lugano Convention of 2007, as agreed to by Council Decision of 27 November 2008 (2009/430/EC) (OJ L147, 10.6.2009, p. 1). In April 2009 the European Communities signed the Hague Convention on Choice of Court Agreements of 30 June 2005, which once in force would have priority for cases between a European Union Member State and non- EU Member States (Art 26.6 of the Convention).

<sup>62</sup>In Case C-386/05 *Color Drack* [2007] ECR I-3699, paragraph 24 the court signalled and in Case C-381/08 *Car Trim GmbH v Key Safety Systems Srl* of 25 February 2010 further clarified the autonomous character of the criterion in the case of sale of goods, Art 5.1 (b). It is the place where the goods were or should have been delivered as determined on the basis of the provisions of the contract, but where this is impossible without reference to the applicable law, it is the place where the physical transfer of the goods took place or should have taken place. This is the place where the purchaser obtained or should have obtained actual power of disposal over the goods at the final destination of the sale transaction.

<sup>63</sup>Case 12/76 *Industrie Tessili Italiana Como v Dunlop AG* [1976] ECR I-1473 and C-440/97 *GIE Group Concorde v Master of the Vessel Suhadiwarno Panjan* [1999] ECR I-6307. Thus a court first had to determine the applicable law and thereafter apply it, that is, the rules of national law as identified by the choice of law rules, to determine the place of performance.

<sup>64</sup>See Case 189/87 *Kalfelis v Bankhaus Schroder Munchmeyer Hengst & Co* [1988] ECR 5565: tort or delict must be regarded as independent concept that seeks to cover actions which are not related to contract.

<sup>65</sup>See for example Case 21/76 *Handelswekerij GJ Bier BV v Mines de Potasse d’Alsace SA* [1976] ECR 1735: this concept covers both, the place where the event giving rise to the liability and the place where that event results in damage, in cases where these are not identical.

## 4 Identifying the applicable law

Within the European Union, the choice of law rules for contractual obligations are enshrined by the Rome Convention on the Law Applicable to Contractual Obligations of 1980<sup>66</sup> for contracts made before 17<sup>th</sup> December 2009, and remaining in force for Denmark,<sup>67</sup> and 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 (Rome I)<sup>68</sup> for contract made after this date. For non-contractual obligations, the choice of law rules for all Member States apart from Denmark<sup>69</sup> are codified in Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II).<sup>70</sup>

### 4.1 Rome Convention and Rome I Regulation

Under the Rome I Regime the parties are free to choose, explicitly or implicitly, the law applicable to their contract,<sup>71</sup> but in the absence of choice, detailed provision is made to identify the applicable law.

By Article 4 of the Rome Convention, the contract shall be governed by the law of the country with which it is most closely connected.<sup>72</sup> Primarily such connection is determined by applying certain presumptions set out in paragraphs 2–4. In case of a contract for the carriage of goods it is presumed that 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, the contract is most closely connected with that country.<sup>73</sup>

<sup>66</sup>OJ L266, 9 October 1980, p. 1 (80/934/EEC).

<sup>67</sup>See Recital (46) of Rome I and Articles 1 and 2 of the Protocol on the Position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community.

<sup>68</sup>OJ L 177, 4 July 2008, p. 6.

<sup>69</sup>See Recital (40) of Rome II and Articles 1 and 2 of the Protocol on the Position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community.

<sup>70</sup>OJ L 199, 31 July 2007, p. 40.

<sup>71</sup>See the respective Articles 3 of the Rome Convention and the Rome I Regulation.

<sup>72</sup>However, 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. Severance of a part of the contract and the application of another law to that part should only take place in exceptional cases and only where the object of that part is independent. In particular, where the connecting criterion applied to a charterparty is that set out in Article 4.4 of the Convention, that criterion must be applied to the whole of the contract, unless the part of the contract relating to carriage is independent of the rest of the contract (Case C-133/08, *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV, MIC Operations BV* [2008] ICF, judgement of 06.10.2009, nyr).

<sup>73</sup>In applying this presumption, single voyage charterparties and other contracts, the main purpose of which is the carriage of goods, shall be treated as contracts for the carriage of goods. The ECJ also clarified in C-133/08 *Intercontainer* that the latter connecting criterion (as provided for in the second sentence of Article 4.4 applies to a charterparty, other than a single voyage charterparty, **only** when the main purpose of the contract is not merely to make available a means of transport, but the actual carriage of goods.

However, the outcome is not necessarily decisive as the presumption shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country. Where the elements of the presumption are not fulfilled, the closest connection needs to be determined by a detailed analysis of the case taking into account all connecting factors. It is at these points of evaluation where most litigation ensues and national courts differ in their interpretation of EC law.<sup>74</sup> However since the decision by the European Court of Justice of 6<sup>th</sup> October 2009 in Case C-133/08, *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV, MIC Operations BV* more guidance has become available. In particular, the relationship between the presumptions and the derogation in Article 4.5 was clarified: whilst a court should determine the applicable law by means of the presumption, where it is clear from the circumstances as a whole that the contract is more closely connected with a country other than that determined on the basis of one of the criteria set out in Article 4.2 to 4.4 of the Convention, it is for the court to disregard those criteria and apply the law of the country with which the contract is most closely connected.

Thus, whilst under the Convention, the closest connection is sought by means of applying presumptions which can be displaced in favour of a more close connection; under the new Regulation the approach is different. The Rome I Regulation starts with exact rules for specific types of contracts and by focusing on the place of habitual residence of the characteristic performer. Only where the contract does not fall within any of the specific types or where the characteristic performance cannot be determined must the closest connection be identified. The law identified by means of the specific categories or the characteristic performance can only be displaced by a manifestly closer connection to another country.<sup>75</sup> The Regulation thus emphasises clarity and predictability<sup>76</sup> and has increased the threshold for displacing the general rule.

For contracts for the carriage of goods, by Article 5.1 of the Regulation, 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.<sup>77</sup> If those requirements are not met, rather than

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<sup>74</sup>There is authoritative guidance on the interpretation of the Convention in the Report of Professors Giuliano and Lagarde published in the Official Journal of the European Communities [1980] OJ 282/1, and whilst national courts are under no obligation to refer questions of interpretation, references to the European Court of Justice for a preliminary ruling under the Convention are now possible. However, this is only possible since 1<sup>st</sup> August 2004, as it took the Protocols (the Brussels Protocol and the Second Protocol) that had been drafted to enable preliminary rulings a 'mere' 13 years longer to enter into force than the Convention itself.

<sup>75</sup>By Recital (19) in cases where there are bundles of rights falling into more than one category, the centre of gravity should be established and by Recital (21) in order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts.

<sup>76</sup>See Recitals (6) and (16).

<sup>77</sup>Recital (22) states: "As regards the interpretation of contracts for the carriage of goods, no change in substance is intended with respect to Article 4(4), third sentence, of the Rome Convention. Consequently, single-voyage charterparties and other contracts the main purpose of which is the carriage of goods should be treated as contracts for the carriage of goods. For the purposes of this Regulation, the term 'consignor'

going back to identifying the closest connection by analysis of all factors involved as necessary under the Convention, the law of the country where the place of delivery as agreed by the parties is situated shall apply.

## 4.2 Rome II Regulation

For claims in torts, delicts and quasi-delicts the Rome II Regulation provides rules to identify the applicable law for events giving rise to damage which have occurred after 11 January 2009. Whilst choice of law is possible, this is only recognised if either made after the event giving rise to the damage occurred or, before the event, only where parties pursuing commercial activity have freely negotiated the agreement.<sup>78</sup> In the absence of choice, Article 4 of Rome II provides that the law applicable in torts or delicts is the law at the place of damage (irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur).<sup>79</sup> This rule is however displaced in favor of the place of common habitual residence of the person claimed to be liable and the person sustaining damage. In addition, where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected<sup>80</sup> with a country other than that indicated in the above rules, the law of that other country shall apply.

Whilst these are the general rules for torts and delicts, special rules exist in Articles 10–13 for other non-contractual obligations, namely unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*.<sup>81</sup>

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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.”

<sup>78</sup> Art 14.1 Rome II.

<sup>79</sup> Please note that this is much narrower than the interpretation of ‘the place where the harmful event occurred’ under the jurisdictional rules in Art 5.3 Brussels I.

<sup>80</sup> Art 4.3 clarifies that a manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

<sup>81</sup> The provisions on unjust enrichment in Art 10 and on *negotiorum gestio* in Art 11 of the Rome II Regulation both start with pointing to the secondary connection, the law of a pre-existing relationship, whether contractual or tortious, to which the quasi-contractual obligation relates (Arts 10.1 and 11.1); failing that the law of common habitual residence at the time of the occurrence of the unjust enrichment or the events giving rise to the damage (Arts 10.2 and 11.2), failing that the law of the country where the unjust enrichment took place or where the act was performed (Arts 10.3 and 11.3). All of the above can be displaced by a manifestly closer connection to another country, leading to the application of that other country’s law (Arts 10.4 and 11.4). Art 12 on *culpa in contrahendo* shares this approach by favouring the secondary connection approach (Art 12.1), but where the law applicable cannot be determined in that way, Art 12.2 uses the same principles and wording enshrined in the general rule for torts/delicts of Art 4 to the quasi-contract of *culpa in contrahendo*: firstly place of damage, displaced by common habitual residence, displaced by a manifestly closer connection. Even though the text of Art 12.2 (b) Rome II Regulation is not as clear as Art 4.2, but it is assumed that the same value as overriding factor was intended.

### 4.3 Mandatory rules

Where the applicable law offends mandatory rules, particularly of the forum,<sup>82</sup> the applicable law may be displaced to the extent that its provisions contravene. For example the House of Lords in *The Morviken*<sup>83</sup> decided that insofar as a forum selection clause coupled with a choice of law clause in favour of the courts and the law of The Netherlands could not be given effect, since it would result in a contracting out of the mandatory<sup>84</sup> limits of the Hague-Visby Rules, which under English law applied to the case in question, in contrast to the chosen applicable law of the Netherlands which only applied the Hague Rules.<sup>85</sup>

### 4.4 Scope of the applicable law

The reach of the applicable law depends on the scope given to it. Generally, issues of evidence and procedure<sup>86</sup> are left to the *lex fori*; yet presumptions of law and rules regarding the burden of proof are allocated to the applicable law,<sup>87</sup> as are rules of prescription and limitation or on the nature, extent and assessment of damages.<sup>88</sup>

## 5 Is the convention which is part of the applicable law pertinent?

Where the test as set out above leads to the law of a country that has ratified an international treaty, the convention as incorporated into the legal system can be applied, within its scope and limits of application. [Some countries have not ratified a transport convention, but have created domestic legislation with similar rules to those enshrined in the convention; this however still means that it is only domestic law that is applied, rather than the Convention.]

Attention must be given to the possibility that implementing legislation may vary or insert additional rules as to application and may by this means expand or, where the convention accepts reservations, also narrow the scope of the convention. For example by virtue of section 1(3) of the United Kingdom Carriage of Goods by Sea Act 1971, the Hague-Visby Rules also apply to intra UK carriage and by s 1(6) to non-negotiable receipts, where the document expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading.

<sup>82</sup>See Art 7 Rome Convention (please note that Germany, Luxembourg and the United Kingdom, as well as Latvia and Slovenia entered reservations with respect to Art 7.1), Art 9 Rome I and Art 16 Rome II.

<sup>83</sup>*Owners of Cargo on Board the Morviken v Owners of the Hollandia (The Hollandia)*, (*The Morviken*) [1983] 1 A.C. 565; [1983] 1 Lloyd's Rep. 1; House of Lords.

<sup>84</sup>See Art III r.8 HVR.

<sup>85</sup>Insofar as the decision concerns jurisdiction, it is unlikely that this decision could stand nowadays under the principle of mutual trust and competence under the Brussels I Regulation; see also Y Baatz, *Jurisdiction and Arbitration under the Rotterdam Rules* (2008) 14 JIML 608 at 609.

<sup>86</sup>But different legal systems can differ in categorising issues as evidential and procedural as opposed to substantive.

<sup>87</sup>See Art 14 Rome Convention, Art 18 Rome I and Art 22 Rome II Regulations.

<sup>88</sup>See Art 10 Rome Convention, Art 12 Rome I and Art 15 Rome II Regulations.

## 5.1 Scope

### 5.1.1 *Subject matter*

Whilst all conventions cover the carriage of goods for reward, some of the conventions limit the scope with respect to the type of goods carried; e.g. CMR excludes the carriage of funeral consignments, postal items or furniture removal from its scope<sup>89</sup> and the Hague and Hague-Visby Rules do not apply to deck-cargo or live animals,<sup>90</sup> whereas the Rotterdam Rules apply to these cargoes, but allow contractual provisions to limit liability for live animals.<sup>91</sup>

### 5.1.2 *Documentary/type of contract*

Some carriage conventions only apply to particular transport documents or types of carriage contracts. The Hague and Hague-Visby Rules for example only apply to contracts enshrined in bills of lading,<sup>92</sup> COTIF 1980 only applied to contracts for which a consignment note had been issued<sup>93</sup> and each of the sea carriage conventions excludes charterparty contracts from its scope.<sup>94</sup> [In the Rotterdam Rules and also for CMR, to the extent that the Additional Protocol of 2008 comes into force, specific provision is made for electronic carriage documents and consignment notes.]

### 5.1.3 *Territorial application*

Most transport conventions only apply to international carriage of goods between two different states and require a particular connection to at least one contracting state. For example the Hague and Hague-Visby Rules require that the goods are shipped from or the bill of lading issued in a contracting state; Hamburg,<sup>95</sup> Rotterdam Rules<sup>96</sup> and CMR<sup>97</sup> apply to carriage outgoing from or incoming to a contracting state, whereas for CIM<sup>98</sup> and any of the air conventions<sup>99</sup> to apply mandatorily the carriage must normally be between two contracting states.

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<sup>89</sup> Art 1.4 CMR.

<sup>90</sup> Arts I (c) HR and HVR.

<sup>91</sup> Art 81 RR.

<sup>92</sup> Arts I (b) HR and HVR.

<sup>93</sup> See Art 1.1 CIM 1980; this however is not longer the case under COTIF 1999 (Arts 1.1 and 6.2).

<sup>94</sup> Art I (b) HVR, Art 2.3 HambR, Arts 6, 7 RR.

<sup>95</sup> Art 2.1 HambR.

<sup>96</sup> Art 5 RR.

<sup>97</sup> Art 1.1 CMR.

<sup>98</sup> Art 1.1 CIM 1999.

<sup>99</sup> Arts 1.2 of the Warsaw and Montreal Conventions.

## 5.2 Identifying Contracting States

Authoritative information on who is a Contracting State, State Party or Member State of the relevant convention can be obtained from the depositary for the instruments of ratification, acceptance, approval or accession of the convention in question. The identity of the depositary is stated in the final provision of the convention.<sup>100</sup> It is, for

- The Hague, Hague-Visby Rules with SDR Protocol the Belgian Government; for status information see <http://www.diplomatie.be/en/treaties/>;
- The Hamburg Rules and Rotterdam Rules the United Nations; for status information see the UN Treaty collection at <http://treaties.un.org/> or via UNCTRAL, which receives regular updates from the United Nations Treaty service see <http://www.uncitral.org/>;
- The CMNI Budapest Convention the Hungarian Government; status information is also available via UNECE<sup>101</sup> at [http://www.unece.org/trans/main/sc3/sc3\\_legalinst.html](http://www.unece.org/trans/main/sc3/sc3_legalinst.html);
- CMR including its SDR and Additional Protocol the United Nations; for status information see the UN Treaty collection at <http://treaties.un.org/>;
- COTIF/CIM the depositary is OTIF; for status information see <http://otif.org> following the links ‘publications’, and ‘COTIF 1999’ and ‘state of signatures, ratifications and entry into force’. Similarly follow the links to ‘COTIF 1980’, where information on the Member States of the 1980 convention is sought.
- The Air Carriage Conventions depositaries are the governments as set out below; since the ICAO receives immediate notice of status information by these designated governments, reliable information can be obtained via the ICAO website at <http://www.icao.int/> following the link ‘Treaty Collection’.
  - Warsaw Convention 1929, 1955 Hague Protocol & 1975 Montreal Additional Protocols 1–4—Polish Government
  - Guadalajara Convention 1961—Mexican Government
  - [Guatemala City Protocol 1971 (not in force)—ICAO]
  - Montreal Convention 1999—ICAO

## 5.3 Contractual incorporation

Where the convention enables the parties to incorporate its rules into the contract, the clause ought to express clearly the extent of the incorporation, whether as a whole, including the provisions of liability in mandatory form,<sup>102</sup> or only insofar as the contract leaves gaps and does not provide differently.<sup>103</sup>

<sup>100</sup>E.g. Art 53.5 Montreal Convention, Art 87 RR and Art 38 CMNI.

<sup>101</sup>United Nations Economic Commission for Europe.

<sup>102</sup>With the effect that any contractual clause limiting this liability is null and void; see *McCarren & Co v Humber International Transport and Truckline Ferries (Poole) (The Vechstroon)* [1982] 1 Lloyd’s Rep. 301 Queen’s Bench Division (Commercial Court).

<sup>103</sup>See *Dairy Containers Ltd v Tasman Orient Line CV (The Tasman Discoverer)* [2004] UKPC 22; [2004] 2 Lloyd’s Rep. 647 Privy Council (New Zealand) and *Browner International Ltd v Monarch Shipping Co Ltd (The European Enterprise)* [1989] 2 Lloyd’s Rep. 185 Queen’s Bench Division (Commercial Court).



## 5.4 More than one convention

Where a state is party to more than one convention, the priority of the convention must be established, for example

- Article 55 of the Montreal Convention determines that it prevails over any other Warsaw Convention regime.
- By Article XIX Hague Protocol, Articles IV of the Additional Montreal Protocols No. 1 and No. 2, and Article XV Additional Montreal Protocol No. 4, between parties to the Protocol, the Convention and its protocols are read together as one instrument.
- By Article 82, the Rotterdam Rules do not affect the application of conventions for other forms of transport other than by sea insofar as they cover the particular sea transport or, in accordance with Article 26 insofar as such convention applies to the non-sea-leg of the journey.
- By Articles VIII Hague and Hague-Visby Rules, Article 25.1 Hamburg and Article 83 Rotterdam Rules any international convention or national law regulating global limitation of liability of vessel owners is not affected by those Rules.

## 6 Reach of convention as complemented by domestic law

### 6.1 Coverage and provisions of convention

The transport conventions typically cover the carrier's (mandatory) liability, his rights, duties and limits of liability, which at times are coupled with provision as to burden of proof, the shipper's rights and duties and in some of the conventions the consignee's position is also included.<sup>104</sup> Many conventions deal with the extent to which the carrier is liable for others, as well as with the liability of an actual carrier who is not the contracting carrier.<sup>105</sup> Some of the conventions also determine who holds rights of suit<sup>106</sup> and some identify the place of proceedings in case of suit.<sup>107</sup>

### 6.2 Matters covered to the exclusion of domestic law—examples

The CMR in chapter VI seems to conclusively deal with rights to contribution between successive carriers and provides an exclusive code as to liability for loss of or damage or delay to the consigned goods in the period stipulated in Article 17. CIM is considered to comprehensively and exhaustively deal with rights of suit, whereas CMR, Warsaw and Montreal although making reference to rights of suit do not seem

<sup>104</sup>E.g. Art 13 CMR, Art 44 CIM, Arts 13 and 15 Warsaw and Montreal Conventions and chapter 11 RR.

<sup>105</sup>E.g. Art 3 CMR, Arts 3 and 45 CIM, the Guadalajara Convention, Art 30 and 36 Montreal Convention, Art 10 HambR and Arts 18–20 RR.

<sup>106</sup>E.g. Art 13 CMR, Art 44 CIM, Arts 13.3 Warsaw and Montreal Conventions and Art 57 RR.

<sup>107</sup>Art 31 CMR, Art 46 CIM, Arts 28 Warsaw and 33 Montreal Conventions, Art 21 HambR and chapter 14 RR.

to do so exclusively. The air carriage liability regimes, insofar as provisions are made, have been held to be uniform and exclusive.<sup>108</sup>

### 6.3 Matters left entirely to domestic law—examples

By Article 32.3 CMR the extension of the period of limitation is specifically reserved to domestic law of the court or tribunal seized, and issues of contributory negligence are expressly reserved to the domestic law of the court under Articles 21 of the Warsaw, Warsaw-Hague and Warsaw-MP1 Conventions.

### 6.4 Particular reference to domestic law—examples

Article 48 CIM makes some provision for the suspension and interruption of periods of liability, but otherwise refers the matter to national law.

The CMNI in Article 16.2, concerning liability for the time before loading and after discharge, refers to the law applicable to the contract of carriage and in Article 29 CMNI provides rules to identify such national law; it further refers cases not provided for in the convention to be governed by the national law.

## 7 Mismatch between conventions systems and reality of transportation

As seen, there are many transport conventions mostly dealing with one mode of transport only, albeit some provisions are made to extend the application for a unimodal convention to auxiliary transport as for example in Art 2 CMR or Art 1.3 and 1.4 CIM. In reality, however, goods are transported by several means before arriving at their place of destination. Whilst the United Nations adopted the Convention on International Multimodal Transport of Goods 1980, it never came into force,<sup>109</sup> thus leaving the parties to find contractual solutions. Insofar the parties are assisted by the work undertaken by United Nations Conference on Trade and Development (UNCTAD) and the International Chamber of Commerce (ICC) and can make their contract subject to the UNCTAD/ICC Rules for Multimodal Transport Documents (ICC No. 481).<sup>110</sup> The following standard transport documents are examples of transport

<sup>108</sup>*Sidhu v British Airways Plc* [1997] AC 430 House of Lords.

<sup>109</sup>Which, it is submitted, may be due to its rather shipper friendly nature: as the Hamburg Rules, the 1980 Multimodal Convention is based on presumed fault, burdening the multimodal transport carrier with liability for damages due to delay and loss or damage to the goods in his care, unless he can prove that he or his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequence and without enabling the carrier to rely on specific events in order to exclude his liability.

<sup>110</sup>And some of the older contracts are still subject to the ICC Uniform Rules for a Combined Transport Document (1975) (ICC Publication No. 298), which however are no longer in force.

documents subject to these rules: the BIMCO<sup>111</sup> MULTIDOC 95,<sup>112</sup> the BIMCO MULTIWAYBILL 95,<sup>113</sup> the FIATA<sup>114</sup> FBL<sup>115</sup> and FIATA FWB.<sup>116</sup>

## 8 Conclusion

Whilst the parties may include stipulations for the application of a particular carriage convention, such choice must be upheld by the forum deciding the dispute in conjunction with the applicable law. It is therefore strongly recommended to complement a provision choosing the application of a particular transport convention with a forum selection clause, as well as a choice of law clause. Contractual provisions designed to fill the gaps between applicable carriage conventions and/or to determine the rights and duties of the parties to the carriage contract in detail, insofar as conventions regimes allow, can prove to be immensely valuable. However due to the mandatory nature of many provisions of the relevant conventions such clauses can only provide a base-layer of certainty; the final decision as to whether these provisions can be upheld remains with the forum applying the rules of the applicable law.

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<sup>111</sup>Baltic and International Maritime Council, Copenhagen.

<sup>112</sup>BIMCO Negotiable Multimodal Transport Bill of Lading of 1995.

<sup>113</sup>BIMCO Multimodal Transport Waybill of 1995.

<sup>114</sup>International Federation of Forwarding Agents Association, Glattbrugg.

<sup>115</sup>Negotiable FIATA Multimodal Transport Bill of Lading.

<sup>116</sup>Non-Negotiable FIATA Multimodal Transport Waybill.