

# MARLUS

SCANDINAVIAN INSTITUTE OF MARITIME LAW

Editors: Ellen Eftestøl-Wilhelmsson, Anu Bask,  
Trine-Lise Wilhelmsen and Erik Røsæg

European Intermodal Sustainable  
Transport – Quo Vadis?

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Marlus nr. 459  
Sjørettsfondet  
Nordisk institutt for sjørett  
Universitetet i Oslo

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ISSN: 0332-7868

Sjørettsfondet  
University of Oslo  
Scandinavian Institute of Maritime Law  
P.O. box 6706 St. Olavs plass 5  
N-0130 Oslo  
Norway

Phone: 22 85 96 00  
Fax: 22 85 97 50  
E-post: [sjorett-adm@jus.uio.no](mailto:sjorett-adm@jus.uio.no)  
Internet: [www.jus.uio.no/nifs](http://www.jus.uio.no/nifs)

Editor: Professor dr. juris Trond Solvang -  
e-mail: [trond.solvang@jus.uio.no](mailto:trond.solvang@jus.uio.no)

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Print: 07 Xpress as

# Overview of content

Editorial:

European Intermodal Sustainable Transport – Quo Vadis? ..... 5

## **The Multimodal Problem from a Legal Point of View**

Network’s Nuisances - Time for Suit and Timely Notice of  
Complaint in Multimodal Contracts ..... 15  
*Marian Hoeks, Erasmus University, Rotterdam*

Freight Integration ..... 43  
*Wouter Verheyen, Erasmus University, Rotterdam,  
and Odisee University College, Brüssel*

Jurisdiction & Multimodal Transport: A Green Perspective ? ..... 87  
*Cécile Legros, Rouen-Normandy University*

Multimodal Perspectives of the Carriage of Goods by Sea ..... 115  
*Andrea La Mattina, University of Genoa*

Electronic Bills of Lading and Some Finnish Considerations..... 137  
*Katja Heikkinen, University of Helsinki*

## **Different Aspects Related to “Green” Transport**

Defences and Special Risks in the Uniform Rules Concerning  
the Contract of International Carriage of Goods by Rail ..... 173  
*José Manuel Martín Osante, University of the Basque Country, Bilbao*

The Multilayered Institutional Framework of Inland Waterway  
Transport in Europe ..... 191  
*Henning Jessen, Institute for the Law of the Sea and Maritime Law,  
University of Hamburg*

## **Different Methods of Organizing Green Carriage**

Sea Shuttle Concept in North-Eastern Europe ..... 237

*Violeta Roso, Chalmers University of Technology, Gothenburg*

*Linda Styhre, IVL Swedish Environmental Research Institute, Stockholm/  
Gothenburg*

*Johan Woxenius, School of Business, University of Gothenburg*

*Rickard Bergqvist, School of Business, University of Gothenburg*

*Kent Lumsden, Chalmers University of Technology, Gothenburg*

Cargo bundling – Contribution to the  
Sustainable Transportation ..... 263

*Marta Katarzyna Kołacz, Erasmus University Rotterdam*

Are Liability Systems of any Interest in European Multimodal  
Transport? ..... 291

*Anu Bask, Aalto University School of Business, Helsinki*

*Mervi Rajahonka, Aalto University School of Business, Helsinki*

*Ellen Eftestøl-Wilhelmsson, University of Helsinki and University of Oslo*

Acronyms ..... 325

Publications from Sjørettsfondet ..... 329

## Special issue on:

# European Intermodal Sustainable Transport – Quo Vadis?



## Editorial

The idea of this Special Issue of *MarLus* “European Intermodal Sustainable Transport – Quo Vadis?” originates from a seminar in Helsinki in September, 2014, organised by Ellen Eftestøl-Wilhelmsson and Anu Bask. The purpose of the seminar was to examine the European Common Transport Policy on Sustainable Carriage of Goods from an academic point of view. The seminar was interdisciplinary, with participants from both law and logistics. The Helsinki seminar emphasised the conclusion of a four-year research project: the InterTran research project, financed by the Finnish Academy and the Scandinavian Institute of Maritime Law. The InterTran project was performed by researchers from the University of Helsinki (law) and Aalto University School of Business (logistics). The topic of the project was the European Union Commission strategy towards a target of sustainable freight, in particular the idea of using private law as a tool to reach that goal.

This Special Issue has involved a double blind peer-review process; as a result of the review, ten articles were accepted for publication. The

special issue editors are grateful to all anonymous reviewers for sharing their expertise during the review. This issue includes articles from law and logistics, indeed even a combination of the two disciplines. We were particularly interested in articles with an interdisciplinary approach: three of the articles accepted can be classified as interdisciplinary.

As mentioned, the starting point of the research project was to examine the EU Commission's idea of providing the multimodal transport industry with a harmonised multimodal legal framework, as a tool to boost multimodal transport in Europe. From a legal point of view the lack of a harmonised international legal framework has been discussed by scholars for decades. This is also in different ways the topic for the first group of articles; *the multimodal problem from a legal point of view*. These articles discuss problems related to the current legal situation in multimodal contracts of carriage (Hoeks, Verheyen, Legros) and possible solutions (La Mattina). In addition, the problem related to electronic bills of lading is discussed, although from a general point of view (Heikkinen). The second group of articles addresses *different aspects related to "green" modes of transport* such as rail (Osante) and inland waterways (Jessen). Lastly, in group three we placed articles discussing *different methods of organising green carriage* either by short sea shuttle (Roso *et al.*) or by cargo bundling (Kołacz). The last article is on the (lack of) connection between a harmonised liability system and multimodal carriage (Bask *et al.*).

One of the articles accepted for this special issue is by one of the leading experts on multimodal transport law, namely Assistant Professor Dr. Marian Hoeks from Erasmus University Rotterdam. She was also a keynote speaker at the Helsinki seminar. Sadly, she passed away during the review of this special issue. We dedicate this special issue to her, in memory of a beloved colleague and a highly respected researcher.

## **The multimodal problem from a legal point of view**

The problem most discussed in multimodal carriage of goods from a legal point of view is the lack of a harmonized legal regime governing

the contract of carriage involved. The parties to an international multimodal contract of carriage will either enjoy freedom of contract or be governed by a unimodal transport convention according to the so-called network system, depending on the jurisdiction the case is tried in. *Marian Hoeks* deliberates on this in her contribution *Network's nuisances - Time for suit and timely notice of complaint in multimodal contracts*. Time bars vary under the different unimodal conventions, which might be attributed to the separate stages of transport. This alone is a problem for the parties, but in addition it is not at all clear when the time limitation starts to run; is it when the specific mode of transport was used, or when the carriage as such started? The question is parallel to the question when the cargo is handed over to the carrier involved in a specific mode used to perform a multimodal contract of carriage. As pointed out by *Hoeks*, time is an important factor in transport. The consequences of letting time lapse may be quite harsh for a cargo claimant under a multimodal contract of carriage.

The next article: *Freight integration; Legal hindrances to a more efficient model of transportation* analyses a particular type of multimodal contract of carriage, namely a contract where the modes of transport are left open to be decided by the carrier. The author, *Wouter Verheyen* discusses the legal qualification of what he addresses as the freight integration contract and, in case of qualification as a carriage contract, the governing law. The scope clauses of the different unimodal carriage regimes are thus analysed in depth. According to *Verheyen* a homogenous interpretation seems hard to establish. The legal position of the parties to freight integrator contracts (where the mode of transport to be used is undefined) is highly unpredictable. Accordingly, the author discusses whether the parties can create legal certainty by the use of jurisdiction and arbitration or choice of law clauses. This is not a waterproof system and *Verheyen* thus suggests changes to international unimodal conventions that would create legal certainty as regards the law applicable to what he defines as freight integration contracts.

The use of jurisdiction and arbitration clauses is further reflected upon by *Cécile Legros* in her article *Jurisdiction & Multimodal Transport:*



*A Green Perspective?* From the standpoint of international private law, Legros discusses whether the rules on jurisdiction in multimodal contracts of carriage in EU law could be an incentive for the desired modal shift. The conclusion is that the rules on jurisdiction and arbitration are certainly not promoting a modal shift. On the contrary, questions about jurisdiction are as complicated as questions about applicable law, to which the jurisdiction and arbitration provisions are more or less an appendix. In addition, a conflict might also arise with the Brussels I Regulation if the dispute falls within the scope of application of that instrument. Identifying the court with jurisdiction is hence very difficult. This obstacle, added to a certain tendency for “procedural manoeuvring”, leads to arbitration, a fact that is not entirely positive, according to Legros.

Bearing in mind the obstacles to finding the applicable law as well as the relevant jurisdiction has led to a debate among legal scholars and organisations on the need for a harmonised legal framework for multimodal contracts of carriage, the pending Rotterdam Rules, applicable to contracts for carriage wholly or partly by sea, contain a multimodal aspect, as the heading indicates. Accordingly, *Andrea La Mattina* in his article: *Multimodal perspectives of the carriage of goods by sea. Towards a uniform system of international transport law via the Rotterdam Rules*, advocates that the major maritime states should ratify the convention directly. The Rotterdam Rules are not the way to “Utopia”, but because of their broad scope and solution to the multimodal problem, can be characterized as the next-best solution for the transport industry as a whole. Much of the discussion on the regulatory gap and the applicable legal regime for multimodal contracts of carriage relates to the applicable liability rules. This question is solved by the Rotterdam Rules.

Another issue connected to international transport, including multimodal transport, is the question of digitalization, in particular the digitalization of transport documents. *Katja Heikkinen* reflects on the pros and cons related to an electronic bill of lading in her article *Electronic Bills Of Lading and Some Finnish considerations*. The objective of *Heikkinen’s* article is to evaluate the legal status of an electronic bill of lading, in particular from a Finnish point of view. The main question here is

whether electronic equivalents have the same legal value as paper bills of lading and whether all functions of a bill of lading can be performed in an electronic environment. *Heikkinen's* conclusion is that the current legal situation in Finland does enable a paper bill of lading to be replaced by electronic means so that all functions of a bill of lading can be maintained in a paperless trade.

## Different aspects related to “green” transport

One of the main ideas behind the EU Commission project on sustainable carriage of goods by promoting multimodal carriage was to increase the share of rail carriage, which is considered to be a more environmentally friendly method of transport than, for example, road transport. Promoting multimodal transport should be done *inter alia* by providing the multimodal industry with a harmonized liability regime for multimodal contracts of carriage. So far the Commission has not succeeded in creating a liability regime that is acceptable to all parts of the industry. One reason for this is that unimodal mandatory liability regimes vary to such a degree that it is hard to find common ground for a new regime. Much has been written in particular as regards problems related to harmonizing a future multimodal legal regime with, for example, the CMR (Convention on the Contract for the International Carriage of Goods by Road, 1956). The liability regime applicable to rail carriage is, however, not much debated. *José Manuel Martín Osante's* article on *Defences and special risks in the Uniform Rules Concerning the Contract of International Carriage of Goods by Rail* is therefore welcome. The article describes the general liability regime of rail carriage and the grounds for exemption from liability of the rail carrier as governed by CIM-COTIF (Uniform Rules concerning the Contract of International Carriage of Goods by Rail - Appendix B to COTIF: Convention concerning International Carriage by Rail, 1980). The grounds for exemption are divided into two groups: *non-privileged* grounds (defences) and *privileged* grounds (special risks). In his article *Osante* discusses the burden of proof related to the exemptions.

Another mode of transport is carriage by inland waterways. Today it

seems that the use of inland waterways varies to a great deal within the EU, despite the fact that inland waterway transport offers a sustainable and environmentally-friendly alternative for general cargo and container shipments arriving at sea ports. According to *Henning Jessen*, inland waterways is therefore a method of transport the Commission would like to see growing. In his article *The Multilayered Institutional Framework of Inland Waterway Transport in Europe - Challenges in Promoting River Transportation*, *Jessen* discusses two policy packages (“NAIADES I and II”) initiated by the EU to enhance the conditions for EU inland waterway transport.

## **Different methods of organizing green carriage**

Not only inland waterways, but also short sea shipping is under consideration by the EU Commission as a priority area of transport, due to its great potential as a green method of carrying cargo. However, in order to be successful, an industry must be competitive. In the article *Short Sea Shuttle Concept in North-Eastern Europe*, *Violeta Roso, Linda Styhre, Johan Woxenius, Rickard Bergqvist and Kent Lumsden* analyse a particular container shipping concept, the Short Sea Shuttle concept, in a north-eastern European setting. The Short Sea Shuttle concept has much in common with feeder shipping, but with particular requirements. Based on data collected from firms within the maritime cluster *Roso et al.* conclude that a high degree of punctuality is particularly important as it allows the transfer to sea of cargo which is currently transported by other modes.

Another way of organizing transport to reduce its negative impact on the environment is to ensure that no vehicles are running empty or half loaded. As *Marta Katarzyna Kołacz* points out in her article *Cargo bundling – contribution to sustainable transportation*, cargo bundling is one solution to problems in European Transport. The concept will not only contribute to sustainable transportation but will also allow the transport industry to reduce costs of shipment. While it is proven that cargo bundling ensures efficiency gains, there is however no certainty of

legal relations between the parties involved. *Kołacz* concludes that a legal framework which can assure that the consequences of cargo bundling are similar in different European countries, would support the activity. Even if it turns out that unified solutions are impossible, at least some policy recommendation should be suggested in order to improve the use of cargo bundling.

In the final article *Are Liability Systems of any Interest in European Multimodal Transport? Views from Finnish Logistics Service Providers and Shippers*, Anu Bask, Mervi Rajahonka and Ellen Eftestøl-Wilhelmsson question the European project on a harmonized liability regime in relation to the desired modal shift from road carriage to multimodal carriage. Previous economic research has shown that the friction costs of an unpredictable liability system are minor and accordingly have an insignificant impact on the choice of transport alternatives. *Bask et al.* have collected data from Logistic Service Providers (LSPs) and Shippers (logistics service buyers) operating in Finland and asked: (1) Are liability issues a problem in the current legal framework, and: (2) Is there a need for a harmonized legal instrument for better support of intermodal transport? Based on interviews, the conclusion is in line with previous research; a harmonized liability regime is not an efficient tool to enhance a modal shift.

This special issue of *Marlús* examines different aspects of European Intermodal Sustainable Transport. We hope you will enjoy reading the articles, which may trigger some ideas on *Quo Vadis*. For our part, on the basis of the articles published below, we conclude that sustainable solutions are already available; the problem is how this potential could be better employed and developed for the use of the transport industry. The examples from short sea shipping and inland waterways show that green transport offers great potential and should be promoted. Additionally, collaboration for sustainable solutions such as cargo bundling should be enhanced. Neither the law nor practicalities should stand in the way of a greener future in the transport industry. Legal and logistics research can provide support in disclosing the changes needed. The transport market is at the moment undergoing major changes due to

digitalization. This development should be used to ensure sustainable development in the European transport industry. How this can be achieved should be of interest both to the industry itself and public authorities, as well as to researchers.

We offer our special thanks to the Editor-in-Chief, Professor Trond Solvang, for consenting to publish this special issue, and also to Information Officer Kirsti Aarseth for all her help in the process.

Ellen Eftestøl-Wilhelmsson  
Anu Bask  
Trine-Lise Wilhelmsen  
Erik Røsæg

Special Issue Editors

# The Multimodal Problem from a Legal Point of View



# Network's Nuisances - Time for Suit and Timely Notice of Complaint in Multimodal Contracts

Marian Hoeks  
Assistant Professor of Commercial Law  
Erasmus University, Rotterdam\*

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\* Marion Hoeks died tragically during the production of this volume.



## **Abstract**

Time is an important factor in transport. The consequences of letting time go by may be quite harsh for the cargo claimant. Procrastination is severely punished, especially in international air and rail carriage. But, as onerous as the rules on time for suit and timely notice are under 'normal' circumstances, at least they are relatively clear. Unfortunately, matters become much more opaque when more than one mode of transport is combined under a single contract of carriage. This article examines the concepts of 'prescription' or 'limitation of actions' and timely notice of complaints. This discussion will include some thoughts on the purpose of both instruments. Second, the difficulties of applying them in relation to multimodal contracts will be explained, after which some solutions will be offered. Lastly, a conclusion will be drawn.

## **Key words**

Prescription , limitation of actions, timely notice, multimodal transport

# 1 Time flies

In this era of Just In Time (JIT) logistics, time is an important factor in transport. Yet on the whole, delay does not seem to be accorded a similar amount of respect in transport law. After all, the carrier only has to pay a somewhat meager amount of compensation if the consignee suffers losses due to a delay in delivery.<sup>1</sup> This is not entirely true, however. When it comes to the period in which legal action can be taken or the time frame in which a complaint must be made, transport law is very much a stickler for time. For one, transport law generally allows only a relatively short period of time to start legal proceedings.<sup>2</sup> The standard limitation period in uniform transport law is no more than one year. The air carriage conventions exceed this with a time frame of two years, and both the CMR and the COTIF-CIM extend it to three, respectively two years under special circumstances, but otherwise the period of limitation for an action arising out of carriage under the conventions is brief indeed.<sup>3</sup>

Still, in comparison with the amount of time that is reserved by these regimes for the notice of complaints or the ascertainment of damage or loss it is an ocean of time. The last mentioned time frames are either nearly non-existent – because complaint has to be made at or before ‘the acceptance of the goods’ – or measured in days instead of in years.<sup>4</sup>

But not only are the time frames prescribed by uniform transport law short, they are also generally less forgiving than those found in general

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<sup>1</sup> The carrier liability limitation for delay generally relate to the carriage charges. See the limits for delay in art. 33 COTIF-CIM; four times the carriage charges, art. 23(5) CMR; the carriage charges, art. 20(3) CMNI; the carriage charges. Conversely, neither the Hague- nor the Hague-Visby Rules contain liability limitation for delay and the air carriage conventions do not differentiate between damage or loss caused by delay and ordinary damage or loss, the liability cap is in both cases 19 SDR per kilogram.

<sup>2</sup> The standard periods for actions based on contract and tort are generally somewhat longer. U.K.: Tort and contract 6 years, art. 2 and 5 Limitation Act 1980; Netherlands: Tort and contract 5 years, art. 3:307 and 3:310 Dutch Civil Code; Germany: Tort and contract 3 years, § 195 German Civil Code, Belgium: Tort 5 years and contract 10 years, art. 2262bis(1) Belgian Civil Code *etc.*

<sup>3</sup> See art. 32(1) CMR and 48(1) COTIF-CIM.

<sup>4</sup> See art. II(6) HVR, 30(1) CMR, 23(1) CMNI, 47(1) COTIF-CIM and 31(1) MC.

civil law on the national level. Where under national law – at least in the civil law systems – at the expiration of the time for suit the (potential) right to compensation remains but is no longer enforceable – as it tends to bar the claimant’s remedy but does not extinguish the right itself<sup>5</sup> – the claimant’s rights under the carriage regimes are as a rule extinguished when no suit is brought within the allotted time.<sup>6</sup> The international air and rail carriage law of the CIM and the Montreal Convention even takes this one step further and goes so far as to also relieve the cargo interest of his right to claim when there was no timely notice or ascertainment of the damage or loss.<sup>7</sup> Luckily for the cargo claimant the other carriage regimes are not nearly so relentless. Under the other carriage conventions the lack or late notice of complaint only leads to *prima facie* evidence that the goods have been delivered as described in the transport document.<sup>8</sup> This is certainly a setback for the cargo claimant, but hardly as insurmountable as the extinction of his rights to compensation.

When taking all this into account it is clear that time is very much of the essence in all facets of transport. From a practical point of view – when carrying a cargo of perishables delay does not serve anyone well – as well as from a legal perspective. The consequences of letting time go by may after all be quite harsh for the cargo claimant. Procrastination is severely punished, especially in international air and rail carriage. But, as onerous as the rules on time for suit and timely notice are under ‘normal’ circumstances, at least they are relatively clear. Unfortunately, matters become much more opaque when more than one mode of

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<sup>5</sup> In most national legal systems today the right to claim is not extinguished. According to French doctrine for instance, a *naturalis obligatio* continues to exist. R. Zimmermann, ‘Extinctive’ Prescription under the Avant-projet’, *European Review of Private Law* 2007, p. 805-820 at p. 805 footnote 1. Other examples are: Art. 2 and 5 Limitation Act 1980 and art. 6:131 Dutch Civil Code.

<sup>6</sup> The Montreal Convention is very clear in art. 35 where it states that ‘The right to damages shall be extinguished’, whereas art. III rule 6 HVR expressly provides that the carrier ‘shall be discharged from all liability whatsoever’ on the expiry of the time limit, which implies that the right itself has become non-existent. M.A. Clarke, *Contracts of Carriage by Air*, London: Lloyd’s List 2010, p. 182-183; *Aries Tanker Corp v Total Transport* [1977] 1 WLR 185, [1977] 1 Lloyd’s Rep 334.

<sup>7</sup> There are exceptions to this rule which can be found in art. 47(2) COTIF-CIM.

<sup>8</sup> E.g. art. 23(1) CMNI, art. 30(1) CMR and Rule III(6) HVR.

transport is combined under a single contract of carriage.

Contracts entailing more than one mode of transport are generally referred to as multimodal transport contracts.<sup>9</sup> Since all of the modes of transport boast their own set of rules, mostly on the national as well as the international level, it would seem that a mere combination of modes should not prove to be too much of a challenge. Reality reveals that especially the international conventions are ill suited to govern only parts of a contract, however. When scrutinized, the scope of application provisions of carriage conventions confirm that they were drafted mainly with unimodal contracts in mind. This equally applies to those conventions that do not mention the requirement of a contract as such, even though these specifically determine that they do apply to parts of a carriage, as long as said part – if separated from the rest of the carriage – fulfils the requirements of the scope of application provisions.<sup>10</sup> Both the air carriage conventions, the Warsaw Convention and the newer Montreal Convention, are within this category. Only these transport treaties contain clear network provisions detailing their applicability vis-à-vis multimodal contracts. But although they are clear on the subject, the actual application of the air carriage regimes under multimodal circumstances is not lacking challenges. Among these are the above mentioned rules concerning time for suit and complaint. In multimodal transport it is not exactly clear when these periods start. Is it during or at the end of the air stage or rather at the end of the entire transport? Within the concept of the network approach logic would dictate that they should adhere to the air carriage as such, but as the time frames in

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<sup>9</sup> More precise a multimodal transport contract is a contract in which a carrier promises 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 and two or more modes of transport are actually used during its performance. M.A.I.H. Hoeks, *Multimodal Transport Law*, Alphen aan den Rijn: Kluwer Law International 2010, p. 63.

<sup>10</sup> See art. 1 and 38 of the Montreal Convention, the Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on 28 May 1999 and art. 1 and 31 of the Warsaw Convention, the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929.

question are already short, shortening them even further in this manner might lead to unwarranted results.

Since this issue also rears its ugly head in relation to the other carriage conventions if the course set out by the Court of Appeal in ‘Quantum’ is pursued, the following will address the riddle in more detail.<sup>11</sup> First the concepts of ‘prescription’ or ‘limitation of actions’ and timely notice of complaints will be discussed in further detail. This discussion will include some thoughts on the purpose of both instruments. Second, the difficulties of applying them in relation to multimodal contracts will be explained, after which some solutions will be offered. Lastly, a conclusion will be drawn.

## 2 Time for suit

### 2.1 Tongue tied; ‘prescription’ or ‘limitation of actions’?

The ‘time bar’ in the carriage conventions cannot be easily described with the use of only one term. The words ‘limitation of action’ for instance suggest a mere barring of the remedy, a loss of the option to start proceedings, but not the loss of the right itself. As such these terms are used at common law with exactly this content. English time bar provisions are therefore generally marked as being of a procedural nature.<sup>12</sup> The result is that cargo interests entitled to a barred debt may not be able to recover

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<sup>11</sup> In *Quantum* the Court of Appeal determined that the CMR applies to international road carriage that is part of a larger, multimodal contract, much like the air carriage conventions do for international air carriage stages. As the COTIF-CIM and the CMNI have very similar scope of application provisions this will likely mean that they too are deemed applicable in a multimodal transport context. Both the German and the Dutch Supreme Courts have more recently decided they do not share the view of the English Court of Appeal on this matter, however. See *Quantum Inc v. Plane Trucking Ltd* [2002] 2 Lloyd’s Rep. 25; BGH 17 July 2008, I ZR 181/05, *TranspR* 2008, 365 and HR 1 June 2012, *NJ* 2012, 516 (*Goðafoss*), with comment K.F. Haak.

<sup>12</sup> A. Briggs, *Conflict of Laws*, Oxford: OUP 2008, p. 43.

it by action but may still obtain satisfaction if alternative methods of recovery are available.<sup>13</sup>

The functional equivalent to 'limitation of action' used in legal systems belonging to the Romanistic legal tradition is the term (extinctive) 'prescription'.<sup>14</sup> Yet, especially the adjective 'extinctive' implies the loss of the right itself, not merely the loss of the remedy. When compared to the text of art. III(6) HVR, this term appears more suitable as the effect of the HVR time bar is to extinguish the claimant's rights, not merely to bar its claim according to Lord Wilberforce in *The Aries*.<sup>15</sup> However, based on *The Fiona* the maritime time bar apparently does not extinguish all defences.<sup>16</sup> The time limitations found in the CMR and the COTIF-CIM also affect the ability of the carrier to use his right of action as a defence. Art. 32(4) CMR, art. 48(4) COTIF-CIM and art. 24 (5) CMNI all determine that once a right is barred it can no longer be used as counterclaim, set-off or exception. So where – according to Lord Denning in *The Brede* – the right of set-off is not caught by a time bar under the HVR as it is distinguishable from a counter claim, the cargo claimant should be able to invoke it under the HVR but not under the CMR, COTIF-CIM or the CMNI.<sup>17</sup> Nonetheless, this is not entirely correct.

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<sup>13</sup> J.F. Wilson, *Carriage of Goods by Sea*, Harlow: Pearson 2010, p. 206. According to the English Law Commission: "It follows that if the defendant does not include details of the expiry of the limitation period in the defence, the claimant may obtain a remedy notwithstanding the fact that the limitation period has expired." Law Commission, Report Limitation of Actions, 9 July 2001, (Law Com No. 270), at p. 33.

<sup>14</sup> This term derives directly from the Roman *longi temporis praescriptio*. A. Triggiano, 'Short Remarks on Extinctive Prescription in Legal History', *10 US-China L. Rev.* 35 (2013), p. 37.

<sup>15</sup> *Aries Tanker Corporation v Total Transport Ltd (The Aries)*, [1977] 1 All ER 398, [1977] 1 WLR 185 at 188; J.F. Wilson, *Carriage of Goods by Sea*, Harlow: Pearson 2010, p. 206-207; S. Baughen, *Shipping Law*, Abingdon: Routledge 2012, p. 119.

<sup>16</sup> *Mediterranean Freight Services Ltd v BP Oil International Ltd (The Fiona)* [1994] 2 Lloyd's Rep 506. In this case the shipper successfully raised the defence that the dominant cause of the damage had been the shipowner's breach of its obligations under art. III(1) HVR against a claim by said shipowner in respect of a shipment of dangerous goods.

<sup>17</sup> *Henriksens Rederi A/S v. Centrala Handlu Zagranicznego (C.H.Z.) Rolimpex (The Brede)* [1973] 2 Lloyd's Rep 333 at p 336. E.G. set-off is limited to money claims, whereas counterclaim is not so limited. Plus, set-off is only a ground of defence, or rather a shield, not a sword, whereas counterclaim enables a defendant to enforce a

Although set-off should in principle be possible under the HVR even after the time bar has elapsed, as per Lord Denning, he also held that as a matter of long established rule a cargo owner has no right to make deductions from freight in respect of short delivery or damage to cargo.<sup>18</sup> So if the carrier demands payment of the freight held back by the cargo interest after the time bar has elapsed, the latter is obliged to pay, even if the sum was held back in relation to valid complaints concerning shortage in delivery or damaged cargo at delivery.

Clarke feels that this also applies in relation to the CMR, even if the cargo claimant resorts to the doctrine of deduction or abatement instead of set-off, and even if the claimant invokes this defence before the expiration of the time for suit of art. 32(1) CMR.<sup>19</sup> Thus, it seems a decidedly maritime approach is currently applied to road carriage cases tried in England.

Despite all this, the right to compensation itself would not appear to extinguish due to expiry of the time for suit under the CMR, CMNI and COTIF-CIM, unlike under the HVR. The fact that art. 32(4) CMR, art. 24(5) CMNI and art. 48(4) COTIF-CIM all speak of a right of action ‘which has become time-barred’ or ‘which has become barred by lapse of time’, strongly suggests that the right of action does in fact remain, even if it can no longer be enforced in court or in arbitration.

And last, but not least the Montreal Convention surprises us with a contradiction in terms of sorts. The relevant article in the Montreal Convention, art. 35 MC, is titled ‘Limitation of actions’ but determines that “*The right to damages shall be extinguished (...)*”.

So, although all uniform transport regimes contain a provision which curtails the amount of time available for starting legal proceedings, it seems that they do not all generate identical results. Thus the terms such

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claim against the plaintiff as effectually as in an independent action. *Stooke v Taylor* [1880] 5 QBD 569 at 575-576, per Cockburn CJ.

<sup>18</sup> *Henriksens Rederi A/S v. Centrala Handlu Zagranicznego (C.H.Z.) Rolimpex (The Brede)* [1973] 2 Lloyd’s Rep 333. Freight is a special obligation which is not subject to the rule of equitable set-off.

<sup>19</sup> M.A. Clarke, *International Carriage of Goods by Road*, Abingdon: Informa 2014, p. 152-153.

a 'time bar', 'prescription' and 'limitation period' used in the following will be somewhat less than a perfect fit at times, but considering the opaque nature of the issue this is the best that can be hoped for.

## 2.2 The purpose of the limitation of time for suit

Since the consequence of prescription is that the creditor can no longer compel the debtor to perform or to compensate, the first argument for its existence that springs to mind is the protection of this debtor.<sup>20</sup> There is a little more to it than that, however. The traditional purpose of limitation periods was to create an acceptable balance between the interests of potential creditors and potential debtors. A system of maximum fairness was sought which was based on the assumption that at a certain point in time most potential creditors with meritorious claims would have started proceedings while the financial and psychological costs to potential debtors in relation to preserving evidence remained at the same level.<sup>21</sup>

In relation to carriage the protection of the debtor concept roughly translates into the idea that the carrier cannot be expected to keep records for long periods of time and must be notified while the events are still reasonably fresh and on record, as to what claims are to be presented. In contrast, the interests of the creditor appear to be of a lesser concern in uniform carriage law than in general civil law, considering the relatively brief prescription periods in the specialized regimes. Nonetheless, the balance argument concerns only one of the three aims that are generally thought to be served by setting deadlines. These are that for one, deadlines ensure that there will be an end to the threat of potential litigation in order to minimize the unfairness to defendants of being subjected indefinitely to the peril of being sued over a particular matter. For another, the limitation of the time for suit provides a mechanism for the courts

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<sup>20</sup> J.L. Smeehuijzen, *De bevrijdende verjaring*, Deventer: Kluwer 2008, p. 25.

<sup>21</sup> N. Des Rosiers, 'Canada', in: E.H. Hondius (ed.), *Extinctive Prescription, On the Limitation of Actions*, The Hague: Kluwer Law International 1995, p. 93-113 at p. 93. One could also imagine that the financial and psychological costs to potential debtors in relation to preserving evidence go up over time.



to function more effectively by encouraging potential litigators to start proceedings comparatively soon after the conflict generating event, so that there are less likely to be evidentiary problems. And thirdly, prescription is meant to create an incentive to settle speedily so that the disrupting effect of unsettled claims on commercial intercourse is minimized.<sup>22</sup> Added to these three aims can be the fact that deadlines do not only protect the would-be plaintiff against claims in general, but also specifically against those that are not meritorious. Where such claims may be easy to refute directly after the occurrence of the event that was the cause of the conflict, this is likely to become harder over time.<sup>23</sup>

By and large the reasons for limiting the time for suit are plentiful and valid. Still, there might also be certain contraindications. Or at the very least reasons why parties should be able to extend a time bar should they so desire, even before it has expired. In situations where the parties involved are already in negotiation and chances of settling outside the court seem fair inflexibility of the instrument of prescription may work to the disadvantage of both the creditor and the debtor. Especially in those cases where the claimant's rights are extinguished. Under general Dutch civil law for example such '*vervaltermijnen*' can neither be halted nor suspended – either before or after they expire – which forces the creditor to either put a lot of trust in the debtor, or to start litigation when the deadline approaches and accrue all the legal costs involved which might otherwise have been avoided.<sup>24</sup> In addition, such forced litigation is not commercially sound as it can easily alienate parties that might otherwise have resumed doing business together. As it happens, the MC provides the opportunity to extend or waive the period to either the carrier or to both parties when in agreement, which prevents such compulsions.<sup>25</sup> The specialized part of the Dutch Civil Code relating to

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<sup>22</sup> N. Des Rosiers, 'Canada', in: E.H. Hondius (ed.), *Extinctive Prescription, On the Limitation of Actions*, The Hague: Kluwer Law International 1995, p. 93-113 at p. 94.

<sup>23</sup> J.L. Smeehuijzen, *De bevrijdende verjaring*, Deventer: Kluwer 2008, p. 25-27.

<sup>24</sup> Rights that have been extinguished cannot be revived. J.L. Smeehuijzen, *De bevrijdende verjaring*, Deventer: Kluwer 2008, p. 356; M.A. Clarke, *Contracts of Carriage by Air*, London: Lloyd's List 2010, p. 182-183.

<sup>25</sup> E. g. art. III(6) HVR determines that the period may be extended if the parties so

transport law also provides the opportunity to contractually extend a 'vervaltermijn' in art. 8:1701, but only after the cause of action has arisen. Unfortunately, the COTIF-CIM knows no such provision and thus leaves the matter to national law, which may not always be accommodating.

In practice carriers simply tend to grant an extension of the prescription or the limitation period where a settlement seems feasible.<sup>26</sup> This may also not always be in accordance with the letter of the law in relation to those conventions that merely bar legal proceedings instead of extinguishing the right itself. Where on the one hand art. 24(2) CMNI generously allows such extensions by stating that at any time during the limitation period said period may be extended by the person against whom an action is instituted, the HVR also allow the parties to extend the period for action, but only after the cause of action has arisen. The CMR does not regulate the matter itself at all; art. 32(3) CMR refers the matter to the *lex fori*.<sup>27</sup> If that perchance were to be Dutch law it would mean that in principle the period of limitation can only be extended by the carrier and only after it has expired.<sup>28</sup> Again, for transport the Dutch Civil Code makes an exception in art. 8:1701 which lets the parties extend both 'verval-' and 'verjaringstermijnen' after the cause of the action has arisen.<sup>29</sup> Also, under German law parties are in principle free to change limitation periods by contract, as under English law.<sup>30</sup> Nonetheless, in

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agree after the cause of action has arisen. Based on the freedom of contract granted by art. 27 MC the carrier may extend the period of prescription of art. 35 MC also before it has expired as well as waive the defence. Under German and Dutch law the period can be extended by party agreement before expiration in relation to international carriage by air under the Warsaw Convention as well, see BGH 22 April 1982, NJW 1983, p. 516; OLG Frankfurt 15 September 1999, *TranspR* 2000, p. 183; HR 12 February 1982, *S&S* 1982, 56.

<sup>26</sup> F. Berlingieri, *International maritime conventions*, Abingdon: Informa 2014, p. 71.

<sup>27</sup> The COTIF-CIM does not provide much information concerning this issue and thus also seems to refer it to national law, albeit the law applicable to the contract of carriage instead of the *lex fori*.

<sup>28</sup> Art. 3:322(3) Dutch Civil Code.

<sup>29</sup> A 'verjaringstermijn' is a limitation period which causes the remedy to be barred, whereas a 'vervaltermijn' causes the right to be extinguished on expiration.

<sup>30</sup> See § 439(4) of the German Commercial Code for the rules on transport law to this end.

the latter legal system truncated (or extended) limitation periods are subjected to the ‘reasonableness test’ under the Unfair Contract Terms Act 1977.<sup>31</sup> In transactions involving commercial parties of equal bargaining strength altered terms are possible, as long as clear words are used.<sup>32</sup>

A last noteworthy failing of the rules limiting the time for suit in either the HVR or the MC would be that if fairness and balance are indeed the purpose of these rules, they should not be restricted to claims against the carrier, but should constrain claims by the carrier as well, which they currently do not.<sup>33</sup>

### 3 The period of notice

All of the carriage conventions also contain a provision that stimulates the cargo claimant to make any damage or loss resulting from the carriage known to the carrier on the shortest possible notice. Where the CMNI and the CMR determine that the acceptance without reservation of the goods by the consignee is *prima facie* evidence of the delivery by the carrier of the goods in the same condition and quantity as when they were handed over to him for carriage respectively in the condition described in the consignment note, the HVR amount to similar consequ-

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<sup>31</sup> See: Schedule 2, “Guidelines” for Application of Reasonableness Test, as attached to the Unfair Contract Terms Act 1977.

<sup>32</sup> E.g. *Oxford Architects Partnership v Cheltenham Ladies College*, [2006] EWHC 3156 (TCC), [2007] BLR 293, [2007] Bus LR D25, [2007] PNLR 18.

<sup>33</sup> R. Dettling-Ott in: E. Giemulla & R. Schmid (eds.), *Warschauer Abkommen*, Alphen aan den Rijn: Kluwer Law International 2006, art. 29 WC, No. 4; L. B. Goldhirsch, *The Warsaw Convention Annotated*, Dordrecht: Martinus Nijhoff Publishers 2000, p. 189-190; I. Koller, *Transportrecht*, München: Beck 2007, art. 29, para. 2; E. Giemulla & R. Schmid (eds.), *Warschauer Abkommen*, Alphen aan den Rijn: Kluwer Law International 2006, p. art. 19, para. 2(a); *Henriksens Rederi A/S v. Centrala Handlu Zagranicznego (C.H.Z.) Rolimpex (The Brede)* [1973] 2 Lloyd’s Rep 333; *Aries Tanker Corporation v Total Transport Ltd (The Aries)*, [1977] 1 All ER 398, [1977] 1 WLR 185; *Mediterranean Freight Services Ltd v BP Oil International Ltd (The Fiona)* [1994] 2 Lloyd’s Rep 506.

ences but use a somewhat different tack.<sup>34</sup> The HVR do not specify literally that they attach to 'delivery', nor to the acts or omissions of the 'consignee', but choose 'the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage' instead.<sup>35</sup> Nonetheless, in actual fact the moment of delivery is the decisive factor even here.

Unlike their counterparts in international rail and air transport law the provisions of the CMNI, CMR and HVR on the timely notice of complaints do not affect the further settlement of the case overmuch in practical terms. Although they determine that a failure to give timely notice results in the emergence of *prima facie* evidence against the cargo interests' claim, the timely notice of complaint does not in itself provide sufficient evidence to lead to the liability of the carrier. In other words, even if the cargo claimant sends timely reservations or complaint, this rebuts the presumption, but it does not prove loss or damage or that these occurred during transit.<sup>36</sup> This means that the cargo claimant still has to furnish more compelling evidence that there in fact was loss or damage and that this loss or damage resulted from the carriage. The provisions thus do not allocate the burden of proof among the parties.

What is of import to notice is that the time of delivery or the time of the removal of the goods can, in light of these rules, not be a singular moment. As Clarke perceptively points out, the time of delivery is a moment that must be carefully defined and respected as it defines the end of the period of responsibility of the carrier. But since at that time – not by that time – the checking, inspecting or surveying as mentioned by art. III(6) HVR and 30(2) CMR must be done, restricting the moment of delivery or the time of the removal to a single point in time would

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<sup>34</sup> Art. 23(1) CMNI and art. 30(1) CMR.

<sup>35</sup> Art. III(6) HVR.

<sup>36</sup> M.A. Clarke, *International Carriage of Goods by Road*, Abingdon: Informa 2014, p. 198. Berlingieri provides: "(...) the information the claimant must provide in order to defeat the prima facie evidence that this rule impliedly provides in favour of the carrier is general, not specific and even if it would be treated as evidence of the facts as described, it would not provide sufficient information for the assessment of the claim." F. Berlingieri, *The Carriage of Goods and Passengers by Sea*, Abingdon: Routledge 2014, p. 70.

render compliance with the provisions on notice impossible.<sup>37</sup>

Thus, in principle notice may need to be given under the road, inland waterway and sea carriage regimes, but doing so, and failing to do so, has relatively little effect. The provisions of these regimes on this subject may therefore be likened to toothless lions. The provisions titled ‘Extinction of right of action’ and ‘Timely notice of complaints’ in the COTIF-CIM and the Montreal Convention respectively, on the other hand, are a far cry from harmless. Art. 31(4) MC determines that if no complaint is made within the times expressed by the article, no action shall lie against the carrier, and art. 47 COTIF-CIM even goes so far as to state that acceptance of the goods by the person entitled shall extinguish 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. Hence, where the Montreal Convention – as well as its predecessor in art. 26 WC – has heightened the stakes by removing the right of action, the COTIF-CIM is the most intimidating of all; not only does non-compliance extinguish the right of the cargo claimant altogether, it also provides him with only a bare minimum amount of time in which to accomplish that which is necessary to avoid this unforgiving sanction. Only if the loss or damage was ascertained before the acceptance of the goods, the ascertainment was omitted solely through the fault of the carrier, if the loss was not apparent and ascertainment occurred at the latest within seven days after the acceptance of the goods, or if the person entitled proves that the loss or damage results from an act or omission, done with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result, will the claimant escape with his right to be compensated intact. A salient fact is that the ascertainment in question concerns the drawing up of a report by the carrier, so no third party expert or surveyor has to be involved. As a result, the claimant is completely dependent on the cooperation of the carrier, which is probably why the lack ascertainment due to the fault of the carrier is one of the reasons for thwarting the sanction otherwise imposed by art.

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<sup>37</sup> M.A. Clarke, *International Carriage of Goods by Road*, Abingdon: Informa 2014, p. 199.

47 COTIF-CIM. The carrier's only admonitions are that he must act without delay, and if possible in the presence of the person entitled.

One may wonder why there are such extreme differences in the carriage regimes in this area. Indeed, it is very hard to come up with a reason why the need for timely notice of complaint should be more pressing for rail and air carriers than for their fellows in sea, inland waterway and road transport. In spite of this, some explanation of the general purpose of the limitation of the period to give notice of complaint in combination with the loss of action or the loss of the right to compensation can readily be found. In *Fothergill*, Lord Wilberforce commented the following in relation to art. 26 WC:

“The purpose of art 26, on the other hand, appears to me to be reasonably clear. It is (1) to enable the airline to check the nature of the ‘damage’, (2) to enable it to make inquiries how and when it occurred, (3) to enable it to assess its possible liability, to make provision in its accounts and if necessary to claim on its insurers, (4) to enable it to ensure that relevant documents (eg the baggage checks or passenger ticket, or the air waybill) are retained until the issue of liability is disposed of. (...) Moreover, prompt notification may give the airline an opportunity of recovering the objects lost.<sup>38</sup>

Besides the discrepancies described above, all of the regimes also contain certain similarities in their approach of the notice of complaint. In case the loss or damage is not apparent at the moment of delivery, the period in which it is to be ascertained or in which complaint is to be made consists of two parts in all of them. Besides a relative period, the running of which depends on the creditor's knowledge of the loss or damage, there is also a maximum period which varies from three to fourteen days. This maximum period is tied to an objective criterion such as the moment of delivery, receipt or acceptance of the goods, at the expiry of which a claim will be barred or extinguished regardless of the cargo claimant's knowledge. The reasons for including the objective standard in this scenario are comparable to those for the existence of limitation or

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<sup>38</sup> *Fothergill v Monarch Airlines* [1981] AC 251, 272, per Lord Wilberforce.

prescription periods in general; at a certain point in time the parties have to be able to treat an incident as irrefutably in the past.<sup>39</sup>

## 4 The multimodal sore spots

Because of the brevity of the periods prescribed for actions or complaint in the transport law conventions and the severity of the sanctions which may ensue in certain cases, it is important to determine at which point in time such periods start. For unimodal transports this should not be all that difficult as the conventions provide specific details as guidelines. In multimodal carriage matters are a bit less evident however.

What for instance if the loss remains unlocalized? In a case brought before the *Rechtbank* Haarlem in 1999 fresh flowers were damaged due to overheating during the transport. Whether this had occurred during the air stage between Miami and London or during the road stage between London and Amsterdam was never discovered.<sup>40</sup> As a result the *Rechtbank* determined concerning the applicable time bar that:

“Since neither the CMR, (...), nor the Warsaw Convention provides for the situation in which more than one time bar may apply, art. 8:1722 of the Dutch Civil Code, which provides for such situations, applies as Dutch law applies to the rest of the contract.”<sup>41</sup>

Since the loss remained unlocalized in this instance, art. 8:1722 of the

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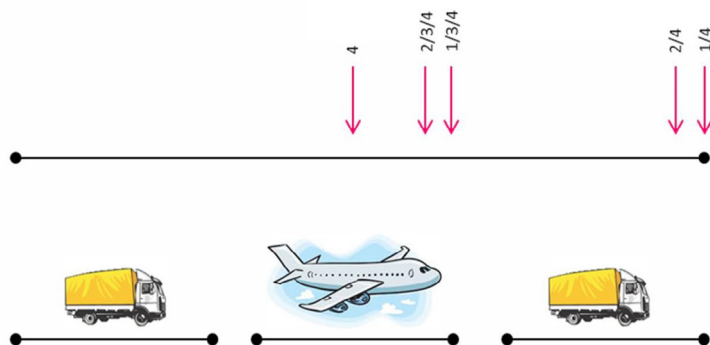
<sup>39</sup> R. Zimmermann, ‘Extinctive’ Prescription under the Avant-projet’, *European Review of Private Law* 2007, p. 805-820, at p. 809.

<sup>40</sup> Rb Haarlem 6 July 1999, S&S 2000, 88.

<sup>41</sup> “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.” It should be noted that at that point in time the CMR was still applied to internationale road carriage which is part of a multimodal contract. This is no longer the case, see HR 1 June 2012, NJ 2012, 516 (*Godafoss*).

Dutch Civil Code would have applied as part of the law applicable to the contract in any case, as neither the Warsaw Convention nor the CMR could be applied to the unattributed loss. Nonetheless, even when the loss can be localized this does not exactly put paid to the potential problems *vis-à-vis* the time limitation for actions and complaint. To begin with, the solution applied by the *Rechtbank* is an article of national law. Most other legal systems are unlikely to be able to provide a similar re-prieve. Furthermore, the article only relates to the limitation of the time for actions, not to the limitation of the time for complaint or ascertainment of the damage. This leaves that most pressing issue – which is daunting particularly in relation to international air and rail carriage stages – as yet unsolved. Thirdly, it does not provide answers regarding situations where the loss can be pinpointed. If for example the Warsaw Convention were to apply to such a claim as brought before the *Rechtbank* Haarlem, it would still not be entirely clear when the periods of limitation would begin to run. Directly after the air carriage stage is completed? Or only after the entire multimodal carriage is concluded? Art. 26 WC and 31 MC refer to (1) delivery, whereas art. 29 WC and 35 MC appoint either the date (2) ‘of arrival at the destination’, (3) ‘on which the aircraft ought to have arrived’, or (4) ‘on which the carriage stopped’. To complicate matters even further art. 26 WC and 31 MC do not refer to the moment of delivery as such, but specify ‘receipt by the person entitled to delivery’, which also leaves one guessing as to who exactly the person entitled to delivery would be. Is that the consignee waiting at the end of the multimodal transport, or is that the next carrier in the transport chain if there is one? This large number of options and the uncertainty as to their interpretation in relation to multimodal carriage leads to the following cluttered picture in which any of the pink arrows may represent the moment in time at which a limitation period starts:





*Picture 1. The arrows represent the options for the moments (1) of receipt by the person entitled to delivery, (2) of arrival at the destination, (3) on which the aircraft ought to have arrived, and (4) on which the carriage stopped.*

A consignee will certainly hope that both periods start after the entire multimodal transport has been concluded as he is generally only able to establish the condition of the goods at the end of the entire transport, which is when he finally receives them.<sup>42</sup> But do the carriage conventions leave room for such an interpretation? Besides, the multimodal carrier may not agree that this is the best solution. Especially not when he did not perform the air carriage himself but subcontracted with another carrier for this stage. The start of the prescription period and that for timely notice of complaint will in the relation between carrier and subcontractor most certainly attach to the air stage. If this is different under the multimodal contract this may leave the multimodal carrier facing a recourse gap.

## 4.1 Recourse

In relation to the period of prescription of two years under the air carriage

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<sup>42</sup> M.A.I.H. Hoeks, *Multimodal Transport Law*, Alphen aan den Rijn: Kluwer Law International 2010, p. 14-15.

regimes the difference between the attachment to the air stage or the end of the entire transport does not necessarily have a great impact. The difference will after all most likely not be more than a few days and in singular cases a few weeks. For those who (would) get caught by this discrepancy the consequences are dire, that is true, but the chances of this happening are relatively small. Under the CMNI, the HVR and the CMR with their single year the loss of a few weeks is certainly less desirable, but as this would also hardly happen on a regular basis a recourse gap will not often occur. In relation to the timely notice of complaint these last mentioned conventions also do not make waves. After all, the failure to comply with notice rules of these regimes does not have that much of an impact. No, the problems mostly arise in relation to the notice of complaint rules in international air and rail carriage. Under the air carriage regimes, the notice can be given forthwith after the discovery of the damage, and, at the latest, within either seven (WC) or fourteen days (MC) from the date of receipt in the case of cargo. This leaves the multimodal carrier with at least one or two weeks reprieve, even if the 'receipt' were to attach to the air stage. That this may not be sufficient is shown by a case of multimodal transport, albeit not a multimodal contract, before the *Rechtbank* Amsterdam in December 1998. KLM had transported a 'wafer-stepper' from Schiphol to Los Angeles. On 8 November, 1993 a local road carrier working under a separate contract took over the cargo and transported it to its destination in Utah, where it arrived on 11 November 1993. At that point in time it is discovered that the wafer-stepper has been damaged. The consignee holds KLM liable for the damage in name of the consignor on 18 November, 1993. So only ten days pass after the delivery of the cargo by KLM in Los Angeles. Sadly for the cargo claimant the Warsaw Convention with its limit of 7 days applied to the carriage, and not the more recent Montreal regime with its slightly longer period for notice of fourteen days. The cargo claimant – or in this case the subrogated insurance company – therefore had lost its right to start legal proceedings against the carrier and could not expect to be indemnified by the air carrier.<sup>43</sup> Obviously, such a scenario could

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<sup>43</sup> Rb Amsterdam 23 December 1998, S&S 1999, 86.

just as easily have occurred under a multimodal contract with a subcontracted air and/or road stage.

Clearly, the danger is more than theoretic in relation to contracts entailing international air carriage. Yet the risk of a recourse gap is even higher when a multimodal contract provides for an international rail transport stage and damage or loss ensues from that part of the transport. After all, the COTIF-CIM gives the ‘person entitled to accept the goods’ even less time to perform those actions necessary to retain the right to claim compensation than the Montreal Convention.

Such an international rail stage in the contract may turn out to be beneficial to the carrier if the COTIF-CIM were to be applied to it and the rail stage is not the last mode of transport in the chain. In such a scenario the timely ascertainment of damage or loss provisions of the CIM may after all possibly be deemed to attach to the ‘delivery’ of the cargo directly after the rail stage. As the ascertainment has to be done before the acceptance of the goods, or – if ascertainment is indeed necessary – at the latest seven days after such acceptance in case of not apparent loss or damage, the timeframe in which ascertainment is helpful may already have passed when the goods are accepted at the end of the multimodal transport. Thus interpreted, the rules of the COTIF-CIM would often lead to an absolute protection of the carrier against liability. This pleads against such an interpretation as this result is obviously not in accordance with the purpose of the COTIF-CIM, which is to balance the risks in international rail carriage between carrier and shipper.

If the COTIF-CIM would not be applied to an international rail carriage which is part of a larger, multimodal contract, or, if the CIM would apply to such a rail stage but the moment of acceptance is ascribed to the end of the entire transport, not to the end of the rail carriage, the carrier is less likely to profit from such an escape of liability. On the contrary, the carrier may then even have to compensate the cargo claimant for the loss suffered by him, while not being able to recoup his losses thus incurred from any subcontractor he may have hired for the rail stage.

## 5 Solutions?

All in all, multimodal contracts result in quite a legal pickle in this area. But blandly spoken, fitting multimodal transport contracts in the unimodally predisposed uniform transport law framework mostly feels like trying to fit a square peg into a round hole. As there currently is only one international instrument that may possibly regulate certain types of multimodal transport in the near future, it might be rewarding to check whether this regime, being the Rotterdam Rules, provides a solution to the current conundrum.

### 5.1 The Rotterdam Rules

Not only do the RR contain art. 23 on 'notice in case of loss, damage or delay', but they also include an entire chapter on the 'time for suit', which consists of art. 62-65 RR. The hopes that the new regime will resolve both the problem in discerning at which point in time limitation periods should start in case of multimodal contracts and the recourse issue are soon quelled however. Because the RR apply to the whole multimodal contract including an international sea stage it would seem that they do provide a clear answer as to moment in time at which the limitation periods start to run. Both the time for notice and the period of limitation for actions simply start to run at the delivery at the end of the carriage, according to art. 23(1) and 62(2) RR. Yet, the rules on time for suit of the Rotterdam regime are preceded by the rules of the regime given precedence by art. 26 RR. It would be best to assume that those rules, for instance those of the COTIF-CIM or the CMR, would then attach to the end of the entire multimodal contract as well, but this is not explicitly stated. Furthermore, the RR do not resolve the situations in which the multimodal contract does not provide for international sea carriage. Although the RR may be offered as an argument for attaching the periods of delivery to the end of the entire transport contract also in those multimodal contracts not governed by the Rules, such an approach still fails to provide an answer to the question which of the potentially ap-

licable sets of rules actually regulates the length of the limitation periods and other issues that may arise. In addition, the recourse problems endure.

As the existing unimodal carriage conventions either allow the extension of the period of limitation for actions outright or refer impliedly or directly to either the national law applicable to the contract or the *lex fori*, resolving the recourse issue via the Rotterdam Rules would have been an option.<sup>44</sup> As this would constitute an intrusion into the unimodal sub-contracts entered into by Rotterdam Rules carriers and unimodal subcarriers this would extend the influence of the new Rules even farther, however, which would most likely have created a political obstacle of sorts.

The CMNI contains an example of how such a provision might be construed in art. 24(4) where it states that:

“Any action for indemnity by a person held liable under this Convention may be instituted even after the expiry of the limitation period provided for in paragraphs 1 and 2 of the present article, if proceedings are instituted within a period of 90 days commencing from the day on which the person instituting the action has settled the claim or has been served with process, or if proceedings are *instituted within a longer period as provided by the law of the State where proceedings are instituted.*”

As the article applies to ‘any action for indemnity’ it appears that even

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<sup>44</sup> See art. III(6) HVR, 24(2) CMNI, 32(3) CMR, 47 COTIF-CIM and 35 MC. Nevertheless, aside from concluding that the issue is regulated by the applicable national law where a convention does not make allowance for it, it is also possible to argue that if the convention is silent on the possibility of extending the time bar there is no such option. Berlingieri for instance offers this approach concerning the possibilities of interrupting or suspending the time bar under the HVR: “*The question arises whether where nothing is said as in the Hague-Visby Rules, the lex fori applies in respect of the causes of suspension or interruption. Since they are both special characteristics of the period of time that may affect the right or the action, they should, as a general rule, be governed by the law applicable to the period by which the right or the action may be exercised. Therefore, since that period is governed by the Convention, the lack of any provision in respect of the possible suspension or interruption entails that no suspension or interruption is permissible.*” F. Berlingieri, *International maritime conventions*, Abingdon: Informa 2014, p. 72.

actions against subcontractors who have not performed international inland waterway carriage are governed by this provision.<sup>45</sup> Whether this is indeed the intended effect is hard to ascertain as the Convention does not apply to such contracts and if the provision is thus interpreted this will be an extension of the instrument's scope of application. If the expansive approach is taken the indemnity claims to which this provision applies are either based on contracts of international or national inland waterway carriage or on contracts that do not concern carriage at all, such as subcontracts relating to terminal operations.<sup>46</sup> Which means that they are either not governed by a carriage convention or within the domain of the CMNI itself.

Unfortunately, the CMNI solution is not entirely suited to subcontracts in the multimodal sphere. To be sure, those are often CMR contracts, which should not lead to any difficulties as the CMR leaves the options for extending the limitation period to the *lex fori*. Then again, they might also concern HVR carriage and the HVR only allow the parties to agree to an extension of the limitation period in art. III(6), not another convention, and that only after the cause of action has arisen. Even the CMNI itself might be an obstacle here, as it determines that the person against whom an action is instituted may at any time during the limitation period extend that period by a declaration in writing to the injured party, but

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<sup>45</sup> An example of such an effect can be found in art. 8:1720 of the Dutch Civil Code which determines that a new period of limitation of three months starts if the carrier or a consignor wishes to start a recourse action against one of the parties in the 'exploitation chain' as described in art. 8:361 DCC. These parties are for instance the owner of the vessel, vehicle or airplane, the carrier, the charterer(s), the subcarrier(s) or the consignor. The action itself does not have to be based on a 'contract of exploitation' however, but can also be based on tort for instance. For carriage under a bill of lading a separate article exist, art. 8:1712 DCC, which also provides a three month limitation period for indemnity actions. M.W.E. Koopmann, *Bevrijdende verjaring*, Deventer: Kluwer 1993, p. 138-139. Under German transport law a limitation period of an extra three months is also provided for recourse actions, but without the extra restrictions found in the Dutch article. § 439(2) German Commercial Code.

<sup>46</sup> Where the CMNI specifically states that the person instituting the action for indemnity has to have been held liable under the CMNI the HVR apparently requires the indemnity action to be based on the HVR according to *The Xingcheng and The Andros* [1987] 1 WLR 1213, PC. See S. Baughen, *Shipping Law*, Abingdon: Routledge 2012, p. 119.

does not mention any other possibilities to extend the period.

## 5.2 Interpretation

An alternative answer may perhaps be found in interpreting the conventions in such a manner that when applied to multimodal contracts, their prescription periods start to run at the end of the contract as a whole, and not at the end of one of the transport stages. Naturally this would cause an expansion of the risk of recourse gap, and is a hard selling point in relation to those conventions that use identical terminology in their scope of application provisions as well as in the provisions regulating their period of limitation. The CMR for instance uses the term ‘delivery’ in its scope of application provision art.1, but also in the article determining the period of responsibility of the CMR carrier, art. 17, and in the article detailing the period of limitation, art. 32. If the CMR is to apply to the international road stages of a multimodal contract, such as was deemed appropriate in *Quantum*, it is necessary to imbue the term delivery with more than one meaning. This is not unheard of, as many words differ in meaning depending on their context, but it is rather a ‘hard sell’ in an area of law that thirsts for legal security.<sup>47</sup>

Nevertheless, the simple fact of the matter is that starting the limitation periods at the end of the multimodal carriage would be the fairest solution for the cargo claimant. In addition there are certain other arguments for such an interpretation to be found as well. The first one that can be mentioned is the application of the Montreal Convention to the international carriage of cargo performed by aircraft for reward, even if said carriage is part of a multimodal contract.<sup>48</sup> Given this fact it would mean that the consignee is forced to examine the goods after the air carriage stage, even if this is not the last part of the journey, if the limitation periods would adhere to the air stage. Besides being far from practical or even possible at times, preventing this necessity is typically

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<sup>47</sup> *Quantum Inc v. Plane Trucking Ltd* [2002] 2 Lloyd’s Rep. 25; M.A.I.H. Hoeks, *Multimodal Transport Law*, Alphen aan den Rijn: Kluwer Law International 2010, p. 147-149 and 206-207.

<sup>48</sup> Art. 1 and 38 MC.z

one of the reasons why a shipper would decide to contract with a multimodal carrier instead of having a freight forwarder find separate carriers for the stages of the intended transport.

A second reason for attaching to the end of the contract, to the moment the consignee is finally able to examine the cargo, can be distilled from the fact that at times not even the delivery under unimodal contracts attaches to end of the actual carriage. Cargo may be stored for quite some time between discharge and delivery. This does not mean that the limitation periods start to run at the moment of discharge however, not even if the storage is not governed by the rules applicable to carriage.<sup>49</sup> Furthermore, even unimodal carriage can consist of more than one stage, and as long as the carriage is performed based on a single contract, the limitation period starts at the delivery at the end of the entire transport. *The Sonia* is an example of this. In this case the English Court of Appeal dealt with the fact that the cargo was not delivered at the initial destination but was carried to another place, as agreed between the parties at the original destination.<sup>50</sup> 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, according to the Court. Had the cargo been delivered under a new and separate contract, the limitation period would have started to run at the time when the cargo ought to have been delivered under the original contract. In *The Sonia* the on-carriage had still been part of the original contract, however, only with some alterations, so that delivery under said contract had taken place at the final destination. Thus, the one year time limit of art. III(6) HVR started at that later date.<sup>51</sup>

Another illustration of dealing with multi-stage unimodal transport can be found in art. 47(3) COTIF-CIM, which states that if the cargo has

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<sup>49</sup> HR 22 January 1993, NJ 1993, 456; S&S 1993, 58 (*Van Loo/Wouters*).

<sup>50</sup> *Trafigura Beheer BV v Golden Stavraetos Maritime Inc.*, [2003] 2 Lloyd's Rep. 201 (*The Sonia*).

<sup>51</sup> M.A.I.H. Hoeks, *Multimodal Transport Law*, Alphen aan den Rijn: Kluwer Law International 2010, p. 263.



been reconsigned rights of action in case of partial loss or in case of damage, arising from one of the previous contracts of carriage, shall be extinguished as if there had been only a single contract of carriage. Where in *The Sonia* the limitation period would only start at the later delivery if both stages of transport had been part of the same contract, this provision of uniform law even expands the possibility to carriage which is performed under multiple contracts. It should be noted that the consignments and reconsignments covered by this article naturally only concern COTIF-CIM carriage.<sup>52</sup>

All things considered, interperation does seem to be an option, but not a very certain one. If the contracting parties wish to ascribe the start of the time bars to the end of the entire transport they can always choose to clarify this in their contract on the off chance that this will fortify their position, plus extend the limitation periods in advance even if this is not always allowed. In addition they can separately agree to extend the periods of limitation after the cause of action has arisen in combination with a choice of forum and a choice of law if necessary, as some of the carriage conventions and certain national regimes explicitly allow this.

To evade any recourse gaps the multimodal carrier should, where possible, also try to implement the last two options.

## 6 Conclusion

Where periods of limitation concerning actions as well as the notice of complaint are apparently necessary to keep international trade going, they do at times have a considerable ‘sting’. In cases where time barred actions may not even be brought as a counterclaim of set-off by the cargo claimant, while there are no time bars on actions by the carrier under the convention, in cases such as the multimodal air and road transport brought before the *Rechtbank Haarlem*, where the period for notice had already just about expired before the consignee even had a chance to

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<sup>52</sup> Art. 47 COTIF-CIM thereto refers to art. 28 COTIF-CIM.

check the goods, the consequences for the cargo claimants are very harsh. The harshest of all being the necessity of having the carrier ascertain the damage or loss to the cargo even before it has been accepted on pain of the extinction of right of action against the carrier, as prescribed by the COTIF-CIM.

When applying such rules to multimodal contracts matters seem to cross over from merely harsh to unfair if done on purely 'network approach' basis. If the time bars are attributed to the separate stages of the transport, they will be unduly shortened if the stage where the loss or damage occurred was not the last stage of the transport. But even if the end of the entire multimodal contract were to serve as the starting point for the limitation periods, this would not solve all problems. On the contrary, it would even create some. It is true that it would lead to a fairer situation for the consignee, but it would not for the multimodal carrier who subcontracts part of the transport. For that carrier recourse gaps may ensue.



# Freight Integration

Legal Hindrances to a More Efficient  
Model of Transportation

Wouter Verheyen  
Assistant professor, Erasmus University, Rotterdam  
Lecturer Odisee University College, Brüssel

## **Abstract**

In freight integration contracts the determination of the means of transportation is left to the discretion of the carrier. Such freedom allows for a more efficient transportation. For this reason freight integration is increasingly popular in hinterland logistics and parcel distribution. This innovation in practise conflicts however with the existing legal framework. First of all when the carrier can freely decide upon the means of transportation, his role evolves more and more to that of a transport architect. By doing this, the distinction between carrier and freight forwarder or commissionaire de transport dissolves even more. Secondly, the freedom to select the mode of transportation seems to conflict with the mode specific nature of carriage law. Confronted with these frictions, in this article it is investigated whether the current legal framework still allows for legal certainty in case of freight integration.

## **Key words**

Freight integration, transport, legal certainty, mandatory law, carrier liability, transport intermediary

## **Contact**

Wouter Verheyen, assistant professor, Erasmus University, Burgemeester Oudlaan 50, 3062 PA Rotterdam, The Netherlands. Lecturer Odisee University College, Stormstraat 7 1000 Brussel, Belgium.

E-mail: [verheyen@law.eur.nl](mailto:verheyen@law.eur.nl)

# 1 Introduction

Freight integration contracts are carriage contracts where the carrier enjoys a (sometimes limited) choice to freely select the means of transportation. This freedom offers great opportunities for a more efficient transportation, as the carrier can take into account factors that are unknown at the time of the conclusion of the contract. This allows for economic benefits, what results in a rise of freight integration in parcel distribution and integrated (hinterland) container transport. However, freight integration causes legal uncertainty to the contract parties at the time of the conclusion of the contract, both at the level of the qualification of the contract and, in case of qualification as a carriage contract, at the level of the governing carriage law. Consequently the legal framework can create a hindrance to the further development of freight integration. After outlining the uncertainties, the article examines possibilities for parties to contractually create certainty and makes proposals for possible legal interventions. The main focus lies on the second ground of uncertainty, after touching shortly upon the first ground of uncertainty.

## 1.1 Problem statement

### 1.1.1 Freight integration: opportunities for a more sustainable transport

For shippers, the means of transportation is often a non-issue.<sup>1</sup> The shipper is interested in having the goods at the right time in the right place, without any damages to the cargo, and all of this at the best possible price. The carrier can offer a better price, by not committing to a specific means of transportation, since this allows him to take into account all relevant factors influencing the transport costs at the time of the performance of the contract (available capacity, quantity of goods to be sent to a specific place, extreme traffic disturbance, time of arrival of the goods at the (air)port).<sup>2</sup> This advantage and the support by local and European governments<sup>3</sup> induce the growth of freight integration contracts.

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<sup>1</sup> See for example: Ramberg Jan. *The Law of Carriage of Goods – Attempts at Harmonization*, in: SSL 1973, 212, 241; Ramberg Jan. *Global unification of Transport Law: a hopeless task?*, in: Penn.St.Int'l L.Rev (2008-09), 851, 855; ZLU e.a., “Studie on Freight integrators, to the commission of the EU, Final report”. Berlin 2003.[http://ec.europa.eu/transport/logistics/documentation/freight\\_integrators/doc/final\\_report\\_freight\\_integrators.pdf](http://ec.europa.eu/transport/logistics/documentation/freight_integrators/doc/final_report_freight_integrators.pdf), 38 [visited 27 November 2014].; Kh. Brussels 19 August 1999, *RHA* 2001, 242; Basedow Jürgen. *Der Transportvertrag*. Tübingen, (J.C.B. Mohr) 1987, 289-291; De Wit Ralf. *Multimodal transport: carrier liability and documentation*, London, (Lloyd’s of London Press) 1995, 171; Reuschle, Fabian. *HGB 407 Frachtvertrag* in: Ebenroth/Boujong/Joost/Strohn, *Handelsgesetzbuch* (2nd ed.). München, (Beck) 2009, nr. 6.

<sup>2</sup> ZLU e.a., “Studie on Freight integrators, to the commission of the EU, Final report”, Berlin 2003, [http://ec.europa.eu/transport/logistics/documentation/freight\\_integrators/doc/final\\_report\\_freight\\_integrators.pdf](http://ec.europa.eu/transport/logistics/documentation/freight_integrators/doc/final_report_freight_integrators.pdf), 1 [visited 27 November 2014]; Demsey, Paul. *The law of intermodal transportation: what it was, what it is, what it should be*. In: Trans.L.J. 2000, 367, 383-386.

<sup>3</sup> See for Europe; Communication from the commission, The EU’s freight transport agenda: Boosting the efficiency, integration and sustainability of freight transport in Europe, Brussel, 18 October .2007, COM(2007)606 final; See for the Netherlands :Topteam Logistiek, “Adviesrapport Topteam Logistiek Partituur naar de top”, [http://topsectoren.nl/documenten/logistiek/Partituur-naar-de-Top-Adviesrapport-Topteam-Logistiek-2011\\_2013-10-01\\_52.pdf](http://topsectoren.nl/documenten/logistiek/Partituur-naar-de-Top-Adviesrapport-Topteam-Logistiek-2011_2013-10-01_52.pdf), 15 and 38 [visited 27 November 2014]; see for Flanders: VIL, “Extended gateway Vlaanderen, een werve(le)nd project voor logistiek Vlaanderen”, Antwerp 2008, <http://www.slideshare.net/wjzondag/extended-gateway-vlaanderen-vrp-03-06-08-presentation> [visited 27 November 2014].

This is mainly the case for parcel distribution services, where freight integration has become standard business practice.<sup>4</sup> Nevertheless, also in hinterland transportation and door-to-door container transport, there is a growth of freight integration.<sup>5</sup>

*Table 1 Types of freight integration*

	<i>Type of freight integration</i>	<i>Alternative means of transportation</i>
Type I	Parcel transportation	Rail-road-air
Type II	Integrated container transportation	Door to door: rail-road-inland waterways-sea
Type III	Integrated hinterland logistics	Hinterland stretch: rail-road-inland waterways-short sea shipping

### 1.1.2 *Freight integration: challenging the legal framework?*

The mandatory nature of uniform carriage law is defended by the fact that this enhances legal certainty and thus facilitates trade.<sup>6</sup> Legal certainty requires the possibility to predict the possible liability exposure in case of a non-performance of the contract at the time of conclusion of the contract. The research question underlying this research is whether the current legal framework allows for such legal certainty in case of

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<sup>4</sup> United States International Trade Commission, *Express Delivery Services: Competitive conditions facing U.S.-based firms in foreign markets*, USITC-publication, 3678, 2004, p. 2-5; Helm Johann Georg, *Handelsgesetzbuch: Grosskommentar: Frachtgeschäft*, Berlin, (de Gruyter) 1994, 8; OLG Düsseldorf 12 March 2008, I-18 U 160/07, openJur 2011, 61131.

<sup>5</sup> See footnote 5.

<sup>6</sup> See for example: HAAK, Krijn. *Uniform vervoerrecht: verwezenlijking en beperking*. In: *Eenvormig bedrijfsrecht, realiteit of utopie?* Den Haag, (Boom Juridische uitgevers) 2006, (183) 186; Debattista, Charles. *Carriage conventions and their interpretation in English courts*. In: JBL 1997, (130) 137 and 140 (“*Harmonisation in the drafting and interpretation of laws is frequently assumed to be the highest goal of legal endeavour. However, this goal may be difficult to attain in specialist areas of commercial law- like the law of carriage...Where this is the case, predictability in practice between parties in dispute may be a more realistic and desirable aim than uniformity between the courts applying conventions in different countries.*”).



freight integration. This is only possible insofar the judge's decision in case of a possible dispute can be predicted at the time of conclusion of the contract, and this as to the following two questions. First, whether the contract will be qualified as a carriage contract by the competent court and second, if the contract is qualified as a carriage contract, what carriage law will be applied. As transport intermediary law is not governed by uniform law, also the qualification of the contract will be very much influenced by the judge's national perspective. Therefore for the first question, this research looks into the perspective taken by courts in Belgium, France, Germany, the Netherlands and the UK. For the second part, the focus lies mainly with the international carriage conventions,<sup>7</sup> even though reference is being made to good practices in national carriage law. The pertinence of these questions lies in the strong diverging liability rules that can be applicable in case a different answer is given to these questions. This is evidenced in the table below, where the possible liability exposure of the service provider is given for all possibly applicable liability regimes in case of an international parcel distribution contract.

This figure evidences that both possible grounds of uncertainty can stand in the way of an accurate estimation of this exposure to risk for both parties to the contract at the time of the conclusion of the contract and to decide upon the appropriate insurance. Due to the mandatory nature of carriage conventions, it is also very difficult for parties to contractually create legal certainty if carriage law doesn't provide this itself

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<sup>7</sup> In this article, the following Conventions are being referred to: Convention on the Contract for the International Carriage of Goods by Road (CMR), Geneva, 19 May 1956; Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 28 May 1999 (Montreal Convention); Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM), Appendix B to the Convention concerning International Carriage by Rail (COTIF), Bern, 9 June 1999 (COTIF-CIM); Budapest convention on the contract for the carriage of goods by inland waterway (CMNI), Budapest 22 June 2001. *De lege ferenda* also The Rotterdam Rules (United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Rotterdam, 23 September 2009) are taken into account.

*Table 2 possibly applicable liability regimes in case of international parcel distribution*

Qualification	Applicable liability regime	Liability standard	Liability limits?	Mandatory
Qualification as a carrier	Montreal Convention (Air transportation)	Presumed liability	19	Yes
	CMR (Road transportation)		8,33	
	COTIF-CIM (Rail transportation)		17	Often
	National (carriage) law (subsidiary)		Depends	
Qualification as a transport intermediary	Commissionnaire de transport (fr.)	(mostly) Fault based liability	Unlimited	(mostly) no
	Freight forwarder (acting as an agent)			

### 1.1.3 Research questions

In order to assess whether the parties can anticipate the judge's decision in a later dispute, all steps in the judge's decision making process have to be predictable. As unification in logistics law is limited to some parts of carriage law and even in the fields that are unified, national judges come to diverging judgements, an additional precondition for legal certainty is that the liability exposure needs to be identical irrespective of the national law applicable and the court seized or, if this condition is not fulfilled, that the competent court and applicable law can be predicted at the time of the conclusion of the contract. These considerations bring us to the following research questions (table 2).

After a short introduction the results of the research at the level of the qualification of the contract, the focus of the rest of this article will lie with the second sub-question, the assessment of the applicable carriage law, in case of a qualification as a carrier.

Table 3 Decision making process and research questions

	Judge's decision making process	Research question	Legal certainty?
Qualification	Can freight integration contract be qualified as carriage contract?	Does consensus exist in different countries with regards to the essential character of the determination of the means of transportation?	If consensus OR if competent court is predictable at time of conclusion of the contract.
	Will the specific contract be qualified as a carriage contract, taking into account all relevant elements from the specific case?	Is qualification of a contract as carriage contract or forwarding contract/ <i>contrat de commission</i> based on uniform elements that are known at the time of the conclusion of the contract?	If consensus OR if competent court is predictable at time of conclusion of the contract + if fulfilment of conditions can be predicted at the time of conclusion of the contract.
Liability in case of qualification as carrier	What means of transport was used? Does the regime applicable to this means of transport apply to freight integration contracts?	Do carriage conventions have a real scope (applicability depends on way of performance of the contract) OR a contractual scope (applicability depends on means of transport contractually agreed upon)?	Only if conventions have a contractual scope. In case of a real scope applicability depends on the means of transportation, and leads to unpredictability in case of freight integration
	Is consent at the time of conclusion required?	Does consensus exist with regards to the question whether consent at the time of the conclusion of the contract is required in case of a convention with a contractual scope?	Only in case there is consensus that consent is required at the time of the conclusion of the contract.
	In case of a contractual scope: is the condition for applicability fulfilled in the specific contract?	Does a consensus exist with regards to the possibility of an implied consensus? Are the elements taken into account to decide whether there is an implied consent predictable at the time of the conclusion of the contracts?	Only if such implied consent is based upon elements that are known at the time of the conclusion of the contract.
	If yes: Can there be an implied consent?		

## 2 First ground of uncertainty: uncertainty with regards to the qualification of the contract as a carriage contract<sup>8</sup>

Taking into account the strongly diverging liability regime, it should come as no surprise that disputes about the qualification of the service provider are omnipresent in cargo claims. Even though this problem is not specific to freight integration contracts, some specific features of freight integration contracts add to uncertainty on this point.

### 2.1 Can a freight integration contract be qualified as a carriage contract?

A first question is whether an international consensus exists with regards to the question whether a freight integration contract can be qualified as a carriage contract. Some prominent authors in France and Belgium argue that the agreement on the means of transportation is an essential characteristic of the contract of carriage.<sup>9</sup> According to this interpretation, a freight integration contract cannot be qualified as a contract of carriage. Some lower case law confirms this point of view.<sup>10</sup> A vast majority of case law and doctrine however, considers the determination of the means of transportation accessory to the contract of carriage.<sup>11</sup> As also contemporary

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<sup>8</sup> See more in depth on this question: W. Verheyen, Verheyen, Wouter, Could (contractual incorporation of) DCFR be an answer to the lack of harmonization in the field of forwarding law?”, JICCL 2015, 82-89.

<sup>9</sup> Rodière, René. *Droit des transports terrestres et aériens*. Paris, (Daloz) 1977, 228; Rodière, René and Barthélémy Mercadal, *Droit des transports terrestres et aériens*. (4th ed.). Paris, (Daloz) 1984, 172; Le Tourneau, Philippe. *Contrat de transport*. In: Rép.civ.Daloz 2007, 2; Fredericq, Louis. *Handboek van het Belgisch Handelsrecht*, Brussel, (Bruylant) 1980, 174.

<sup>10</sup> Kh. Brussels 30 January 2014, TBH 2014, 926; Vred. Overijse-Zaventem 28 May 2003, AR 01A409 (not published)

<sup>11</sup> See for example; Basedow, Jürgen. *Der Transportvertrag*. Tübingen, (J. C. B. Mohr) 1987, 58-59; Koller, Ingo. *Transportrecht Kommentar*, (6th. Ed.), München, (C. Beck) 2007, 57; Clarke, Malcolm and David Yates. *Contracts of carriage by land and air*, (2nd. Ed.), Londen, (Informa) 2008, 3. See also the case law cited in the second part

French and Belgian authors take this perspective,<sup>12</sup> a strong consensus seems to exist and thus there is no uncertainty about this first point.

## 2.2 Will a freight integration contract be qualified as a carriage contract?<sup>13</sup>

A second question is whether qualification of a contract as carriage contract or forwarding contract<sup>14</sup> / *contrat de commission* is based on uniform elements that are known at the time of the conclusion of the contract. Some typical characteristics of freight integration, such as the fact that he will play a more prominent role as organiser of the transport, the forwarder's characteristic obligation,<sup>15</sup> make the fine line<sup>16</sup> between carrier and transport intermediary even finer.<sup>17</sup> Even though we defined

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of the research, where a qualification as carrier is upheld, even though the means of transport was not agreed upon in the contract.

- <sup>12</sup> See for example: Paulin, Christophe. *Droit des transports*, Paris, (Lexis Nexis) 2005, 196 ; Reuschle, Fabian. *HGB 407 Frachtvertrag*. In: Ebenroth/Boujong/Joost/Strohn, *Handelsgesetzbuch*. (2nd ed.), München, (Beck) 2009, n° 6; Putzeys, Jacques. *Droit des transports et droit maritime*. (2nd ed.), Louvain-la-Neuve, (Bruylant) 1989, 127.
- <sup>13</sup> As the focus in this article lies with the second research question, this article contains only a recap of earlier research on this point. For an in depth analysis of the results of this part of the research, see: Verheyen, Wouter. *Contractuele aansprakelijkheid van vervoersintegratoren*. Brugge (Die Keure) 2014, 65-282; Verheyen, Wouter, Could (contractual incorporation of) DCFR be an answer to the lack of harmonization in the field of forwarding law?, JICCL 2015, 82-89; Verheyen, Wouter. *Harmonisation instruments: the way forward for forwarding law?* In: Common Core, PECL and DCFR: could they change shipping and transport law? Cambridge, (Metro) 2015, 111-127.
- <sup>14</sup> Where reference is here being made to a forwarding contract, this is to be understood as forwarder as an agent.
- <sup>15</sup> See for example: Rinkler, Axel. *§ 453 Speditionsvertrag*. In: Ebenroth / Boujong / Joost / Strohn, *Handelsgesetzbuch* (2th ed.). München, (Beck) 2009, n°65.
- <sup>16</sup> See for example: Claringbould, Maarten. *De aansprakelijkheid van de expeditie. Over 'vervoer of expeditie' en gewoonte*. In: NTHR (2008) 55, 56; Guignard, Laurent. *Sous-traitance et transport*. Paris, (Litec) 2001, 436-461. See for Germany: § 437 HGB; Merkt Hanno. *HGB § 407 Frachtvertrag*. In: Baumbach/Hopt, *Handelsgesetzbuch*. (35th ed.). München, (Beck), 2012, n°. 18; Czerwenka, Beate. *HGB § 407 Frachtvertrag*. In: Münchener Kommentar zum Handelsgesetzbuch: §§ 407-475h. *Transportrecht*. (2nd ed.). München, (Beck) 2009, n°. 114; Loyens, Jan. *Handboek transportrecht*. Antwerp (Intersentia) 2011, 379.
- <sup>17</sup> The fact that the service provider organises the transport doesn't stand in the way of

a freight integration contract as a contract between the integrator and the shipper where the integrator undertakes to carry the goods, in practice it is often very difficult, if not impossible to ascertain the obligation the service provider took upon himself as explicit stipulations on this point are lacking or dubious.<sup>18</sup> Therefore, the contract qualification can often only be deducted from other elements. Here, there are two threats to the predictability of a later qualification: 1) the relevant context to be taken into account to qualify the contract as a carriage contract or rather as transport intermediary contract and 2) the availability of consensus in different countries on this point. The research evidences that none of the two conditions are fulfilled.

Uncertainty with regards to the qualification of the contract exists mainly in France. First of all, unlike in other countries,<sup>19</sup> there is no presumed qualification as a carrier in case of doubt.<sup>20</sup> Secondly, the

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a qualification as carrier: Paulin, Christophe. *Réflexions sur la distinction entre contrat de transport et contrat de commission de transport*. In: études sur le droit de la concurrence et quelques thèmes fondamentaux, mélanges en l'honneur d'Yves Serra. Paris, (Daloz) 2006, (325) 331. ("*La liberté d'organisation n'est donc pas absente du contrat de transport*").

<sup>18</sup> These problems are recognised in all countries: See for Belgium: Antwerp 27 Januari 1967, *ETL* '68, 1244; Noels, Dirk *De tussenpersonen in het transport*. Gent, (Mys en Breesch) 1996, 25-26. See for France : Cass. fr. 17 Februari 1998, *BTL* 1998, 419; Tilche, Marie. *Commission, transport, où est la différence?* In: *BTL* 2000, 285; Paulin, Christophe *Droit des transports*, Paris, (Lexis Nexis) 2005, 269. See for Germany Reuschle, Fabian. *HGB 407 Frachtvertrag*. In: Ebenroth/Boujong/Joost/Strohn, *Handelsgesetzbuch*. (2nd ed.), München, (Beck) 2009, n°41. See for Holland: Claringbould, Maarten. *De aansprakelijkheid van de expediteur, Over 'vervoer of expeditie' en gewoonte*. In: *NTHR* 2008, 55-56; Haak, Krijn and Dick Zwitser, *Opdracht aan hulppersonen over logistieke dienstverlening in het vervoer*. Deventer, (Kluwer) 2003, 462 .

<sup>19</sup> See for example: Brussels 11 October 1990, *RGAR* 1992, 11962; Van Aar v. Compagnie Europeene de Contraction Stone, Hof 's Hertogenbosch 7 April 2009, *S&S*, 2011, 35; QB 17 November 1993 *Aqualon (UK) Ltd / Vallana Shipping Corp* [1994] 1, *Lloyd's Rep.*, 669.

<sup>20</sup> See for examples where this element was taken into account: Cass. fr. 17 November 1965, n 61-10. 968, *BT*, 1966, 38. Cass. fr. 22 January 2002, n° 98-18. 975; Cass. fr. 5 February 2002, n° 00-12. 045; Paris, 28 March 1977, *BT*, 1977, 348; *CA Aix-en-Provence 13 January 2004*, n 00/07876. , *Lamyline*. See also Guignard, Laurent. *Sous-traitance et transport*. Paris, (Litec) 2001, 444; Bazin-Beust, Delphine and Jocelyne, Vallansan. *Commission de transport*. In: *J. Cl. Trans.* , Fasc. 612, n°. 23; Delbecque, Philippe. Cass. 8 november 2004, *RTD Com*, 2005, 871 (note). With the *Code des transports*

context after the conclusion of the contact plays a much more prominent role. This context can in other countries only lead to a -for the service provider- less favourable qualification as a carrier,<sup>21</sup> in France it will on the contrary often support a qualification or liability as *commissionnaire de transport*. While the lack of actual carriage by the service provider is for example not taken into account at all in other countries to support a qualification as freight forwarder,<sup>22</sup> in France subcontracting the carriage traditionally supported a qualification as *commissionnaire de transport* and the *Code des Transports* even installs the liability as a *commissionnaire* for the subcontracting road carrier. Moreover, a sometimes opposite weight will be attributed to other elements that are taken into account in other countries to support a qualification as carrier. While freight consolidation or the billing of a lump sum (both relevant in case of type I integration), will in some other countries mainly support a qualification as carrier<sup>23</sup> and will in Germany automatically lead to liability of the freight forwarder as a carrier,<sup>24</sup> in France these elements are taken into account to support a qualification as *commissionnaire de transport*.<sup>25</sup>

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this element gained even more importance: L 3224-ICTF (“*Les responsabilités du transporteur routier qui recourt à la sous-traitance sont celles prévues par le Code de Commerce pour les commissionnaires*”); Kerguelen-Neyrolles, Bernadette. *Lamy transport tome 2, commission de transport, mer, fer, air, commerce extérieur*. Rueil-Malmaison, (Lamy), 2012, 11.

<sup>21</sup> See footnote 21.

<sup>22</sup> Ghent 5 November 2003, RW 2006-‘07, 177; Kh. Brussels 12 February 1977, ETL 1978, 285; Hof ’s-Hertogenbosch 17 December 1990, S&S 1991, 77; QB 12 Oktober 1979, LLRep 1981, 192

<sup>23</sup> See with regards to cargo consolidation: for Germany:§ 460 HGB; Merkt Hanno. *HGB “§ 460 Sammelladung*. In: Baumbach/Hopt, *Handelsgesetzbuch*. ( 35th ed.). München, (Beck), 2012, 1; Rinkler, Axel. *§ 460 Sammelladung*. In: Ebenroth / Boujong / Joost / Strohn, *Handelsgesetzbuch* (2th ed.). München, (Beck) 2009; Ramberg Jan, *Unification of the law of international freight forwarding*. In: RDU 1998, 5, 8.

<sup>24</sup> see for Belgium: Kh. Brussels 23 November 1983, TBH 1984, 316. See for the UK: Colley v. Brewer’s wharf & Transport, KB 5 October 1921, Lloyd’s Rep 1921, 5; Aqualon (UK) Ltd v. Vallana Shipping Corp, QB 17 November 1993, Lloyd’s Rep. 1994, 669; QB 12 October 1979, ETL, 1984, 411.

<sup>25</sup> Bazin-Beust, Delphine and Jocelyne, Vallansan. *Commission de transport*. In: J. Cl. Trans. , Fasc. 612, 14-15. See contra a decisive weight of the consolidation activities: Paris 17 May 1996, BTL 1996, 400; see however pro such role: Versailles 6 March 1997, BTL 1997, 668.

Therefore, certainty regarding the qualification would only be possible if parties can have certainty with regards to the incompetence of the French courts at the time of the conclusion of the contract.

Such certainty could be obtained under the Brussels I-Regulation (the EU Regulation regulating the competent court in civil and commercial matters) by incorporating an exclusive jurisdiction (derogative) clause in the contract. An exclusive jurisdiction clause is however not permitted under CMR COTIF-CIM and Montreal Convention.<sup>26</sup> Therefore, legal uncertainty with regards to the qualification of the contract is possible, if the French court can be competent under one of the rules of such Convention or under article 2 or 5 of the Brussels I-regulation<sup>27</sup> (in case of a qualification as *commissionnaire de transport*).

### **3 Second ground of uncertainty: uncertainty with regards to the applicable carriage law**

In case the contract is qualified as a carriage contract, the question arises whether parties can have certainty with regards to the applicable carrier liability regime at the time of the conclusion of the contract. A first question is whether the framework is adequate for freight integration. This means that the framework facilitates freight integration, by providing a uniform liability regime that is applicable irrespective of the means of transportation that is chosen for the performance of the contract. If such

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<sup>26</sup> Article 31 CMR; 33.1 Montreal Convention and article 46.1 COTIF-CIM; Antwerp 30 January 1980, RW 1983-84, 2171; Rb. 's Gravenhage 23 November 1983, S&S 1984, 114. See also: De Meij, Pelle. *Samenloop van CMR-verdrag en EEX-verordening*. Deventer, (Kluwer), 2003, 158; Hartenstein, Olaf and Fabian, Reuschle. *Handbuch des Fachanwalts Transport- und Speditionsrecht* Köln, (Luchterhand) 2010, 452-453; Haak, Krijn. *The liability of the carrier under the CMR* Den Haag, (Stichting vervoeraadres), 1986, 282; Grignon-Dumoulin, Stéphanie. *Forum Shopping- article 31 de la CMR*. In: RDU, 2006, 609, 611.

<sup>27</sup> Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 16 January 2001, L 12/1.



an adequate framework does not exist, we examine whether parties can have certainty with regards to the non-applicability of carriage conventions. Applicability would obviously be preferable, because in the second situation, this question would again be left to the fragmented national law, likewise adding to the transaction costs.

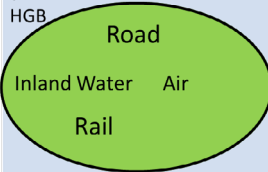
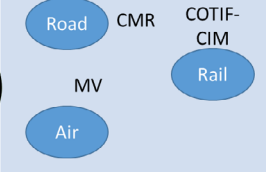
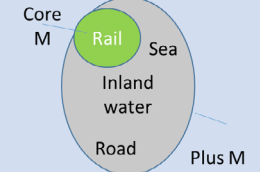
### 3.1 Is the legal framework adequate for freight integration?

#### 3.1.1 Adequateness for freight integration?

For the purpose of this research we define the adequateness of a legal framework as the ability to provide legal certainty by applying to a contract. Consequently the legal framework can only be adequate for freight integration insofar this service is governed 1) by a single liability regime 2) that is definitely applicable. In order to be adequate, it is required that all alternative means of transportation, which can be used to perform a specific type of freight integration, fall within the scope of the same carriage regime. The means of transportation that fall within the scope of a specific regime, are hereafter referred to as the *mode* of the specific regime. This mode can be divided in the core-mode, containing the means of transportation that trigger the applicability of the specific regime and the plus-mode, containing the means of transportation to which the application of the regime extends, if the applicability is triggered. A look at the Rotterdam Rules could clarify the difference between the core-mode and the plus-mode. Article 1.1 provides that “*The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.*” Consequently, the convention only applies to contracts for the carriage by sea (core-mode), but if there is such a contract, also other means of transportation fall

within the scope<sup>28</sup> (plus-mode).<sup>29</sup> Figure I gives an example of regimes that are (not) adequate for different types of freight integration.

Figure 2 Adequateness of the legal framework for freight integration

Type I and 3: example of adequate framework: German national law	Type I: example of inadequate framework: international law	Type III: example of adequate framework: COTIF-CIM
§ 407 HGB 		

### 3.1.2 Adequateness for Type I and II integration

The core-mode of international conventions<sup>30</sup> is to a large extent limited to carriage by a specific type of infrastructure or sometimes even to a specific type of vehicle.<sup>31</sup> Consequently, separate regimes exist for car-

<sup>28</sup> See for example on this plus-mode: Berlingieri, Francesco. *Multimodal aspects of the Rotterdam Rules*. [www.rotterdamrules2009.com](http://www.rotterdamrules2009.com), 2 [visited 27 November 2014]; Diamond, Anthony. *The Rotterdam Rules*. In: LMCLQ 2009, 445, 451-452; Lake, Michael. *Ships, planes, trains and automobiles: how far inland do the Rotterdam Rules reach?*. In: NZBLQ 2010, 312, 314; Sturley, Michael. *Scope of application*. In: The Rotterdam Rules 2008. Alphen a/d Rijn, (Wolters Kluwer) 2010, 39, 41.

<sup>29</sup> See similarly: article 1.1 (core-mode) and 1.3/1.4 (plus-mode) COTIF-CIM.

<sup>30</sup> Book 8 Dutch BW and the Belgian carriage laws are similarly structured to the conventions.

<sup>31</sup> The mode of CMR doesn't expand to all transport by road, but is limited to transport by road by means of motorized vehicles. Mainly for sustainable city logistics this can be disadvantageous (See further sub paragraph 1.3.1.3).

riage by road,<sup>32</sup> rail,<sup>33</sup> inland waterways,<sup>34</sup> air<sup>35</sup> and sea.<sup>36</sup> Therefore, the modes of transportation are very narrow and are not adequate for type I and II integration. In For example German national law, however, the mode of transportation is much broader, as the regime of §407 and further HGB governs all non-maritime transport.<sup>37</sup> Therefore, both type I and III integration are governed by a uniform regime.

### 3.1.3 Adequateness for Type III integration

While the core-modes of international conventions are not adequate for Type I and II integration, some conventions do contain a plus-mode that makes them adequate for Type III integration. As illustrated above, both Rotterdam Rules and COTIF-CIM, have such a plus-mode.<sup>38</sup> As this plus-mode expands to carriage by rail, road or inland waterways, both regimes are fit for freight integration.

Montreal Convention only contains a plus- resumption: damage that can have arisen during carriage by another means of transport for the purpose of loading, unloading or transshipment is presumed to have arisen during the carriage by air, subject to proof of the contrary.<sup>39</sup> Of course, this plus-mode cannot cause the necessary certainty, because, if it can be established where the damage came into existence, these rules do not apply. Especially for intercontinental parcel-distribution, this is a major shortco-

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<sup>32</sup> Article 1 CMR.

<sup>33</sup> Article 1 COTIF-CIM.

<sup>34</sup> Article 1.1 *jo.* article 2 CMNI.

<sup>35</sup> Article 1.1 Montreal Convention.

<sup>36</sup> Article I(b) *jo.* article 2 Hague-Visby; article 2 Hamburg Rules; Article 1. 1 *jo.* Article 5.1 Rotterdam Rules.

<sup>37</sup> § 407 (3) HGB (“*das Gut zu Lande, auf Binnengewässern oder mit Luftfahrzeugen befördert werden soll*”)

<sup>38</sup> See *supra* title 1.3.1.1.

<sup>39</sup> Article 18.4 Montreal Convention Hartenstein, Olaf and Fabian, Reuschle. *Handbuch des Fachanwalts Transport- und Speditionsrecht* Köln, (Luchterhand) 2010, 555-556; Clarke, Malcolm. *Carrier’s liability in cross-border air cargo substitute transportation*. *TranspR*. 2005, 182, 183; Hoeks, Marian. *Multimodal transport including a rail stage since the Vilnius protocol*. In: *TVR* 2010, 1, 6-7; Van Der Vlies, J.F. *Vertragswidriges en verdragsmässiges trucking: vervoer van luchtvracht waarbij het vervoer geheel of gedeeltelijk plaatsvindt over de weg*. In: *TVR* 2007, 2.

ming. Also Hague-Visby,<sup>40</sup> CMR and CMNI<sup>41</sup> lack a satisfactory plus-mode that makes these regimes adequate for type III integration. Apart from article 2 CMR (piggyback-transport),<sup>42</sup> CMR lacks any plus-mode that brings accessory transportation within the scope of transportation. Such plus-mode would especially be useful for last mile logistics. Several alternatives for city-distribution are being developed, such as cargo-bikes,<sup>43</sup> and -trams.<sup>44</sup> The transport by these means of transportation does not fall within the core-mode of CMR. Because of the lack of a plus-mode, CMR is not applicable to this transport. Even though the application of the principle *accessorium sequitur principale* could solve this problem, case law seems rather reluctant to widen the scope of conventions by applying this general contract law principle.<sup>45</sup> Secondly, the application of this principle could add even more to this uncertainty: the costs of the last mile are often higher

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<sup>40</sup> Due to the tackle-to-tackle-provision of Art. VII HV. See on this point for example Bugden, Paul and Simone, Lamont-Black, *Goods in transit and freight forwarding*. London, (Sweet and Maxwell), 2010, 326; Girvin, Stephan. *Carriage of goods by sea*, 2e ed., Oxford, Oxford University Press, 2011, 258; Berlingieri, Francesco. *General introduction*. In: The Rotterdam Rules 2008, Alphen a/d Rijn (Wolters Kluwer) 2010, 15-18; Berlingieri, Francesco. *A New Convention on the Carriage of Goods by Sea: Port-to-Port or Door-to-Door?* In: RDU 2003, 265.

<sup>41</sup> There is a mini-plus mode included in article 2.2 CMNI, however this is not relevant for freight integration as it only applies to sea transport without transshipment.

<sup>42</sup> Art. 2 CMR, see for example Delbecque, Philippe. *La convention CMR, les transports superposes et multimodaux*. In: RDU 2006, 569, 572-575; Glass, David. *Article 2 of the CMR convention - a reappraisal*. JBL 2000, 562-586; Herber, Ralf. *HGB § 452 Frachtvertrag über eine Beförderung mit verschiedenartigen Beförderungsmitteln*. in: Münchener Kommentar zum Handelsgesetzbuch: §§ 407-475h. Transportrecht. (2nd ed.), München, (Beck) 2009, nr. 55-56; K.F. Haak, *The carrier liability under the CMR*. Den Haag, (Stichting Vervoeradres) 1986, 96.

<sup>43</sup> Maes Jochen Christa Sys and Thierry Vanelslander. *Beleidspaper: Kunnen fietskoeriers een rol spelen in de Vlaamse logistieke sector*. Antwerp 2011, <http://www.flanders-logistics.be/fietskoeriers/beleidspaper.pdf> [visited 27 November 2014].

<sup>44</sup> Neuhold, Gottfried. *Cargo-Tram Zurich - The environmental savings of using other modes*. Zurich 2005, [http://www.bestufs.net/download/conferences/Amsterdam\\_Jun05/BESTUFS\\_Amsterdam\\_June05\\_Neuhold\\_ERZ.pdf](http://www.bestufs.net/download/conferences/Amsterdam_Jun05/BESTUFS_Amsterdam_June05_Neuhold_ERZ.pdf) [visited 27 November 2014].

<sup>45</sup> *Victoria Sales Corporation v Emery Air Freight*, USCA 2nd circuit 22 October 1990, 917 F. 2d 705; 59 USLW 2261. See also for example: *OLG Hamburg* 14 August 2004, TransPR. 2004, 402.

than the costs of the “main transport”.<sup>46</sup> So, one could argue that the “main transport” is, in fact, accessory to the last mile or hinterland transport.<sup>47</sup>

### **3.1.4 Conclusion: transport law is in general not adequate for freight integration**

Transport law, is to a large extent, not adequate for freight integration. The only exception that is currently applicable in international law is the COTIF-CIM plus-mode, which can create an adequate framework for Type III integration in addition to an international rail transport. If the Rotterdam Rules enter into force, the same will be true type III integration, in addition to sea transport. For other types of integrated transportation, however, there is no prospect of an adequate legal framework.

In national law, some regimes, such as German law, can offer an adequate framework for (some types of) freight integration. The problem is, however, that there can only come a role to national law if there is no international convention applicable to the contract. Therefore, in order to allow national legislators to create an adequate legal framework for international contracts, certainty with regards to the non-applicability of international conventions to freight integration contracts is required at the time of the conclusion of the contract.

## **3.2 Does the legal framework create legal certainty with regards to the applicable liability regime?**

As the legal framework is not adequate for freight integration in most situations, legal certainty at the time of the conclusion of the contract is only possible if parties can ascertain the non-applicability of those regimes that are not adequate for freight integration at the time of the

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<sup>46</sup> Gevaers Roel, Eddy Van de Voorde and Thierry Vanelander. *Characteristics and typology of last-mile logistics from an innovative perspective in an urban context*. In: *City Distribution and Urban Freight Transport: Multiple Perspectives*, Cheltenham (Edward Elgar Publishing), 2011, 56-74.

<sup>47</sup> See on this disadvantage of the absorption theory: Hartkamp, Arthur Severijn and C.H. Sieburgh, “6. Verbintenissenrecht, deel III algemeen overeenkomstenrecht” in A.S. Hartkamp and Sieburgh, Carla. *Mr. Asser’s handleiding tot de beoefening van het Nederlands Burgerlijk recht*, Deventer, (Kluwer) 2010, 52.

conclusion of the contract. As the means of transportation remains unknown for the parties to a freight integration contract until after the conclusion of the contract, this is only possible if the way in which the contract is performed, is not taken into account when deciding upon the applicability. The question whether this way of performance is taken into account depends on both the formulation of the scope rule of a convention or national law and the interpretation of this scope rule by national courts.

### **3.2.1 Formulation scope rules and legal certainty**

Conventions and national laws mostly contain a scope rule, a rule that limits the applicability of the regime to specific means of transportation and, what is important for this research, which establishes the required link between the specific carriage and the means of transportation. It is this link that determines whether legal certainty is possible. As generally accepted concepts on this point are lacking, I introduce the concept ‘real scope rule’ for scope rules that connect applicability to the means of transport that was used for the performance of the contract, and to the concept ‘contractual scope rule’ for scope rules that connect applicability to the means of transport contractually agreed upon. Finally, there is the ‘documentary scope rule’, according to which applicability depends on the issuance of a transport document linked to a specific means of transportation. A problem is, however, that for some conventions, such as CMR there are different interpretations as to the nature of the scope rule. This again only allows for legal certainty insofar the parties can predict the competent court at the time of the conclusion of the contract.

#### **3.2.1.1 Real scope rule: no legal certainty possible**

In case of a real scope rule, it is impossible to establish the governing regime at the time of the conclusion of the contract, unless the freedom of choice is limited to means of transportation that all fall within the same mode (see the previous question). The Montreal Convention applies such real scope rule. Article 1.1 of this conventions states that “(t)his

*Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward*". As a result, no contract for the carriage by this specific means of transportation is required.<sup>48</sup> This is also supported by the systematics of the convention, as the trucking-provision of article 18<sup>49</sup> does explicitly refer to a contract: "*carriage intended by the agreement between the parties to be carriage by air*". Accordingly, if a contract contains an option for the carriage to be performed by air, the Montreal Convention might be applicable, but only insofar the carrier effectively chooses to perform the carriage by air.

### **3.2.1.2 Contractual and documentary scope rule: legal certainty possible**

In case of a contractual scope rule, legal certainty is possible, insofar as national courts interpret this requirement in such a way that this condition requires a consent at the time of the conclusion of the contract. Also the documentary scope rule can allow for legal certainty, insofar as parties can agree upon the (non-) issuance of this document at the time of the conclusion of the contract. CMNI and Rotterdam Rules clearly have a contractual scope. This follows from the functional definition of the contract of carriage which is limited to carriage by a specific means of transportation.<sup>50</sup> Even though COTIF-CIM -similarly to the ambiguous CMR-scope rule (see next title)- refers to "contract of carriage of goods by rail for reward",<sup>51</sup> the contractual scope rule is supported by the Central office explanatory report: "*It is the opinion of the Central Office that there is no conflict with the CMR in the case of complementary carriage by road. The contract of carriage regulated by Article 1 differs from the contract regulated by the CMR, namely, a contract whose purpose is 'the carriage of goods by road in vehicles for reward'*". This, clearly, on the condition that

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<sup>48</sup> Versailles 25 April 2006, nr. 05/00001; Bugden, Paul and Simone, Lamont-Black, *Goods in transit and freight forwarding*. London, (Sweet and Maxwell) 2010, 322.

<sup>49</sup> See supra on page 7.

<sup>50</sup> Article 1.1 CMNI; Article 1.1 Rotterdam Rules. See for example on Rotterdam Rules: Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna 6-17 October 2003), A/CN. 9/544, [www.uncitral.org](http://www.uncitral.org), para. 70.

<sup>51</sup> Art. 1.1 COTIF-CIM.

*the carriage by rail and the carriage by road as a supplement constitute the subject-matter of a single direct contract of carriage.*"<sup>52</sup> Finally, the preparatory works of the Hague Rules indicate that not only a documentary scope rule but also a contractual scope rule was intended.<sup>53</sup> Moreover, due to its documentary scope rule,<sup>54</sup> the agreement on the non-issuance of a bill of lading can exclude the applicability of Hague(-Visby) Rules.<sup>55</sup>

### 3.2.1.3 Ambiguous scope rules: legal certainty depending on competent court

Different interpretations are possible with regards to the nature of the scope rule. This is especially the case under CMR. Article 1.1 states "*This Convention shall apply to every contract for the carriage of goods by road in vehicles for reward.*" In Belgium<sup>56</sup> Germany<sup>57</sup> and Holland<sup>58</sup>, this sentence is interpreted as a single condition, requiring a contract with the carriage of goods by road as the object. On the other hand, in English case law, this phrase is construed in such a way as if it contains two separate conditions. According to this construction, CMR requires a

<sup>52</sup> OTIF, "Central Office Report on the Revision of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 and Explanatory Reports on the texts adopted by the Fifth General Assembly", 1 January 2011, [www.otif.org](http://www.otif.org), 109.

<sup>53</sup> Hill, Norman. *The Travaux préparatoires of the Hague-Rules and of the Hague-Visby Rules*, Antwerp, (CMI) 1997, 90-91.

<sup>54</sup> Article I(b) *jo.* article II HV.

<sup>55</sup> Pantainer AG / Legget & Platt TW Inc, Cass. 15 September 2011 ETL 2012, 31; Pas. 2011, 1952, RHA 2012, 25, concl. G. Dubrulle; RW 2011-12, 1719 (note J. Loyens).

<sup>56</sup> TNT v. Mitsui Marine and Sony, Cass. 8 November 2004, C.03.0510.N, Arr.Cass. 2004, 11, 1767; ETL 2006, 2, 228; Pas. 2004, 11, 1741. See also the cases mentioned in footnote 59.

<sup>57</sup> Bahnsen, Kay Uwe. *CMR art. 1 [Geltungsbereich. Völkerrechtliche Verbindlichkeit]*. In : Ebenroth / Boujong / Joost / Strohn, *Handelsgesetzbuch*. (2nd ed.), München, (Beck) 2009; Thume, Karl-Heinz. *Kommentar zur CMR*. (2nd ed.), Frankfurt am Main, (Verlag Recht und Wirtschaft) 2007, 82; Ferrari, Franco. *CMR art. 1[Anwendungsbereich]*. In: Internationales Vertragsrecht, Rom I-Vo. CISG CMR FactÜ Kommentar. (2nd ed.), München, (Beck) 2012, n° 12; Jesser-Huß, Helga. *CMR art. 1 [Anwendungsbereich, völkerrechtliche Sondervereinbarungen]*. In: Münchener Kommentar zum Handelsgesetzbuch: §§ 407-475h. Transportrecht. (2nd ed.), München, (Beck) 2009, n° 18.

<sup>58</sup> Hof's Gravenhage 28 November 2007, S&S 2009, 28; Rb. 's Gravenhage 10 April 2002, S&S 2003, 104; Rb. Rotterdam 5 September 2007, S&S 2009, 41.



contract for the carriage of goods that is performed by road. As a result, freight integration contracts fall within the scope of CMR, insofar they are performed by road.<sup>59</sup> The same is true in French case law,<sup>60</sup> however, here a freight integration contract is most likely to be qualified as a *contrat de commission de transport*<sup>61</sup>. Because of the different interpretations of the CMR scope-rule, the question whether legal certainty is possible depends on the competent court.

### 3.2.2 National interpretations of contractual scope rule and legal certainty

Even if all conventions that are possibly applicable have a contractual scope rule, this still does not mean that parties can have legal certainty. The contractual scope rule is interpreted in two different ways. The first interpretation takes into account the consent at the time of the conclusion of the contract (referred to as the strict-contractual scope rule) and thus allows for certainty. The second one, however, does not, as the performance of the contract determines whether there is a contract for the carriage by a specific mode (referred to as the real-contractual scope rule).

#### 3.2.2.1 Strict-contractual scope rule

According to the first interpretation, a contract for the carriage by a specific means of transport requires consent at the time of the conclusion of the contract on the use of a means of transportation falling within this mode. This interpretation is mainly supported by Belgian case law.

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<sup>59</sup> Quantum Corp Ltd v Plane Trucking Ltd CA 27 March 2002, [2002] EWCA Civ 350; [2002] 1 W.L.R. 2678; [2003] 1 All E.R. 873; [2002] 2 All E.R. (Comm) 392; [2002] 2, Lloyd's Rep., 25; [2002] C.L.C. 1002; (2002) 99(20) L.S.G. 31; *Times* 18 april 18, 2002; Datec Electronic Holdings Ltd v United Parcels Service Ltd HOL 16 May 2007, [2007] UKHL 23; [2007] 1 W.L.R. 1325; [2007] 4 All E.R. 765; [2007] 2 All E.R. (Comm) 1067; [2007] Bus. L.R. 1291; [2007] 2, Lloyd's Rep., 114; [2007] 1 C.L.C. 720; [2007] R.T.R. 40; (2007) 151 S.J.L.B. 670; *Times* 18 May 2007.

<sup>60</sup> See for example: CA Lyon 21 September 2012, n° 10/08157.

<sup>61</sup> See on page 1 and further. See also with regards to the qualification of freight integration contracts: Delbecque, Philippe. *Transports routiers internationaux. CMR. Conditions d'application. Contrat. Transport de marchandises par route. Nécessité*, RTD com, 2005, 871.

The Belgian Supreme Court decided in the landmark-case *TNT v. Sony*<sup>62</sup> that the requirement for a contract for the carriage of goods by road, is not fulfilled if the contract does not specify the means of transportation and it cannot be established from the facts of the case which means of transportation parties agreed upon.<sup>63</sup>

Even though the Supreme Court refers to the possibility of an implicit choice of mode, Belgian case law takes a strict perspective and, in fact, requires the technical impossibility to carry by another means of transportation, in order to allow for an implicit choice, making CMR applicable.<sup>64</sup> Such technical impossibility can exist in cases where the size of the cargo does not allow for a specific means of transportation,<sup>65</sup> if the necessary infrastructure for a specific type of transport is lacking<sup>66</sup> or if only the specific means of transportation allows for a timely delivery.<sup>67</sup> On the contrary, the performance of the contract by specific means of transportation or the issuance of a specific transport document, cannot constitute such an implicit consent. This is because also when the means of transportation is not specified, the carrier will eventually have to select

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<sup>62</sup> *TNT v. Mitsui Marine and Sony*, Cass. 8 November 2004, C.03.0510.N, Arr.Cass. 2004, 11, 1767; ETL 2006, 2, 228; Pas. 2004, 11, 1741.

<sup>63</sup> See similarly: OLG Frankfurt Am Main 11 November 1981, VersR. 1982, 697; OLG Köln 4 April 1986, TranspR. 1986, 432; *Quantum Corp Ltd v Plane Trucking Ltd* QB 10 april 2001; All E.R. (Comm) 2001 1, 916; *Lloyd's Rep.*, 2001 2, 133; C.L.C., 2001, 1192.

<sup>64</sup> Brussels (5th ch.) 16 June 2010 and 2 September 2011, DAOR 2012, 21 (note W. Verheyen) (in this case a length of under 100 kilometers was not considered sufficient to constitute an implicit choice to carry by road); , N.V. DPD Belgium / P.J. Timmermans, Antwerp 31 October 2011, 2010/AR/875, ETL 2013, 82; *TNT express NV / Alante Europe N.V. e.a.*, Antwerp 30 January 2012, 2010/AR/1670, NJW 2012, 510 (note W. Verheyen); Kh. Hasselt 9 December 2008, AR 07/2102, not published (in the last case even a technical impossibility wasn't considered as sufficient).

<sup>65</sup> S. Ünám, "The Scope of application of the Rotterdam Rules and Freedom of Contract" in M.D. Güner-Özbek (ed.), *The United Nations Convention for the Carriage of Goods wholly or partly by Sea. An Appraisal of the "Rotterdam Rules"*, Berlin, Springer, 2011, 87, 90

<sup>66</sup> See the cases cited in the previous footnote and OLG Karlsruhe 18 May 2011, b 18 U 23/10, [www.tis-gdv.de](http://www.tis-gdv.de).

<sup>67</sup> Rb. Rotterdam 23 October 2013, C/10/ 335273 / HA ZA 09-2001, [www.rechtspraak.nl](http://www.rechtspraak.nl).

a specific means for the performance of the carriage.<sup>68</sup> This point of view makes a possible later judgement highly predictable and allows for legal certainty with regards to the (non-)applicability of transport regimes at the time of the conclusion of the contract. The downside to this approach is, however, that it opens up the door for the evasion of transport conventions by just leaving the means of transportation in the contract of carriage open. Indeed, this a shortcoming of this strict-contractual scope rule, but from a commercial perspective, taking into account the interests of “bona fide” freight integrators and their contract parties, this approach is the only one which allows for legal certainty.

### 3.2.2.2 Real-contractual scope rule

Under the real-contractual scope rule, it is held that by the choice of the carrier to use a specific means of transportation, the contract transforms into a contract for the carriage by the specific means of transportation. Here, the consent-requirement is construed in two steps. First, by leaving open the means of transportation, the shipper gives to the carrier not only a factual option to select the means of transportation, but also a legal option. The contract would thus be a contract with alternative obligations or with a possibility for a party decision. This interpretation, which is followed by a majority of Dutch and German doctrine<sup>69</sup> and case law,<sup>70</sup> eliminates the difference between the contractual scope rule and the real scope rule.<sup>71</sup> This leads to a situation where parties cannot predict the (non-) applicability of any regime with a scope expanding to some but not all options allowed by the contract, except for Hague

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<sup>68</sup> See the case law in footnote 62.

<sup>69</sup> Bahnsen, Kay Uwe. *CMR art. 1 [Geltungsbereich. Völkerrechtliche Verbindlichkeit]*. In : Ebenroth / Boujong / Joost / Strohn, *Handelsgesetzbuch*. (2nd ed.), München, (Beck) 2009, n° 15; Czerwenka, Beate. *HGB § 407 Frachtvertrag*. In: Münchener Kommentar zum Handelsgesetzbuch: §§ 407-475h. *Transportrecht*, 2e ed., München, (Beck) 2009, n° 116.

<sup>70</sup> See for example: BGH 4 March 2004, IZR 200/01; *TranspR.* 2004, 460; Hof 's Gravenhage 28 November 2007, S&S 2009, 28.

<sup>71</sup> See for a French example: Cass. fr. 7 December 2004, RTD com. 2005, 188, n° 2; BTL 2005, 12. See also in the same way: Staniland, Hilton. *Scope of application*. In: *The Rotterdam Rules*, a practical annotation. London, (Informa), 2009, 15.

(-Visby) with its documentary scope rule, at the time of the conclusion of the contract.

### 3.2.2.3 Strict-contractual or real-contractual: an evaluation

Even though the strict-contractual scope rule can allow for law evasion, I believe that this is the right interpretation. There are three arguments in support of this view.

First of all, one can question whether the real-contractual scope corresponds with the intended purpose of the draftsmen of the conventions. At least the preparatory works to Rotterdam Rules support the opposite view. In the final version of Rotterdam Rules, the draft article 1bis was eliminated. According to this article “*a contract that contains an option to carry the goods by sea shall be deemed to be a contract of carriage under article 1(a), provided that the goods are actually carried by sea*”.<sup>72</sup> From the fact that these contracts were to be governed by a separate article, it can be deduced that they did not fall within the scope of 1(a).<sup>73</sup> The elimination of this article indicates that the draftsmen of the convention wanted to exclude these contracts from the scope,- even more now the article was extensively discussed during the negotiations<sup>74</sup>- and, therefore, parties should have been aware of the consequences of the elimination.<sup>75</sup> Sturley, one of the members of the expert group, even claims that this article was withdrawn because it would, on a theoretical level, create a shift from a contractual to a real scope, and because on a practical level, it was considered unreasonable that the carrier would be able to unilaterally decide upon the applicable liability rules, without

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<sup>72</sup> Sturley, Michael. *Scope of application*. In: The Rotterdam Rules 2008. Alphen a/d Rijn, (Wolters Kluwer) 2010, 39, 43.

<sup>73</sup> See for example Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 October 2003), A/CN.9/544, [www.uncitral.org](http://www.uncitral.org), 22.

<sup>74</sup> See “Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea] - Provisional redraft of the articles of the draft instrument considered in the Report of Working Group III on the work of its twelfth session (A/CN.9/544)”, A/CN.9/WG.III/WP.36, [www.uncitral.org](http://www.uncitral.org), 5; Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 October 2003), A/CN.9/544, [www.uncitral.org](http://www.uncitral.org), 22.

<sup>75</sup> Art. 31.4 Vienna Convention on the law of Treaties.

possibility for the cargo-interest to evaluate the risk.<sup>76</sup>

Secondly, the construction with alternative obligations seems to conflict with the accessory character of the determination of the means of transportation.<sup>77</sup> Therefore, parties can conclude a contract of carriage without agreement on this point, and thus, reading an implicit alternative obligation into the contract seems to go beyond contract interpretation.

Thirdly, from a practical point of view, the real-contractual scope creates difficulties in assessing the applicable liability regime in cases where damage came into existence at the beginning of the carriage operations: did the carrier intend to perform the entire carriage by road, or was he on his way to the rail terminal, which would make COTIF-CIM applicable instead of CMR? <sup>78</sup>

### 3.2.3 Conclusion: current legal framework doesn't allow for legal certainty

Three grounds of uncertainty were identified standing in the way of legal certainty: 1) the real scope rule which is included in the Montreal Convention, 2) different interpretations of the nature of the scope rule under CMR and 3) the real-contractual interpretation of the contractual scope rule, mainly in Dutch and German case-law and doctrine.

Due to the first ground of uncertainty, in all contracts with an option to carry internationally by air (in practice, such an option exists in almost all international parcel delivery contracts), the Montreal Convention is potentially applicable, and will automatically become applicable in case of performance by air. As the Montreal convention differs greatly from other conventions (higher limits, little possibility for exonerations, no

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<sup>76</sup> See Sturley, Michael. *Scope of application*. In: The Rotterdam Rules 2008. Alphen a/d Rijn, (Wolters Kluwer) 2010, 39, 41; Sturley, Michael. *Solving the Scope of application puzzle: contracts, trades and documents in the UNCITRAL transport law project*. In: JIML 2005, 22, 32-33; Czerwenka, Beate. *Scope of application and rules on multimodal transport contracts*. In: TranspR. 2004, 297, 299-300.

<sup>77</sup> See in this respect supra page 3

<sup>78</sup> Rb. Amsterdam 8 March 1972, S&S 1973, 9; Rb. Rotterdam 2 January 1976, S&S 1977, 66; 's Hertogenbosch 17 December 1990, S&S 1991, 77 (in this case the court applies CMR on a national transport by road prior to an international sea transport to the USA. The court here applies CMR because the international carriage started by road).

possibility to break through the limits), the possible applicability of Montreal Convention has important consequences in the field of liability exposure.

For both the second and the third type of uncertainty, it is relevant what court will be competent to decide upon the case. However, a problem here is that CMR and COTIF-CIM do not allow for exclusive jurisdiction clauses and put forward several courts as competent.<sup>79</sup> A jurisdiction clause can here only create prorogation of jurisdiction (create an additional forum) but not derogation of jurisdiction (create an exclusive jurisdiction). As a result, it will be impossible for parties to predict the court that will decide upon the case later, at the time of the conclusion of the contract. Thus, it is equally impossible to ascertain the (non-)applicability of regimes at the time of the conclusion of the contract.

Because of these reasons, legal certainty will often be lacking in case of freight integration contracts as parties are unable to predict the applicable liability regime at the conclusion of the contract.

## **4 Is it possible for the parties to create legal certainty?**

Even though the mandatory applicability of carriage laws limits the room for party initiatives, certainty can still be increased by means of a combination of a jurisdiction and choice of law clause. The downside to this is that first of all the incorporation of such clauses adds to the negotiation costs, and secondly, a strong bargaining position or interest by both parties in legal certainty is required.

### **4.1 Jurisdiction clause**

From the research under the previous headings it follows that only if the Belgian courts are competent, legal certainty can be possible with regards

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<sup>79</sup> See further under title 1.4.1.

to both the qualification of the contract and the applicable carriage regime, as only Belgian courts apply the strict-contractual interpretation on a consistent basis. Even if Belgian courts are competent, then still the applicability of the Montreal Convention remains uncertain.

The problem is that although the Brussels I-Regulation allows for exclusive jurisdiction clauses,<sup>80</sup> carriage conventions, like CMR and COTIF-CIM,<sup>81</sup> do not. As the jurisdiction rules of CMR and COTIF-CIM have priority over those of the Brussels I-Regulation,<sup>82</sup> the fact that a later dispute will be decided by the Belgian courts cannot be ascertained at the time of the conclusion of the contract: even though Belgian courts will find the carriage conventions inapplicable, the other countries' courts will disregard the exclusive jurisdiction clause and, if seized first, continue proceedings. Brussels I (bis) Regulation<sup>83</sup> gives the Belgian Courts, if they are named in an exclusive jurisdiction clause, the possibility to start proceedings, even if another court has been seized first.<sup>84</sup> However, other countries that will find the carriage conventions applicable, will not stay their proceedings, what might eventually lead to parallel proceedings.<sup>85</sup>

In order to solve this problem, first of all, the parties can include an arbitration clause, as CMR and COTIF-CIM do allow for exclusive arbitration clauses.<sup>86</sup> A problem, however, is that for small contracts, like parcel delivery contracts, arbitration does not seem to be a realistic choice. Another possible solution is to include a clause awarding damages to the

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<sup>80</sup> Art. 23 Brussels I-Regulation.

<sup>81</sup> Art. 31 CMR and art. 46 COTIF-CIM only allow for a prorogatory jurisdiction clause, but not for a derogatory jurisdiction clause.

<sup>82</sup> See explicitly in that sense: Art. 71 Brussels I-Regulation.

<sup>83</sup> Regulation No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *OJ* 20 December 2012, L 351/1.

<sup>84</sup> Council regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] *OJ* L 351/1

<sup>85</sup> See on this point Verheyen, Wouter. EEX(bis) and CMR: the return of parallel proceedings?, In: *ETL* 2015, 145-170.

<sup>86</sup> See art. 33 CMR. The lack of an arbitration provision in COTIF-CIM implicitly allows for such an exclusive arbitration clause.

other party in case of the breach of the choice of court agreement,<sup>87</sup> combined with a jurisdiction clause attributing jurisdiction to Belgian courts in case of breach of this clause. Even though this technique has not been tested sufficiently,<sup>88</sup> in order not to have the courts dismiss the claim as a violation of *res judicata*, the clause should contain an abstract quantification of the damages.<sup>89</sup> This way, the court only has to confirm the violation of the exclusive jurisdiction clause, without having to go into the underlying dispute to assess the actual damage.

## 4.2 Choice of law clause

In order to enjoy legal certainty, parties will often, in addition to the jurisdiction clause, have to include a choice of law clause. There are three possibilities that allow for legal certainty. The first option is to choose for a national law that offers a uniform liability regime, such as German law. German national transport law offers a uniform framework in case of land transportation (and national air transportation).<sup>90</sup> Moreover, the possibility to adapt the limits of liability in the general conditions allows to bring the liability regime close to the Montreal regime in case of international parcel transportation without an individually negotiated contract being required.<sup>91</sup> The second possibility is to choose for a non-

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<sup>87</sup> Hess, Burkhard, Thomas Pfeiffer and Peter Schlosser. *The Brussels I-regulation (EC) No. 44/2001. Application and enforcement in the EU*, München, (Beck) 2008, 1117; Magnus, Ulrich and Peter Mankowski, *Brussels I Regulation*, München, Sellier European Law Publishers, 2012, 511; K. takahashi “Damages for Breach of a choice-of-court agreement”, *Yearbook of private international law*. 2008, 57, 84-86.

<sup>88</sup> Hess, Burkhard, Thomas Pfeiffer and Peter Schlosser. *The Brussels I-regulation (EC) No. 44/2001. Application and enforcement in the EU*, München, (Beck) 2008, 1117. See also: Magnus, Ulrich and Mankowski, Peter. *Brussels I Regulation*. München, (Sellier European Law Publishers) 2012, 511.

<sup>89</sup> Takahashi, Koji. *Damages for Breach of a choice-of-court agreement*. In: *Yearbook of private international law* 2008, 57, 74 sub footnote 81 and 87-88.

<sup>90</sup> §407 HGB.

<sup>91</sup> §449 HGB; Schmid, Reinhard. § 449 HGB *Abweichende Vereinbarungen*. In: *Münchener Kommentar zum Handelsgesetzbuch: §§ 407-475h. Transportrecht*. (2nd ed.) München, (Beck) 2009; Herber, Ralf. *The new German Transport Legislation*. ETL 1998, 591, 599-600; Herber, Ralf. *Münchener Kommentar zum Handelsgesetzbuch: §§ 407-475h. Transportrecht*. (2nd ed.) München, (Beck) 2009, n° 6-10.



mandatory regime that allows parties to create a uniform contractual liability regime, such as English law.<sup>92</sup> The third option is to opt for an international carriage regime that is made applicable irrespective of the means of transport used for the performance of the carriage. As the Rome I-Regulation<sup>93</sup> does not govern choices of law for international conventions,<sup>94</sup> this choice of law needs to be accepted in the national law of the country chosen.<sup>95</sup> Dutch law allows for such choice of law for international conventions, even if they are in conflict with mandatory national law.<sup>96</sup> This is for example not the case under French law.<sup>97</sup> As the Montreal Convention, due to its real scope rule, remains possibly applicable when the Belgian judge is competent, legal certainty for international parcel delivery contracts is only possible if the parties use one of the last two options and contractually incorporate the Montreal Convention, irrespective of the means used for the performance of the contract.

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<sup>92</sup> This is however only true for land transport. See for example: MacDonald Eggers, Peter. *Carriage by land*. In: *Chitty on contracts, Volume II Specific Contracts*. (29th ed.), London, (Sweet & Maxwell) 2004, 557; Messent, Andrew and Glass, David. *CMR: contract for the international carriage of goods by road*. (2nd ed), London, (LLP) 1995, 36. See also: Clarke, Malcolm. *Contracts for the carriage of goods by road: Cabotage in the United Kingdom*. In: JBL 1998; 591, 593 (“*The CMR is not infrequently incorporated as terms of a contract of carriage, to which the CMR does not apply proprio vigore. Clearly, the English Courts would give effect to the terms of the contract.*”).

<sup>93</sup> Regulation No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 4 July 2008, L 177/6.

<sup>94</sup> Recital 13 Brussels I--regulation; Chuah, Jason. *Law of international trade. Cross-border commercial transactions*. (4th ed.), London, (Thomson Sweet & Maxwell) 2009, 654 ; Lagarde, Paul and Tenenbaum, Andrew. *De la convention de Rome au règlement Rome I*. In : RCDIP 2008, 727, n° 9.

<sup>95</sup> See for example: Mankowski, Peter. *The Rotterdam Rules – Scope of Application and Freedom of Contract*. In: EJCCCL 2010, 9, 12 .

<sup>96</sup> This is true in The Netherlands. See for example HR 13 Mai 1966, NJ 1967, 3; Zerstegen-Van der Harst/Norfolk Line, HR 26 Mai 1989, NJ 1992, 105; S&S 1989, 98, ro. 2. 13; HR 5 January 2001, C99/162HR, RvdW 2001, 18; S&S 2001, 61, ro. 3. 3. 2.

<sup>97</sup> See for example: Bernardeau, R. *La CMR en tant que règle des transports intérieurs*. In : ETL 1998, 785, 790 (“*Si la liberté contractuelle demeure le fondement de l'application conventionnelle de la CMR à un transport intérieur, elle en constitue aussi la limite: on ne peut déroger, par des conventions particulières, aux lois qui intéressent l'ordre public*”).

## 5 How can legislators create legal certainty?

Proposing any changes in the law always has a utopian character. Nonetheless, if lawmakers want to uphold the mandatory nature of carriage law, it is the duty of these lawmakers to restore the main arguments pro mandatory law: to create legal certainty and to facilitate trade. In this article, I single out 3 possible changes for international law. 2 “minor” and one for a (r)evolution in carriage law. All of these proposals aim at making the regimes adequate for freight integration (widening the scope or changing the perspective of transport law) or at least at taking away uncertainty (creating certainty with regards to the non-applicability, without an active role in contract drafting being required).

### 5.1 Incorporate strict-contractual scope in all carriage conventions

A first step toward legal certainty in international law could be to incorporate a strict-contractual scope rule in all carriage conventions. In the Montreal Convention, this would require a change of the scope rule while for other Conventions a clarification<sup>98</sup> of the scope rule would be sufficient. Such a change would eliminate the need for parties a forum clause and the necessary choice for the Montreal Convention when carriage by air is an option. The downside to this change is of course that it would leave freight integration contracts to the fragmented national law, adding to transaction costs.

### 5.2 Umbrella-convention allowing for choice of regimes

The second “minor” change would be to draw up an “umbrella”-convention allowing contract parties to contractually incorporate one of the regimes that are potentially applicable to the contract. Such a convention

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<sup>98</sup> See pro clarification: Haak, Krijn. *Pleidooi voor revisie CMR*. In: TVR 2011, 108.

would be not only very useful for freight integration contracts, but also for multimodal carriage contracts. Even though this might allow the strongest contract party to choose the most favourable regime, this should not be considered as too much of a constraint. In the current situation, in most countries the final choice as to the applicable liability regime is also left to the carrier. The benefit of the possibility of a contractual incorporation is that this would at least allow for certainty at the time of the conclusion of the contract, instead of after the performance. This allows the cargo-interest to take the risk exposure into account when selecting the carrier and to take up a more efficient level of insurance.

### 5.3 Cargo-based liability regimes

Because of the great difference of the value per kilogram of for example commodities like cereals and, on the other hand, electronics like *iPads*, the last proposal is to have a strong (r)evolution in transport law and to shift from a mode-based liability regime to a cargo-based regime.<sup>99</sup> The risk involved in carriage is to a large extent determined by the specific type of cargo instead of by the means of transportation. Therefore, we propose to design specific regimes for parcels, palletised cargo or containers and bulk transportation. Such cargo-perspective can already be found in for example the French *contrats types100* and the Dutch *SVA deelmktvoorwaarden*.<sup>101</sup> As the type of cargo is known at the time of the conclusion of the contract, such a change excludes any uncertainty. Moreover, liability limits would be more suitable if they corresponded to the individual value of a type of cargo, instead of the average value

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<sup>99</sup> See more in depth on this point: Verheyen, Wouter. *The DPD-case: a case for a parcel-specific liability regime?* In: ETL 2013, 3-12. See other authors in support of this idea: Ramberg, Jan. *The Law of Carriage of Goods – Attempts at Harmonization*. In: SSL 1973, 212,241; ETL 1974, 2, 31; Ramberg Jan, *Global unification of Transport Law: a hopeless task?* In: Penn. St. Int'l L. Rev. 2008-09, 851, 855 ; Manca, P. *A legal outline of carriage by containers*. In: ETL 1968, 491, 495.

<sup>100</sup> See on the *contrats types*: Kerguelen-Neyrolles, Bernadette and Laurent, Garcia-Campillo. *Lamy Transport Tome I, Route Transport intérieur et international*, Mueil-Malmaison Cedex, (Wolters Kluwer) 2010, 21-22.

<sup>101</sup> <http://www.sva.nl/nl/vervoerrecht/vervoerscondities/deelmktcondities> [visited 27 November 2014].

of any type of cargo shipped by a specific means of transportation.<sup>102</sup>

## **6 Conclusion: freight integration: legal hindrances to a more efficient model of transportation!**

From a logistic point of view, freight integration is a more sustainable and efficient model of transportation. The fragmented legal framework however, didn't adapt to the integration of transportation. This results in legal uncertainty, both at the level of qualification of the contract as at the level of the applicable liability regime. Moreover, the mandatory framework makes it very difficult for parties to create legal certainty themselves, as this requires a jurisdiction or an arbitration clause and a choice of law clause. Both conditions add to transaction costs and create a competitive disadvantage for freight integration. Therefore, a change of law is not only desirable but also necessary, in order to allow for a further optimization of transport. This will, however, require a change in the legislator's state of mind: even during the preparations of the Rotterdam Rules, the following observation was still made with regards to freight integration: *"as to the situation where the mode of transport was not specified in the contract, it was stated that it could be addressed by courts and that commercial parties should be encouraged to avoid such uncertainty in the contracts they entered into"*.<sup>103</sup>

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<sup>102</sup> See with regards to this problem in the current transport law: Verheyen, Wouter. *The DPD-case: a case for a parcel-specific liability regime?* In: ETL 2013, 3-12.

<sup>103</sup> See Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 October 2003), A/CN. 9/544, [www.uncitral.org](http://www.uncitral.org), n° 72.

## Table of references

### Case Law

- Antwerp 27 Januari 1967, *ETL* '68, 1244
- Kh. Brussels 12 February 1977, *ETL* 1978, 285
- Antwerp 30 January 1980, *RW* 1983-84, 2171
- Kh. Brussels 23 November 1983, *TBH* 1984, 316
- Brussels 11 October 1990, *RGAR* 1992, 11962
- Kh. Brussels 19 August 1999, *RHA* 2001, 242
- Vred. Overijse-Zaventem 28 May 2003, AR 01A409 (not published)
- Ghent 5 November 2003, *RW* 2006-'07, 177
- TNT v. Mitsui Marine and Sony, Cass. 8 November 2004, C.03.0510.N, Arr.Cass. 2004, 11, 1767; *ETL* 2006, 2, 228; Pas. 2004, 11, 1741
- Kh. Hasselt 9 December 2008, AR 07/2102, not published
- Brussels (5th ch.) 16 June 2010 and 2 September 2011, *DAOR* 2012, 21 (note W. Verheyen)
- Pantainer AG / Legget & Platt TW Inc, Cass. 15 September 2011 *ETL* 2012, 31; Pas. 2011, 1952, *RHA* 2012, 25, concl. G. Dubrulle; *RW* 2011-12, 1719 (note J. Loyens)
- N.V. DPD Belgium / P.J. Timmermans, Antwerp 31 October 2011, 2010/AR/875, *ETL* 2013, 82
- TNT express NV / Alante Europe N.V. e.a., Antwerp 30 January 2012, 2010/AR/1670, *NJW* 2012, 510 (note W. Verheyen)
- Kh. Brussels 30 January 2014, *TBH* 2014, 926
- OLG Frankfurt Am Main 11 November 1981, *VersR.* 1982, 697
- OLG Köln 4 April 1986, *TranspR.* 1986, 432; *Quantum Corp Ltd v Plane Trucking Ltd*

- BGH 4 March 2004, IZR 200/01; TranspR. 2004, 460
- OLG Hamburg 14 August 2004, TranspR. 2004, 402.
- OLG Düsseldorf 12 March 2008, I-18 U 160/07, openJur 2011, 61131
- OLG Karlsruhe 18 May 2011, b 18 U 23/10, [www.tis-gdv.de](http://www.tis-gdv.de)
- Cass. fr. 17 November 1965, n 61-10. 968, BT, 1966, 38
- Paris, 28 March 1977, BT, 1977, 348; CA Aix-en-Provence 13 January 2004, n 00/07876. , Lamyline
- Paris 17 May 1996, BTL 1996, 400
- Versailles 6 March 1997, BTL 1997, 668
- Cass. fr. 17 Februari 1998, *BTL* 1998, 419
- Cass. fr. 22 January 2002, n° 98-18. 975
- Cass. fr. 5 February 2002, n° 00-12. 045
- Cass. fr. 7 December 2004, RTD com. 2005, 188, n° 2; BTL 2005, 12
- Versailles 25 April 2006, nr. 05/00001
- CA Lyon 21 September 2012, n° 10/08157
- HR 13 Mai 1966, NJ 1967, 3
- Rb. Amsterdam 8 March 1972, S&S 1973, 9
- Rb. Rotterdam 2 January 1976, S&S 1977, 66
- Rb. 's Gravenhage 23 November 1983, S&S 1984, 114
- Zerstegen-Van der Harst/Norfolk Line, HR 26 Mai 1989, NJ 1992, 105; S&S 1989, 98, ro. 2. 13
- Hof 's-Hertogenbosch 17 December 1990, S&S 1991, 77;
- HR 5 January 2001, C99/162HR, RvdW 2001, 18; S&S 2001, 61, ro. 3.3.2
- Rb. 's Gravenhage 10 April 2002, S&S 2003, 104;
- Hof 's Gravenhage 28 November 2007, S&S 2009, 28;
- Rb. Rotterdam 5 September 2007, S&S 2009, 41.

Hof 's Gravenhage 28 November 2007, S&S 2009, 28.

Van Aar v. Compagnie Europeene de Contraction Stone, Hof 's  
Hertogenbosch 7 April 2009, S&S, 2011, 35

Rb. Rotterdam 23 October 2013, C/10/ 335273 / HA ZA 09-2001, [www.rechtspraak.nl](http://www.rechtspraak.nl).

Colley v. Brewer's wharf & Transport, KB 5 October 1921, Lloyd's Rep  
1921, 5

QB 12 Oktober 1979, LLRep 1981, 192

QB 17 November 1993 *Aqualon (UK) Ltd / Vallana Shipping Corp*  
[1994] 1, Lloyd's Rep., 669.

QB 10 april 2001; All E.R. (Comm) 2001 1, 916; *Lloyd's Rep.*, 2001 2,  
133; C.L.C., 2001, 1192.

Quantum Corp Ltd v Plane Trucking Ltd CA 27 March 2002, [2002]  
EWCA Civ 350; [2002] 1 W.L.R. 2678; [2003] 1 All E.R. 873; [2002]  
2 All E.R. (Comm) 392; [2002] 2, Lloyd's Rep., 25; [2002] C.L.C.  
1002; (2002) 99(20) L.S.G. 31; *Times* 18 april 18, 2002

Datec Electronic Holdings Ltd v United Parcels Service Ltd HOL 16  
May 2007, [2007] UKHL 23; [2007] 1 W.L.R. 1325; [2007] 4 All E.R.  
765; [2007] 2 All E.R. (Comm) 1067; [2007] Bus. L.R. 1291; [2007] 2,  
Lloyd's Rep., 114; [2007] 1 C.L.C. 720; [2007] R.T.R. 40; (2007) 151  
S.J.L.B. 670; *Times* 18 May 2007.

Victoria Sales Corporation v Emery Air Freight, USCA 2<sup>nd</sup> circuit 22  
October 1990, 917 F. 2d 705; 59 USLW 2261.

## Doctrine

Bahnsen, Kay Uwe. *CMR art. 1 [Geltungsbereich. Völkerrechtliche  
Verbindlichkeit]*. In: Ebenroth / Boujong / Joost / Strohn,  
Handelsgesetzbuch. (2nd ed.), München, (Beck) 2009

Basedow Jürgen. *Der Transportvertrag*, Tübingen, (J.C.B. Mohr) 1987, 602

Bazin-Beust, Delphine and Jocelyne, Vallansan. *Commission de trans-  
port*. In: J. Cl. Trans. , Fasc. 612

- Berlingieri, Francesco. *A New Convention on the Carriage of Goods by Sea: Port-to-Port or Door-to-Door?* In: RDU 2003, 265-280
- Berlingieri, Francesco. *General introduction*. In: The Rotterdam Rules 2008, Alphen a/d Rijn (Wolters Kluwer) 2010
- Berlingieri, Francesco. *Multimodal aspects of the Rotterdam Rules*. [www.rotterdamrules2009.com](http://www.rotterdamrules2009.com), 2 [visited 27 November 2014];
- Bernardeau, R. *La CMR en tant que règle des transports intérieurs*. In : ETL 1998, 785-795
- Bugden, Paul and Simone, Lamont-Black, *Goods in transit and freight forwarding*. London, (Sweet and Maxwell), 2010, 902
- Chuah, Jason. *Law of international trade. Cross-border commercial transactions*. (4th ed.), London, (Thomson Sweet & Maxwell) 2009, 756
- Claringbould, Maarten. *De aansprakelijkheid van de expeditie. Over 'vervoer of expeditie' en gewoonte*. In: NTHR (2008) 55-67
- Clarke, Malcolm. *Contracts for the carriage of goods by road: Cabotage in the United Kingdom*. In: JBL 1998; 591-595
- Clarke, Malcolm. *Carrier's liability in cross-border air cargo substitute transportation*. TranspR. 2005, 182-185
- Clarke, Malcolm and David Yates. *Contracts of carriage by land and air*, (2nd. Ed.), Londen, (Informa) 2008, 626
- Czerwenka, Beate. *Scope of application and rules on multimodal transport contracts*. In: TranspR. 2004, 297, 297-303
- Czerwenka, Beate. *HGB § 407 Frachtvertrag*. In: Münchener Kommentar zum Handelsgesetzbuch: §§ 407-475h. Transportrecht. (2nd ed.). München, (Beck) 2009
- Debattista, Charles. *Carriage conventions and their interpretation in English courts*. In: JBL 1997, 130-142
- Delbecque, Philippe. Cass. 8 november 2004, RTD Com, 2005, 871 (note).



- Delbecque, Philippe. *La convention CMR, les transports superposes et multimodaux*. In: RDU 2006, 569-583
- De Meij, Pelle. *Samenloop van CMR-verdrag en EEX-verordening*. Deventer, (Kluwer), 2003, 364
- Demsey, Paul. *The law of intermodal transportation: what it was, what it is, what it should be*. In: Trans.L.J. 2000, 367-417
- De Wit Ralf. *Multimodal transport: carrier liability and documentation*, London, (Lloyd's of London Press) 1995, 583
- Diamond, Anthony. *The Rotterdam Rules*. In: LMCLQ 2009, 445-536
- Ferrari, Franco. *CMR art. 1[Anwendungsbereich]*. In: Internationales Vertragsrecht, Rom I-Vo. CISG CMR FactÜ Kommentar. (2nd ed.), München, (Beck) 2012
- Fredericq, Louis. *Handboek van het Belgisch Handelsrecht*, Brussel, (Bruylant) 1980, 639
- Gevaers Roel, Eddy Van de Voorde and Thierry Vanelander. *Characteristics and typology of last-mile logistics from an innovative perspective in an urban context*. In: City Distribution and Urban Freight Transport: Multiple Perspectives, Cheltenham (Edward Elgar Publishing), 2011, 56-74.
- Girvin, Stephan. *Carriage of goods by sea*, 2e ed., Oxford, Oxford University Press, 2011, 870
- Glass, David. *Article 2 of the CMR convention - a reappraisal*. JBL 2000, 562-586;
- Grignon-Dumoulin, Stéphanie. *Forum Shopping- article 31 de la CMR*. In: RDU, 2006, 609-618
- Guignard, Laurent. *Sous-traitance et transport*. Paris, (Litec) 2001, 698
- Haak, Krijn. *The liability of the carrier under the CMR* Den Haag, (Stichting vervoeradres), 1986, 395\_
- Haak, Krijn and Dick Zwitser, *Opdracht aan hulppersonen over logistieke dienstverlening in het vervoer*. Deventer, (Kluwer) 2003, 670

- Haak, Krijn. *Uniform vervoerrecht: verwezenlijking en beperking*. In: Eenvormig bedrijfsrecht, realiteit of utopie? Den Haag, (Boom Juridische uitgevers) 2006, 183-202
- Haak, Krijn. *Pleidooi voor revisie CMR*. In: TVR 2011, 108-112
- Hartenstein, Olaf and Fabian, Reuschle. *Handbuch des Fachanwalts Transport- und Speditionsrecht* Köln, (Luchterhand) 2010, 1064
- Hartkamp, Arthur Severijn and C.H. Sieburgh, “6. Verbintennisrecht, deel III algemeen overeenkomstenrecht” in A.S. Hartkamp and Sieburgh, Carla. *Mr. Asser’s handleiding tot de beoefening van het Nederlands Burgerlijk recht*, Deventer, (Kluwer) 2010, 667
- Helm Johann Georg, *Handelsgesetzbuch: Grosskommentar: Frachtgeschäft*, Berlin, (de Gruyter) 1994, 754
- Herber, Ralf. *The new German Transport Legislation*. ETL 1998, 591, 591-606
- Herber, Ralf. *HGB § 452 Frachtvertrag über eine Beförderung mit verschiedenartigen Beförderungsmitteln*. in: Münchener Kommentar zum Handelsgesetzbuch: §§ 407-475h. Transportrecht. (2nd ed.), München, (Beck) 2009
- Hess, Burkhard, Thomas Pfeiffer and Peter Schlosser. *The Brussels I-regulation (EC) No. 44/2001. Application and enforcement in the EU*, München, (Beck) 2008, 256
- Hill, Norman. *The Travaux préparatoires of the Hague-Rules and of the Hague-Visby Rules*, Antwerp, (CMI) 1997, 875
- Hoeks, Marian. *Multimodal transport including a rail stage since the Vilnius protocol*. In: TVR 2010, 1-9
- Jesser-Huß, Helga. *CMR art. 1 [Anwendungsbereich, völkerrechtliche Sondervereinbarungen]*. In: Münchener Kommentar zum Handelsgesetzbuch: §§ 407-475h. Transportrecht. (2nd ed.), München, (Beck) 2009
- Kerguelen-Neyrolles, Bernadette. *Lamy transport tome 2, commission de transport, mer, fer, air, commerce extérieur*. Rueil-Malmaison,

- (Lamy), 2012, 970
- Koller, Ingo. *Transportrecht Kommentar*, (6th. Ed.), München, (C. Beck) 2007, 2061
- Lagarde, Paul and Tenenbaum, Andrew. *De la convention de Rome au règlement Rome I*. In : RCDIP 2008, 727-780
- Lake, Michael. *Ships, planes, trains and automobiles: how far inland do the Rotterdam Rules reach?*. In: NZBLQ 2010, 312-342
- Le Tourneau, Philippe. *Contrat de transport*. In: Rép.civ.Dalloz 2007
- Loyens, Jan. *Handboek transportrecht*. Antwerp (Intersentia) 2011, 677
- MacDonald Eggers, Peter. *Carriage by land*. In: *Chitty on contracts, Volume II Specific Contracts*. (29th ed.), London, (Sweet & Maxwell) 2004
- Maes Jochen Christa Sys and Thierry Vanelslander. *Beleidspaper: Kunnen fietskoeriers een rol spelen in de Vlaamse logistieke sector*. Antwerp 2011, <http://www.flanderslogistics.be/fietskoeriers/beleidspaper.pdf> [visited 27 November 2014]
- Magnus Ulrich and Peter Mankowski, *Brussels I Regulation*, München, Sellier European Law Publishers, 2012, 511;
- Manca, P. *A legal outline of carriage by containers*. In: ETL 1968, 491-531
- Mankowski, Peter. *The Rotterdam Rules – Scope of Application and Freedom of Contract*. In: EJCL 2010, 9-21
- Merkt Hanno. *HGB § 407 Frachtvertrag*. In: Baumbach/Hopt, *Handelsgesetzbuch*. (35th ed.). München, (Beck), 2012
- Merkt Hanno. *HGB “§ 460 Sammelladung*. In: Baumbach/Hopt, *Handelsgesetzbuch*. (35th ed.). München, (Beck), 2012
- Messent, Andrew and Glass, David. *CMR: contract for the international carriage of goods by road*. (2nd ed), London, (LLP) 1995, 355

- Neuhold, Gottfried. *Cargo-Tram Zurich – The environmental savings of using other modes*. Zurich 2005, [http://www.bestuufs.net/download/conferences/Amsterdam\\_Jun05/BESTUUF5\\_Amsterdam\\_June05\\_Neuhold\\_ERZ.pdf](http://www.bestuufs.net/download/conferences/Amsterdam_Jun05/BESTUUF5_Amsterdam_June05_Neuhold_ERZ.pdf) [visited 27 November 2014].
- Noels, Dirk. *De tussenpersonen in het transport*. Gent, (Mys en Breesch) 1996, 366
- OTIF, “Central Office Report on the Revision of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 and Explanatory Reports on the texts adopted by the Fifth General Assembly”, 1 January 2011, [www.otif.org](http://www.otif.org)
- Paulin, Christophe. *Droit des transports*, Paris, (Lexis Nexis) 2005, 314
- Paulin, Christophe. Réflexions sur la distinction entre contrat de transport et contrat de commission de transport. In : études sur le droit de la concurrence et quelques thèmes fondamentaux, mélanges en l’honneur d’Yves Serra. Paris, (Daloz) 2006, 325-336.
- Ramberg Jan. *The Law of Carriage of Goods – Attempts at Harmonization*, in: SSL 1973, 212-252
- Ramberg Jan, *Unification of the law of international freight forwarding*. In: RDU 1998, 5-14
- Ramberg Jan. *Global unification of Transport Law: a hopeless task?*, in: Penn.St.Int’l L.Rev (2008-09), 851-857
- Reuschle, Fabian. *HGB 407 Frachtvertrag* in: Ebenroth/Boujong/Joost/Strohn, *Handelsgesetzbuch* (2nd ed.). München, (Beck) 2009
- Rinkler, Axel. § 453 *Speditionsvertrag*. In: Ebenroth / Boujong / Joost / Strohn, *Handelsgesetzbuch* (2th ed.). München, (Beck) 2009
- Rinkler, Axel. § 460 *Sammelladung*. In: Ebenroth / Boujong / Joost / Strohn, *Handelsgesetzbuch* (2th ed.). München, (Beck) 2009
- Rodière, René. *Droit des transports terrestres et aériens*. Paris, (Daloz) 1977, 941
- Rodière, René and Barthélémy Mercadal, *Droit des transports terrestres et aériens*. (4th ed.). Paris, (Daloz) 1984, 172

- Schmid, Reinhard. § 449 HGB *Abweichende Vereinbarungen*. In: *Münchener Kommentar zum Handelsgesetzbuch: §§ 407-475h. Transportrecht*. (2nd ed.) München, (Beck) 2009
- Staniland, Hilton. *Scope of application*. In: *The Rotterdam Rules, a practical annotation*. London, (Informa), 2009
- Sturley, Michael. *Scope of application*. In: *The Rotterdam Rules 2008*. Alphen a/d Rijn, (Wolters Kluwer) 2010, 39, 41.
- Sturley, Michael. *Solving the Scope of application puzzle: contracts, trades and documents in the UNCITRAL transport law project*. In: *JIML* 2005, 22-41
- K. takahashi “*Damages for Breach of a choice-of-court agreement*”, *Yearbook of private international law*. 2008, 57-91
- Thume, Karl-Heinz. *Kommentar zur CMR*. (2nd ed.), Frankfurt am Main, (Verlag Recht und Wirtschaft) 2007, 82;
- Tilche, Marie. *Commission, transport, où est la différence?* In: *BTL* 2000, 285;
- Topteam Logistiek, “*Adviesrapport Topteam Logistiek Partituur naar de top*”, [http://topsectoren.nl/documenten/logistiek/Partituur-naar-de-Top-Adviesrapport-Topteam-Logistiek-2011\\_2013-10-01\\_52.pdf](http://topsectoren.nl/documenten/logistiek/Partituur-naar-de-Top-Adviesrapport-Topteam-Logistiek-2011_2013-10-01_52.pdf), 15 and 38 [visited 27 November 2014]
- United States International Trade Commission, *Express Delivery Services: Competitive conditions facing U.S.-based firms in foreign markets*, USITC-publication, 3678, 2004
- S. Ünám, “*The Scope of application of the Rotterdam Rules and Freedom of Contract*” in M.D. Güner-Özbek (ed.), *The United Nations Convention for the Carriage of Goods wholly or partly by Sea. An Appraisal of the “Rotterdam Rules”*, Berlin, Springer, 2011
- Van Der Vlies, J.F. *Vertragswidriges en vertragsmässiges trucking: vervoer van luchtvracht waarbij het vervoer geheel of gedeeltelijk plaatsvindt over de weg*. In: *TVR* 2007, 1-8
- Verheyen, Wouter. *The DPD-case: a case for a parcel-specific liability regime?* In: *ETL* 2013, 3-12.

- Verheyen, Wouter. *Contractuele aansprakelijkheid van vervoersintegratoren*. Brugge (Die Keure) 2014, 680
- Verheyen, Wouter, Could (contractual incorporation of) DCFR be an answer to the lack of harmonization in the field of forwarding law?”, JICCL 2015, 82-89
- Verheyen, Wouter. EEX(bis) and CMR: the return of parallel proceedings?, In: ETL 2015, 145-170
- Verheyen, Wouter. *Harmonisation instruments: the way forward for forwarding law?* In: Common Core, PECL and DCFR: could they change shipping and transport law? Cambridge, (Metro) 2015, 111-127
- VIL, “Extended gateway Vlaanderen, een werve(le)nd project voor logistiek Vlaanderen”, Antwerp 2008, <http://www.slideshare.net/wj-zondag/extended-gateway-vlaanderen-vrp-03-06-08-presentation> [visited 27 November 2014].
- ZLU e.a., “Studie on Freight integrators, to the commission of the EU, Final report”. Berlin 2003. [http://ec.europa.eu/transport/logistics/documentation/freight\\_integrators/doc/final\\_report\\_freight\\_integrators.pdf](http://ec.europa.eu/transport/logistics/documentation/freight_integrators/doc/final_report_freight_integrators.pdf), 38 [visited 27 November 2014].
- Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna 6-17 October 2003), A/CN. 9/544, [www.uncitral.org](http://www.uncitral.org)
- “Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea] - Provisional redraft of the articles of the draft instrument considered in the Report of Working Group III on the work of its twelfth session (A/CN.9/544)”, A/CN.9/WG.III/WP.36, [www.uncitral.org](http://www.uncitral.org)



# Jurisdiction & Multimodal Transport : A Green Perspective ?

Cécile Legros  
Professor at Rouen-Normandy University



## **Abstract**

The promotion of multimodal transport by European Authorities is based on several considerations, amongst which its positive influence on sustainable development. From the point of view of private law, it is questionable whether EU law could be an incentive to promote modal shift. This issue will be addressed from the angle of litigation as the way litigations are settled can be considered as one of the criteria of sustainability.

Considering the current jurisdiction and arbitration rules applicable to multimodal transport, it must be noted that no enforceable international convention specifically governs this type of transport. Identifying the applicable regime to litigations raised by multimodal transport is quite a challenging assignment as it is determined by a great variety of sources.

The analysis of the rules governing this type of litigations prove that they are not an incentive for the development of multimodalism. Imagining a better way to settle multimodal litigations in Europe thus appears relevant.

## **Key words**

Multimodal transport – jurisdiction – arbitration.

## **Contact**

Cécile Legros, Professor at Rouen-Normandy University, CUREJ EA 4703, 3. Av. Pasteur, 76186 Rouen cedex, France.

E-mail: [cecile.legros@univ-rouen.fr](mailto:cecile.legros@univ-rouen.fr)

## Introduction

The promotion of multimodal transport by European Authorities is based on several considerations, amongst which its positive influence on sustainable development<sup>1</sup>. Several methods have been investigated to encourage the development of multimodal transport. One of these could consist in analysing the above mentioned development towards sustainable freight within the European Union from the point of view of private law<sup>2</sup>. This issue will be addressed from a particular angle, the angle of litigation. Indeed, the way litigations are settled can be considered as one of the criteria of sustainability.

Litigations arising from multimodal transport are governed by rules derived from different legal sources. The first step that must be taken if a dispute related to multimodal transport has not been resolved amicably, is to identify the judge (or arbitral tribunal) who has the jurisdiction, according to the relevant source. It is therefore worth investigating whether jurisdictional rules on multimodal transport may contribute (or not) to promoting co-modality, or modal shift. Before dealing with this issue, it is necessary to define the terms in question. The word ‘jurisdiction’ means, according to the Oxford dictionary, “*The official power to make legal decisions and judgements ; A system of law courts; a judicature ; The territory or sphere of activity over which the legal authority of a court or other institution extends*”. As regards litigations related to multimodal transport, the term jurisdiction refers to a combination of the above definitions. More precisely, it consists in identifying the Courts with the ability to rule such litigations. The analysis will be extended to arbitration, as several international instruments contain provisions on this alternative method of dispute resolution. Discussion on the different definitions of multimodalism is frequent<sup>3</sup>. The InterTran project defined co-modality, as “*an*

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<sup>1</sup> See. InterTran project : <http://www.helsinki.fi/katti/english/InterTran-project.htm>.

<sup>2</sup> See : Eftestøl-Wilhelmsson, Ellen. European Sustainable Freight – The Role of Contract Law [http://www.helsinki.fi/katti/english/EE-W\\_Publications/European\\_Sustainable\\_Freight.pdf](http://www.helsinki.fi/katti/english/EE-W_Publications/European_Sustainable_Freight.pdf)

<sup>3</sup> See UNECE Glossary published in January 2001 : Terminology on Combined

*optimal combination of various modes of transport within the same transport chain, so called intermodal or multimodal transport*". This expression will be considered here in a broad sense, including all journeys performed by at least two different means of transport.

Considering the current jurisdiction and arbitration rules applicable to multimodal transport, it must be noted that no enforceable international convention specifically governs this type of transport. Identifying the applicable regime to litigations raised by multimodal transport is thus quite a challenging assignment. As far as 'door to door' transport is concerned, the Rotterdam Rules intended to solve part of the issue. But, it is unclear if this goal was achieved, as different regimes remain in relation with the mode of transport and the legal instrument governing non maritime legs of transport<sup>4</sup>.

At present and in the absence of an international legal instrument, the legal regime is determined by three types of sources : contracts concluded between the parties, unimodal conventions, or even State laws when these conventions are not applicable. Looking at jurisdictional rules governing this type of litigations, it is questionable whether they may be an incentive for the development of multimodalism (1). A step further is perhaps necessary, venturing into a foresight exercise designed to identify the best way to settle multimodal litigations in Europe (2).

## 1 Jurisdiction rules and multimodality

Wondering whether jurisdictional rules may be an incentive for the development of multimodalism, it is first necessary first to analyse the currently applicable rules, and then to consider their possible influence on multimodality.

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Transport, p. 17 ff. : <http://www.unece.org/fileadmin/DAM/trans/wp24/documents/term.pdf>.

<sup>4</sup> Legros, C. (2012) Relations between the Rotterdam Rules and the CMR, TMLJ, vol. 36, 725-740 ; see also : Eftestol-Wilhemsson, E. The Rotterdam rules in a multimodal context, (2010) 16 IMJL, 274.

## **1.1 Presentation of the current state of international law**

To identify which jurisdictional rules are applicable to a multimodal dispute requires the adoption of the same method as identifying the regime applicable to a transport dispute in general. It consists in the identification of the appropriate applicable International Convention or Domestic Law. This is a major issue related to multimodality. Indeed, the lack of special international rules for multimodal transport produces two significant problems. Firstly, the inadequacy of the liability regime, which may change according to when the damage occurred. Secondly, legal uncertainty, precisely arising from the difficulty to identify the appropriate regime, especially when the origin of the damage is unknown<sup>5</sup>. If we set aside this issue and assume that the applicable regime has been identified, one must look if the applicable instrument contains jurisdiction and/or arbitration provisions or not. Such rules can be found in different types of instruments. First, in legal instruments (International conventions, European Regulations, State Laws). Second, in non binding instruments (soft law, drafts, non enforceable Conventions). And finally, in contracts.

### **1.1.1 Jurisdiction and arbitration rules in legal instruments**

#### **1.1.1.1 Jurisdiction and arbitration rules in unimodal conventions**

International conventions likely to apply to a dispute related to multimodal transport are unimodal conventions. Indeed, given the lack of a special international instrument, courts confronted with a litigation resulting from a multimodal transport generally try to identify the stage of transport during which the damage occurred, and subsequently apply

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<sup>5</sup> Hoeks, Marian. *The law applicable to the multimodal contract for the carriage of goods*, (2009), Erasmus University Rotterdam, p. 9 ff.

the corresponding unimodal regime, thus using the so-called ‘ network system’. This method is generally provided for in unimodal conventions<sup>6</sup>. For instance, if the carriage has been performed successively by a road carrier, and then by sea, according to article 2 of the CMR, this convention will govern the contract, provided that a unique contract has been concluded, that the goods have not been unloaded from the vehicle and that the damage occurred during the road leg<sup>7</sup>. But if the vehicle containing the goods is carried over a part of the journey by sea, and the damage occurred during the sea leg and was caused by the maritime carrier, the liability of the carrier by road shall be determined according to the applicable mandatory sea regime. As a consequence, an international multimodal transport is most often governed by a unimodal Convention. Some of these unimodal Conventions do not contain any specific litigations rules, like Hague-Visby Rules. As for the others, the main characteristics of jurisdiction and arbitration provisions will be described below.

Another international legal source could be a European Regulation. So far however, no European Regulation governing the carriage of goods exists. As for the transport of passengers, the existing Regulations<sup>8</sup> do

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<sup>6</sup> Art. 38 of the Montreal Convention, art. 1 of the COTIF-CIM ; art. 2(2) CMNI ; art. 16 of the Hamburg Rules.

<sup>7</sup> CA Aix-en-Provence, 28 november 2005, IDIT CMR-UNIDROIT Data base N°22345 ; Cass com 2 october 1990, Bull. civ. IV, n°226 ; JCP 1990. IV. 378 ; RJDA (1991) 16, n° 73.

<sup>8</sup> **Air:** Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 - 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 ; Regulation (EC) no 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air.

**Rail.** Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers’ rights and obligations.

**Maritime :** Regulation 1177/2010 concerning rights of passengers when travelling by

not contain any provision relating to multimodal transport.

When none of the international unimodal Conventions apply, multimodal contracts are governed by domestic laws, generally identified through a rule of conflict of law. Very few State laws provide for special rules on multimodal transport<sup>9</sup>.

At present, five international conventions governing contracts of carriage contain jurisdiction and arbitration provisions. As for maritime transport, the only relevant convention is the Hamburg Rules of 1978 (HR)<sup>10</sup>. The recent Rotterdam Rules adopted in 2008 (RR)<sup>11</sup> also contain this type of provisions, though these are not yet in force. Moreover, such provisions may not be applied universally as Chapters 14 and 15 of the Convention are optional. Furthermore, it is unlikely that the EU will opt for these provisions as they strongly derogate from the Brussels I Regulation<sup>12</sup>. As for the carriage of goods by road, the Geneva Convention (CMR) of 1956<sup>13</sup> includes the most far-reaching rules. The Convention governing international railway transport is the COTIF dated 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999 (COTIF)<sup>14</sup>. And finally, the two air transport conventions, the Warsaw Convention regulating liability for the international carriage of persons, luggage, or goods

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sea and inland waterway. The Regulation was published on 17 December 2010 in the Official Journal of the EU and its provisions will apply as from 18 December 2012. Regulation 392/2009, adopted on 23 April 2009, on liability of carriers of passengers by sea in the event of accidents deals specifically with the rights of passengers in case of loss or damage resulting from an accident. The Regulation will apply as from 31 December 2012.

<sup>9</sup> In Europe both Germany and The Netherlands have ruled on multimodal transport. But these statutes do not include jurisdiction rules.

<sup>10</sup> United Nations International Convention on the Carriage of Goods by Sea adopted in Hamburg on 31 March 1978.

<sup>11</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea adopted 11 December 2008.

<sup>12</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.

<sup>13</sup> The Convention on the Contract for the International Carriage of Goods by Road, signed at Geneva 19 May 1956.

<sup>14</sup> 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).

performed by aircraft for reward of 1929 (WC)<sup>15</sup> and the Montreal Convention of 1999 (MC)<sup>16</sup>. Jurisdiction and arbitration provisions contained in these conventions apply if the convention is applicable itself, notwithstanding a possible interference with the Brussels I Regulation if the dispute falls within the scope of application of this instrument. At present, such interference is really problematic with the CMR, as this convention contains developed enforcement provisions<sup>17</sup>. As for the conventions adopted by the EU itself<sup>18</sup>, compatibility of the jurisdiction and arbitration provision has been preserved. This issue has also been taken into consideration in the negotiations of the Rotterdam Rules with the adoption of a ‘opt-in’ system for the two chapters dedicated to jurisdiction and arbitration. Indeed, such provisions proved to be inconsistent with the Brussels I Regulation and could have jeopardized the adoption of the convention by EU member States.

Despite some differences, the main characteristics of these jurisdiction and arbitration provisions can be identified<sup>19</sup>. These special rules are generally designed on the same model. First, it must be noted that transport law being part of international trade law, the principle of contractual freedom is in this field prominent. Contracting parties may thus agree on a jurisdiction or arbitration clause. If no choice has been

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<sup>15</sup> Originally signed in 1929 in Warsaw (hence the name), it was amended in 1955 at The Hague, Netherlands, and in 1971 in Guatemala City, Guatemala.

<sup>16</sup> The Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on 28 May 1999. Art. 2(1).

<sup>17</sup> See below page 100.

<sup>18</sup> The Montreal convention for instance was approved by an EU Council Decision of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (EUOJ L 194 , 18/07/2001 P. 0038 – 0038). The Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999, was signed in Bern, Switzerland on 23 June 2011, and entered into force on 1 July 2011, in accordance with Article 9 of the Agreement (EUOJ L 183/1, 13/07/2011).

<sup>19</sup> For more details, see : Legros, C. *Compétence juridictionnelle : les conflits de normes en matière de contrats de transport internationaux* (Jurisdiction : Conflict of Norms in the Field of International Transport Contracts), (2007) *Journal du droit international - JDI*, 799-836, 1081-1125.

made by the parties, these conventions provide for subsidiary forums. Relating to jurisdiction provisions, article 31 of the CMR constitutes a topical example of these types of provisions. As for arbitration, article 22 of the Hamburg Rules is one of the most far-reaching provision in this area.

### **Article 31 CMR**

1. In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory:

(a) The defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made,

or (b) The place where the goods were taken over by the carrier or the place designated for delivery is situated.

2. Where in respect of a claim referred to in paragraph 1 of this article an action is pending before a court or tribunal competent under that paragraph, or where in respect of such a claim a judgement has been entered by such a court or tribunal no new action shall be started between the same parties on the same grounds unless the judgement of the court or tribunal before which the first action was brought is not enforceable in the country in which the fresh proceedings are brought.

3. When a judgement entered by a court or tribunal of a contracting country in any such action as is referred to in paragraph 1 of this article has become enforceable in that country, it shall also become enforceable in each of the other contracting States, as soon as the formalities required in the country concerned have been complied with. These formalities shall not permit the merits of the case to be re-opened.

4. The provisions of paragraph 3 of this article shall apply to judgements after trial, judgements by default and settlements confirmed by an order of the court, but shall not apply to interim judgements or to awards of damages, in addition to costs against a plaintiff who wholly or partly fails in his action.



5. Security for costs shall not be required in proceedings arising out of carriage under this Convention from nationals of contracting countries resident or having their place of business in one of those countries.

## **Article 22 HR – Arbitration**

1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.

2. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.

3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:

(a) a place in a State within whose territory is situated:

(i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

(ii) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(iii) the port of loading or the port of discharge; or

(b) any place designated for that purpose in the arbitration clause or agreement.

4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.

5. The provisions of paragraphs 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.

6. Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen.

**Freedom of choice.** By exercising free choice, contracting parties may express their willingness in two ways : by selecting a competent court or by opting for arbitration. As for jurisdiction clauses<sup>20</sup>, the parties are generally allowed to designate in the contract a court of their choice, or even designate the jurisdiction of a country. However, it is a rather 'supervised' choice as operators are not allowed to choose their jurisdiction freely. The choice is generally limited to forums authorised by the Convention when no choice is made<sup>21</sup>. Besides, only Courts of contracting parties to the convention can be designated. Such a requirement is logical as it aims to guarantee the application of the convention itself. Indeed, if a case is brought in front of a national Court of a non contracting State, this Court is quite unlikely to apply the convention, though domestic laws do not always prohibit them from doing so<sup>22</sup>. But the main problem of these provisions is that they do not authorise exclusive jurisdiction clauses. Whenever a forum has been specially chosen by the contracting parties, the plaintiff may opt to bring an action before the chosen court, or before one of the other forums listed in the provision. However, this system tends to ruin the objective of foreseeability of jurisdictions clauses.

Regarding now arbitration clauses when allowed by international unimodal conventions<sup>23</sup>, the traditional principle of party autonomy in this domain is undermined by a strict framework. It is often the case that the seat of arbitration can only be selected from a limited list of locations, generally corresponding with forums authorised by the convention when no choice is made. There are also formal requirements, particularly the obligation for the clause to be in writing<sup>24</sup>. And finally, freedom of choice regarding applicable rules by the parties or arbitrators is also limited.

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<sup>20</sup> CMR, Art. 31 ; Art. 21 HR ; Art. 46(1), COTIF-CIM ; Art. 32, WC ; Art. 67 to 72 RR.

<sup>21</sup> See below p. 6.

<sup>22</sup> Cass com 28 march 2000, Navire Teesta, N° 98-11600, RJDA (2000) 7-8, 766 ; DMF (2000), 920 : In this case the Hague Visby Rules were not applicable ipso jure. However, the French Cour de cassation refused to apply the Hamburg Rules although conditions for the application wet met, on the grounds that France had not ratified this convention.

<sup>23</sup> CMR, Art. 33 ; HR, Art. 22 ; MC, Art. 34 ; RR, Art. 67 to 72.

<sup>24</sup> Which is not a legal requirement for international contracts under French Law : Art. 1507 Civil Procedure code.

Indeed, the clause will only be valid if the arbitrators apply the corresponding convention. This last requirement aims to guarantee the application by the arbitrators of the convention itself. However, such a requirement tends to mix conditions of validity of the arbitration clause itself and conditions of enforceability of the award. The arbitration clause should not be invalid if the parties designated a different law or convention to govern their contract<sup>25</sup>. Arbitrators should be aware that these unimodal conventions are mandatory and should be applied to ensure the validity of the award itself, despite the choice of a different law. Failing to do so, the award could indeed be declared unenforceable in the countries which are parties to such conventions under Article V, paragraph 2 (b) of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, the recognition or enforcement of the award being considered contrary to the public policy.

**Absence of choice.** If no choice has been made by the parties, conventions provide for subsidiary forums. These forums are very close to those generally encountered in international private law instruments, as Brussels I Regulation for instance or even State laws. In this sense, Article 31(1) CMR can be taken as an example, and compared to Article 5-1° of Brussels I Regulation.

Four forums can be generally found in these conventions<sup>26</sup>.

The first one is the domicile of the defendant : Courts where the defendant is ordinarily resident, or has his principal place of business, have jurisdiction.

The second one is the forum of conclusion of the contract : location of the branch or agency through which the carriage contract of was made.

The third one is the forum « of departure » : place where the goods were taken by the carrier.

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<sup>25</sup> This is however the tendency in French case-law : see Legros, C. Compétence : arbitrage et CMR (Arbitration and CMR): comment of CA Aix 2 September 2004, (2005) JCP, éd. E & A, p. 1930.

<sup>26</sup> Of course the precise content of these provisions may vary from an instrument to another.

And finally, the fourth forum is the *forum of « arrival »*: place designated for delivery.

Compared to Bussels I Regulation or domestic laws (for instance French law), the only significant difference is the *forum of departure* which has no parallel in those instruments.

Another important point relates to the precise designation of the forum must be noted. Some instruments designate a precise Court, for example the Court of the domicile of the defendant<sup>27</sup>. While others, like the CMR for instance<sup>28</sup>, only designate the country in which the actions may be brought, and not the precise court where these actions may take place. This point is important because it is not so easy for parties to be aware of that issue just by reading the provisions. And moreover, it leads to legal uncertainty because once the country where a suit can be brought has been identified, still remains the need to find the proper Court designated by domestic jurisdiction rules according to the *lex fori*. And to some extent, jurisdictional rules looking similar, can ultimately prove to lead to different Courts. In the *Lutz* case<sup>29</sup>, the ‘Cour de Cassation’ had to solve the problem caused by the absence of an equivalent of the forum of delivery (31 (1) (b) CMR) in French legislation. According to this provision, France had jurisdiction. But no French Court could be identified by application of the French legislation. Indeed, the French equivalent provision gives in fact jurisdiction to the place of the ‘actual’ delivery (art. 46 CPC). And in the case at hand, the goods had been totally destroyed during the carriage. Although France had jurisdiction according to the CMR, it was consequently impossible to identify a competent Court in France, as there was no delivery at all. The High Court decided however that, as France had close links with the case (it was the place of contractual delivery), Courts of this place could be seized according to the principle of sound administration of justice. This decision has been criticized as this solution seems to deviate from the current

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<sup>27</sup> MC, Art. 33; WC, Art. 28-1.

<sup>28</sup> COTIF, RU-CIM, Art. 26 ; HR, Art. 21; RR, Art. 66.

<sup>29</sup> Cass civ. (1) 20 december 2000, N°98-15.546, Bull. 2000 I N° 342 p. 221.

interpretation of the convention<sup>30</sup>. Such a discrepancy however is issued by the application of the *lex fori* and could be solved by seizing the International Cour of Justice, as provided for in article 47. But this recourse has never been used. Rather, the solution adopted in the *Lutz* case is quite consistent with the underlying principles governing the CMR jurisdictional rules.

***Lis pendens* and recognition provisions.** Finally, some of these conventions contain *lis pendens* and related actions rules<sup>31</sup>. Recognition and enforcement rules can also be found in certain conventions<sup>32</sup>. When the litigation is linked to the EU, difficulties regarding the combination of these conventions with EU Laws and in particular with Brussels I Regulation arise frequently.

These types of rules are challenging as regards such a combination with Brussels I Regulation which includes both rules on jurisdiction and on recognition and enforcement of judgments. In fact, a combination of jurisdiction provisions does not meet any major obstacles as article 71 of the Regulation (Chapter VII - ‘Relations with other instruments’), stipulates that the regulation does not affect any conventions adopted on special matters (principle of *lex specialis*) to which the Member States are parties and containing jurisdiction or recognition or enforcement of judgments provisions. Thus, this provision authorises Courts of a Member State, which is a party to a Convention on a particular matter, to assume jurisdiction in accordance with that convention<sup>33</sup>.

By contrast, combinations of rules on recognition or enforcement of judgments, as well as those on *lis pendens* raise many problems.

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<sup>30</sup> Loewe R., Commentary on the Convention of 19 May 1956 on the Contrat for the International Carriage of Goods by Road (CMR), (1976) European Transport Law, 311.

<sup>31</sup> Art. 31(2) CMR ; Art. 21(4) HR ; Art. 26(4) CIMT (UNCTAD Convention on multi-modal transport of 1980) ; Art. COTIF-CIM 46(2).

<sup>32</sup> Art. 31(3) CMR ; Art. 73 RR.

<sup>33</sup> Case C-148/03, ECJ October 2004, Nürnberger Allgemeine, [2004] ECR I-10327 - EUCJ 19 December 2013 - Case C 452/12, Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV [2013] ECR I 4107, Legros C., (2014) JCP E N° 39, 1480, n°12 - Case C-157/13, ECJ 2 september 2014, Nickel & Goeldner Spedition v Kintra, Legros C., (2015), Rev. Crit. DIP, to be published.

The European Court of Justice had occasions to decide on such issues in the famous TNT Express Nederland case in 2010<sup>34</sup>. This case concerned the compatibility of CMR *lis pendens* (Art. 31(2)) and recognition and enforcement (Art. 31(3)) provisions with Brussels I Regulation. In 2002, Siemens Nederland NV and TNT (the carrier) had entered into a contract for the carriage of goods by road from Netherlands to Germany. But the goods were not delivered to their destination. TNT instituted proceedings before the Rotterdam Court in Netherlands against Siemens' insurer, asking for a declaration of limitation of liability. TNT asked to benefit from Article 23 of the CMR, which lays down the rules applicable to the amount of compensation that can be claimed. The Rotterdam Court dismissed the action and TNT appealed against that judgment to the Regional Court of Appeal in The Hague. Two years after, the forwarder's insurer brought an action against TNT before the Regional Court of Munich in Germany for compensation in respect of the loss suffered by Siemens on account of the loss of the goods. Given that proceedings between the same parties and concerning the same carriage were already pending in the Netherlands (Rechtbank te Utrecht), TNT contended that, under the *lis pendens* rule laid down in Article 31(2) of the CMR, the Munich Court could not hear the insurer's action. The Court however rejected TNT's line of argument founded on Article 31(2) of the CMR and ordered it to pay compensation. The insurer then requested the enforcement of this judgment in the Netherlands pursuant to Regulation No 44/2001. TNT then demanded the order to be set aside and the enforcement of the judgment to be refused or, at least, the decision to be deferred until the Hague Court of Appeal had ruled on the appeal lodged against the judgment of the Rotterdam Court. His argument was that by virtue of the *lis pendens* rule laid down in Article 31(2) of the CMR, the Munich Court lacked jurisdiction to hear the insurer's action. But the insurer argued on the grounds of 44/2001 Regulation. TNT was dismissed. TNT appealed on a point of law against the order of the Rechtbank te Utrecht. In its submission, TNT argued that the Court failed to have regard to the fact that, by virtue of the second subparagraph of Article

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<sup>34</sup> Case C 533/08, ECJ 4 May 2010, TNT Express Nederland [2010] ECR I 4107.

71(2)(b) of Regulation No 44/2001, Article 31 of the CMR derogates from the prohibition, laid down in Article 35(3) of the regulation, on reviewing the jurisdiction of the court of the Member State of origin. In those circumstances, the Supreme Court of the Netherlands decided to suspend proceedings and to refer the following questions to the Court of Justice for a preliminary ruling.

Six questions were asked to the ECJ, which can be summarized into two main problems. The first one concerned the relations between Brussels I Regulation recognition and enforcement rules and those of the CMR, as regards Article 71(2)(b) of Regulation No 44/2001. In other terms, which rules should prevail. The second issue raised the same problem as regards *lis pendens* rules, existing in both sources. The answer of the ECJ to the first question was the following : “Article 71 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in a case such as the main proceedings, the rules governing jurisdiction, recognition and enforcement that are laid down by a convention on a particular matter, such as the *lis pendens* rule set out in Article 31(2) of the Convention on the Contract for the International Carriage of Goods by Road, signed at Geneva on 19 May 1956, as amended by the Protocol signed at Geneva on 5 July 1978, and the rule relating to enforceability set out in Article 31(3) of that convention, apply provided that they are highly predictable, facilitate the sound administration of justice and enable the risk of concurrent proceedings to be minimised and that they ensure, under conditions at least as favourable as those provided for by the regulation, the free movement of judgments in civil and commercial matters and mutual trust in the administration of justice in the European Union (*favor executionis*)”. In other terms, despite Article 71 of Council Regulation (EC) No 44/2001, recognition and enforcement or *lis pendens* provisions of a convention on a particular matter, do not prevail over Regulation (EC) No 44/2001 rules if they provide for conditions less favourable as those provided for by the Regulation. In this case, the key issue was the verification of the jurisdiction of the first Court seized.

Indeed, Regulation 44/2001 prohibits such a verification. But article 31(3) of the CMR does not offend this rule. It only provides that a judgment enforceable in a contracting State according to the convention's rules shall also become enforceable in each of the other contracting States, as soon as the formalities required in the countries concerned have been complied with. Indeed, according to Article 35, paragraph 2 of Regulation 44/2001 the judge in charge of enforcement is not supposed to verify the competence of the judge who made such a decision. But it is less clear to know if this provision can be applied when the *lis pendens* rules of the convention have not been respected. However, the fact that ECJ stated that EC Regulation *lis pendens* rules also prevailed on those of the CMR, leads to the conclusion that the enforcement of the German decision cannot be rejected.

This interpretation has been confirmed recently by another ECJ decision in case C 452/12 of 201335. In this case only *lis pendens* rules were discussed and the first seized Court's jurisdiction was not challenged. ECJ confirmed the prevalence of EU regulations over the CMR's provision on *lis pendens*. The conclusion to be drawn from the above cases is that despite Article 71 of Regulation 44/2001 which theoretically gives priority to special conventions, these conventions can be set aside when recognition, enforcement or *lis pendens* rules are at stake. Indeed, the CMR provisions are far less precise than the EU Regulations. Moreover, ECJ prioritizes the principle of *favor executionis*, ensuring the free movement of judgments and mutual trust in the administration of justice in the European Union. It is doubtless that such conflicts are likely to disappear in the future if EU adopts itself new conventions as their compatibility with EU instruments will be checked before, as it has been the case when negotiating the Rotterdam Rules.

This discussion is important as it affects the way jurisdiction rules for multimodal transport should be designed.

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<sup>35</sup> Legros, Cécile. Incidence d'un jugement déclaratoire négatif de responsabilité rendu sur le fondement de la CMR sur la compétence du second juge saisi d'une action récursoire (Influence of a negative liability decision issued on the grounds of the CMR on jurisdiction), [2014] JCP ed. E&A, 1480, comm. n°12.



### **1.1.1.2 Jurisdiction and arbitration rules in domestic laws**

The second legal source of jurisdiction and arbitration rules that may be applied to multimodal litigations is domestic law. For example, French Law does not provide for any special jurisdiction or arbitration rules for transport litigations. Therefore no rules for multimodal transport litigations exist. These litigations are governed by general rules of civil procedure. As for jurisdiction, rules related to contracts (or torts) are applied. Those are quite similar to Brussels I<sup>36</sup>. Arbitration is also governed by the Civil Procedure Code<sup>37</sup>. Brussels I Regulations apply to recognition and enforcement of judgments, provided that the litigation is within its scope of application. Otherwise, French international private law rules apply. As for enforcement of arbitral awards in France, French law is competent<sup>38</sup> as New York convention of 1958<sup>39</sup> authorises State parties to apply their own legislation if more favourable to enforcement than the convention, which is the case for French law.

### **1.1.1.3 Jurisdiction and arbitration rules in nonbinding instruments**

Regarding non-binding instruments such as soft law, or non enforceable conventions, two instruments prove to be relevant. First, the UNCTAD/ICC rules for Multimodal Transport Documents<sup>40</sup>, which provides a set of rules that can be voluntarily applied to a multimodal contract. However, these Rules do not contain any specific provision on jurisdiction or arbitration. They only mention such issues as possible additional clauses. Second, the UNCTAD Convention on multimodal transport, adopted in 1980, which, however, never came into force<sup>41</sup>. Yet, this latter convention is interesting as it had provided for special provisions on jurisdiction and

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<sup>36</sup> Art. 42 to 48 Civil Procedure Code (CPC).

<sup>37</sup> Art. 1442 to 1527 Civil Procedure Code (CPC).

<sup>38</sup> Art. 42-48 CPC and case law.

<sup>39</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention").

<sup>40</sup> [http://unctad.org/en/PublicationsLibrary/tradewp4inf.117\\_corr.1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/tradewp4inf.117_corr.1_en.pdf)

<sup>41</sup> [http://unctad.org/en/PublicationsLibrary/tdmtconf17\\_en.pdf](http://unctad.org/en/PublicationsLibrary/tdmtconf17_en.pdf)

arbitration. Article 26 'Jurisdiction' contains rules which are not really different from those provided for in unimodal conventions. We can find here the four forums previously described, as well as a provision enabling free choice of jurisdiction but which is still not exclusive.

## **ARTICLE 26 – JURISDICTION**

1. In judicial proceedings relating to international multimodal transport under this Convention, the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

(a) defendant place of business : The principal place of business or, in the absence thereof, the habitual residence of the defendant; or

(b) place of conclusion of the contract : The place where the multimodal transport contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(c) place of « departure » ou « arrival » : The place of taking the goods in charge for international multimodal transport or the place of delivery; or

(d) place freely chosen : Any other place designated for that purpose in the multimodal transport contract and evidenced in the multimodal transport document.

The same conclusion as those related to the actual unimodal conventions can be reached for the arbitration provision (art. 27).

## **ARTICLE 27- ARBITRATION**

1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to international multimodal transport under this Convention shall be referred to arbitration.

2. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:

(a) A place in a State within whose territory is situated:

The principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

(ii) The place where the multimodal transport contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or (iii) The place of taking the goods in charge for international multimodal transport or the place of delivery; or

(b) Any other place designated for that purpose in the arbitration clause or agreement.

3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

4. The provisions of paragraphs 2 and 3 of this article shall be deemed to be part of every arbitration clause or agreement and any term of such clause or agreement which is inconsistent therewith shall be null and void.

5. Nothing in this article shall affect the validity of an agreement on arbitration made by the parties after the claim relating to the international multimodal transport has arisen.

The analysis of the previous rules on arbitration and jurisdiction, though contained in an instrument specially dedicated to multimodal transport is rather disappointing. They reveal that in this area, the drafters of these instruments did not consider that particular rules for multimodal transport were necessary, those currently governing transport in general proving to be at least relevant, subject to minor adaptations. Indeed, multimodal transport litigations have the same basic features as unimodal litigations, involving a claimant (generally the owner of the goods) and a defendant (generally the carrier), along with their respective insurers. Both are generally multiparty. As far as forums are concerned, the need for a different forum specially appropriate for multimodal litigations does not appear clearly. However it does not mean that these mechanisms of dispute resolutions are actually efficient.

#### **1.1.1.4 Jurisdiction and arbitration rules in contracts governing multimodal transport**

Finally contracts must be examined. Indeed, as few legal provisions are specifically drafted for multimodal transport, contracting parties are likely to design their own provisions, provided that they respect mandatory rules. A large range of contracts, and general terms and conditions for multimodal transport have been analysed<sup>42</sup>. It must be noted however, that most jurisdiction clauses examined designate the Courts of the country in which the multimodal transport operator is established and which corresponds to a common practice in maritime and road transport. When transport is mainly performed by sea, arbitration clauses are sometimes included, though arbitration clauses are more commonly found in charter-parties. But these clauses are still not different to those found in unimodal contracts. Here again, the necessity to draft clauses specially designed for multimodal purposes does not appear clearly.

Now that the existing provisions have been reviewed, their influence on multimodality development needs to be analysed.

### **1.2 Influence on multimodality**

#### **1.2.1 Absence of special jurisdiction and arbitration dedicated to multimodal transport**

Having briefly looked at the main features of jurisdiction and arbitration provisions contained in the current instruments governing contracts of transport, it seems necessary to analyse whether or not these provisions are likely to encourage multimodal transport. A negative answer can be inferred from the previous analysis. Several justifications can prove it. Obviously, jurisdiction and arbitration provisions contained in unimodal conventions have not been specifically designed for multimodal transport. Thus, they may not be particularly adapted to it. However, it must be admitted that these provisions were drafted for transport purposes and thus

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<sup>42</sup> Notably : FIATA combined transport bill of lading and the BIMCO/INSA COMBIDOC...

provide rather appropriate forums, linked with the material reality of transport : forum of the taking of the goods, forum of delivery etc. In this sense, these forums could be appropriate for multimodal transport as well.

### 1.2.2 Encouragement of forum shopping

Problematically, though it is not a specific problem to multimodal transport, a certain trend to foster *forum shopping*<sup>43</sup> can be observed. When the parties have not agreed on an exclusive jurisdiction clause or an arbitration clause, the different options offered to the claimant are obviously not only used to provide an easy access to justice. The multiple optional forums offered to the parties, encourage plaintiffs to bring actions in front of the court more likely to grant the application of the claimant. In the field of transport litigation, taking advantage of procedural differences existing between domestic laws along with interpretation discrepancies is rather frequent. A topical example is the use of negative declarations of liability. This manoeuvre is frequently used by road carriers who bring actions in countries where such judgments can be ruled<sup>44</sup>. Jurisdiction is also selected according to their interpretation of article 29 of the CMR<sup>45</sup> concerning the breaking of liability limits<sup>46</sup>

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<sup>43</sup> Bat v Exel (2013) EWCA civ 1319, analysed by S. Lamont-Black, in *Enhancement of harmonization, predictability and foreseeability through the EU guidance in transport law?*, this review, p. XX.

<sup>44</sup> Notably, The Netherlands, Belgium, Italy. In France, procedural rules do not allow claimants to bring actions unless they have an actual interest to do so. Preventive actions are then prohibited, except in certain limited areas.

<sup>45</sup> Article 29(1) CMR : « The carrier shall not be entitled to avail himself of the provisions of this chapter which exclude or limit his liability or which shift the burden of proof if the damage was caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seised of the case, is considered as equivalent to wilful misconduct. »

<sup>46</sup> See inter alia : Smeele, F. Dutch case law on Art. 29 CMR European Transport Law 35 (2000), 329-341 ; 36 (2001), 37-40 ; (2003) ; Theunis, J. and Peters J. F., *Wilful misconduct under the CMR*, *Etudes offertes à B. Mercadal*, (2002) Francis Lefebvre, 523 ; Grignon-Dumoulin, S. *Forum shopping - Article 31 de la CMR*, (2006), *Uniform Law review*, 609 ; Calme, S. *Le choix offert à la victime quant à la réglementation applicable au sein même de la convention CMR : un arrêt de principe de la Cour de justice fédérale allemande* (2011) *Revue de Droit des Transports*, 8 ; Glockner, H., *Limits to Liability and Liability Insurance of Carriers under Articles 3 and 23 to 29 of the*

As Belgium for instance adopts a very restrictive interpretation of the expression ‘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’, the limits are never overruled in this country. As a consequence, if it is possible for the carrier to seize a Belgian Court of a negative action of liability, the decision hinders any further decisions that may have been issued at the initiative of the actual ‘victim’ of the loss or damages causes to the carried goods. This situation corresponds precisely with the facts in the *TNT* and *Nipponkoa* cases. This type of procedural behaviour is quite normal. But talking about uniform international instruments somehow ruins the objective of uniformity of laws. Especially so when the location of the suit is chosen on the grounds of interpretation discrepancies of international instruments by State parties. Such procedural manoeuvring is certainly not very sustainable.

### 1.2.3 Encouragement to settle out of Courts

Finally, it is well known that the identification of the applicable regime is particularly complex in multimodal transport. Thus, identifying the Court which has jurisdiction is also very difficult. Such obstacles, added to a certain tendency for procedural manoeuvring, fosters settlements out of Courts. Avoiding trial can be considered positively. The famous French author *Honoré de Balzac* said “Un mauvais arrangement vaut mieux qu’un bon procès”<sup>47</sup>. However, it must be said, I do not agree with this. Rather, settlements do not always benefit the ‘victim’. Accepting a settlement only to avoid pleading far away from home, or because of legal uncertainty on the applicable regime is so high that the claimant, or the claimant’s lawyer, is unable to know what the outcome of the trial could be, thus weakening the claimant, and often inciting him to accept an unfair settlement.

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CMR, in: IRU (ed), *International Carriage of Goods by Road (CMR)*; Haak, K. F., *The Liability of the Carrier under the CMR*, The Hague, Stichting Vervoeradres, 1986.; O.J. Tuma, *The Degree of Default under Article 29 CMR*, *Uniform Law review* 3 (2006), 585.

<sup>47</sup> Illusions Perdues, T5.730 : « a bad settlement is better than a fair trial ».

The law at present does not entirely ensure satisfactory solutions for multimodal litigations. It is too complex, it fosters forum shopping, apart from situations where a balanced agreement has been made. The previous developments are not all specific to multimodal transport and can be found in transport litigations in general. A more proactive approach should be tried to find potential solutions to improve the effectiveness of settlement of multimodal disputes.

## **2 Improving effectiveness of settlement of multimodal disputes**

The point being made is that current jurisdictional rules are not likely to encourage multimodal transport, or even to enable efficient resolution of disputes. To encourage the development of multimodal transport, one of the solutions is to improve legal certainty by adopting a specific liability regime. Several works have been carried out in the past years and even decades, unfortunately unsuccessfully<sup>48</sup>. It would certainly be easier to achieve uniform rules under EU legislation. But I must confess that I am rather reluctant to resort to EU legislation as far as carriage of goods is concerned. In my opinion, the good level for ruling is the international level and not a regional one. Yet, there are numerous obstacles before an international convention is in force. In this sense, a European regulation could be a first step. But how could settlements of multimodal disputes be improved? To answer this question, it is necessary first to agree on criteria of efficient dispute resolution methods, and, perhaps, to invent ‘a green method’ of dispute resolution for multimodal litigation. Limiting forum shopping is certainly the first obvious way to achieve this goal

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<sup>48</sup> Legros, Cécile, Bailly-Hascoët, Valérie, Aspects juridiques de l’intermodalité (Legal Aspects of Intermodality), in *Les corridors de transport*, (2012) EMS, p. 153-182.

## 2.1 Limiting forum shopping

From a legal point of view, the main criteria of sustainability is legal certainty. The point has been made that jurisdiction and arbitration rules are generally so complex that the entitled Court or arbitration tribunal is not easily identifiable. Moreover, the options offered to claimants frequently lead to *forum shopping*. A solution to these issues could be to abandon the multiple forums offered to the claimants and to propose a single forum. Indeed, offering multiple options, as the place of taking of the goods, the place where the contract has been concluded.. etc. certainly promotes access to justice, but also increases legal uncertainty and ‘bad’ forum shopping.

If a single forum was to be provided for, it is however hard to admit that we could get rid of the principle of *actor sequitur forum rei*, granting jurisdiction to the domicile of the defendant. But if legally possible, the only relevant forum would certainly be the place of performance of the contract, which, in transports, is the place of delivery of the goods to the consignee. Several reasons confirm this analysis. This place meets the criteria of legal certainty as it is generally mentioned on the transport document. Thus, this forum is easily predictable. Moreover, such a forum is in many cases close to the dispute as it is often the place where the damage is discovered and where evidence can generally be found. And, incidentally, it corresponds with Brussels I Regulation for contractual litigations.

Indeed, in Europe at least, it seems irrelevant to derogate from Brussels I Regulation as it creates more problems than it solves. Brussels I Regulation for contractual litigations provides for two jurisdictions: the domicile of defendant (article 2 ) and “in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided” (article 5(1)(b)) which is for transport the place of delivery<sup>49</sup>. So we can finally reach the conclusion that no special jurisdiction provisions are requested as far as jurisdiction is concerned, at least when Brussels I Regulation is applicable<sup>50</sup>. When

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<sup>49</sup> Cass com 16 november 2010, N° 09-66955, Bulletin 2010, IV, n° 181.

<sup>50</sup> That is when the defendant is domiciled in EU (art. 2).



this Regulation does not apply, that is when the defendant is not established in the EU, such provisions may however prove of interest. Recent international conventions like Rotterdam Rules set up a system of opting in<sup>51</sup>. This system preserves European rules as it is likely the EU will not opt for these provisions. But it also discards uniform conventional rules when EU legislation is not applicable which is not satisfactory for international traders as jurisdictions domestic rules are very different from a country to another. A solution could be to restrict the application of conventional provisions on jurisdiction to situations where EU Regulation n°44/2001<sup>52</sup> is not applicable.

This system has proven very complex. Could arbitration be a solution to these difficulties ?

## **2.2 Inventing a sustainable multimodal dispute resolution**

A sustainable dispute resolution method would need to meet criteria such as speed, low cost, quality and expertise. Yet, we have to recognize that such values are frequently underlined when describing arbitration. This leads to the following question : is arbitration a better way to resolve a multimodal dispute ? Indeed, it seems an appropriate method of dispute resolution as for expertise and legal multiculturalism. Another advantage of this system would be the uniform application of international law. As we often say in France “international arbitrators do not have a forum”, meaning that they have no allegiance to a State or a State law. In this context, there are more unlikely to interpret international texts (Convention or Regulation) according to domestic laws or principles. However, it should not be denied that arbitration has definite advantages, but also serious disadvantages, such as costs. Nevertheless, creating a real European Arbitration and Mediation Centre specialized for all means of transport, particularly in the field of multimodal transport, could be an appropriate remedy for these difficulties. It must not be forgotten however

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<sup>51</sup> See above p.93.

<sup>52</sup> Now Regulation n°1215/2012.

that, as arbitration is based upon the will of the parties, it cannot be imposed. And in this sense, the simpler the rules, the better. Such complex rules as in the CMR, or even more so in the Rotterdam Rules, are totally inappropriate for arbitration. And above all, they are unable to achieve one of their goals which is to protect the consent of the parties. But this is another issue that cannot be developed here.

**Conclusion.** Improving multimodal dispute resolution raises many questions that cannot be easily answered. Several points must be kept in mind however.

A need for specific jurisdictions and enforcement rules is not obvious for multimodal transport in European instruments.

It is indeed necessary to simplify the existing ones, for multimodal litigations and transport litigations in general, especially in international instruments and arbitration. This could be done in two ways. By using EU regulation 44/2001 instead of special provisions on jurisdiction. And by encouraging the promotion of arbitration in this field.



# Multimodal Perspectives of the Carriage of Goods by Sea

Towards a Uniform System of International  
Transport Law via the Rotterdam Rules

Andrea La Mattina, University of Genoa

## **Abstract**

This paper focuses on the evolution of the regulation of the international transport of goods by sea with particular reference to the issues connected to multimodal transport.

In the current economic context, international maritime transport is frequently only a phase of a complex multimodal transport operation, but which is not specifically regulated by any international convention currently in force. Furthermore, the analysis of the relevant comparative case law demonstrates that national courts are uncertain as to which liability regime to apply on the multimodal transport operator. Of course, uncertainty it is depending from the parties, as to which law is applicable depending on which is the competent court.

Although the new Rotterdam Rules are not revolutionary, for the first time they provide a liability regime for the sea carrier which specifically takes into consideration the development of sea transport from a «multimodal perspective», and it fills in the gaps left by the international conventions that are currently in force. From this perspective the author would like the Rotterdam Rules to be promptly ratified by the major maritime States so as to (at least partially) resolve the situation of uncertainty that characterises the subject of multimodal transport.

## **Key words**

Hague-Visby Rules, Hamburg Rules, liability of the carrier, multimodal transport, Rotterdam Rules.

## **Contact**

Andrea La Mattina, University of Genoa, Italy – National scientific qualification as Associate Professor of Commercial and Maritime Law.

E-mail: [andrea.lamattina@unige.it](mailto:andrea.lamattina@unige.it)

# 1 From Brussels to Rotterdam via Hamburg

The International Convention for the unification of certain rules of law relating to bills of lading (Brussels, 25 August 1924, hereinafter the 1924 Brussels Convention)<sup>1</sup> was conceived in order to compromise the interests of maritime carriers with those of shippers with the aim being to limit the abuse of freedom of contract<sup>2</sup>. This conception clearly also marked the 1968 Visby Protocol<sup>3</sup> and the 1979 Brussels Protocol<sup>4</sup>, both amending the 1924 Brussels Convention (hereinafter the Hague-Visby Rules) with the sole intent of clarifying certain matters already regulated by such Convention<sup>5</sup>.

The United Nations Convention on the Carriage of Goods by Sea (Hamburg, 31 March 1978, hereinafter the Hamburg Rules) had the aim of defending cargo interests in a stronger way than provided for by the 1924 Brussels Convention and its amendments. But, despite their pro-

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<sup>1</sup> Entered into force on 2 June 1931.

<sup>2</sup> G. Treitel, F.M.B. Reynolds, *Carver on Bill of Lading*, London, 2001, 9-062; H. Karan, *The carrier's liability under international maritime conventions: the Hague, Hague-Visby, and Hamburg rules*, Lewiston-Queenston-Lampeter, 2004, 21 ss.; S.M. Carbone, *Contratto di trasporto marittimo di cose*, 2nd ed. (in cooperation with A. La Mattina), Milano, 2010, 251 ss. The preparatory works of the Hague-Visby system were edited by F. Berlingieri, *The Travaux Préparatoires of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924, the Hague Rules, and of the Protocols of 23 February 1968 and 21 December 1979, the Hague-Visby Rules*, Antwerp, 1997, and by M. Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules*, Littleton-Colorado, 1990.

<sup>3</sup> Protocol to amend the International Convention for the unification of certain rules of law relating to bills of lading (Brussels, 23 February 1968), entered into force on 23 June 1977.

<sup>4</sup> Protocol to amend the International Convention for the unification of certain rules relating to bills of lading as modified by the Amending Protocol of 23 February 1968 (Brussels, 21 December 1979), entered into force on 14 February 1984.

<sup>5</sup> Uniformity of discipline of carriage of goods by sea is now compromised because not all the contracting States of the original 1924 Brussels Convention have adopted the 1968 Visby Protocol and the 1979 Brussels Protocol. At this respect, please, see the "Status of Ratification of Maritime Conventions" schedule provided for by the Comité Maritime International website ([http://comitemaritime.org/Uploads/Publications/CMI\\_YBK\\_Part\\_III.pdf](http://comitemaritime.org/Uploads/Publications/CMI_YBK_Part_III.pdf)).

moters' intention, the Hamburg Rules – their drafting style apart<sup>6</sup> – have been largely acknowledged as being along the same line of continuity of the Hague-Visby Rules: indeed, carriers' liability has not been significantly enhanced<sup>7</sup>.

With regard to the maritime leg of the transport, also the new discipline adopted in the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam, 23 September 2009, hereinafter the Rotterdam Rules)<sup>8</sup> is substantially consistent with the above-mentioned uniform maritime transportation law currently in force, even if it better defines some of its aspects<sup>9</sup>. The drafters of the Rotterdam Rules have taken into account the reasons why the Hamburg Rules have failed to reach sufficient international consensus<sup>10</sup>, and have come back to a carrier liability scheme similar to that

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<sup>6</sup> H. Karan, The carrier's liability under international maritime conventions: the Hague, Hague-Visby, and Hamburg rules, cit., 47. See also R. Asariotis, Contracts for the Carriage of Goods by Sea and Conflict of Laws, in *Jour. Mar. Law and Comm.*, 1995, 293 ff.

<sup>7</sup> R. Asariotis, Allocation of liability and burden of proof in the Draft Instrument on Transport Law, in *Lloyd's Mar. Comm. Law Quart.*, 2002, 388; W. Tetley 2008, *Marine Cargo Claims*, 4th ed., Cowansville, 2008, 936-937; M. Lopez de Gonzalo, Operatività e limiti delle regole di diritto uniforme relative al trasporto marittimo, in *Jornadas de Lisboa de Direito Marítimo – O contrato de transporte marítimo de mercadorias*, Coimbra, 2008, 80-81, S.M. Carbone, *Contratto di trasporto marittimo di cose*, loc. cit. For a comment on the first decisions applying the Hamburg Rules see A. La Mattina, *Le prime applicazioni delle Regole di Amburgo tra autonomia privata, diritto internazionale privato e diritto uniforme dei trasporti*, in *Riv. dir. int. priv. e proc.*, 2004, 597 ss.

<sup>8</sup> UN Resolution 63/122. The Rotterdam Rules has not yet entered into force. In order to check the ratification status of the Rotterdam Rules see the UNCITRAL website ([www.uncitral.org](http://www.uncitral.org)).

<sup>9</sup> In general, on the evolution of the preparatory works of the Rotterdam Rules see, inter alia, F. Berlingieri, S. Zunarelli, *Il Draft Instrument on Transport Law del CMI*, in *Dir. maritt.*, 2002, 3 ss.; H. Honka, *The Legislative Future of Carriage of Goods by Sea: Could it not be the UNCITRAL Draft?*, in *Scandinavian Studies in Law*, 46, 2004, 93 ss.; J. Schelin, *The UNCITRAL Convention on Carriage of Goods by Sea: Harmonization or De-Harmonization?*, in *Texas Int'l L. J.*, 321 ss., 2008-2009, p. 321 ss.; M. Sturley, *Transport Law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules*, in R. Thomas (ed.), *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules*, Oxon, 2009, 1 ss.

<sup>10</sup> The Hamburg Rules are in force between a limited number of States (at present 34).

adopted by the Hague-Visby Rules<sup>11</sup>. In particular, the «presumed fault» of the carrier, established by Article 17.2, is based on some fundamental obligations with which the carrier must comply<sup>12</sup>, coupled with a complex (and more precise) onus probandi scheme, which is modelled on an amended version of the traditional «excepted perils» system<sup>13</sup>.

However, it would be a mistake to consider the Rotterdam Rules as a mere updating of the Hague-Visby Rules<sup>14</sup>: as a matter of fact, the new 2009 Convention modifies the carrier liability regime currently in force, and takes into account both the technical evolution of sea transport and a full-fledged assessment of the duties which a modern carrier should fulfil<sup>15</sup>.

No wonder, therefore, that nautical fault has been removed from the list of the «excepted perils» and the Rotterdam Rules provide not only the obligation of the carrier to «properly crew... the ship...during the voyage by sea»<sup>16</sup>, but also the carrier's «vicarious liability» in relation to every fault of the shipowner's employees and/or agents during the execution of the carriage<sup>17</sup>. Furthermore, the obligation to provide a seaworthy vessel is extended by Article 14.a throughout the entire duration

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In order to check the ratification status of the Hamburg Rules see the UNCITRAL website ([www.uncitral.org](http://www.uncitral.org)).

<sup>11</sup> R. Asariotis, Allocation of liability and burden of proof in the Draft Instrument on Transport Law, 389 ss.; F. Berlingieri, S. Zunarelli, C. Alvisi, La nuova convenzione UNCITRAL sul trasporto internazionale di merci «wholly or partly by sea» (Regole di Rotterdam), in *Dir. maritt.*, 2008, 1173 ss.; A. Diamond, The next sea carriage Convention?, in *Lloyd's Mar. Comm. Law Quart.*, 2008, 149 ss.

<sup>12</sup> See Articles 11, 13 and 14.

<sup>13</sup> See Article 17.3. The complexity of the onus probandi scheme adopted by the Rotterdam Rules is highlighted by K. Mbiah, The Convention On Contracts For The International Carriage Of Goods Wholly Or Partly By Sea: The Liability and Limitation Of Liability Regime, in *CMI Yearbook*, 2007-2008, 289.

<sup>14</sup> A. Diamond, The next sea carriage Convention?, cit., 149.

<sup>15</sup> M. Sturley, The UNCITRAL Carriage of Goods Convention: Changes to Existing Law, in *CMI Yearbook*, 2007-2008, 255; K. Mbiah, The Convention On Contracts For The International Carriage Of Goods Wholly Or Partly By Sea: The Liability and Limitation Of Liability Regime, cit., 290; S.M. Carbone, Contratto di trasporto marittimo di cose, cit., 288 ss.

<sup>16</sup> See Article 14.

<sup>17</sup> See Article 18.



of the sea transport, and no longer exclusively at its beginning, as is the case under Article III.1.a of the Hague-Visby Rules. Finally, the fire exemption has been maintained with some important clarifications regarding its scope of application. In addition to that, specific obligations have been entrusted to the carrier in order to avoid a negative impact of the carriage on the environment: reference is made, in particular, to the obligations indicated in Articles 15, 17.3.n and 32 of the Rotterdam Rules<sup>18</sup>.

The Rotterdam Rules have also taken into account some features of the liability regime contained in the Hamburg Rules derogating from that embodied in the Hague-Visby Rules. This is true, in particular, for the liability of the carrier for a delay, which has been envisaged in Article 21 of the Rotterdam Rules. However, such liability for a delay only arises if the goods are not delivered in a timely fashion at the place of destination indicated and the contract of carriage provides for a specific date for this purpose; therefore, if there is no special provision regarding the time of delivery, then no such carrier liability can be assessed. Hence, in this respect, Article 21 of the Rotterdam Rules differs not only from the Hague-Visby Rules, where no liability for a delay exists, but also from the Hamburg Rules, whose ambiguous Article 5.2 provides for the liability of the carrier if goods are not consigned at the time established in the transport contract, or «within the time which it would be reasonable to expect from a diligent carrier»<sup>19</sup>.

In short, it can be assumed that the Rotterdam Rules continue along the path of the regime of the traditional carrier liability schemes, and yet provide important clarification, as well as innovations with respect to those parts of the Hague-Visby Rules that are no longer consistent with the evolution of the practical needs of maritime transport. In this sense, we do agree with the definitions of the Rotterdam Rules, which

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<sup>18</sup> F. Munari, A. La Mattina, *The Rotterdam Rules and their implications for environmental protection*, in *J. Int. Mar. Law*, 2010, 370 ss.

<sup>19</sup> The debate regarding the opportunity to insert in the Rotterdam Rules a provision similar to article 5.2 of the Hamburg Rules has been recorded during the preparatory works (see UNCITRAL document A/CN.9/645, par. 64).

have been baptized as «evolutionary and not revolutionary»<sup>20</sup> as well as a fair compromise between «tradition and modernity»<sup>21</sup>.

## 2 Uncertain rules for uncertain judges

Moreover, an important new element of the Rotterdam Rules is established in Article 26 where a specific regime has been introduced for multimodal transport in some particular cases. As a matter of fact, such provision extends - under certain conditions - the period of liability of the maritime carrier to non-sea legs of a certain multimodal maritime transport<sup>22</sup>.

As is known, in the current economic context, international maritime transport appears with more frequency as a mere phase of a multimodal transport<sup>23</sup>. But this kind of transport is not specifically regulated by any international convention, the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24 May 1980, hereinafter the Geneva Convention) never having entered into effect. In this situation, Italian and foreign judges have attempted to determine the legal regime which is applicable to multimodal transport (especially to multimodal maritime transport), in some cases extending the international maritime transport rules currently in force to all (or to part) of the phases of such kind of transport<sup>24</sup>. In particular, where the maritime segment of the carriage was the «prevailing route», the Hague-Visby Rules have often been applied to the entire multimodal transport (and, therefore, even to

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<sup>20</sup> M. Sturley, *The UNCITRAL Carriage of Goods Convention: Changes to Existing Law*, in *CMI Yearbook*, p. 255.

<sup>21</sup> P. Delebecque, *The New Convention on International Contract of Carriage of Goods Wholly or Partly by Sea: a Civil Law Perspective*, in *CMI Yearbook*, 2007-2008, 264.

<sup>22</sup> S.M. Carbone, A. La Mattina, *L'ambito di applicazione del diritto uniforme dei trasporti marittimi internazionali: dalla Convenzione di Bruxelles alla UNCITRAL Convention*, in *Riv. dir. int. priv. e proc.*, 2008, 981 ss.

<sup>23</sup> UNCITRAL docs. A/CN.9/WG.III/WP.29, para. 12-26, and A/CN.9/510, para 26-32.

<sup>24</sup> See the case law reported by A. La Mattina, *Il trasporto multimodale nei leading cases italiani e stranieri*, in *Dir. maritt.*, 2007, 1010.

the non-maritime phases of such multimodal transport)<sup>25</sup>; on the contrary, in other cases the decision is based on the so-called «network liability system», thereby splitting the liability regime of the multimodal carrier and affirming that such a regime varies on the basis of the place where the damage to the goods occurs. In these cases, the Hague-Visby Rules have only been applied if the damage is caused during the maritime phase of a certain multimodal transport<sup>26</sup>.

Both of these trends represent positivism and criticism.

On the one hand, the application of the Hague-Visby Rules to multimodal transport irrespective of the localization of the damage to the goods eliminates all doubts concerning the discipline of «non-localized» damages (meaning those damages that arise from an unknown route)<sup>27</sup>, but it does not seem at all convincing, because (a) it represents a «strain» for the application of the Hague-Visby Rules, which does not take into

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<sup>25</sup> Trib. Genova, 12 March 1992, in *Dir. maritt.*, 2003, 430; *Moore-McCormack Lines, Inc. v. International Terminal Operating Co.*, 619 F. Supp. 1406 (S.D.N.Y. 1983); *Hoogovens Estel Verkoopantoor v. Ceres Terminals, Inc.*, 1984 AMC 1417; *Marubeni-Iida, Inc. v. Nippon Yusen Kaisha*, 1962 Amc 1082; *Berkshire Fashions Inc. v. MV Hakusan II*, 954 F.2d 874, 881 (3d Cir. 1992); *Hartford Fire Ins. Co. v. Orient Overseas Container Lines*, 230 F. 3d 549, 555-556 (CA2 2000); App. Aix-en-Provence, 10 July 1984, in *Dr. mar. fr.*, 1987, 84.

<sup>26</sup> App. Roma, 5 January 1948, in *Foro it.*, 1948, I, 697; Trib. Genova, 15 April 1950, in *Dir. maritt.*, 1950, 576; App. Milano, 7 November 1950, in *Foro it.*, 1951, I, 76; Trib. Milano, 26 February 2004, in *Dir. maritt.*, 2006, 1220; Cass., 6 June 2006, n. 13253, in *Riv. dir. int. priv. e proc.*, 2007, 407; *Reider v. Thompson*, 339 US 113, 1951, AMC 38 (1950); *Compagnie Française de Navigation a Vapeur v. Bonnasse*, 19 F.2d 777, 779-780, 1927 AMC 1325, 1329 (2d Cir. 1927); *HSBC Insurance Ltd. v. Scanwell Container Line Ltd*, in *Eur. Transp. Law*, 2001, 358 ss.; App. Versailles, 25 May 2000, *Merz Conteneurs v. Brambi Fruits et al.*, unpublished (but available on the website [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr)); App. Rouen, 13 November 2001, *Via Assurance c. Gefco*, in *Rev. dr. comm.* (Scapel), 2002, 30; *Mayhew Foods Ltd. v. Overseas Containers Ltd.* [1984] 1 Lloyd's Rep. 317; *Oberlandesgericht Hamburg*, 19 August 2004, in *TranspR*, 2004, 403. *Contra* see Trib. Genova 11 January 2011, unpublished, where it was affirmed that multimodal transport is a sui generis kind of carriage to which the system of liability provided for by the regulation of each segment of the carriage is not applicable. On this matter see also E. Turco Bulgherini, *Trasporto combinato delle merci*, in *Porti mare terr.*, 1979, 5, 90.

<sup>27</sup> K. Diplock, *A combined transport document. The Genoa Seminar on Combined Transport*, in *J. Bus. L.*, 1972, 273.

consideration routes which are different to the maritime one<sup>28</sup> and (b) it leaves sufficient room for many doubtful aspects with reference to the notion of «prevailing route».

On the other hand, recourse to the «network liability system» does not create compatibility problems with the application of the international «unimodal» conventions and, in particular, with the Hague-Visby Rules, but it does create uncertainty concerning the applicable regime of responsibility which is unpredictable before the damage occurs and which may not be determined at all in the case of «non-localized» damage. Such uncertainty may not only increase litigation, but may also result in increased insurance costs connected with multimodal transport.

In light of such uncertainties, the Supreme Court of the United States in the Kirby case<sup>29</sup>) inaugurated what has been defined as a «conceptual

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<sup>28</sup> F. Berlingieri, *Le convenzioni internazionali di diritto marittimo e il codice della navigazione*, Milano, 2009, 33.

<sup>29</sup> *Norfolk Southern Railway Co. v. James N. Kirby, Pty. Ltd.* 543 U.S. 14 (2004) 300 F.3d 1300. This case regards a transport from Sydney (Australia) to Huntsville (Alabama, USA). James N. Kirby, Pty Ltd., an Australian manufacturer, hired International Cargo Control (ICC) to arrange for delivery of machinery from Australia to Huntsville by “through” transportation. The bill of lading that ICC issued to Kirby (ICC bill) designated Savannah as the discharge port and Huntsville as the ultimate destination, and set ICC’s liability limitation lower than the cargo’s true value, using the default liability rule in the Carriage of Goods by Sea Act (COGSA) (\$500 per package) for the sea leg and a higher amount for the land leg. The bill also contained a “Himalaya Clause,” which extends liability limitations to downstream parties, including, here, “any servant, agent, or other person (including any independent contractor).” Kirby separately insured the cargo for its true value with co-respondent, Allianz Australia Insurance Ltd. When ICC hired a German shipping company (Hamburg Süd) to transport the containers, Hamburg Süd issued its own bill of lading to ICC (Hamburg Süd bill), designating Savannah as the discharge port and Huntsville as the ultimate destination. That bill also adopted COGSA’s default rule, extended it to any land damages, and extended it in a Himalaya Clause to “all agents ... (including inland) carriers ... and all independent contractors.” Hamburg Süd hired petitioner Norfolk Southern Railway (Norfolk) to transport the machinery from Savannah to Huntsville. The train derailed, causing an alleged \$1.5 million in damages. Allianz reimbursed Kirby for the loss and then joined Kirby in suing Norfolk in a Georgia Federal District Court, asserting diversity jurisdiction and alleging tort and contract claims. Norfolk responded that, among other things, Kirby’s potential recovery could not exceed the liability limitations in the two bills of lading. The District Court granted Norfolk partial summary judgment, limiting Norfolk’s liability to \$500 per container, and certified the decision for interlocutory review. In

approach»<sup>30</sup> affirming that a multimodal transport contract that includes a «substantial» maritime route and a «shorter», but not necessarily «incidental», land route has a maritime nature (unless it results in the different will of the parties to such a contract). Therefore - independently from the identification of the place where eventual damage to the goods occurs – such a multimodal transport contract has to be regulated by the US Carriage of Good by Sea Act (i.e. the Federal legislation on maritime transport where the 1924 Brussels Convention has been implemented). In the case in question the Supreme Court (i) completely overrides the «network liability system» (that - as was said by the Court - may cause «confusion and inefficiency»), as it is not relevant in determining where the damage to the goods occurred, and (ii) grants more certainty and predictability to the conclusions of the case-law trend indicated above, making it unnecessary to measure with «a ruler» which is the «prevailing» route of a certain multimodal maritime transport in order to determine its applicable legal regime and giving substantial emphasis to the relevant «surrounding circumstances» of the case<sup>31</sup>.

In the same perspective, in the Kawasaki case, the Supreme Court has affirmed that a through bill of lading issued abroad by an ocean carrier can apply also to the domestic, inland portion of a multimodal transport (providing both for sea and rail carriages), with the consequence that not only the ocean carriage but also the inland carriage will be

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reversing, the Eleventh Circuit held that Norfolk could not claim protection under the ICC bill's Himalaya Clause because it had not been in privity with ICC when that bill was issued and because linguistic specificity was required to extend the clause's benefits to an inland carrier. It also held that Kirby was not bound by the Hamburg Süd bill's liability limitation because ICC was not acting as Kirby's agent when it received that bill.

<sup>30</sup> M. Sturley, An overview of the latest developments in cargo liability law at the United States Supreme Court, in *Dir. maritt.*, 2005, 358.

<sup>31</sup> In this sense the Supreme Court has affirmed that “realistically each leg of the journey is essential to accomplishing the contract’s purpose: 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”. But the Supreme Court has also affirmed that “[g]eography then is useful in a conceptual inquiry only in a limited sense: if a bill’s sea components are insubstantial, the bill is not a maritime contract”: *Norfolk Southern Railway Co. v. James N. Kirby, Pty. Ltd.*, cit., 662.

governed by the 1936 US Carriage of Goods by Sea Act<sup>32</sup>.

On the basis of what above we cannot ignore the situation of uncertainty that characterizes the rules which are applicable to multimodal transport due to the absence of an unequivocal case law. Only a specific regulatory intervention that is desired by most parties, and that has resulted in interest in the UNCITRAL, would solve the problem<sup>33</sup>.

### 3 Multimodal transport and the Rotterdam Rules

In this perspective, the drafters of the Rotterdam Rules (and before them, the drafters of the *CMI Draft Instrument on Transport Law*, on which

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<sup>32</sup> *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433 (2010). This case regards a transport from China to inland United States destinations. “K” Line issued to the shippers four through bills of lading (i.e., bills of lading covering both the ocean and inland portions of transport in a single document). The bills contain a “Himalaya Clause,” which: (i) extends the bills’ defenses and liability limitations to subcontractors; (ii) permit “K” Line to subcontract to complete the journey; (iii) provide that the entire journey is governed by the Carriage of Goods by Sea Act (COGSA), which regulates bills of lading issued by ocean carriers engaged in foreign trade; and (iv) designate a Tokyo court as the venue for any dispute. “K” Line arranged the journey, subcontracting with Union Pacific for rail shipment in the United States. The cargo was shipped in “K” Line vessels to California and then loaded onto a Union Pacific train. A derailment along the inland route allegedly destroyed the cargo. Ultimately, the Federal District Court granted the motion of Union Pacific and “K” Line to dismiss the cargo owners’ suits against them based on the parties’ Tokyo forum-selection clause. The Ninth Circuit reversed, concluding that that clause was trumped by the Carmack Amendment governing bills of lading issued by domestic rail carriers, which applied to the inland portion of the shipment. The Supreme Court has reversed such decision, affirming that because the Carmack Amendment does not apply to a shipment originating overseas under a single through bill of lading, the parties’ agreement to litigate these cases in Tokyo is binding.

<sup>33</sup> A. Furrer, M. Schürch, Cross-border Multimodal Transport - Problems and Limits of Finding an Appropriate Legal Regime, in K. Boele-Woelki, T. Einhorn, D. Girsberger, S. Symeonides (cur.), *Convergence and divergence in Private International Law - Liber Amicorum Kurt Sier*, The Netherlands, 2010, 402-403.

the Rotterdam Rules are based<sup>34</sup> have intended to specify the extension, in certain cases, of the application of such regulation to forms of multi-modal transport (*door-to-door*) that include a maritime route. In an extreme synthesis, the new convention elaborated on behalf of the UNCITRAL does not have the aim of regulating multimodal transportation *tout court*, but - under certain conditions and in the presence of certain circumstances - only to extend its scope of application in relation to the land and/or air and/or internal waterways route (if any) and/or subsequent to maritime transport. Therefore, the Rotterdam Rules are a little *less* of a «true» multimodal convention (such as the 1980 Geneva Convention) but a little *more* of a convention on maritime transport: correctly, in fact, a «multimodal maritime approach» has been referred to<sup>35</sup>.

In this sense, the Rotterdam Rules, firstly, extend the definition of a «contract of carriage» relevant to its proper scope of application and affirm in Art. 1.1 that such a contract shall provide for carriage by sea and may provide for carriage by other methods of transport in addition to the sea carriage; also the combined provisions of Art. 5 (entitled «General scope of application») and Art. 12 (entitled «Period of responsibility of the carrier») provide that the period of responsibility of the carrier includes the moment from the receipt of the goods until the moment of the delivery of the same goods to the consignee, and that the responsibility of the carrier is not necessarily limited to the phase when the goods are placed on the ship. Furthermore, from Art. 5 of the Rotterdam Rules it is clear that the places of the receipt/delivery of the goods may eventually not coincide with the ports of loading/unloading.

As has therefore been observed, the 1924 Brussels Convention, in its original formulation, was a «tackle-to-tackle» convention, the Hague-Visby Rules and the Hamburg Rules were «port-to-port» conventions, and, finally, the Rotterdam Rules will become a «door-to-door» conven-

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<sup>34</sup> See UNCITRAL doc. A/CN.9/WG.III/WP.21.

<sup>35</sup> M. Sturley, Scope of the coverage under the UNCITRAL Draft Instrument, in J. Int. Mar. Law, 2004, 146; E. Eftestøl-Wilhelmsson, The Rotterdam Rules in a European multimodal context, in J. Int. Mar. Law, 2010, 274.

tion, even if they merely concern «wet» multimodal transports (i.e. multimodal maritime transports)<sup>36</sup>. In reality, as already observed above, the text in question is not really a «door to door» convention because the scope of application of the Rotterdam Rules is limited both under the «subjective» profile as well as the «objective» one.

The scope of application of the Rotterdam Rules is limited under the «subjective» profile because this new convention, once in force, will only be applied (a) to the «contractual» maritime carrier - and this (subject to the «objective» limits mentioned further on) with reference to the services he provides, directly or indirectly, on the maritime route as well as on the land or air or internal waterways route - and (b) to the so-called «maritime performing parties», meaning those individuals who are charged by the same contractual carrier to execute - «during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship» (Art. 17) - «any of the carrier obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods» (Art. 1.6.a). In other words, the Rotterdam Rules - as implicitly stated in Art. 4.1.a - may not be applied towards «non-maritime carriers», unless they operate «exclusively within a port area» (Art. 1.7). This limitation has been criticized by some US scholars, who have highlighted the fact that the Rotterdam Rules are not able to attain the results that were recently reached by the Supreme Court in the Kirby case, therefore obliging operators to utilize the Himalaya Clause in order to allow an extension of the regulation for maritime transport to land carriers<sup>37</sup>.

The Rotterdam Rules are also limited under the «objective» profile as they do not provide a uniform regime for all the phases of a multimodal transport, - but, by adopting the so-called «network liability system»- only in the case of losses or damage to the goods that are verified exclusively

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<sup>36</sup> F. Berlingieri, Basis of liability and exclusions of liability, in *Lloyd's Mar. Comm. Law Quart.*, 2002, 382.

<sup>37</sup> M.E. Crowley, The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: the Multimodal Problem, in *Tul. L. Rev.*, 2005, 1502-1503.



on one route. As a matter of fact, Art. 26 determines the application of the «international instrument» to such phases (not also the state legislation)<sup>38</sup> specifically shaped for the relevant non-maritime route if the interested party would have stipulated a separate transportation contract and if such an instrument imperatively stipulated («either at all or to the detriment of the shipper») the provisions that concern the responsibility of the carrier, the limitation of liability and a time bar. Hence, from an «objective» point of view, the Rotterdam Rules may only be applied with regard to non-maritime routes if: (a) damage to the goods occurs exclusively on a non-maritime route or the damage is not localized (meaning that the route of the transport where the damage occurs is unknown) and (b) there is no mandatory uniform regime of the non-maritime route concerning the responsibility of the carrier, the limitation of liability and a time bar, or, even though there may be such a regime, it does not clash with the corresponding provisions of the new Convention<sup>39</sup>.

The rationale of this regulation resides in the will to avoid conflict between the Rotterdam Rules (in the part where it extends its proper scope of application to the non-maritime route) and the «unimodal» conventions which regulate land, train, air and internal waterway transportation.

Concerning this last proposal, moreover, some scholars have affirmed the superfluous nature of such a disposition considering the fact that there is no conflict amongst the multimodal provisions of the Rotterdam Rules and the scope of application of the «unimodal» conventions, in so far as these - with the exception of what we will state further on<sup>40</sup> - do

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<sup>38</sup> As was said during the preparatory works of the Rotterdam Rules, the word instrument was preferred to the term convention «in order to include the mandatory regulation of regional organizations»: see UNCITRAL doc. A/CN.9/WG.III/WP.81, note 88.

<sup>39</sup> See UNCITRAL doc. A/CN.9/WG.III/WP. 78, para. 18: «the limited network system only comes into play in situations where (...) there might be a conflict between the liability provisions of the draft convention and the liability provisions of the relevant unimodal transport conventions».

<sup>40</sup> See note 42 and the corresponding text.

not have as their objective the regulation of multimodal transport<sup>41</sup>.

Furthermore, the fact that Art. 26 of the Rotterdam Rules provides for the application of another «international instrument» to non-maritime routes (but only with reference to the responsibility of the carrier, the limitation of liability and concerning the time bar) implies that for those routes two different responsibility regimes may be contemporaneously applicable: (i) the one that would have belonged to the route if a «unimodal» transport contract would have been executed for that route (i.e. the regime provided for by CMR, COTIF, CMNI or the Montreal Convention), but limited to the above-mentioned aspects of the responsibility of the carrier, the limitation of liability and the time bar, and (ii) that of the Rotterdam Rules, with reference to all the other aspects of the transport contract (amongst these, for example, are the obligations of the shipper, the transport documents, the delivery, the «right of control», the transfer of the rights that arise from the contract...). From this «an obscure patchwork of different regimes which were not designed to complement each other» would arise<sup>42</sup>, that, in any case, would not resolve all the potential conflicts between the new Convention and the other applicable instruments with regard to non-maritime transport, thereby not solving the problem of an «overlap» with reference to that which is indicated under point ii above<sup>43</sup>.

Lastly, with the aim of preventing possible conflicts with other «unimodal» conventions, Art. 82 - similar to Art. 25 of the Hamburg Rules, but with more specific wording - contains a safeguard clause concerning the scope of application of the multimodal transport regulations provided for by other «unimodal» conventions currently in force. Art. 82 therefore provides that the Rotterdam Rules do not affect the application of multimodal transport regulations provided for by other

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<sup>41</sup> M. Riccomagno, The liability regime of the MTO under the UNCTAD/ICC Rules as influenced by International Conventions on the sea carriage, in *Dir. trasp.*, 1998, 72.

<sup>42</sup> UNCTAD doc. A/CN.9/WG.III/WP.21/Add. 1, Annex II, para 44.

<sup>43</sup> D. Glass, Meddling in multimodal muddle? – a network of conflict in the UNCITRAL Draft Convention on the Carriage of Goods [wholly or partly] [by sea], in *Lloyd's Mar. Comm. Law Quart.*, 306, 2006, 333 ss.

conventions to maritime routes<sup>44</sup>.

## 4 The way to «utopia» or the «next-best solution»?

Rotterdam Rules do not regulate any kind of multimodal transport, but – subject to certain conditions - they extend their scope of application to non-maritime routes involving «wet» multimodal transport. In other words, the Rotterdam Rules do not provide a «uniform» regime of responsibility concerning the multimodal carrier, but – by applying a sort of «network liability system» - they try to fill the gaps left open by the «unimodal» conventions currently in force and, in particular, by the Hague-Visby Rules.

Of course, it would have been better to have a complete regulation of multimodal transport<sup>45</sup> and I hope that one day it would be possible to have a truly «uniform» system of international transport, common to all phases of carriage, based upon what has been called the “concept juridique d’amodalité”<sup>46</sup>, and regulated by a sole convention in lieu of several «unimodal» instruments<sup>47</sup>.

But at present that way is far to have concrete chances to be imple-

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<sup>44</sup> In particular, the Rotterdam Rules do not affect the application of the following provisions: (a) Art. 18.3 of the Warsaw Convention and Article 18.4 of the Montreal Convention on air transport; (b) Art. 2 of the CMR Convention on road transport; (c) Art. 1.3 and Art. 1.4 of the CIM – COTIF Convention on railway transport; (d) Art. 2.2 of the CMNI Convention on internal waterways transport. On these topics, see E. Røsaeg, *Conflicts of Conventions in the Rotterdam Rules*, in *J. Int. Mar. Law*, 2009, 238 ss.; E. Eftestøl-Wilhelmsson, *The Rotterdam Rules in a European multimodal context*, cit., 284 ff.

<sup>45</sup> A. La Mattina, *La responsabilità del vettore multimodale*, in *Dir. maritt.*, 2005, 71-72.

<sup>46</sup> C. Scapel, *Le concept juridique d’amodalité*, in *Mer, terre, air... vers l’amodalité*, *Annales IMTM*, Marseilles, 2012, 42 ff.

<sup>47</sup> S.M. Carbone, *Il trasporto marittimo nel sistema dei trasporti internazionali*, Milano, 1976, 119; G. Romanelli, *Riflessioni sulla disciplina del contratto di trasporto e sul diritto dei trasporti*, in *Dir. trasp.*, 1993, 295 ss.; Id., *Principi comuni nelle convenzioni internazionali in tema di trasporto*, in *Dir. mar.*, 1999, 197 ss.

mented as it has been demonstrated by the complete failure of the 1980 Geneva Convention on International Multimodal Transport of Goods.

Bearing in mind what above, although they are not revolutionary, the Rotterdam Rules should be looked as the first international instrument which provides a regime concerning the liability of the sea carrier which specifically takes into consideration the development of the sea transport into a «multimodal perspective».

In conclusion, at present, it seems that the ratification of the Rotterdam Rules by the major maritime States, with a view to replacing all the international conventions on the transport of goods by sea currently in force, could be the first reasonable step in order to (partially) resolve the situation of uncertainty that characterizes the subject of multimodal transport<sup>48</sup>, or - as it has also been said - the “next-best solution for international multimodal cases”<sup>49</sup>.

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<sup>48</sup> E. Eftestøl-Wilhelmsson, *The Rotterdam Rules in a European multimodal context*, cit., 274.

<sup>49</sup> K. Haak, *Carriage Preceding or Subsequent to Sea Carriage under the Rotterdam Rules*, in *Eur. Jur. of Commercial Contract Law*, 2010, 71.

## Reference list

- Asariotis R. (2002) Allocation of liability and burden of proof in the Draft Instrument on Transport Law. *Lloyd's Maritime and Commercial Law Quarterly*, p. 388 ff.
- Asariotis R. (1995), Contracts for the Carriage of Goods by Sea and Conflict of Laws, in *Jour. Mar. Law and Comm.*, p. 293 ff.
- Beare S. (2002) Liability regimes: where we are, how we got there and where we are going. *Lloyd's Maritime and Commercial Law Quarterly*, p. 306 ff.
- Berlingieri F. (1997) The Travaux Préparatoires of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924, the Hague Rules, and of the Protocols of 23 February 1968 and 21 December 1979, the Hague-Visby Rules. Antwerp.
- Berlingieri F. (2002) Basis of liability and exclusions of liability. *Lloyd's Maritime and Commercial Law Quarterly*, p. 382 ff.
- Berlingieri F. (2004) Background paper on basis of the carrier's liability. *CMI Yearbook*, p. 140 ff.
- Berlingieri F. (2007-2008) Carrier's obligations and liabilities. *CMI Yearbook*, p. 279 ff.
- Berlingieri F. (2009) *Le convenzioni internazionali di diritto marittimo e il codice della navigazione*. Milano.
- Berlingieri F (2009) Multimodal aspects of the Rotterdam Rules. <http://www.rotterdamrules2009.com>
- Berlingieri F. and Zunarelli S. (2002) *Il Draft Instrument on Transport Law del CMI*. *Diritto marittimo*, p. 3 ff.
- Berlingieri F., Zunarelli S., Alvisi C. (2008) *La nuova convenzione UNCITRAL sul trasporto internazionale di merci «wholly or partly by sea» (Regole di Rotterdam)*. *Diritto marittimo*, p. 1173 ff.

- Carbone S.M. (1976) *Il trasporto marittimo nel sistema dei trasporti internazionali*. Milan.
- Carbone S.M. (1982) *La disciplina giuridica del traffico marittimo internazionale*. Bologna.
- Carbone S.M. *Contratto di trasporto marittimo di cose* (2010). 2<sup>nd</sup> ed. in cooperation with La Mattina A., Milan.
- Carbone S.M. and La Mattina A. (2008) *L'ambito di applicazione del diritto uniforme dei trasporti marittimi internazionali: dalla Convenzione di Bruxelles alla UNCITRAL Convention*. *Rivista di diritto internazionale private e processuale*, p. 981 ff.
- Crowley M.E. (2005) *The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: the Multimodal Problem*. *Tulane Law Review*, p. 1461 ff.
- Delebecque F. (2007-2008) *The New Convention on International Contract of Carriage of Goods Wholly or Partly by Sea: a Civil Law Perspective*. *CMI Yearbook*, p. 264 ff.
- Diamond A. (2008) *The next sea carriage Convention? Lloyd's Maritime and Commercial Law Quarterly*, p. 149 ff.
- Diplock Lord K. (1972) *A combined transport document*. *The Genoa Seminar on Combined Transport*. *Journal of Business Law*, p. 273 ff.
- Eftestøl-Wilhelmsson E. (2010), *The Rotterdam Rules in a European multimodal context*, in *J. Int. Mar. Law*, p. 274 ff.
- Faghfour M. (2006) *International regulation of liability for multimodal transport – in search of uniformity*. *WMU Journal of maritime affairs*, p. 95 ff.
- Furrer A. and Schürch M. (2010) *Cross-border Multimodal Transport - Problems and Limits of Finding an Appropriate Legal Regime*. In Boele-Woelki K., Einhorn T., Girsberger D. and Symeonides S. (eds.), *Convergence and divergence in Private International Law - Liber Amicorum Kurt Sier*, The Netherlands, p. 389 ff.

- Glass D (2006) Meddling in multimodal muddle? – a network of conflict in the UNCITRAL Draft Convention on the Carriage of Goods [wholly or partly] [by sea]. *Lloyd's Maritime and Commercial Law Quarterly*, p. 306;
- Honka H. (2004) The Legislative Future of Carriage of Goods by Sea: Could it not be the UNCITRAL Draft? *Scandinavian Studies in Law*, 46, p. 93 ff.
- Karan H. (2004) The carrier's liability under international maritime conventions: the Hague, Hague-Visby, and Hamburg rules. *Lewiston-Queenston-Lampeter*.
- La Mattina A. (2004) Le prime applicazioni delle Regole di Amburgo tra autonomia privata, diritto internazionale privato e diritto uniforme dei trasporti. *Rivista di diritto internazionale privato e processuale*, p. 597 ff.
- La Mattina A. (2005) La responsabilità del vettore multimodale. *Diritto marittimo*, p. 1 ff.
- La Mattina A. (2007) Il trasporto multimodale nei leading cases italiani e stranieri, *Diritto marittimo*, p. 1010 ff..
- La Mattina A. (2010) Le Regole di Rotterdam e il trasporto multimodale. In: *Scritti in onore di Francesco Berlingieri*. Genova, p. 643 ff.
- Lopez de Gonzalo M. (2008) Operatività e limiti delle regole di diritto uniforme relative al trasporto marittimo' in *Jornadas de Lisboa de Direito Marítimo – O contrato de transporte marítimo de mercadorias*. Coimbra.
- Mbiah K. (2007-2008) The Convention On Contracts For The International Carriage Of Goods Wholly Or Partly By Sea: The Liability and Limitation Of Liability Regime. *CMI Yearbook*, p. 289 ff.
- Munari F. and La Mattina A. (2010) The Rotterdam Rules and their implications for environmental protection. *Journal of International Maritime Law*, p. 370 ff.

- Nikaki T. (2006) Conflicting Laws in “Wet” Multimodal Carriage of Goods: The UNCITRAL Draft Convention on the Carriage of Goods [wholly or partly] [by sea]. *Journal of Maritime Law and Commerce*, p. 521 ff.
- Ramberg J. (2001) The future of international unification of transport law. *Diritto marittimo*, p. 643 ff.
- Riccomagno M. (1998) The liability regime of the MTO under the UNCTAD/ICC Rules as influenced by International Conventions on the sea carriage. *Diritto dei trasporti*, p. 72 ff.
- Romanelli G. (1993) Riflessioni sulla disciplina del contratto di trasporto e sul diritto dei trasporti. *Diritto dei trasporti*, p. 295 ff.
- Romanelli G. (1999) Principi comuni nelle convenzioni internazionali in tema di trasporto. *Diritto marittimo*, p. 197 ff.
- Røsaeg E. (2002) The applicability of Conventions for the carriage of goods and for multimodal transport. *Lloyd’s Maritime and Commercial Law Quarterly*, p. 316 ff.
- Røsaeg E (2009) Conflicts of Conventions in the Rotterdam Rules. *Journal of International Maritime Law*, p. 238 ff.
- Scapel C. (2012), Le concept juridique d’amodalité, in *Mer, terre, air... vers l’amodalité*, *Annales IMTM*, Marseilles, p. 42 ff.
- Schelin J (2008-2009) The UNCITRAL Convention on Carriage of Goods by Sea: Harmonization or De-Harmonization? *Texas International Law Journal*, p. 321 ff.;
- Sturley M. (1990) The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules. Littleton - Colorado.
- Sturley M. (2004) Scope of the coverage under the UNCITRAL Draft Instrument. *Journal of International Maritime Law*, p. 138 ff.
- Sturley M. (2005) An overview of the latest developments in cargo liability law at the United States Supreme Court. *Diritto marittimo*, p. 358 ff.



- Sturley M. (2007-2008) The UNCITRAL Carriage of Goods Convention: Changes to Existing Law. CMI Yearbook, p. 255 ff.
- Sturley M. (2009) Transport Law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules. In: Thomas R. (ed.), A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules, Oxon, p. 1 ff.
- Tetley W. (2008) Marine Cargo Claims. 4<sup>th</sup> ed., Cowansville.
- Thomas R. (2009) An analysis of the liability regime of carriers and maritime performing parties. In: Thomas R. (ed.), A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules, Oxon, p. 52 ff.
- Treitel G. and Reynolds F.M.B. (2001) Carver on Bill of Lading, London.
- Van der Ziel G.J. (2009) Multimodal aspects of the Rotterdam Rules. CMI Yearbook, p. 301 ff.

# Electronic Bills of Lading and Some Finnish Considerations

Katja Heikkinen  
University of Helsinki

## **Abstract**

The objective of this article is to evaluate the legal status of an electronic bill of lading (eB/L) from the Finnish point of view. It is questionable whether electronic equivalents have the same legal value as paper bills of lading under Finnish law, and whether all three functions of a bill of lading can be performed in an electronic environment. This is a perspective from which the electronic bill of lading has not been approached. As a conclusion it seems that the current legal situation in Finland does in fact enable the paper bill of lading to be replaced by electronic means so that all three functions of the bill of lading can be maintained in a paperless trade.

## **Key words**

Bill of lading, electronic bill of lading, transport documents, sea carriage, electronic trade, Bolero

## **Contact**

Katja Heikkinen, University of Helsinki, Finland.

E-mail: [katja.heikkinen@hannessnellman.com](mailto:katja.heikkinen@hannessnellman.com)

# 1 Introduction

In this paper I take a look at the legal position of the electronic bill of lading from the Finnish point of view.<sup>1</sup> The bill of lading is a traditional paper transport document which has been used for centuries in sea carriage. It has traditionally served three functions in international trade: it is a receipt for goods; it evidences a contract of carriage; and it is a negotiable document of title which enables goods to be sold and pledged securely while in transit.<sup>2</sup> This article concentrates on these three functions and issues resulting from the electronic environment.

An electronic bill of lading has been coming and under discussion on a global and European Union (EU) level for the last three decades, and it is still on the agenda.<sup>3</sup> Thus far, global traders have been rather reluctant to let go of their comforting paper transport documents. Numerous efforts over the past three decades have aimed to persuade global traders, along with banking, insurance, and the shipping industry to switch from paper to electronic bills of lading. None of these attempts have managed to replace the bill of lading.<sup>4</sup> However, some recent developments, discussed in section 4, suggest that the electronic bill of lading might finally be gaining market acceptance and hitting through.

One explanation for this slow transition is legal development, which is lagging far behind technological development. All international maritime conventions, the Hague Rules 1924<sup>5</sup>, the Hague-Visby Rules 1968<sup>6</sup>,

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<sup>1</sup> This article is loosely based on my master thesis, which I finalized in spring 2014 as a member of the InterTran research group (see Heikkinen (2014)). My role in the InterTran Project was to consider legal issues related to the use of electronic transport documents. For more information on the project, please visit: [www.helsinki.fi/katti/english/InterTran-project.htm](http://www.helsinki.fi/katti/english/InterTran-project.htm).

<sup>2</sup> Finnish Maritime Code (674/1994) section 13:42; Falkanger (2011) p. 271, 276.

<sup>3</sup> See section 4.

<sup>4</sup> See section 2.3.

<sup>5</sup> The International Convention for the Unification of Certain Rules relating to the Bill of Lading, Brussels 1924.

<sup>6</sup> The Hague Rules as amended by the Brussels Protocol (Protocol to amend the Convention for the Unification of Certain Rules relating to the Bill of Lading 1968), Brussels 1968.

and the Hamburg Rules 1978<sup>7</sup> are rather old and none of them expressly addresses the question of electronic bills of lading. The new Rotterdam Rules 2009 do in fact recognise negotiable electronic transport records, but they are not in force yet.<sup>8</sup> In the meanwhile, this lack of supporting rules keeps raising several legal issues which have been solved, so far, mainly by contractual means and model laws.

As no international rules explicitly cover the use of electronic bills of lading, they have to adjust to the current legal environment – which varies from one country to another. This article evaluates the status of an electronic bill of lading under the current legal rules in force in Finland. Section 2 of the article first addresses the role of the bill of lading and its functions in international trade, then the development of eB/L and the main reasons hindering the use of electronic alternatives to paper bills of lading. In section 3, the legal situation in Finland in relation to electronic bills of lading is scrutinized, with some English comparisons. References to English law are justified as the maritime legislation in both countries is based on the same international convention, the Hague-Visby Rules 1968. In addition, jurisprudence related to electronic bills of lading is rich in England, and two current solutions for electronic bills of lading, the Bolero Electronic Bill of Lading (Bolero eB/L) and the CargoDocs Electronic Bill of Lading (CargoDocs eB/L), are based on English legal doctrines.<sup>9</sup>

Even though the two solutions might not be considered as true bills of lading within the meaning of the Hague-Visby Rules 1968 they might well be able to perform all three functions of a bill of lading by contractual mechanisms and with the help of certain English legal doctrines.<sup>10</sup> However, it is questionable whether the legal solutions adopted by these

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<sup>7</sup> United Nations Convention on the Carriage of Goods by Sea 1978, Hamburg 1978.

<sup>8</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, New York 2008; At the moment, 25 member states of the UN have signed the Convention, including Norway, Denmark, and Sweden, but not Finland. The Rules enter into force when 20 member states have ratified them, but so far only Spain, Togo and the Republic of the Congo have ratified the Rules (Signatures and ratifications of Rotterdam Rules (2015)).

<sup>9</sup> See Bolero Rulebook (1999) and CargoDocs Electronic bills of lading (2015).

<sup>10</sup> See Law Commission of England (2001) p. 24.

systems are workable or even acceptable from the Finnish legal point of view. In Finland, the issue is whether the electronic bill of lading has the same legal value as a traditional paper bill of lading under the Finnish Maritime Code (FMC), and if not, whether the functions of a bill of lading could be achieved by other means, for example by contractual stipulations.

## **2 Towards electronic bills of lading**

### **2.1 Role of the bill of lading in international trade**

The bill of lading has been used for centuries all over the world in sea carriage and, as described, it serves three main functions in international trade. In Finland, all three functions of a bill of lading are described in the FMC section 13:42 according to which a bill of lading is evidence of a contract, and of the carrier having received or loaded the goods, and is designated by the term “bill of lading” or contains an undertaking to deliver the goods only against surrender of the document; and it can be either a bearer, order or a straight bill of lading.

All three functions have developed to serve international sale of goods, and insuring and financing trade. The bill of lading plays an important role under several contracts related to cross-border sale of goods, and all of these contracts impose certain requirements on the bill of lading. They have also greatly affected the development of the bill of lading.<sup>11</sup> In order to succeed, an electronic bill of lading should be able to perform all the same functions as a paper bill of lading does, and all other contracts related to the sale of goods should accept the use of electronic documentation. Any attempts by the carrier to replace a paper bill of lading by electronic means might be useless if, for example, the carrier’s protection and indemnity (P&I) insurer does not accept the use of electronic bills of lading.

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<sup>11</sup> Falkanger (2011) p. 271, 276.

During recent decades, the role of the bill of lading in international trade has been decreasing. At the same time, the role of other documents such as sea waybills and multimodal transport documents has been increasing. Despite its decreasing importance, the bill of lading still maintains its central role, especially in the commodity trade. Commodities, such as oil, can be sold many times during transit, and the symbolic function of the bill of lading enables this to be done securely. The bill of lading is also needed when the parties to a sales contract finance their trade by using letters of credit.<sup>12</sup> The bill of lading is often used in conjunction with charter parties in the tramp trade. In the oil trade, for example, it is very common to use a standard voyage or time charter party drafted by major oil companies, such as *Shelltime 4* and *Shellvoy 6*. In addition to the charter party contract, a bill of lading is usually issued for each individual journey.<sup>13</sup>

As pointed out, other transport documents are gaining popularity at the expense of the bill of lading. One explanation for this is that the bill of lading is no longer needed so often. In addition, the delivery mechanism makes the bill of lading cumbersome and slow to use, which causes delays in international trade and makes the bill of lading a less attractive option.<sup>14</sup>

The bill of lading is a document of title, which means that the right to claim delivery at the destination and the right to control the goods by, for example, changing the destination during transit are attached to actual possession of the document (FMC section 13:52). The carrier issues a bill of lading to the consignor at the loading port, and after that the document is sent to the consignee by mail. This can take longer than the carriage of goods. For example, if the goods are sold several times during transit, the document has to be sent through a chain of new buyers. Or if a letter of credit is used, the bill of lading has to go through processes of banks before it reaches the consignee. Thus, the bill of lading frequently arrives at the destination later than the goods, and delivery of goods is

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<sup>12</sup> UNECE (2011) p. 3, 7, and 10.

<sup>13</sup> Baughen (2009) p. 200; *Shellvoy 6*, clause 33.

<sup>14</sup> UNECE (2011) p. 3.

delayed until the bill of lading reaches the consignee. This often means that the goods are either delivered without production of the bill, or the delay results in additional costs, such as demurrage or costs of warehousing.<sup>15</sup>

To tackle this delay issue, many standard charter party contracts require the carrier to deliver the goods without production of the bill of lading. In addition, the carrier might also be obliged under the charter party to change the destination without production of the bill of lading.<sup>16</sup> Delivery is then, in these kinds of situations, made against a letter of indemnity. These practices actually undermine the most important feature of the document – its delivery and control mechanisms, which give the holder exclusive control over the goods. This misuse raises several issues. First of all, a letter of indemnity is not necessarily enforceable, so that the carrier is not fully protected. Delivering the goods without the bill of lading can also amount to misdelivery, and changing the destination can be considered as deviation from the route. Misdelivery and deviation can lead to loss of the carrier's P&I insurance cover. In addition, the carrier might not be able to limit its liability under the contract of carriage because delivering the goods or changing the destination without production of the bill of lading can be considered as an intentional and serious, yet very practical, breach of contract.<sup>17</sup>

So far it seems that there is a genuine demand for a bill of lading and its functions, which should be maintained in the electronic environment as well – at least when goods are sold during transit and when a bank is involved in financing the sale of goods. Switching to an electronic bill of lading could bring many benefits. The costs of issuing and processing paper documentation are very high, and an electronic bill of lading is faster and more cost effective. It could also fix many of the problems which arise when a paper bill of lading is used. As pointed out, a paper

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<sup>15</sup> Grönfors (1991) p. 19; UNECE (2011) p. 5; UNCTAD (2003) p. 12.

<sup>16</sup> See Shellvoy 6, clause 33; The carrier is also obliged to carry the bill of lading on board under clause 33 of Shellvoy 6.

<sup>17</sup> Gard (2011) sections 1.3.4.4, 4.7, and 4.8; Gard (2013) Rule 34 (i, ii, and xi); UNECE (2011) p. 5.



bill of lading is often delivered late, which is a problem that using electronic documentation could fix.<sup>18</sup> So, if an electronic bill of lading is used, no additional costs, such as demurrage or warehousing costs, arise due to a delayed bill of lading, nor would the need arise to use a letter of indemnity in order to receive the goods without the late bill. This also means that carriage is still covered by the carrier's P&I insurance.

So, in summary, an electronic bill of lading could significantly reduce the amount of costs and would lead to a situation where the bill would not have to be used in the “wrong” way.

## 2.2 Why are paper bills of lading still used?

Electronic equivalents to paper transport documents have been on their way for decades but progress in this field has been relatively slow despite the fact that switching to electronic documents could be beneficial and save costs. This raises the question why exactly market players have been so reluctant to use electronic documents. The main obstacles preventing widespread use of electronic transport documents were identified in a survey by the Secretariat of the United Nations Conference on trade and development (UNCTAD) in 2003. According to this report, the main reason preventing use of electronic documents was that the markets, trading partners or infrastructure were not ready to switch to an electronic environment. Other obstacles included such factors as costs, security or confidentiality concerns as well as lack of an adequate legal framework.<sup>19</sup>

It is this last obstacle – the legal framework – that forms the main interest of this paper. An older UNCTAD report prepared in 1998 identified, for example, the following legal issues which concern electronic alternatives to bills of lading and which are of interest to this paper<sup>20</sup>:

- requirement for a written/signed/original document;
- evidential value of electronic records;

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<sup>18</sup> UNCTAD (2003) p. 28.

<sup>19</sup> UNCTAD (2003) p. 27.

<sup>20</sup> See UNCTAD (1998).

- replacement of negotiable documents of title by electronic equivalents

Much has changed since 2003, and it seems that the markets might be readier to switch to electronic bills of lading. However, the legal situation with regard to international maritime conventions is still the same as it was in 2003. None of the international maritime conventions explicitly address the question of electronic bills of lading, but instead it is implicitly assumed in those conventions that the bill of lading is in paper form<sup>21</sup>. This creates legal uncertainty as it is unclear whether an electronic bill of lading can be considered as equivalent to a paper one, thus creating the same legal effects.

### **2.3 Development of electronic bills of lading**

There have been several more or less successful attempts which have aimed to replace the paper bill of lading, and to achieve all the functions of the paper bill of lading in an electronic environment, most of them by contractual means. This development started in the 1980's when the International Association of Independent Tanker Owners (INTER-TANKO) and Chase Manhattan Bank established the Seaborne Trade Documentation (SeaDocs) registry system. This was unsuccessful for several reasons, including for example high costs, and issues concerning insurance, liability and confidentiality of information. It was followed by a standard set of rules called the Rules for electronic bills of lading published by Comité Maritime International (CMI) in 1990 which could be incorporated into a bill of lading by reference.<sup>22</sup>

Different United Nations bodies have also been active in the field of transport documents and electronic commerce. The United Nations Commission on International Trade Law (UNCITRAL) published a Model Law on Electronic Commerce in 1996 which set a model law for national legislators when reforming statutory laws in order to promote electronic trade. Sections 16 and 17 of the Model Law concern transport

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<sup>21</sup> UNCTAD (2001) p. 14.

<sup>22</sup> UNCTAD (2001) p. 16–19.

documents, but these sections have not been a success among national legislators.<sup>23</sup> The model law was followed by the UNCITRAL Model on Electronic Signatures in 2001. Both of these model laws have been acknowledged in the Finnish preparatory works related to electronic commerce and signatures legislation, and they have also influenced the preparation of EU directives, which form the basis of Finnish national legislation in this field.<sup>24</sup>

This article is now interested in two of the latest solutions, the Bolero eB/L and the CargoDocs eB/L.<sup>25</sup> The reason for this interest is that only these two systems have quite recently been approved by the International Group of P&I Clubs, and hence by its 13 member clubs which insure the majority of the world's ocean going vessels.<sup>26</sup> This means that when the parties use these systems, their carriage is still covered by P&I insurance, so that lack of insurance cover is no longer an obstacle to the use of electronic documentation.

The CargoDocs eB/L is a more recent solution, and based on their internet pages the system is gaining popularity, and might just be hitting through. The legal basis for this electronic document is its multilateral user agreement, DSUA.<sup>27</sup> The other current solution, Bolero eB/L, is also based on a multipartite agreement, the Bolero Rulebook, entered into by all the users<sup>28</sup>. Thus the two solutions for electronic bills of lading rely on contractual stipulations in order to replicate the functions of a paper bill of lading.

The solutions adopted in the Bolero Rulebook and CargoDocs are based on English law, and old English legal doctrines such as novation and attornment. Novation refers to a process in which the old contract is terminated and replaced by a new one with the same content (between the carrier and a new holder, for example). Attornment, on the other

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<sup>23</sup> UNCTAD (2001) p. 16–19.

<sup>24</sup> See HE 36/2009 section 2.3, HE 197/2001 section 2.3 and HE 194/2001.

<sup>25</sup> See Bolero Rulebook (1999) and CargoDocs Electronic bills of lading (2015).

<sup>26</sup> UK P&I Club (2013); International Group of P&I Clubs (2015).

<sup>27</sup> See CargoDocs Electronic Bills of Lading (2015), and CargoDocs Legal Framework and DSUA (2015).

<sup>28</sup> See Bolero Rulebook (1999).

hand, means an undertaking by the carrier as a bailee of the goods to deliver the goods to a certain person, for example, to the new “holder”, and this enables the parties to create constructive possession of the goods without the use of a document of title.<sup>29</sup>

This is problematic as parties to a sale of goods contract cannot contractually decide, for example, the law applicable to proprietary rights which concern third parties. The bill of lading has gained its proprietary role by international mercantile custom, but no such custom exists with respect to the electronic bill of lading. Otherwise proprietary rights are regulated on a national level.<sup>30</sup> It is uncertain whether the legal solutions adopted by Bolero, for example, are workable or acceptable under different national rules, and whether they create the desired proprietary and other legal effects.

## **3 Legal position of the electronic bill of lading**

### **3.1 Functional equivalence approach**

As pointed out earlier, none of the international maritime conventions in force explicitly addresses the question of electronic bills of lading, which raises several legal issues. Discussion of electronic bills of lading has quite often concentrated on formal requirements related to tangible paper documents. Fulfilling these requirements, such as ‘writing’, ‘signature’, ‘original’ and ‘unique’, can create issues in an electronic environment. The functional equivalence approach has been introduced by UNCITRAL, for example, in their Model Laws on Electronic Commerce, 1998. This approach relies on the idea that the purpose of each form requirement, such as original and unique, should be fulfilled in an

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<sup>29</sup> Goldby (2011) p. 4–5.

<sup>30</sup> Railas (2004) p. 292.

electronic environment, and electronic documents should be treated equally if they satisfy the criteria for equivalence specified in the law.<sup>31</sup>

This functional equivalence approach has also been followed by national legislators. When the Electronic Commerce Directive was implemented in 2001 in England, the Law Commission of England took the stance introduced by UNCITRAL and stated that “it is function, rather than form, which is determinative of the validity of the signature”.<sup>32</sup> However, so far, no such internationally accepted criteria for functional equivalence (covering all requirements) exist, but UNCITRAL continues their work and is currently drafting a model law on electronic transferable records.<sup>33</sup>

The evidentiary role of transport documents is closely linked to requirements of signature and writing imposed by legislation. So, these formal requirements directly affect the evidentiary value of the electronic bill of lading if, for example, a national court does not accept electronic signatures.<sup>34</sup> The evidentiary value of electronic bills of lading in Finland is evaluated in the next section, 3.2.

The transferable nature of bills of lading is the most problematic function to overcome in an electronic environment. A transferable document embodies the rights it presents and those rights can be transferred by transferring the unique paper document. So, this transferability is linked to the originality, singularity or uniqueness of a document.<sup>35</sup> In terms of a paper bill of lading, certain rights are attached to possession of the document and the document itself is unique in a way that only one person at a time can have possession of the original paper document. This uniqueness gives the holder exclusive control and constructive possession over the goods during transit while the goods are in the hands of the carrier. This feature of uniqueness should be also secured in an electronic environment, and only one person at a time should be able to control the goods. In the Bolero and CargoDocs systems this possession

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<sup>31</sup> UNCITRAL (2011) p. 9–10.

<sup>32</sup> Law Commission of England (2001) p. 16.

<sup>33</sup> See UNCITRAL (2015).

<sup>34</sup> Røsæg (1999) p. 133.

<sup>35</sup> UNCITRAL (2011) p. 5.

is “replaced by ‘exclusive control’ of an electronic record”.<sup>36</sup> The current stance in Finland and England in relation to transferability of electronic bills of lading is discussed in chapter 3.3 onwards.

### 3.2 Evidentiary value of electronic bills of lading

Before going into detail, the legal situation in Finland is here explained briefly. Finland is a party only to the Hague-Visby Rules 1968, but it has still adopted the Hamburg Rules 1978 insofar as possible. This means that the Finnish Maritime Code is a mixture of those two rules with some national peculiarities. In fact the applicability of the Hague-Visby Rules 1968 on the international level depends greatly on the way they are incorporated into national legislation. This is due to the fact that article 16 of the Visby protocol gives the contracting states a wide choice how to give effect to the rules. The contracting states can do so either by giving the convention the force of law or by including the rules in their national legislation in *an appropriate form*. As many countries chose the second option, the applicability of the Hague-Visby rules 1968 is not harmonized at all.<sup>37</sup>

In Finland, the evidentiary value of a bill of lading is based on the FMC section 13:42 according to which “a bill of lading is a *document* which is... evidence of a contract of carriage by sea and of the carrier having received or loaded the goods”. The position of electronic signatures in Finland is quite clear. According to the FMC 13:46 “(t)he bill of lading shall be signed by the carrier or any person acting on his behalf”, and “(t)he signature may be made by mechanical or electronic means”. This means that the code allows the bill of lading to be signed electronically, so that there seems to be no issue as to the evidentiary value of an electronically signed bill of lading. This rule of the FMC is based on the Hamburg Rules, and *Van Boom* states that the Hamburg Rules facilitate the use of electronic bills of lading, and describes them as being media-neutral<sup>38</sup>.

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<sup>36</sup> Goldby (2011) p. 5–6.

<sup>37</sup> Hoeks (2010) p. 300–301.

<sup>38</sup> Van Boom (1997) p. 14.

The evidentiary value of the bill of lading is interconnected to the transferability of the document. In order for a bill of lading to be negotiable, the buyer has to be able to rely on the information content of the bill of lading, so that the bill of lading is not just evidence; it is in certain cases conclusive evidence. In Finland, the carrier's information liability is described in sections 13:49 and 13:50 of the FMC. According to section 13:49, proof to the contrary is not admissible if a third party has acquired a bill of lading in good faith in reliance on the particulars concerning goods therein being accurate. This basically means that the carrier is held liable as if the goods were damaged during transit (implied transport liability).<sup>39</sup> In addition, the carrier is liable for all relevant information concerning not only goods if a third-party-holder "suffers loss by acquiring a bill of lading in reliance on the particulars therein being accurate" and the carrier ought to have realised that the bill of lading was misleading (FMC section 13:50). The purpose of these rules is to support the transferability of a bill of lading.<sup>40</sup> This requirement of acting in reliance is directly linked to the transferability of the bill of lading, and it requires that the holder has, for example, paid the contract price or bought the goods on the basis of the contents of the bill of lading.<sup>41</sup>

*Aurejärvi* and *Hemmo* are of the opinion that nothing in principle prevents electronic promissory notes from having the same evidential value as paper ones. They conclude that this does not mean that transferable promissory notes could be in electronic form as maintaining the negotiability of such documents electronically usually requires some sort of registry system to be used.<sup>42</sup> This interpretation can be used by analogy to bills of lading as they both share the negotiability function. Therefore, it is arguable whether an electronic bill of lading could be – or even needs to be – conclusive evidence if it were not transferable in the first place.<sup>43</sup>

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<sup>39</sup> Sisula-Tulokas (2007) p. 150–151.

<sup>40</sup> HE 62/1994, yksityiskohtaiset perustelut 13:49.

<sup>41</sup> Falkanger (2011) p. 337.

<sup>42</sup> Aurejärvi (2006) p. 96–97.

<sup>43</sup> The Norwegian Law Committee proposes though that a bill of lading should no longer be a valuable paper in the sense of being negotiable, but the maritime code should still have rules on the carrier's information liability which should be extended

Despite the fact that the Finnish Maritime Code recognises electronic signatures, the evidentiary value of an electronic bill of lading remains uncertain on an international level and varies from one country to another. In England, for example, the Law Commission was of the opinion that email qualifies as a document, and digital signatures as well as typing one's initials in the email suffices as a signature. CargoDocs eB/L enables the carrier to sign a bill of lading by email, and in the light of the Law Commission's advice and two recent court cases this seems to be a sufficient solution.<sup>44</sup>

The evidentiary function can also be created by contractual stipulations<sup>45</sup>. A Bolero bill of lading, for example, creates this evidentiary function by stating that a signed message shall have the same effect at law as a paper bill of lading, and that a printed out copy authenticated by Bolero is accepted by the parties as primary evidence<sup>46</sup>. However, the situation might vary from one country to another, and whether a court will uphold these contractual stipulations is another question.<sup>47</sup> *Railas* has also pointed out that the parties cannot contractually bind the court and decide that the requirement of writing in legislation can be satisfied by electronic means.<sup>48</sup>

The new eIDAS regulation in the EU, which will be applied from 1 July 2016 onwards and repeals the electronic signature directive, also covers questions relating to the evidentiary value of electronic signatures and electronic documents.<sup>49</sup> According to article 25 "(a) qualified elec-

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to all kinds of transport documents (Norsk sjolovkomiteen (2012) p. 14, 42).

<sup>44</sup> Law Commission of England (2001) p. 14 –16, 24; CargoDocs Electronic bills of lading (2015); this view of the Law Commission has been confirmed in two recent court cases (though not concerning electronic bills of lading) *J Pereira Fernandes SA v Mehta* [2006] 1 W.L.R 1543 and *WS Tankship II BV v Kwangju Bank Ltd* [2011] EWHC 3103 [Comm], sections 151–155.

<sup>45</sup> Law Commission of England (2001) p. 24.

<sup>46</sup> Bolero Rulebook (1999) sections 2.2.2 (2), and 2.2.3.

<sup>47</sup> Røsæg (1999) p. 134.

<sup>48</sup> Railas (2004) p. 286.

<sup>49</sup> Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.



tronic signature shall have the equivalent legal effect of a handwritten signature” and article 46 states that “(a)n electronic document shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form”. This new eIDAS regulation will also support the evidentiary value of electronic bills of lading.

### **3.3 Status of the electronic bill of lading as a document of title in England and in Finland**

The Hague-Visby Rules 1968, to which Finland and England are parties, apply only to bills of lading or similar documents of title according to article I (b). For the convention to be applicable, a document of title must be issued, and it is uncertain whether an electronic bill of lading qualifies as such. The role of the electronic bill of lading as a negotiable document of title has actually been one of the hardest questions to overcome. This issue directly affects the applicability of the conventions as mentioned above, and is also linked to the transfer of contractual rights to a third party holder, and the proprietary position of the holder of a bill of lading, for example, when the goods are sold or pledged during transit.

There has been long debate and discussion over the legal status of electronic bills of lading in England. The Hague-Visby Rules 1968 are enacted in England by the Carriage of Goods by Sea Act 1971 (the COGSA 1971). The Law Commission of England summarized the general view of electronic bills of lading in its advice when the Electronic Commerce Directive was implemented in 2001. According to that advice, none of the electronic versions of bills of lading qualify as documents of title, so that the COGSA 1971 and the Carriage of Goods by Sea Act 1992 (the COGSA 1992), which concerns transfer of contractual rights under the contract of carriage, are not as such applicable to electronic bills of lading. However, the COGSA 1971 can be incorporated by reference. The main reason for this conclusion was that all electronic versions needed “the participation of the carrier or registrar on each transfer” whereas a paper bill of lading is transferable without such reference. However, the Law

Commission considered that all three functions of a bill of lading can be achieved in England by contract, and by using doctrines such as novation and attornment<sup>50</sup>

Even though both Finland and England are parties to the Hague-Visby Rules 1968, there are some significant differences between the legislation of those two countries, so that conclusions reached in England with regard to electronic bills of lading do not necessarily apply in Finland. There is very little, if any, discussion over the topic in Finnish jurisprudence, and the legal position of electronic bills of lading in Finland remains unclear.<sup>51</sup>

According to the FMC, section 13:2, the code applies to *contracts of carriage by sea*. Thus, Chapter 13 of the FMC is applicable even when the parties use electronic documentation because the applicability of the code does not depend on use of a certain kind of documentation. In addition, a bill of lading can be signed by electronic means (the FMC 13:42). Whether an electronic bill of lading in Finland is a negotiable document of title is yet another question. *Laine* and *Ponka* have asserted that creating a symbolic function which concerns negotiable documents in an electronic environment requires some extra measures, such as a registry system.<sup>52</sup>

*Norros* states that an electronic *substitute* for a negotiable promissory note can achieve the same legal effects as a paper promissory note.<sup>53</sup> This could be interpreted so that an electronic record is not a negotiable document, but its legal effects can be created by other means. *Norros* gives an example of creating such legal effects in Finland. Certain securities can be in electronic form, and the legal effects are created by electronic book entries. This system is based on legislation, the Finnish Act on the Book-Entry System (826/1991<sup>54</sup>) and the Finnish Act on Book-Entry Accounts (827/1991). No such legislation exists in relation to an electronic

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<sup>50</sup> Beale (2002) p. 477; Law Commission of England (2001) p. 24.

<sup>51</sup> See Railas (2004), Ponka (2013), Laine (2003) and Heikkinen (2014).

<sup>52</sup> Laine (2003) p. 1033. See also Aurejärvi (2004) p. 97–98.

<sup>53</sup> *Norros* (2012) p. 233.

<sup>54</sup> The Act 826/1991 has been repealed and replaced by Act 749/2012 (Finnish Act on the Book-Entry System and Creating Operations, in force since 1 January 2013).

bill of lading, which might suggest that it cannot be ‘negotiable’. It is also questionable whether registry systems which are based on contractual solutions are binding on third parties<sup>55</sup>. *Røsæg* has also pointed out that creating new kinds of negotiable instruments only by contractual stipulations is not always possible under national rules. Contractual terms which aim to achieve negotiability are not necessarily effective.<sup>56</sup>

One of the most essential questions seems to be whether an electronic bill of lading is a negotiable document of title. In Finland, this is a subject that has hardly been touched upon in jurisprudence.<sup>57</sup> Based on the arguments presented here, and also those concerning English views, it seems that an electronic bill of lading is not a true bill of lading and thus not a negotiable document of title. Actually, the Law Commission of England would preferably refer to an electronic bill of lading as an electronic contract for carriage<sup>58</sup>. Therefore, it seems to be more essential to discuss how the same legal effects could be achieved in an electronic environment by other means.

### **3.4 Transfer of contractual rights in the electronic environment**

It is in many ways essential that rights under a contract of carriage are transferred to the buyer or to a bank because the buyer or the bank might not be parties to the contract of carriage, often concluded by the seller (as consignor). First of all, the buyer might bear the risk of any loss or damage to the goods during transit.<sup>59</sup> If the goods are delivered to the wrong person or they arrive in damaged condition, the buyer should be entitled to turn to the carrier and present claims against him based on

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<sup>55</sup> Railas (2004) p. 443

<sup>56</sup> *Røsæg* (1999) p. 144.

<sup>57</sup> However, see Ponka (2013), Railas (2004) and Heikkinen (2014).

<sup>58</sup> Beale (2002) p. 477.

<sup>59</sup> This is the assumption in distance sales under the United Nations Convention on Contracts for the International Sale of Goods (the CISG) article 67; The buyer bears the risk also according, for example, to INCOTERMS © 2010 CIF and FOB terms; Railas (2004) p. 231.

the contract of carriage.<sup>60</sup> In addition, the buyer might want to ensure that only he is entitled to claim delivery of the goods and control the goods while in transit once he has paid the sale price to the seller. The bank also quite often requires that the rights attached to certain documents, including the bill of lading, are pledged, i.e. transferred to the bank under a letter of credit<sup>61</sup>.

The bill of lading plays an important role in transferring these rights. The rightful holder of the bill of lading is entitled to present claims against the carrier based on the contract of carriage, so by transferring the bill of lading one can transfer the contractual rights to the holder as embodied in the bill of lading.<sup>62</sup> In England, this exception to the doctrine of privity of contract has been secured statutorily by the COGSA 1992. Rights of suit under the contract of carriage are attached to rightful possession and transfer of the bill of lading under section 2 of COGSA 1992. In *East West Corps v DKBS [2003]* the consignor was not entitled to sue the carrier in contract because the bank had not properly endorsed the bill of lading when it was handed back to the consignor, so that the consignor was not the rightful holder of the bill.<sup>63</sup>

As pointed out earlier, in England the COGSA 1992 does not apply to electronic bills of lading, and there is no case law concerning electronic bills of lading. In England, novation is the only way to transfer contractual rights in an electronic environment to a third party. The Bolero eB/L and CargoDocs eB/L therefore use the novation doctrine to transfer contractual rights and duties to a new holder. This way the position of the holder of an electronic bill of lading is secured. As already noted above, novation means that the old contract is replaced

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<sup>60</sup> This right is not evident in all countries; for example, in the UK it is explicitly secured by the Carriage of Goods by Sea Act 1992.

<sup>61</sup> Several Finnish banks confirm their requirement that goods as well as the bill of lading, i.e. rights attached to the document, are pledged to the bank. (See for example, Aktia Pankki Oyj (2008) and Pohjola Pankki Oyj (2002)).

<sup>62</sup> According to the FMC section 13:42 the bill of lading determines the conditions for carriage and delivery of the goods between the carrier and the holder of the bill of lading, not being the original shipper.

<sup>63</sup> *East West Corp v DKBS [2003]* 1 Lloyd's Rep 239.

by a new contract with exactly the same contents.<sup>64</sup>

In Finland, as well as in the other Nordic countries, the transfer of contractual rights as such is not an issue as the contract of carriage is seen as a tripartite contract to which the parties are the carrier, the consignee and the consignor, or it is seen as a contract for the benefit of a third party.<sup>65</sup> However, by acquiring possession of a paper bill of lading the holder secures that only he is entitled to use the rights attached to the document. This exclusivity should be secured in an electronic environment as well.

So, possession of the bill of lading is required for using certain rights which give the holder exclusive control over the goods while in transit. The right to claim delivery of the goods at the destination and the right to control the goods while in transit, for example by changing the destination, are attached to possession of the bill of lading itself, and these rights can be transferred by transferring the document together with the necessary endorsements, if any.<sup>66</sup> However, an electronic bill of lading is not transferable in the same way as a paper bill of lading is, so that the rights attached to possession cannot simply be transferred by transferring the document.

In England, the rights usually attached to possession of the document are transferred in an electronic environment by novation and attornment, as mentioned earlier. Røsæg points out that the English doctrine of novation is too burdensome in the Nordic countries, as contractual rights can be assigned to a third party quite simply.<sup>67</sup> In Finland, claims and contractual rights, such as the right to claim delivery and control of goods, are freely assignable without notice to the debtor.<sup>68</sup> There are no statutory rules to cover this issue, but the rules concerning promissory notes, and especially simple promissory notes, i.e. ordinary loan agreements (not negotiable ones), can be seen as general principles of the law

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<sup>64</sup> Goldby (2011) p. 4–5.

<sup>65</sup> Sisula-Tulokas (2007) p. 18–19; Røsæg (1999) p. 141.

<sup>66</sup> See the FMC section 13:52.

<sup>67</sup> Røsæg (1999) p. 142.

<sup>68</sup> Varallisuusoikeus (2011) p. 235–236.

of obligations, which could also apply to other, non-monetary claims.<sup>69</sup> However, the transfer of contractual duties requires consent from the creditor, and in such case even the whole contract can be assigned to a third party.<sup>70</sup>

In relation to an electronic bill of lading this means that contractual rights under a contract of carriage are freely assignable despite the electronic form of the document. And as pointed out, no notification to the carrier is needed. However, without such notice the carrier could, for example, deliver the goods to the old creditor, i.e. to the wrong person. In order to be protected against such delivery and against third parties, the carrier has to be notified, and this notice can also be given to an agent such as a registry system. So, the carrier is bound by the assignment of contractual rights, once informed of any such transfer.<sup>71</sup>

In Finland, there are no express rules on pledging bills of lading or general rules on pledging contractual rights. The rules concerning simple promissory notes can be seen as general principles<sup>72</sup>. Thus, contractual rights can be pledged in a similar way as they are transferred, i.e. by giving notice to the carrier.<sup>73</sup> Transferring and pledging rights in an electronic environment does not seem to be an issue from the Finnish legal point of view, and the exclusivity usually gained by possession of the document can be ensured by giving notice to the carrier.

### **3.5 Pledging goods in transit**

The proprietary aspects of a bill of lading are not handled in any of the international conventions, but they have rather emerged by international mercantile custom. However, the exact position of the holder of a bill of

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<sup>69</sup> Aurejärvi (2006) p. 94–95; Tepora (2009) p. 49; Tepora (2006) p. 112, 204; See Chapter 3 of the Finnish Promissory Notes Act (622/1947) as amended for rules concerning ordinary loan agreements.

<sup>70</sup> Norros (2012) p. 222.

<sup>71</sup> See section 31 of the Finnish Promissory Notes Act.

<sup>72</sup> See for Tepora (2009) p. 49; Tepora (2006) p. 112, 204.

<sup>73</sup> Based on the Finnish Promissory Notes Act, sections 10 and 31 the rules concerning transfers also apply to pledges, so that the debt can be pledged by giving notice to the debtor.

lading varies from one country to another as property related questions, such as those concerning better rights to the goods, acquiring better rights than the preceding holder and pledging the goods, are determined by varying national rules. Generally, the goods as well as the rights attached to the bill of lading can be pledged by pledging the document itself.<sup>74</sup>

In Finland, some property-related questions are handled expressly in the Maritime Code in sections 13:56 and 57, which are not based on the Hague-Visby Rules 1968 or the Hamburg Rules 1978. Section 13:56 concerns better rights to goods in case the goods are sold to multiple parties, and section 13:57 concerns the seller's right of stoppage which ceases to have effect when a bearer or order bill of lading has been transferred to a third party (not being the original buyer). As these sections point out, the protected position against the seller and third parties is based on being the "rightful holder of the bill of lading".

This is important, as under the terms of a letter of credit the bank quite often requires a pledge to it of the goods as well as contractual rights under the contract of carriage.<sup>75</sup> In an electronic environment no such negotiable document exists, and the rights under a contract of carriage as well as the goods have to be pledged in another way. Pledging contractual rights has been dealt with in the previous section 3.4. In the Bolero and CargoDocs systems, constructive possession of the goods is transferred by attornment. This is an English legal doctrine whereby the bailee of goods, such as the carrier, acknowledges that he holds the goods on behalf of the new holder and delivers the goods to that holder.<sup>76</sup> In the Bolero system, the goods are pledged by using this attornment doctrine. The bank is designated as a Pledge Holder in the Bolero registry after which the Bolero as the agent of the carrier acknowledges that the carrier holds the goods on behalf of the Pledge Holder.<sup>77</sup>

According to the Finnish Commercial Code (3/1734) section 10:1.2,

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<sup>74</sup> Railas (2004) p. 242–244, 277.

<sup>75</sup> See Aktia Oyj (2008) p. 2.

<sup>76</sup> Goldby (2011) p. 5–7.

<sup>77</sup> Bolero Rulebook (1999) sections 3.4.1 and 3.4.2.

goods can also be pledged when they are in the hands of a third party, such as the carrier, by giving notice to that third party in possession. Based on this rule and the previous section as well, it seems that the rights attached to a bill of lading as well the goods themselves can be pledged in Finland by giving notice to the carrier. Therefore, the solutions adopted in the Bolero and CargoDocs systems seem to be workable from the Finnish point of view.

In Finland and England, pledging goods while in transit and transferring contractual rights under a contract of carriage does not, in fact, require using a bill of lading at all. In addition, as Røsæg points out, the banks are actually more interested in the customer's ability to pay, so that pledging goods and contractual rights might not be all that important after all<sup>78</sup>.

## **4 Some recent developments in international trade**

Replacing the paper bill of lading by electronic equivalents is still on the agenda at EU level and in global fora as well. This can be seen from the European Commission's latest white paper on transport policy in 2011, "Roadmap to a single European transport area – Towards competitive and resource efficient transport systems", in which the Commission listed its future transport policy initiatives and actions. One of the initiatives presented was creation and deployment of a single transport document in electronic form. This document is supposed to promote greener and more efficient multimodal transport by unifying transport documents, which differ according to transport mode and are usually unimodal.<sup>79</sup> It is basically a standardised multimodal e-waybill, and according to the latest information, is supposed to replace the bill of lading and its func-

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<sup>78</sup> Røsæg (2013) p. 2.

<sup>79</sup> COM(2011) 144 final, p. 19; SEC (2011) 391, p. 50.



tions as well.<sup>80</sup> The EU has also enacted the new eIDAS regulation. This replaces the old electronic signatures directive, and it explicitly covers questions that relate to the evidential value of electronic signatures and documents, thus supporting, use of electronic bills of lading.

In addition to these EU level developments, discussion on the international level has also been very active, for example, within several United Nations bodies such as UNCTAD and UNCITRAL. Since 2011, Working Group IV of UNCITRAL has been working on electronic transferable records, and they are currently drafting a model law on electronic transferable records.<sup>81</sup> The implications of this new model law on electronic equivalents to a bill of lading remain to be seen.

Despite these current and earlier policy level efforts, the international markets and trade practices change slowly. As the UNCTAD survey identified in 2003, one of the main reasons why global trade has not switched to electronic documentation was that the markets have not been ready.<sup>82</sup> This means, for example, that banks may not have accepted electronic documents, or that such documents have not been covered by P&I insurance. As pointed out earlier, the bill of lading plays an important role in many contracts which are connected to the international sale of goods. For example, if a bank wants a paper bill of lading for the purposes of a letter of credit, then the parties to the sale of goods contract agree to use a paper one. Even if the carrier would like to use electronic documentation, it is under pressure to serve its clients and issue a paper bill of lading. However, the market situation has changed since 2003 in this respect.

Some recent developments indicate that the markets and different parties connected to a sale of goods transaction might be readier than in 2003 to let go of paper transport documentation. For example, since 2010 the carriage of goods has been covered by the carrier's P&I insurance even if the parties use an electronic bill of lading – provided that the system used is accepted by the P&I insurers. Two electronic bills of lading

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<sup>80</sup> Cane (2012).

<sup>81</sup> See UNCITRAL (2015).

<sup>82</sup> UNCTAD (2003) p. 27.

systems, the Bolero eB/L and CargoDocs eB/L, are currently accepted by the International Group of P&I Clubs.<sup>83</sup>

Another positive sign is a BPO, which stands for bank payment obligation. This is a kind of electronic substitute for a letter of credit – or better described it is supposed to replace letters of credit by electronic means. In 2013, the International Chamber of Commerce (ICC) launched the first rules for bank payment obligations called “the Uniform Rules for bank payment obligations (URBPO)”. In order for it to be successful, trade documentation including the bill of lading has to be in electronic form. CargoDocs eB/L and Bolero eB/L both support the use of BPOs.<sup>84</sup>

Another example of recent developments is the new clause for electronic bills of lading introduced by the Baltic and International Maritime Council (BIMCO). In 2014 BIMCO published a new clause for charter parties under which the charterer can choose the form of the bill of lading, which can be electronic. This very recent development indicates that there is indeed a market demand for such a clause.<sup>85</sup>

## 5 Conclusions

Despite the fact that bills of lading no longer play a central role in international trade they are still in use especially when commodities such as oil are traded and carried in the tramp trade. There is still a genuine need to cover all three functions of the bill of lading in an electronic environment when goods are sold during transit, or when they are used as collateral. Using an electronic bill of lading could fix certain cumbersome features of a paper bill of lading and some malpractices associated with its use. However, developments have been very slow but there are some signs indicating that markets might finally be ready to switch to an

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<sup>83</sup> UK P&I Club (2013).

<sup>84</sup> See CargoDocs Bank Payment Obligations (BPO) (2015) and Bolero Bank Payment Obligation (BPO) (2015).

<sup>85</sup> BIMCO (2014).

electronic environment, signs such as acceptance of electronic bills of lading by P&I insurers, the new bank payment obligation and the new BIMCO clause for electronic bills of lading.

One of the impediments on the way has been the current complicated legal environment and lack of legal framework to support electronic documents. There is no international maritime convention to support an electronic bill of lading. This means that an electronic bill of lading has to adjust to the current legal environment, which is a patchwork of several international maritime conventions, *lex mercatoria*, different national rules and contractual solutions. Two potential systems operating now are both based on contractual frameworks: CargoDocs and Bolero. These both aim to achieve the functions of a paper bill of lading by contractual stipulations and by English legal doctrines, such as novation and attornment.

The status of these electronic documents as well as other electronic equivalents to paper bills of lading is unclear in Finland. As stated in section 3.2, the FMC does in fact recognise electronic signatures, so that the evidentiary value of an electronic bill of lading is not problematic. However, it seems that an electronic bill of lading is not a negotiable document of title as such in Finland. Certain extra measures are required in order to create the same legal effects in an electronic environment as possession of a bill of lading and transfer of that possession create. As presented in sections 3.4 and 3.5, contractual rights as well as exclusive rights to goods can be transferred and goods can be pledged to a third party during transit by notifying the carrier.

On that basis, it seems that the current legal situation in Finland does in fact enable the paper bill of lading to be substituted electronically so that all three functions of a bill of lading can be fulfilled – one way or another – meaning that the legal situation in Finland is not an obstacle to the use of electronic bills of lading. In addition, solutions adopted under CargoDocs and Bolero seem at least quite workable and acceptable from the Finnish legal point of view.

However, some solutions are based on legal doctrines which make use of a bill of lading no longer essential. In an electronic environment,

the transfer of contractual rights and constructive possession over the goods are based on notice sent to the carrier or to a registry system, which makes use of a document like a bill of lading seem unnecessary.

This compact article leaves many topics related to electronic transport records untouched, and more extensive and holistic research on the topic would be welcome from the Nordic point of view, for example. Many interesting questions which arise when an electronic bill of lading is used, such as conflict of law issues, incorporation of general terms and arbitration clauses, have not been within the scope of this article. It could also be fruitful to assess actual trade practices, as well as the views and stance taken by the industry in relation to development of electronic transport documents.

States can choose how to enact the Hague-Visby Rules 1968, and as with the Finnish example, nothing in the Hague-Visby Rules 1968 themselves seems to prevent the legislator from stretching the scope of application of the rules to electronic signatures or even to electronic bills of lading. This kind of possibility to act on a national level is not necessarily a desirable solution as it affects uniformity adversely. Currently, the legal position of the electronic bill of lading will vary from one country to another as there are no international rules to govern these questions. Even if the legislation of one country were to accept the use of electronic bills of lading, this is not in my opinion sufficient and is far from a satisfactory solution in global trade.

## Table of references

### National legislation and preparatory works

Carriage of Goods by Sea Act 1971 (England).

Carriage of Goods by Sea Act 1992 (England).

Finnish Act on the Book-Entry System (826/1991).

Finish Act on the Book-Entry System and Clearing Operations  
(749/212)

Finnish Act on Book-Entry Accounts (827/1991).

Finnish Commercial Code (3/1734).

Finnish Maritime Code (674/1994).

Finnish Promissory Notes Act (622/1947).

HE 62/1994. Hallituksen esitys eduskunnalle merilaiksi ja eräksi siihen liittyviksi laeiksi 62/1994 vp. (Finnish Government Proposal for the Maritime Code).

HE 194/2001. Hallituksen esitys eduskunnalle laiksi tietoyhteiskunnan palvelujen tarjoamisesta ja eräksi siihen liittyviksi laeiksi. (Finnish Government Proposal for the Act on Provision of Information Society Services).

HE 197/2001. Hallituksen esitys eduskunnalle laeiksi sähköisistä allekirjoituksista ja viestintähallinnosta annetun lain 2 §:n muuttamisesta. (Finnish Government Proposal for the Act on Electronic Signatures).

HE 36/2009. Hallituksen esitys eduskunnalle laiksi vahvasta sähköisestä tunnistamisesta ja sähköisistä allekirjoituksista sekä eräksi siihen liittyviksi laeiksi 36/2009. (Finnish Government Proposal for the Act on Strong Electronic Identification and Electronic Signatures).

## **Preparatory works of European Union**

COM(2011) 144 final. White paper. Roadmap to single European transport area – Towards competitive and resource efficient transport systems. Brussels, 2011.

SEC(2011) 391. Commission staff working document accompanying the White Paper Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system. Brussels, 2011.

## **International conventions**

CISG. United Nations Convention on Contracts for the International Sale of Goods (CISG). Vienna, 11 April 1980.

Hague Rules 1924. International Convention for the Unification of Certain Rules relating to the Bill of Lading (the Hague Rules). Brussels, 25 August 1924.

Hague-Visby Rules 1968. The Hague Rules as amended by the Brussels Protocol 1968 (Protocol to amend the Convention for the Unification of Certain Rules relating to the Bill of Lading 1968). Brussels, 23 February 1968.

Hamburg Rules 1978. United Nations Convention on the Carriage of Goods by Sea. Hamburg, 31 March 1978.

Rotterdam Rules 2009. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. New York, 11 December 2008.

## **Soft law instruments**

INCOTERMS © 2010 by the International Chamber of Commerce.  
ICC rules for the use of domestic and international trade terms.  
ICC Publication 715E-FIN. 2010.

International Chamber of Commerce (ICC) Uniform Rules for Bank Payment (URBPO). ICC Publication No. 750. 2013.

Comité Maritime International (CMI) Rules for Electronic Bills of Lading. Paris, 29 June 1990.

United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce. 12 June 1996.

United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Signatures. 5 July 2001.

## **United Nations (UN) documents**

UNECE. Recommendation 12: Measures to facilitate maritime transport documents procedures (2011). UNECE/TRADE/C/CEFACT/2011/4. [http://www.unece.org/fileadmin/DAM/cefact/recommendations/rec12/rec12rev1\\_inf123e.pdf](http://www.unece.org/fileadmin/DAM/cefact/recommendations/rec12/rec12rev1_inf123e.pdf) [Visited on 10 May 2015].

UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 bis as adopted in 1998. New York, 1999. [http://www.uncitral.org/pdf/english/texts/elect-com/05-89450\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/elect-com/05-89450_Ebook.pdf) [Visited on 16 May 2015].

UNCITRAL. Legal issues relating to the use of electronic transferable records (Note by the UNCITRAL Secretariat 10–14 October 2011). A/CN.9/WG.IV/WP.115. <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V11/855/64/PDF/V1185564.pdf?OpenElement> [Visited on 16 May 2015].

UNCITRAL. Draft provisions on electronic transferable records (Note by the UNCITRAL Secretariat 3 March 2015). A/CN.9/WG.IV/WP.132. <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V15/014/42/PDF/V1501442.pdf?OpenElement> [Visited on 10 May 2015].

UNCTAD. Electronic Commerce: Legal considerations (Study prepared by the UNCTAD secretariat 15 May 1998). UNCTAD/SDTE/BFB/1. <http://r0.unctad.org/ecommerce/docs/legal1.pdf> [Visited on 10 May 2015].

UNCTAD. Electronic commerce and international transport services (Report by the UNCTAD secretariat 31 July 2001). TD/B/COM.3/

EM.12/2. [http://unctad.org/en/PublicationsLibrary/tdbco-m3em12d2\\_en.pdf](http://unctad.org/en/PublicationsLibrary/tdbco-m3em12d2_en.pdf) [Visited on 10 May 2015].

UNCTAD. The use of transport documents in international trade (Report by the UNCTAD secretariat 26 November 2003). UNCTAD/SDTE/TLB/2003/3. [http://unctad.org/en/Docs/sdtetlb20033\\_en.pdf](http://unctad.org/en/Docs/sdtetlb20033_en.pdf) [Visited on 10 May 2015].

## Books, articles and more

Aktia Pankki Oyj. *Aktia Pankki Oyj:n vahvistamat tuontiremburssin yleiset ehdot*. 2008. <http://www.aktia.fi/documents/10552/83737/tuontiremburssin-yleiset-ehdot-fi.pdf/7a99d062-4a87-4c8c-bdb6-276bcd32b43a> [Visited on 10 May 2015].

Aurejärvi, Erkki and Mika Hemmo. *Luotto-oikeuden perusteet*. 2<sup>nd</sup> edition. Helsinki, 2006.

Baughen, Simon. *Shipping Law*. 4th edition. Abingdon, 2009.

Beale, Hugh and Lowri Griffiths. *Electronic commerce: formal requirements in commercial transactions*. In: Lloyd's Maritime and Commercial Law Quarterly. (2002), pp. 467–484.

BIMCO. *Electronic Bills of Lading Clause for Charter Parties*. Special Circular No. 3. Bagsvaerd, 2014. [https://www.bimco.org/~media/Chartering/Special\\_Circulars/SC2014\\_03.ashx](https://www.bimco.org/~media/Chartering/Special_Circulars/SC2014_03.ashx) [Visited on 11 May 2015].

*Bolero Bank Payment Obligation (BPO)*. <http://www.bolero.net/products/bank-payment-obligation-bpo> [Visited on 13 May 2015].

Bolero Rulebook 1999.

Cane, Tom. *The e-Freight multimodal e-waybill*. Video from the 2<sup>nd</sup> e-Freight Conference. Delft, 2012. <http://www.efreightconference.com/Vimeo/video22.html> [Visited on 11 August 2012].

*CargoDocs Bank Payment Obligations (BPO)*. 2015. <http://www.essdocs.com/products/cargodocs/bank-payment-obligations-bpo> [Visited on 10 May 2015].



- CargoDocs Electronic bills of lading*. 2015. <http://www.essdocs.com/edocs/electronic-bills-of-lading> [Visited on 10 May 2015].
- CargoDocs Legal Framework and DSUA*. 2015. <http://www.essdocs.com/resources/legal-dsua> [Visited on 11 on May 2015].
- Falkanger, Thor, Hans Bull and Lasse Brautaset. *Scandinavian Maritime law. The Norwegian perspective*. 3<sup>rd</sup> edition. Oslo, 2011.
- Gard. *Guidance on Bills of Lading*. 2011. <http://www.gard.no/ikbViewer/Content/20651968/Gard%20Guidance%20bills%20of%20lading%20March%202011.pdf> [Visited on 7 May 2015].
- Gard. *Rules 2013*. [http://www.gard.no/ikbViewer/Content/20734511/Gard\\_Rules\\_2013.pdf](http://www.gard.no/ikbViewer/Content/20734511/Gard_Rules_2013.pdf) [Visited on 10 May 2015].
- Goldby, Miriam. *Legislating to facilitate the use of electronic transferable records: A case study. Reforming the law to facilitate the use of electronic bills of lading in the United Kingdom*. Paper prepared for the UNICITRAL Colloquium on Electronic Commerce. New York, 2011. [http://www.uncitral.org/pdf/english/colloquia/EC/Legislating\\_to\\_facilitate\\_the\\_use\\_of\\_electronic\\_transferable\\_records\\_-\\_a\\_case\\_study\\_.pdf](http://www.uncitral.org/pdf/english/colloquia/EC/Legislating_to_facilitate_the_use_of_electronic_transferable_records_-_a_case_study_.pdf) [Visited on 13 May 2012].
- Grönfors, Kurt. *Towards Sea Waybills and Electronic Documents*. Göteborg, 1991.
- Heikkinen, Katja. *Konossementin funktiot kansainvälisessä kaupassa: kohti sähköistä kaupankäyntiä*. Helsinki 2014.
- Hoeks, Marian. *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods*. Alphen aan den Rijn, 2010.
- International Group of P&I Clubs. (2015). <http://www.igpandi.org/Home> [Visited on 14 May 2015].
- Laine, Juha and Ilja Ponka. *Kirjallisen muodon täyttäminen sähköisesti*. In: Defensor Legis. (2003), pp. 1028–1043.

- Law Commission of England. *Electronic commerce: Formal requirements in commercial transactions*. Advice from Law Commission. London, 2001. [http://lawcommission.justice.gov.uk/docs/Electronic\\_Commerce\\_Advice\\_Paper.pdf](http://lawcommission.justice.gov.uk/docs/Electronic_Commerce_Advice_Paper.pdf) [Visited on 7 May 2015].
- Norros, Olli. *Velvoiteoikeus*. Helsinki, 2012.
- Norsk sjølovkomiteen. *Gjennomføring av Rotterdamreglene i sjøloven. NOU Norges offentlige utredninger 2012:10*. 2012.
- Pohjola Pankki Oyj. *Remburssihakemus*. 2002. [www.pohjola.fi/media/liitteet?cid=331224295&srcpl=4](http://www.pohjola.fi/media/liitteet?cid=331224295&srcpl=4) [Visited on 10 May 2015].
- Ponka, Ilja. *Sähköinen tunnistaminen ja allekirjoitus Suomen velvoiteoikeudessa*. Helsinki, 2013.
- Railas, Lauri. *The Rise of the Lex Electronica and the International Sale of Goods*. Helsinki, 2004.
- Røsæg, Erik. *On electronic bills of lading – in particular on Bolero bills of lading*. In: SIMPLY 1999: Scandinavian Institute's Maritime and Petroleum Law Yearbook, pp. 129–152. Oslo, 1999.
- Røsæg, Erik. *Security Interest in Goods under Transport*. A paper presented in the OST Colloquium on Maritime Law, 4–5 October 2013 at Southampton University. Southampton, 2013.
- Shelltime 4 Time Charter Party. London, 2003.
- Shellvoy 6 Voyage Charter Party. London 2005.
- Signatures and ratifications of Rotterdam Rules 2015. United Nations Treaty Collection. [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XI-D-8&chapter=11&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-8&chapter=11&lang=en) [Visited on 7 May 2015].
- Sisula-Tulokas, Lena. *Kuljetusoikeuden perusteet*. 3<sup>rd</sup> edition. Helsinki, 2007.
- Tepora Jarno, Janne Kaisto and Esa Hakkola. *Esinevakuudet*. Helsinki, 2009.
- Tepora, Jarno. *Johdatus esineoikeuteen*. 2<sup>nd</sup> edition. Helsinki, 2006.

UK P&I Club. *Electronic (Paperless) trading systems - Electronic Shipping Solutions & Bolero International Ltd. - Updated ESS DSUA Version 2013.1*. Circular 6/2013. [http://www.ukpandi.com/fileadmin/uploads/uk-pi/Latest\\_Publications/Circulars/2013/Circular613\\_PaperlessTrading.pdf](http://www.ukpandi.com/fileadmin/uploads/uk-pi/Latest_Publications/Circulars/2013/Circular613_PaperlessTrading.pdf) [Visited on 10 May 2015]

Van Boom, W.H. *Certain legal aspects of electronic bills of lading*. In: *European Transport Law*. Vol. 32 (1997), pp. 9–24.

*Varallisuusoikeus*. Saarnilehto, Ari... [et al.]. 2<sup>nd</sup> edition. Helsinki, 2011.

### **English court cases**

East West Corp v. DKBS [2003] 1 Lloyd's Rep 239.

J Pereira Fernandes SA v Mehta [2006] 1 W.L.R 1543.

WS Tankship II BV v Kwangju Bank Ltd [2011] EWHC 3103 (Comm).

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# Different Aspects Related to “Green” Transport



Defences and Special Risks  
in the Uniform Rules Concerning  
the Contract of International  
Carriage of Goods by Rail

José Manuel Martín Osante  
University of the Basque Country  
(UPV/EHU), Bilbao

## **Abstract**

After describing the general liability regime of the rail carrier for loss, damage and delay, the Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM) regulate the grounds for exception of liability of that carrier. Those grounds for exception are a series of circumstances that allow the carrier to be released from his liability, by way of compensation for the stringency with which CIM treats the carrier, as is evident from the injured party only having, in principle, to establish that the damage occurred during the liability period (between the taking over and the delivery) for the carrier to be deemed liable. The grounds for exception are divided into two groups: the non-privileged grounds (defences) envisaged in Article 23.2 CIM and the privileged grounds (special risks) of Article 23.3 CIM. The criterion used to group the grounds is the burden of proof.

## **Keywords**

International Carriage of Goods by Rail, Liability. Defences, Special risks

This article has been produced in the course of research project Ref. DER2012-37543-C03-02: “New Legal Solutions regarding Documentation and Liability in view of the Restructuring of the Transport Market”, subsidized by the Spanish Ministry of Economy and Competitiveness.

## **Contact**

José Manuel Martín Osante, Assistant Professor of Commercial Law, University of the Basque Country (UPV/EHU), Bilbao, Spain.

E-mail: [martin.osante@ehu.es](mailto:martin.osante@ehu.es)

# 1 Contractual liability of the rail carrier

The liability of the rail carrier, regulated in Articles 23 et seq. CIM, is a contractual liability<sup>1</sup>. Specifically, Article 23.1 CIM extends the liability of the rail carrier to the three standard cases of breach of the transport contract, namely, (total or partial) loss, damage to the goods, and delay in delivery<sup>2</sup>, but without defining what is meant in each of those cases. This silence of the CIM would require those terms to be interpreted in some detail, without forgetting the need to turn to national legislation (Article 8.2 COTIF). However, bearing in mind that they are breaches inherent in any type of transport contract, that is, not exclusive to the international contract of carriage of goods by rail, we will only consider here some specific points regarding those breaches.

The regulation of liability in the CIM begins with a general statement of the liability of the rail carrier for damage to the goods resulting from loss, damage or delay, from the taking over of the goods to delivery, and regardless of the kind of vehicle used (Article 23.1 CIM). However, this attribution of liability to the carrier is not on a clear basis, as that precept is silent on whether (proven or alleged) fault plays any role in the liability regime relating to international carriage of goods by rail. This silence has led, fundamentally, to two types of interpretations. According to the first, the CIM envisages a liability regime regardless of the fault of the carrier, that is, a strict liability or, specifically, by risk<sup>3</sup>, and according

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<sup>1</sup> MUTZ, G., *Münchener Kommentar zum Handelsgesetzbuch*, Band 7, Viertes Buch, Transportrecht, München, 1997, Art. 36 CIM, n. 3.

<sup>2</sup> CLARKE, M. / YATES, D., *Contracts of carriage by land and air*, London-Singapore, 2004, p. 171; KOLLER, I., *Transportrecht*, 6th. ed., München, 2007, Art. 23 CIM, n. 3; and DURAND, P., *Les transports internationaux (ferroviaires et mixtes). Etude comparée des nouvelles conventions de Berne mises en application le 1er mars 1956*, Paris, 1956, 206.

<sup>3</sup> In this sense, NÁNÁSSY, B., *Das Internationale Eisenbahnfrachtrecht*, Wien, 1956, 516-519; FINGER, H.-J., *Internationaler Eisenbahnverkehr*, 2nd. ed., München-Berlin, 1965, 71; WICK, J., *Das Internationale Eisenbahnfrachtrecht*, Wien, 1974, 240-242; DUBISCHAR, R., *Grundriß des gesamten Gütertransportrechts*, Frankfurt am Main, 1987, 73; and MUTZ, G., "Le Droit de transport international ferroviaire en pleine mutation", *Liber Amicorum Jacques Putzeys. Études de Droit des*



to the second, the CIM adopts a liability regime of presumption of fault of the carrier<sup>4</sup>.

## 2 Grounds for exception of liability: Classification

After describing the general liability regime of the rail carrier for loss, damage and delay, Article 23 CIM then goes on to regulate, in sections 2 and 3, the grounds for exception of liability of that carrier. Those grounds for exception are a series of circumstances that allow the carrier to be released from his liability, by way of compensation for the stringency with which CIM treats the carrier, as is evident from the injured party only having - in principle - to establish that the damage occurred during the liability period (between the taking over and the delivery) for the carrier to be deemed liable.

The grounds for exception are divided into two groups: the *non-privileged* grounds (defences) envisaged in Article 23.2 CIM and the *privileged* grounds (special risks) of Article 23.3 CIM<sup>5</sup>. A significant difference between the groups of grounds for exception is that the non-privileged grounds enable the carrier to be relieved of liability for loss, damage and delay, while the privilege grounds allow the carrier to be relieved of liability for loss and for damage, but not for delay<sup>6</sup>. However, the criterion

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Transports, Bruxelles, 1996, 557.

<sup>4</sup> HELM, J.G., Haftung für Schäden an Frachtgütern, Karlsruhe, 1966, 35-36; and HAENNI, J., «Carriage by rail», en RODIÈRE, R. (dir.) International encyclopedia of comparative law, vol. XII, Law of transport, Chap. 2, Tübingen, 1973, 112.

<sup>5</sup> Cf. NÁNÁSSY, B., Das Internationale Eisenbahnfrachtrecht, cit., 524, 537; and HELM, J.G., Haftung für Schäden an Frachtgütern, cit., 43; and ZUNARELLI, S./COMENALE, M., Manuale di Diritto della Navigazione e dei Trasporti, I, 2nd ed., Padova, 2013, 341.

<sup>6</sup> CLARKE, M. / YATES, D., Contracts of carriage by land and air, cit., 172, 243; and EMPARANZA, A., “El transporte internacional de mercancías por ferrocarril (COTIF-CIM)”, in CONCEPCIÓN RODRÍGUEZ, J.L., (Dir.), Manuales de Formación Continuada-Consejo General del Poder Judicial, n. 21, vol. I, Madrid, 2002, 445.

used to group the grounds is the burden of proof, as indicated below.

In any damage liability regime, regulation of proof is very important, as it enables the person to be identified who must provide the appropriate proof of the damage, of the action or omission that caused them, of the concurrence of any grounds for exception, etc. In this regard, the CIM does not establish a closed and comprehensive regime of the proof in the international carriage of goods by rail (admissible proof, assessment of the proof, which party bears the risk of not accrediting the specific cause of the damage, etc.). It only addresses, in Article 25, which party is responsible for the burden of proving the facts or events that except liability, presuming in certain cases the causal link between the event and the damage.

The burden of proving the grounds of exception falls on the rail carrier<sup>7</sup>. This can be deduced from the literal working of Article 25 CIM, which expressly alludes, in its paragraphs 1 and 2, to it being the “carrier” who must establish the facts or the special risks of Articles 23.2 and 23.3, if he seeks to be exempted from liability. This attribution to the carrier of the burden of proof is a logical consequence of the general presumption of liability of the rail carrier that the CIM establishes (in Article 23) for damage to goods during the period (from taking over to delivery) in which the carrier is responsible for them. If we start from the presumption of liability of the carrier regarding established damage to the goods, it will be the carrier who must endeavour to provide proof to overturn that presumption, otherwise he will be found liable.

On the other hand, the placing of the burden of proof on the rail carrier is in keeping with the facility of proof principle, in so far as that it is easier for the carrier to establish what has been the specific cause of the damage suffered by the goods. The consignor loses control of the goods once they have been handed over to the rail carrier, who then has such goods in his possession and control, which means the carrier therefore assumes liability for their safekeeping. Consequently, in the case

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<sup>7</sup> ALLÉGRET, M., “Transports Internationaux Ferroviaires”, *Juris-Classeur Transport*, Vol. 1, 1999, fasc. 685, 13; and CLARKE, M. / YATES, D., *Contracts of carriage by land and air*, cit., 183-184.

of any damage to the goods during carriage, it will be the carrier who may more easily establish the specific cause of the damage, as he know the circumstances in which that carriage was carried out (suitability of the people used for the transport, characteristics of the vehicles used, state of the goods, etc.) or, at least, assumed the legal obligation of knowing how the carriage was carried out.

As regards the non-privileged grounds, for the carrier to be relieved of his liability for the damage to the goods during the period of responsibility, he must establish, first of all, the occurrence of the specific fact (fault of the person entitled, orders of the person entitled, inherent defect of the goods or unavoidable circumstances) and, secondly, the causal link between that fact and the damage to the goods (Article 25.2 CIM). Two observations should be made in that respect: 1). If the carrier resorts to unavoidable circumstances to be relieved of liability, he must establish the unavoidable circumstance that actually caused the damage to the goods, or otherwise, he will be held to account for that damage. 2). If the carrier seeks protection in the orders of the person entitled, he must provide proof of the order and that that order led to damage to the goods, and, to prevent this exception being applied, the person entitled must establish the fault of the carrier and that this fault was the reason for the order being given,

In the case of the privileged grounds, the carrier must establish the occurrence of one or more of the special risks of Article 23.3 CIM (carriage in open wagons, absence or inadequacy of packaging, etc.) and the mere probability of that risk having been able to cause the damage, since Article 25.2 CIM presumes –*iuris tantum*- that (with the mere possibility established) that risk has been the cause of the damage. The mere probability or likelihood does not simply consist of alleging the occurrence of the special risk, or of theoretical speculations beyond the specific case, but neither can it be equated with the proof of the causal link of the non-privileged grounds for exception. However, the causal link is only presumed in cases of losses and damage, not for delay, given that the privileged grounds are only apply to these.

The aforementioned presumed causal link between special risk and

damage to the goods is an *iuris tantum* presumption, as Article 25.2 in fine CIM states that “the person entitled shall, however, have the right to prove that the loss or damage was not attributable either wholly or in part to one of those risks”. This right to provide proof against that presumption (counter-proof) is expressly envisaged in the CIM (Article 25.2), even though only for privileged grounds of exception (“special risks”). Nonetheless, it should be understood that the person entitled may also provide counter-proof in relation to the ordinary grounds for exception, in order to establish that the real cause of the damage is not the fact alleged by the carrier<sup>8</sup>.

The counter-proof that the person entitled provides will consist of either (negative proof) that there was really no causal link between the alleged fact or risks proven by the carrier and the damage to the goods, or of establishing (positive proof) that the damage was really caused for a reason other than the one alleged by the carrier and for which he is liable (such as, the fault of this carrier). Obviously, the causal link presumption will be undermined if the person entitled provides proof of the real cause of the damage, with that being different to the one alleged by the carrier. However, the person entitled is not required to provide proof of the specific cause of the damage to undermine the causal link presumption, he will only have to establish that the specific risk alleged by the carrier was not the cause of the damage to the goods.

### 3 Defences

#### a) Fault of the person entitled

The first non-privileged ground for exception is the “fault of the person entitled” (Article 23.2 CIM). In that regard, the expression “*person entitled*” (“*ayant droit*”, “derechohabiente”, “*Berechtigten*”) includes both the

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<sup>8</sup> Vid. KOLLER, I., *Transportrecht*, cit., Art. 25 CIM, n. 2.

consignor and the consignee<sup>9</sup>, as persons entitled to bring against the carrier the legal actions based on the contract of carriage, pursuant to Article 44 CIM. The key point here to identify the person who holds the status of person entitled at the time when the damage could have occurred. Therefore, the fault of the consignor and that of the consignee will enable the carrier to be relieved of liability, by providing the appropriate proof of that fault and of the causal link between that and the damage to the goods.

In practice, the fault of the consignor occurs more frequently than that of the consignee. In any event, the fault of the person entitled is a ground for exception that is hardly ever used in practice. This is because the typical cases of fault of the person entitled (fault of the consignor in the packaging or in the loading) are privileged grounds for exception pursuant to Article 23.3.b) and c) CIM, and the carrier prefers the latter channel to be relieved from liability<sup>10</sup>. Another reason is that it may overlap with the second non-privileged cause for exception, namely, the orders of the person entitled that are not due to a fault of the carrier.

Once the person entitled has been identified, the need is to finalise the diligence parameters required. The CIM does not specify that aspect and therefore it can be presumed that the diligence required from the person entitled is the standard one<sup>11</sup>. There is no reason whatsoever to require greater diligence from the person entitled than the one required from the rail carrier. This is why the carrier cannot allege any negligence on the part of the person entitled, but only exclusively one that violates the aforementioned diligence parameter.

The fault of the person entitled, in the same way as any other negligence, may consist of an act or an omission. In this regard, specific cases that can be classified as the fault of the person entitled would be, for

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<sup>9</sup> WICK, J., *Das Internationale Eisenbahnfrachtrecht*, cit., 244; and KOLLER, I., *Transportrecht*, cit., Art. 23 CIM, n. 4.

<sup>10</sup> CLARKE, M. / YATES, D., *Contracts of carriage by land and air*, cit., 172, 243.

<sup>11</sup> MARTÍN OSANTE, J.M. / MARTÍNEZ BALMASEDA, A., “Responsabilidad del porteador ferroviario por incumplimiento: fundamento y supuestos”, in EMPARANZA, A. / RECALDE, A., *El contrato de transporte internacional de mercancías por ferrocarril*, Cizur Menor, 2008, 188.

example, delay caused by the negligence of the consignor in failing to provide documents, failing to provide correct documents or not supplying them in time, and as the fault of the consignor, a road tanker not being correctly sealed.

## **b) Orders given by the person entitled**

The rail carrier may be relieved of liability by establishing that the goods were damaged as a result of an order from the person entitled “other than as a result of the fault of the carrier” (Article 23.2 CIM). The CIM uses the expression “person entitled” to refer to the consignor *and* consignee, therefore, the order both of the consignor and the consignee may be a ground for exception for the rail carrier.

The following considerations should be taken into account as regards what “order” should be taken to mean:

1. The *orders* of Article 23.2 CIM are equated with the *instructions* of Article 17.2 CMR. In this regards, the orders should be considered insofar as they are binding. Otherwise, we would be dealing with recommendations, comments, observations, etc., that the carrier may or may not address and, in the case of doing so, the carrier would be liable for his own decisions.

2. The orders must be given by a person entitled to give them and be lawful<sup>12</sup>, as otherwise the carrier would not be required to follow them and would be acting negligently in the case of obeying unlawful orders. On the other hand, the orders must be clear, and should they not be, the carrier should seek the relevant clarification, as should he not do so, the damage caused to the goods could be attributed to the (shared or exclusive) fault of that carrier.

3. The orders must, therefore, be interpreted in a broader sense than that of the orders modifying the contract of carriage (Article 30 ff)<sup>13</sup>. Thus, for example, the orders regarding the care that the goods require

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<sup>12</sup> In this sense, MARTÍNEZ SANZ, F., *La responsabilidad del porteador en el transporte internacional de mercancías por carretera –CMR–*, Granada, 2002, 192.

<sup>13</sup> Cf. ALLÉGRET, M., “*Transports Internationaux Ferroviaires*”, cit., 6.

during their carriage and the information included in the consignment note, would have the status of orders for the purposes of Article 23.2 CIM.

4. Orders may be careless in various ways. Limiting the application of this ground for exception to the cases of negligent orders would mean curtailing their sphere of application as they would overlap with the first non-privileged ground for exception (fault of the person entitled).

The rail carrier may not successfully allege this ground for exception when the order issued by the person entitled arises from the fault of that carrier. Therefore, for the carrier not to be able to make use of these grounds for exception, there must be a causal link between the fault of the carrier and the order issued by the person entitled. In those cases, the carrier must establish that the person entitled has issued a specific order and that the order has caused damage to the goods, while the person entitled will have to prove the fault of the carrier and that that fault was the reason why he issued the order.

### **c) Inherent defect in the goods**

The third non-privileged ground for exception is the “inherent defect in the goods (decay, wastage, etc.)”, pursuant to Article 23.2 CIM. This provision does not define inherent defect, even though it gives - in parenthesis - two examples of inherent vice: decay and wastage, in order to clarify the scope of those grounds for exception, but without those examples exhausting the many other cases that may amount to inherent vice of the goods (it is not a *numerus clausus*), as is shown by the “etc.”. In the absence of a definition, jurisprudence and doctrine have debated the meaning of inherent vice. In this regard, inherent defect is an atypical defect of certain goods, a defect that is not inherent in the class, species or category to which the goods belong, but only in the specific goods being transported, and therefore they are special qualities of those specific goods.

This allows “the inherent defect of the goods” to be distinguished from a privileged ground for exception with which it has several similarities,

despite the undeniable differences between them, namely, the “nature of certain goods”. Inherent vice refers to the qualities of the specific goods being transported that do not affect all the goods of that class, while the nature refers to the typical qualities of that type of goods, it is not a defect, but rather a quality inherent in it: glass by its very nature is subject to breakages, iron may rust, natural plants may be subject to desiccation, etc.<sup>14</sup> The specific cases of inherent defect of the goods are very diverse, even though some examples can be given, such as the illness of an animal, the parasite that affect a batch of fish, the humidity of the cereals or pulses to be transported, the insufficient pre-cooling of meat etc.

The allegation of this non-privileged ground for exception usually depends on the carrier not being aware of the vice. Case law states that if the carrier has been informed of the inherent defect that affects the goods to be transported, he may not make use of this ground for exception, and therefore, that knowledge would undermine the very being of that clause, with the default goods becoming part of a wider class of goods to make up by themselves a class of goods. [I do not understand the last sentence; please clarify] However, this important restriction on the carrier’s alleging this ground for exception is not considered, at least expressly in the CIM. Article 23.2 CIM literally refers to the “inherent defect in the goods (decay, wastage, etc.)”, as grounds for exception, without ever referring to the carrier being aware or not being unaware of that defect.

#### **d) Unavoidable circumstances**

Rather imprecisely worded, Article 23.2 *in fine* CIM contains the fourth and last non-privileged ground for exception of liability of the rail carrier, namely, those “circumstances which the carrier could not avoid and the consequences of which he was unable to prevent”. The fact that doctrine and case law interpret and apply this ground inconsistently shows that its wording could be improved. This situation generates particularly

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<sup>14</sup> EMPARANZA, A., “El transporte internacional de mercancías por ferrocarril (COTIF-CIM)”, cit., 443.



worrying legal insecurity, if we take into account that this ground for exception blurs the general limit of liability that the CIM imposes on the carrier and that the terms used are so broad that in practice the carrier can resort to it whenever he cannot allege another specific ground of exception, that is, use it as an alternative ground of exception.

In order to try to clarify the meaning of this ground of exception, two questions, at least, should be considered: 1. Whether the expressions used are implicitly referring to two familiar grounds of exception, namely force majeure and unforeseen circumstances. 2. What level of diligence can be expected of the carrier, in order to determine whether the circumstances and their consequences were avoidable.

1. The 1933 version of the CIM referred to force majeure as grounds for exception. However, this concept was replaced in the 1952 revision of the CIM by a new formula (the one envisaged in the current Article 23.2 CIM: “circumstances which the carrier could not avoid and the consequence of which he was unable to prevent”), which sought to overcome the difference in interpretations of force majeure in the states that were parties to the convention<sup>15</sup>. The CIM does not currently expressly contemplate force majeure or unforeseen circumstances as grounds for exception. Unavoidability plays a central role in establishing this ground for relieving liability in the terms used by the current 23.2 CIM. To allege this ground, the circumstances need to have been unavoidable and the consequences of those circumstances could not have been circumvented (in short, stopped, prevented or avoided). No mention is made of unpredictability. In this regard, a traditional aspect of force majeure, unpredictability, is missing. However, from this omission it must not be concluded that the present ground of exception does not include force majeure. On the contrary, this ground is broader than force majeure, as it includes force majeure and unforeseen circumstances, as both are unavoidable events<sup>16</sup>, along with other unavoidable circum-

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<sup>15</sup> BECKER, D., *Die Haftung der Eisenbahn nach nationalem und internationalem Frachtrecht*, Berlin, 1968, 112; and ALLÉGRET, M., “*Transports Internationaux Ferroviaires*”, cit., 7.

<sup>16</sup> WICK, J., *Das Internationale Eisenbahnfrachtrecht*, cit., 245-247.

tances and whose consequences could not have been circumvented. It will be immaterial, for the purpose of being able to allege this ground of exception, whether or not the fact or the circumstance was foreseeable or unforeseeable, inherent or not in the nature, internal or external (of the business organisation of the carrier or, to put it another way, within its sphere of control). The only relevant aspect will be the unavoidability of the fact and its consequences.

2. The ring-fencing of the unavoidable circumstances and consequences requires the level of diligence needed in each case to be identified. Circumstances and their consequences are not avoidable or unavoidable *per se*, but rather whether the circumstance and its consequences were avoidable or unavoidable can only be established after applying the appropriate required diligence level to the specific case and only after comparing that to the specific behaviour of the carrier<sup>17</sup>. However, the CIM does not provide diligence parameters applicable to the rail carrier. Given this silence, different diligence levels (more or less rigorous) have been proposed. Special mention should be made of the model proposed by German doctrine and subsequently shared by the numerous authors from other countries, known as: the maximum diligence that can be economically required<sup>18</sup>. Pursuant to this criterion, the carrier is relieved from liability when he proves that maximum diligence has been employed; but this must be assessed from an economic perspective, so that the carrier cannot be required to adopt damage prevention measures the cost of which exceeds the sum that would have to be paid overall in case of being found liable.

While accepting the advantages of applying the economic criterion in this area, we believe that it provides insufficient legal protection, as the COTIF itself states in Article 8.2 how hypothetical loopholes of that Convention must be filled, a convention of which - as is well known - the

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<sup>17</sup> With the possibility of the rail carrier of the spreading of the general rules, in situations of emergency. See, LA TORRE, U., “Funzione di comando e sicurezza della navigazione”, *Revista de Derecho del Transporte*, n. 12, 2013, 43-44, for maritime and air transport.

<sup>18</sup> MUTZ, G., *Münchener Komm.*, cit., Art. 36 CIM, n. 10.

CIM forms part<sup>19</sup>. Specifically, this precept establishes that “in the absence of provisions in the Convention, national law shall apply”. Therefore, once a loophole is detected in the CIM, namely, the lack of a diligence rule, it must be filled in by applying the diligence model rule in the relevant national legislation.

## 4 Special risks

### a) Carriage in open wagons

This first point that must be studied is the open wagon concept itself. The provision does not offer a definition of what may be considered such, even though Article 23.3 a) contains new wording specifying whether the goods transported under certain conditions must be considered, for the purposes of liability, as carriage in open wagons: when the upper part is open, or when even if the wagon is covered, the sides are open or the cover is simply sheeting<sup>20</sup>.

Another point to be examined relates to the use of sheeting for the carriage of goods. To dispel the doubts that its use may generate, the provision equates the use by the consignor of sheeting for the carriage of goods to the use of an open wagon. Carriage in open wagon comes with an added risk for the goods that they are more easily exposed to deterioration, as they are in contact with the outside air. The goods may be damaged not only by climatic factors, but also by particles that may be in the air and are likely to damage the goods. It, thus, increases the risk of deterioration due to rust, wear, leakage of chemical products, accidental leakage from adjacent wagons, the impact of hail or other inclement weather or even objects falling from bridges on the goods.

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<sup>19</sup> A review of the structure of the COTIF-CIM can be found in PUETZ, A., *Derecho de vagones, Régimen jurídico privado de la utilización de vagones de mercancías en tráfico ferroviario*, Madrid-Barcelona-Buenos Aires, 2012, 42.

<sup>20</sup> CLARKE, M. / YATES, D., *Contracts of carriage by land and air*, cit., 176; and KOLLER, I., *Transportrecht*, cit., Art. 23.3 CIM, n. 7.

Robbery and vandalism cannot be included among the inherent risks of this type of carriage, pursuant to Article 23.3 CIM.

### **b) Nature of certain goods**

Regarding this ground of exception, envisaged in Article 23.3 d) CIM, the carrier is not liable if he proves that the damage to the goods being transported may be due to causes inherent in their nature, which is taken to be the intrinsic properties of that type of goods, which could result in their loss or damage when transported. The very transport and the conditions of the carriage are special risks that increase the likelihood of the goods deteriorating. This section refers, therefore, to sensitive goods likely to generate the risk of damage listed in the article: breakage, rust, interior and spontaneous decay, desiccation or wastage. This list is not closed and other kinds of damage can be included provided they are due to the sensitive nature of those goods.

The basis of the exception is that, the consignor being the person that knows the goods and their quality, is in the best position to provide the appropriate means to avoid damage or deterioration and, therefore, is the one who must assume the risk. All goods are likely, sooner or later, to decay; but not all of them are considered to be sensitive for the purposes of this article. The sensitive nature is a concept that varies according to the specific circumstances of the carriage in question and, therefore, it is important to ring-fence what should be considered as such, for the purpose of liability. We are clearly dealing with a case of sensitive goods when, during carriage under normal conditions with a vehicle usually used to transport goods of that type, the goods are exposed to the aforementioned risks. In this regard, meat and fruit are given as examples of sensitive goods, but fuel and goods likely to evaporate have also been given as such.

### **c) Defects in the identification of the packages**

Defects in the identification of the packages can relieve the carrier of liability. Yet again, the basis of the exception is in the attribution of the facts

to the person that has generated them; the carrier cannot be liable for a risk that he has not caused.

This ground of exception must be read with Article 8 CIM whereby the consignor is liable for the damage that may occur because entries on the consignment note are irregular, as well as in Article 23.2 CIM whereby the carrier is relieved of liability if the loss or damage or delay was caused by the fault of the person entitled. However, the less formal character of the consignment note in the new version of the CIM means that inaccurate designation or numeration may not only be contained in the consignment note, but can also be proven by other means<sup>21</sup>.

#### **d) Carriage of live animals**

Transporting live animals is a risk as, due to very nature of animals, and their mobility and irrationality, it increases the risk of injury to them during the journey<sup>22</sup>. This risk, which cannot be attributed to the carrier, as they are circumstances outside his control, is the basis his being relieved of liability, pursuant to Article 23.3 f), if animals are injured when being transported. As it is a privileged ground, the carrier only has to prove that he was transporting live animals to be able to be excused, it being presumed that the injuries were due to the special nature of the goods transported<sup>23</sup>.

#### **e) Carriage accompanied by an attendant**

The last privileged ground of exception is the one envisaged in Article 23.3 g) which refers to goods being accompanied by an attendant pursuant to the applicable provisions or to an agreement between the consignor and the carrier indicated in the consignment note. However, the indication in the consignment note of whether or not the carriage has been carried out accompanied by an attendant is only admissible proof, so that the absence of that stipulation on the consignment note does not

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<sup>21</sup> KOLLER, *Transportrecht*, cit., Art. 23. 3 CIM, n. 11.

<sup>22</sup> ALLÉGRET, “*Transports Internationaux Ferroviaires*”, cit., 11.

<sup>23</sup> MUTZ, G., *Münchener Komm.*, cit., Art. 36 CIM, n. 11.

prevent its existence being established by other means.

### **f) Absence or inadequacy of packaging**

The carrier is excused liability when the loss or damage is caused by the absence or inadequacy of packaging in the case of goods which by their nature are liable to loss or damage when not packed or when not packed property [Article 23.3 b) CIM]<sup>24</sup>. In the absence of special information about when goods need to be packed, this is deemed to be necessary when the goods would not be able to withstand damage during carriage under normal conditions.

In order for the carrier to allege this ground of exception, the consignor must also be the person required to pack the goods for their carriage by rail. Pursuant to Article 14 CIM, the consignor is responsible for that packing, as the person who knows the goods and can choose the most appropriate packaging. Nothing prevents the parties from designating the carrier as responsible for this operation, in which case the necessary supposition will not be made in order to relieve the carrier of liability if the damage was due to the packaging. A much debated point is whether or not there is a duty to check the packaging and, if so, the consequences that that omission may have when assessing liability. Article 11 CIM does not require the carrier to check the consignment note relating to the state of the goods and of their packaging. In the absence of any indication in that regard, the good condition of the goods and their appropriate packaging are presumed (Article 12.2 CIM), which hinders reference to the note as proof to be able to claim to be excused damage caused on those grounds.

### **g) Loading of the goods by the consignor or unloading by the consignee**

Neither will the carrier be deemed liable, pursuant to Article 23.3 c),

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<sup>24</sup> RECALDE, A., "Otras obligaciones derivadas del contrato de transporte: Pago del precio y de otros gastos; embalaje; carga y descarga; formalidades administrativas", in EMPARANZA, A. / RECALDE, A., *El contrato...*, cit., 94.

when the damage to the goods may be due to the loading of the goods by the consignor or unloading by the consignee as they are considered a specific risk in this sphere. In order to allege this ground of exception, the consignor must be required contractually to carry out the loading as, in that way, any damage that occurs is attributable to the consignor. This is regardless of whether such operations were actually carried out by the consignor or through third parties acting on its behalf<sup>25</sup>. The basis of the exception, then, lies in the attribution of the operation to the persons carrying it out as the carrier cannot be held liable for acts that he has not assumed responsibility for and has not been able to control.

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<sup>25</sup> CLARKE, M. / YATES, D., *Contracts of carriage by land and air*, cit., 179.

# The Multilayered Institutional Framework of Inland Waterway Transport in Europe

– Challenges in Promoting River Transportation

Henning Jessen  
Prof., LL.M., Institute for the Law of the Sea and  
Maritime Law, University of Hamburg



## **Abstract**

For general cargo and container shipments arriving at sea ports, inland waterway crafts offer great potential for a sustainable and environmentally-friendly switching of modes of transport. A well-functioning axis represented by the high-capacity Rhine waterway corridor in the hinterland of the so-called “(Z)ARA sea ports” (Zeebrugge, Antwerp, Rotterdam, Amsterdam) with its dense network of inland waterway terminals accounts for more than 70% of the related interconnected container transshipments within the EU. In other EU regions, however, it is remarkable that this mode of transport is yet far from unlocking its full potential in modern supply chains. For example, less than 2% of all containers handled in the major German port of Hamburg are currently transshipped to inland waterway vessels for the transport to their final destinations (mostly in Eastern Europe) via the river Elbe. This under-utilization results mainly, but not exclusively, from technical limitations of the inland waterway network which also has a negative impact on other potential hinterland services offered between other European sea ports (such as the port of Constanta) and along European inland waterways (e.g. the Danube). However, it is generally agreed that multimodal inland waterway terminals could offer immense opportunities for a sustainable and environmentally-friendly development of efficient interfaces between different modes within the transport chain. Thus, since 2006, the EU has initiated two policy packages (“NAIADES I and II”) to enhance the conditions for EU inland waterway transport “to become a quality mode of transport”. Taking a bird’s eye view, this paper analyzes first some general challenges faced by this EU initiative. Specifically, it takes into account the technical and commercial requirements to utilize this mode of transport in a more efficient way. After all, the paper highlights the multitude of both non-EU and EU legislation relevant for inland waterway transport.

## **Keywords**

Inland Waterway Transport, River Regimes / River Commissions, UNECE, EU Transport Policy, NAIADES, Budapest Convention (CMNI)

## **Contact**

Henning Jessen

Prof., LL.M. (Tulane), Institute for the Law of the Sea and Maritime Law,  
University of Hamburg, Law Faculty, Rothenbaumchaussee 33, D-20148  
Hamburg.

Tel.: +49 40 428385588 / Fax: +49 40 428384546

E-mail: [henning.jessen@jura.uni-hamburg.de](mailto:henning.jessen@jura.uni-hamburg.de)

# 1 The General Significance of Inland Waterway Transport

Transporting goods and people on inland waterways by using vessels, barges and other floating craft is the oldest transportation mode man has ever utilized.<sup>1</sup> In global terms, inland waterway transport has been characterized as “*the natural mode*” of transportation.<sup>2</sup> It is an alternative to other transport modes because it needs less energy and produces fewer emissions. Thus, this mode of transport is – generally – characterized by high capacities and a low environmental impact. However, and even though more than a 100 billion tonne kilometres are transported annually via EU inland waterways,<sup>3</sup> it is remarkable that the overall potential of inland waterway transport is still significantly underutilized both within and outside Europe.

More than 70% of the European States have inland waterways (both rivers and canals). A majority of the EU members’ geographies include navigable rivers. In total, the “arterial system” of European waterways extends over almost 37,000 km. Two thirds of those waterways are of international importance and about half of the system is – at least in theory – suitable for container transport.<sup>4</sup> The five biggest EU sea ports are all connected to major inland waterways.<sup>5</sup>

Moreover, especially for the five land-locked EU members (Austria,

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<sup>1</sup> See generally Donovan, Arthur. *Intermodal Transportation in Historical Perspective*. Transport Law Journal 2000, pp. 317.

<sup>2</sup> Hilling, David. *Transport and Developing Countries*. London, 1996, p. 38.

<sup>3</sup> The European Commission refers to about 140 billion tonne-km per year, see: European Commission. *Towards quality waterway transport*. Memo 13/771 of 13 September 2013. Other recent data refers to 109 billion tonne-km per year in 2011, see: KombiConsult GmbH, Frankfurt am Main (Lead Partner), Intermodality Ltd, Lewes, PLANCO Consulting GmbH, Essen, Gruppo CLAS S.p.A., Milano, 2015. Contract No. FV355/2012/MOVE/D1/ETU/SI2.659386: “*Analysis of the EU Combined Transport*”, p. 82; hereinafter: “*2014 Analysis of the EU Combined Transport*”.

<sup>4</sup> This was even true already in the 1970s, see Calvert, Roger. *Inland Waterways of Europe*. 2nd ed. London, 1975, p. 23.

<sup>5</sup> European Commission. *Towards quality waterway transport*. Memo 13/771 of 13 September 2013.

the Czech Republic, Hungary, Luxembourg, and Slovakia) the major European waterways provide the only direct access to the sea and/or to sea ports in neighboring states.<sup>6</sup> Consequently, the commercial use of inland waterways can and, in fact, should be a vital part of these EU members' transportation systems. This is also true for countries that are able to use major rivers and which have direct access to the sea, like the founding EU members Germany, France, Belgium or the Netherlands. It is also a reason why inland waterway transport has already been subject to early EU legislation, mainly concentrating, however, on the functioning of the internal market.<sup>7</sup>

From a holistic point of view on transport policy, the biggest economic benefits can be generated by integrated (maritime) transport and by diversifying the possible usage of different modes of transports in a multimodal setting. Consequently, it is a strategic policy goal for the EU to reduce its dependence from segmented, unimodal transport – most prominently road transport – and to integrate the different modes of transports better, e.g., by implementing technical measures and regulatory steps within the internal market.

On a global scale, a lot of other countries address these challenges in their domestic transportation policies as well, for example the United States<sup>8</sup> or India.<sup>9</sup> Ultimately, an integrated transportation strategy must include inland waterway and river transportation because this mode has the potential to be the most economic, fuel efficient, environmentally-friendly and – in comparison with other modes – low cost transport

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<sup>6</sup> For example, a bilateral treaty between Germany and the Czech Republic of 1929 (and concluded for a duration of 100 years, thus until 2028) grants the Czech Republic the exclusive right (via a lease contract) to use an area of 30.000 m<sup>2</sup> within the port of Hamburg (the so-called “Vltava berth”).

<sup>7</sup> See further below, section 3.4; see generally: Power, Vincent. *EC Shipping Law*, 2nd ed. London 1998, pp. 126; Regner, Richard. *Das Binnenschiffsverkehrsrecht der EG*. Vienna 2008, p. 303.

<sup>8</sup> See, for example, the proposed bill “Section 407: Reinvesting In Vital Economic Rivers and Waterways Act of 2013” as assigned to a congressional committee in 2013, i.e., not yet enacted in the US.

<sup>9</sup> Sriraman, S. *Long Term Perspectives on Inland Water Transport in India*, RITES Journal (January 2010), at 18.4, see <http://www.rites.com/rites-journal-2010/PDF/sriraman.pdf> [last access: May 2015].

mode. It is striking that the total external costs of inland waterway navigation (in terms of accidents, congestion, noise emissions, air pollution and other environmental impacts) are seven times lower than those of road transport.<sup>10</sup> From a comparative point of view – and detached from the existing traditional dominance of road transport in many economies – the advantages of an environmentally-sound and sustainable use of inland waterways are quite impressive as there are:

- lower capital costs (about 5% to 10% of the costs of developing an equivalent 4-lane highway);
- lower maintenance costs (estimated to be about 20% of the costs of maintaining national highways); and
- lower fuel costs (inland water transport is a highly fuel-efficient mode of transport as it is estimated that one liter of fuel can move 105 tons / km as compared to 24 tons / km of freight by road).<sup>11</sup>

The following text tries to highlight the most important legal issues addressed by the EU since 2006 to create and improve a modern inland waterway regime in Europe. Above all, this relates to the EU's "NAIADES" policy packages I and II („Navigation and Inland Waterway Action and Development in Europe”).<sup>12</sup> These EU policy packages apply to an interdisciplinary context of infrastructure policy, legal regulation and com-

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<sup>10</sup> See, e.g., the website of the European Commission, Mobility and Transport, Inland Waterways – What do we want to achieve?, [www.ec.europa.eu/transport/modes/inland/index\\_en.htm](http://www.ec.europa.eu/transport/modes/inland/index_en.htm) [last access: May 2015]; for comparative US data on the statistics of commercial use of inland waterways, see Haulk, Jake. *Waterways as Vital National Infrastructure*. Pittsburgh 1998, pp. 24.

<sup>11</sup> For all data see Sriraman, S. *Long Term Perspectives on Inland Water Transport in India*, RITES Journal (January 2010), at 18.4, see <http://www.rites.com/rites-journal-2010/PDF/sriraman.pdf> [last access: May 2015]; see also: European Commission. *Towards quality waterway transport*. Memo 13/771 of 13 September 2013, referring to the fact that the CO<sub>2</sub> emissions and fuel consumption of a large inland waterway vessel is only a third of those of comparable road transports; Bieber, Roland/Maiani, Francesco. *Europäisches Verkehrsrecht*. Baden-Baden 2015, pp. 135.

<sup>12</sup> See Communication from the Commission the promotion of inland waterway transport - “NAIADES” - *An Integrated European Action Programme for Inland Waterway Transport*, COM(2006)6, see: <http://www.naiades.info/> and [http://ec.europa.eu/transport/modes/inland/promotion/naiades\\_en.htm](http://ec.europa.eu/transport/modes/inland/promotion/naiades_en.htm) [last access: May 2015].

mercial realities. Complementary activities financed from NAIADES funds also contribute to identifying the overall legal framework in a more coherent way because this framework is intertwined with long-standing technical and policy challenges.

Ultimately, there is still a legal fragmentation of inland waterway laws in Europe – this legal fragmentation has also been described as a “*multilayered institutional landscape*”.<sup>13</sup> It is still true that inland waterway regulation is partly dominated by specific legal regimes for individual rivers, most prominently relating to the navigation of the Rhine, as discussed further below.<sup>14</sup> Some technical baselines have to be drawn and some legal foundations must set the scene here.

## 2 The Pros and Cons of Inland Waterway Transport – A European Assessment

The major European waterways can serve as general examples for some advantages and disadvantages of utilizing inland waterway transport. The European Rhine corridor is probably the best example for the technical challenges and requirements of a modern inland waterway regime. The Rhine is responsible for over 50% of all inland waterway freight transport in the whole of the EU, in the area of combined transport it is even more than 70%.<sup>15</sup> At the same time, for 200 years, the Rhine is traditionally subject to an intricate specialized legal regime.<sup>16</sup>

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<sup>13</sup> UNECE. *White Paper on Efficient and Sustainable Inland Water Transport in Europe*. Geneva 2011, p. 37, available online at <http://www.unece.org/transport/resources/publications/inland-water-transport-publications.html> [last access: May 2015].

<sup>14</sup> See Section 3.2.

<sup>15</sup> See: “2014 Analysis of the EU Combined Transport” (note 3), p. 79.

<sup>16</sup> See Section 3.2.

## 2.1 The Major Technical Parameters of Inland Waterway Transport

In Europe, and possibly even globally, the Rhine basin is the most developed, efficiently maintained and commercially utilized system for inland water transportation purposes. This has been confirmed by a recent independent analysis (financed by EU funds), identifying once more “*the high-capacity Rhine waterway corridor in the hinterland of the sea ports of Zeebrugge, Antwerp, Rotterdam and Amsterdam (ZARA sea ports) [as being] the dominant transport route*”.<sup>17</sup>

Additionally, the Rhine river areas are characterized by high population centers and major waterway density. Waterway transportation is mainly characterized here by the frequent use of high-technology push-tow systems. On the other hand, “industrial” inland waterways have been influenced heavily for decades by human activities including intensive navigation as well as habitat modification by hydraulic engineering.<sup>18</sup> The natural structure on many stretches of the Rhine and other big European rivers has been modified significantly, including:

- depth and width;
- flow regimes;
- natural sediment transport;
- fish migration routes;
- construction of dams and reservoirs; and
- construction of dykes and irrigation networks.<sup>19</sup>

As a result, more than 80% of the European navigable waterways are technically altered for various purposes (e.g. for flood protection and hydropower generation). Nevertheless, the general environmental appraisal of inland water transport as described above has been broadly confirmed by the EU, the OECD<sup>20</sup> and other independent studies.<sup>21</sup>

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<sup>17</sup> See: “2014 Analysis of the EU Combined Transport” (note 3), p. 74.

<sup>18</sup> See European Commission. *Guidance Document on Inland Waterway Transport and Natura 2000*. Brussels 2012, p. 25.

<sup>19</sup> Ibid.

<sup>20</sup> See: OECD. *Inland Waterways and Environmental Protection*. Paris 2006, p. 92.

<sup>21</sup> See generally Planco. *Verkehrswirtschaftlicher und ökologischer Vergleich der*

However, in general terms, there still remain some disadvantages affecting the efficient use of rivers and navigable waterways. In cases where transportation of goods via the use of domestic inland waterways cannot be complemented by large capital-intensive investments in infrastructure,<sup>22</sup> severe problems might generally be created by technical and navigational challenges such as:

- (still) insufficient depths throughout a stretch of (possibly connected) navigable waters;
- variability of capacity and range for inland waterway transport;
- dependency on rainfall and its effects on river flow and water level;<sup>23</sup>
- siltation in major rivers from erosion of uplands and deforestation;
- reduced draft and navigation being relegated as a lower priority for human use;
- possible lack of a modern fleet, i.e. low draft high technology vessels;
- lack of adequate navigational aids resulting in possible restricted manoeuvrability over longer periods of time, especially if major accidents occur;
- lack of permanent terminal installations with adequate infrastructure for load-ing/unloading, storage etc.
- lack of bulk commodities along the water front; and
- lack of return cargo on inland waterway routes.<sup>24</sup>

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*Verkehrsträger Straße, Schiene und Wasserstraße*. Essen 2007.

<sup>22</sup> On this challenge see in particular Hijdra, Arjan/Woltjer, Johan/Arts, Jos. *Troubled Waters: An institutional analysis of ageing Dutch and American waterway infrastructure*. Transport Policy 42 (2015), pp. 64.

<sup>23</sup> This is even true for well-developed industrial European rivers because prolonged drought or floods from the melting Alpine snow have the capacity to cause interruptions to Rhine traffic. For a recent US example describing an imminent shutdown of commercial inland waterway shipping on the Mississippi river, see Lloyd's List of 8 January 2013, p. 5 ("US pledges to keep the Mississippi River open").

<sup>24</sup> See explicitly for all of these technical impediments Hilling, David. *Transport and Developing Countries*. London, 1996, pp. 41-66.



One technical parameter is of key technical importance: The least available depth of water in all navigable areas of rivers is the critical factor for navigation and craft size.<sup>25</sup> The fundamental importance of the river depth is also evidenced by the link to maritime transport as some rivers, such as the German Elbe or Weser rivers serve as access areas to the major seaports of Hamburg and Bremen. However, the largest ocean-going vessels are only able to navigate to the berths of those seaports if the riverbeds are constantly altered by further deepening them.

Apart from the river depth, other critical parameters (“bottlenecks”) for navigation and commercial use of rivers are the width of channels (possibly differing in different regional areas, including minimum width in narrow sections and possible width restrictions by wharves and bridge piers); river flow velocity; minimum bend radius; the ratio of the wetted cross-section to the mid-ship section of ships; and navigational restrictions (e.g. by lock gates, bridges which are relevant for the so-called “air draught”, underwater power cables or pipelines) sometimes caused by major accidents.<sup>26</sup> In fact, a large inland waterway casualty – such as the “*TMS Waldhof*” accident on the Rhine in early 2011 – occurring at the wrong time and at a difficult position can cause massive disruption to commercial navigation.<sup>27</sup>

## 2.2 The Realities of Inland Waterway Transport – Unbalanced EU Statistics

States intending to utilize their domestic inland rivers and channels in a more coherent and integrated way have to be aware of all technical

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<sup>25</sup> See: “2014 Analysis of the EU Combined Transport” (note 3), p. 160.

<sup>26</sup> Ibid., p. 161.

<sup>27</sup> The “*TMS Waldhof*” accident is a good example for this “*achilles heel*” of inland waterway shipping. The accident and the difficult location of the capsized vessel caused a temporary shutdown of commercial shipping on the Rhine. All in all, more than 400 inland waterway vessels were affected by three weeks of delays and congestion as a result of the casualty. On the regulatory impact of the accident see also a presentation available at [http://www.ccr-zkr.org/files/documents/eventdiscours/20110119\\_pauli\\_en.pdf](http://www.ccr-zkr.org/files/documents/eventdiscours/20110119_pauli_en.pdf) [last access: May 2015]; on the commercial impact of this accident see: “2014 Analysis of the EU Combined Transport” (note 3), p. 74.

challenges as described above, in particular the constant costs involved with maintaining a modern inland waterway infrastructure. On the one hand, the overall costs may be lower as compared to maintaining all highways of a national economy, on the other hand still massive public investments are still needed. In sum, the existing technical, navigational and commercial challenges represent both positive and negative aspects of inland waterway shipping at the same time. Utilizing this mode of transport in a more efficient and coherent way definitely raises funding challenges, however, as part of “wise” infrastructure policies and investments these challenges may also generate considerable return for national transportation systems.

Generally, a lot of European rivers meet most of the criteria as described above quite well as these riverways have been developed and maintained already for decades. Nevertheless, there are numerous local problems and it is quite striking that the sobering overall European transport statistics on inland waterway transport obviously document those problems.<sup>28</sup> Inland waterway transport within the EU concentrates on a relatively small number of regional corridors and countries. Moreover, recent Eurostat statistics (collected under the auspices of Regulation EC/1365/2006)<sup>29</sup> evidence that 12 out of 28 EU members do not even have a share of inland waterway transport in their “modal split”.<sup>30</sup>

The absence of this mode of transport may be a result of the unique geography of some countries. For example, a small island country like Malta simply does not have commercially relevant inland waterways. But geographic constraints are not the sole explanation for all of those countries not having a domestic share of inland waterway transport. Five

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<sup>28</sup> Nevertheless, the “2014 Analysis of the EU Combined Transport” (note 3), p. 81, refers to a “tremendous growth [of combined inland waterway/road volumes related to the development of Western sea ports] over the last 20 years”.

<sup>29</sup> Regulation (EC) No 1365/2006 of 6 September 2006 on statistics of goods transport by inland waterways and repealing Council Directive 80/1119/EEC, OJ L/246/1 of 25 September 2006.

<sup>30</sup> Eurostat. *Modal Split of inland freight transport, 2012 (% of total tonne-kilometers)*, see [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Freight\\_transport\\_statistics\\_-\\_modal\\_split](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Freight_transport_statistics_-_modal_split) [last access: May 2015].

other countries (the Czech Republic, Italy, Poland, Finland<sup>31</sup> and the UK<sup>32</sup>) have a rather minuscule share of inland waterway transport ranging below 1% of all domestic transports. Obviously, the mode could generally be utilized better but its potential is not being retrieved, especially taking into account heavy competition from road transport and railway services providers. On the contrary, the Netherlands (46.5%) and, notably, Bulgaria (30.5%) and Romania (29.3%) have the highest shares of inland waterway transport in their “modal split”.<sup>33</sup> The highest freight numbers are being transported in total on the Dutch and the German sections of the Rhine. Especially, the Netherlands seeks to constantly improve the quality of its inland waterway transport sector by supporting innovative programs aiming to take off containers from the road to be transported by barges on “smart waterways” instead.<sup>34</sup>

Nevertheless, though some of the biggest EU ports – above all Rotterdam and Antwerp – have a rate of up to 30% transshipments from ocean-going vessels to inland waterway barges, the average of this sea/

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<sup>31</sup> The low digit for Finland is rather surprising as the country, at least generally, has an existing network of almost 8.000 km of navigable waterways and two major inland waterway canals of international importance (the Saimaa Canal and the Saimaa Deepwater Channels), see: PLATINA (funded by the EU (DG-MOVE). European Good Practices Report for Inland Waterway Transport 2011, pp. 69, available at <http://naiades.info/downloads/> [last access: May 2015].

<sup>32</sup> Despite the low share of inland waterway examples in the UK, there are practical examples for the commercial use of this mode of transport, see, e.g., Lloyd’s List of 16 April 2013, p. 2 (“*Kellogg switches cereal boxes from road to Manchester Ship Canal*”); Lloyd’s List of 19 June 2012, p. 6 (“*Making the Thames earn its keep*”).

<sup>33</sup> Eurostat. *Modal Split of inland freight transport, 2012 (% of total tonne-kilometers)*, see [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Freight\\_transport\\_statistics\\_-\\_modal\\_split](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Freight_transport_statistics_-_modal_split). [last access: May 2015]. The numbers for Bulgaria and Romania can be explained by a good utilization of the river Danube. However, still in 1999, the Danube was characterized as “*the most underutilized transport artery of Central Europe*”, see: 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 Binnenschifffahrt e.V. – Duisburg, Impetus Consultants Ltd. – Athens, Österreichisches Institut für Raumplanung, Vienna.

<sup>34</sup> For more information please refer to the information on the Dutch Ministry of Infrastructure and the Environment: <http://www.rijkswaterstaat.nl/zakelijk/verkeersmanagement/idvv/> [last access: May 2015].

inland waterway transport transshipment rate is considerably lower. For example, in the major sea port of Hamburg, less than 2% of all imported containers are transshipped on the river Elbe. The river itself (i.e., its natural depth and width) would generally be suitable for commercial inland waterway transport and it is, in fact, used for shipments of commodities in bulk. However, the under-utilization of container transshipments adds significantly to notoriously congested roads in the affected regions.

Some of the man-made deficits – mentioned generally before – have been identified throughout the European non-Rhine inland waterway network hampering the development of combined transport services.<sup>35</sup> For instance, along the German canal network adjacent to the “high-performance Rhine”, low bridge clearances allow containers to be stacked only two-high. However, three-high stacking is regarded as the minimum for achieving competitive inland waterway container transport.<sup>36</sup>

All in all, the general transport rate of goods in EU-based inland waterways is only close to 7%.<sup>37</sup> About 80% of all European goods are being transported via trucks on the roads and the rest of the overall share is being transported via railways. It can be inferred from these numbers that the environmentally-friendly and cost-efficient transport via inland waterways still has a lack of appreciation and needs more political promotion. With further investments in infrastructure and the use of more modern motor vessels and barges the overall transport capacity on Europe’s major waterways could possibly be increased by 50% (estimates

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<sup>35</sup> See generally: NEA/Panteia, PLANCO, via Donau, CE Delft, MDS Transmodal, Medium and Long Term Perspectives of Inland Waterway Transport in the European Union, 2012.

<sup>36</sup> See in particular: *2014 Analysis of the EU Combined Transport* (note 3), p. 161: “As a result, bridge clearances need to be increased, a time-consuming and costly process, as experience from Germany shows. A clearance programme has been launched for the canal network, but it will take a long time to be completed. Again, waterway upgrades are difficult due to the limitation of public budgets and environmental concerns, as dredging to increase navigation depth is regarded to have a particularly adverse impact on the environment.”

<sup>37</sup> Eurostat. *Modal Split of inland freight transport, 2012 (% of total tonne-kilometers)*, see [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Freight\\_transport\\_statistics\\_-\\_modal\\_split](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Freight_transport_statistics_-_modal_split) [last access: May 2015].

for the Rhine) and even up to 80% (estimates for the Danube)<sup>38</sup> but other rivers – such as the Elbe – should be part of the commercial growth strategy as well.<sup>39</sup>

However, in Europe, the instruments of transport policy and the overall legal framework have to contribute to achieving this growth objective.

### 3 The Legal Framework of Inland Waterway Transport in Europe

The intricacies of the overlapping and sometimes even competing legal regimes on inland waterway transport have already been described as a general drawback of this policy area.<sup>40</sup> This may be true at least for the strategic ambitions of the European Commission. In 2004, a multinational expert group (the “*European Framework for Inland Navigation*”) stated in a report on the legal framework on inland waterway transport in Europe:

“...this framework is neither strong enough to attract sufficient attention the political level to the problems of inland navigation nor to mobilise all the resources necessary to develop this sector. Moreover, the Group has noted the diverse, even dispersed, nature of structures, procedures and responsibilities which, despite existing coordination mechanisms, does not guarantee the implementation of regulatory instruments under the best conditions. The present state of integration of river transport consequently speaks

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<sup>38</sup> See UNECE Press Release of 11 October 2012 (“*UNECE calls for increased use of the environment-friendly inland waterways*”).

<sup>39</sup> Estimates refer to general reserve capacities ranging between 5 and 300%, see Vogt, H.-P. *Die Binnenschifffahrt als zukunftsweisender Verkehrsträger*, in: Riedel, Eibe (ed.), *Multimodaler Transport und Binnenschifffahrt*, Baden-Baden 2001, p. 16.

<sup>40</sup> See the reference to the respective “*multilayered institutional landscape*” in Europe (note 13).

out in favour of adapting structures with a view to greater unity.<sup>341</sup>

By referring to a “diverse, even dispersed, nature of structures, procedures and responsibilities” the expert group pointed to the (six) different regulators of inland waterway shipping in Europe.<sup>42</sup> One major source of law for European inland waterway transport regulation are the Resolutions and Publications of the Working Party on Inland Water Transport of the United Nations Economic Commission for Europe (UNECE).

The UNECE’s strong role has primarily historic reasons stemming from the era of the “cold war” and the separation of Europe into more liberal market-based economies in the west and socialism-oriented countries in the East. In particular, the UNECE has already undertaken significant steps to harmonize technical, professional, safety-based and infrastructure-related matters of inland navigation in the whole of Europe.<sup>43</sup> An earlier UNECE White Paper stated already in 1996 that there was no single inland navigation market in Europe (i.e. not referring to the (then) EC at the time).<sup>44</sup> Instead this market and the legal framework for this mode of transport is – until today – composed of partly coordinated fragments based on different river basins and connecting canals. The rules governing the access to the market are equally fragmented and diverse.

The UNECE as well as the highly specialized river commissions for the Rhine and the Danube are powerful and traditional regulators for European inland water legislation. In particular, the legal regime for the river Rhine represents a second most important source of law for European inland waterway transport regulation.<sup>45</sup> It is impossible for the EU

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<sup>41</sup> EFIN. A new institutional framework for the European inland navigation. 2004, p. 9, available at <http://www.ccr-zkr.org/13020200-en.html> [last access: May 2015].

<sup>42</sup> All in all, there are four individual River Commissions (though with varying powers), the UNECE and the EU.

<sup>43</sup> See Platz, Tilman Erich/Ruijgrok, Kees. *Inland Waterways*, p. 177, in: Finger, Matthias/Holvad, Torben (eds.), *Regulating Transport in Europe*. Cheltenham/Northampton 2013.

<sup>44</sup> UNECE. *White Paper on Trends in and Development of Inland Navigation and Its Infrastructure*. Geneva 1996, Doc. TRANS/SC.3/138, para. 92

<sup>45</sup> See below section 3.2.

to disregard the wide range of the pan-European work of the UNECE and the traditional “technical” influence of the river commissions on the regulation of inland waterway transport. In fact, the “governance-relationship” and the cooperation between regulatory activity of the EU and these older specialized institutions is one of the key political questions for the future of EU legislation on inland waterway transport.<sup>46</sup> Specifically, the question is whether cooperation and coordination of overlapping legal regimes could entail more than merely concluding intra-organisational administrative agreements.<sup>47</sup>

### 3.1 Traditional Regulatory Activities of Non-EU Bodies – The UNECE

For statistical purposes in Europe, the OECD understands “*navigable inland waterways*” to be waterways on which vessels with a carrying capacity of not less than 50 tons can navigate when normally loaded.<sup>48</sup> In the US, a civil court recently took an even wider view characterizing “*navigable waters*” as those that are “*capable of supporting commercial activity*”, including even “*potential commercial activity*”.<sup>49</sup>

#### 3.1.1 Classifying the Network of European Inland Waterways

Though the background of the legal discussion in the US is largely a procedural one, it still evidences that only waterways which can be ca-

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<sup>46</sup> See Riedel, Eibe. *Mannheimer Akte, Belgrader Akte und Europäische Union – Rechtsregimes im Wandel*, in: Riedel, Eibe/Wiese, Günther (eds.), *Probleme des Binnenschiffahrtsrechts X – Vorträge der X. Mannheimer Tagung für Binnenschiffahrtsrecht*. Heidelberg 2004.

<sup>47</sup> For example, in 2013, the European Commission has concluded such an administrative agreement with the Central Commission for the Navigation of the Rhine (CCNR) providing for a systematic exchange of information, regular meetings to coordinate activities and according mutual observer status, see <http://www.ccr-zkr.org/11040200-en.html> [last access: May 2015].

<sup>48</sup> OECD, Eurostat. *Glossary for Transport Statistics*. [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Glossary:Navigable\\_inland\\_waterway](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Glossary:Navigable_inland_waterway) [last access: May 2015].

<sup>49</sup> *Aqua Log v. Lost & Abandoned Pre-Cut Logs & Rafts*, 709 F. 3d 1055 (11th Cir. 2013).

tegorized in a commercial context are relevant for generic transport policy purposes in any legal order, including the EU. Necessarily, States will have to tie this kind of categorization (or classification) into their domestic transport and finance priorities. In Europe (again: not within the EU) this challenge is addressed in a wide sense – under the auspices of the UNECE’s “*AGN Agreement of 1996*”.<sup>50</sup>

This agreement has identified and classified a network of European inland waterways and ports of international importance (“*E waterways and ports*”). The UNECE also publishes a regularly updated “*Blue Book*” to offer a technical inventory of existing and envisaged standards and parameters of E-waterways and ports in Europe.<sup>51</sup> The “*Blue Book*” depicts the current inland navigation infrastructure parameters as compared to the minimum standards and parameters prescribed in the AGN Agreement of 1996. Moreover, and critically important to form an integrated perspective, the UNECE’s “*Blue Book*” also identifies bottlenecks and missing links in the existing “E waterway network”.

### 3.1.2 The European Vessel Identification Number (ENI)

As one of the key regulators of inland waterway transport, the UNECE has *inter alia* also negotiated and launched a unique European Vessel Identification Number (ENI).<sup>52</sup> Since April 2007 every vessel operating on European inland waterways needs to have an ENI number. The ENI regime introduced an eight-digit number system (the first three digits represent a national authority and the following five digits stand for a serial) which is to be placed on the hull of the vessel. The ENI system is comparable with the IMO’s ship identification number referring to sea-

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<sup>50</sup> UNECE. *European Agreement on Main Inland Waterways of International Importance*. Geneva 1996, Doc. ECE/TRANS/120/Rev.3 of 19 January 1996.

<sup>51</sup> UNECE. *The UNECE Inventory of Main Standards and Parameters of the Waterway Network*, Geneva 2012, Doc. ECE/TRANS/SC.3/144/Rev.2, 2nd ed.; available online at <http://www.unece.org/transport/resources/publications/inland-water-transport-publications/2012/blue-book/blue-book.html> [last access: May 2015].

<sup>52</sup> See UNECE Doc. ECE/TRANS/SC.3/172E, Res. 61, Recommendations on Harmonized Europe-Wide Technical Requirements for Inland Navigation Vessels (2006).



going vessels above 100 gt (gross tons).<sup>53</sup> The ENI applies to all vessels which are more than 20 meters long and which have more than 100 cubic meters in volume.

To give a third example of UNECE achievements, inland waterway transport needs some general accord on “the rules of the road” since the major European waterways expand over a number of different countries with different languages. While not every rule must be identical over the whole stretch of a waterway there have to be some common harmonized traffic rules. This is why the UNECE, in 1985, developed the European Code for Inland Waterways (CEVNI).<sup>54</sup> CEVNI is generally based on the national regulations of the member countries. Not only did CEVNI harmonize the different navigation rules but also (earlier) the signs and signals on inland waterways (SIGNI).<sup>55</sup> Every master navigating a barge on European inland waterways must have passed a CEVNI test and needs an International Certificate of Competence (ICC) which is valid for five years.

### **3.2 Traditional Regulatory Activities of Non-EU Bodies – The Central Commission for the Navigation of the Rhine (CCNR)**

From a historic point of view, the single two most important acts regulating the European inland waterways are the Revised Mannheim Act of 1868 on Navigation of the Rhine<sup>56</sup> and the Belgrade Act of 1948 on

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<sup>53</sup> UNECE, Work of the Working Party of the Standardization of Technical and Safety Requirements in Inland Navigation (2006), pp. 2.

<sup>54</sup> UNECE Resolution No. 24 of 15 November 1985; for more information see [http://www.unece.org/trans/main/sc3/sc3/sc3\\_ig/group\\_cevni.html](http://www.unece.org/trans/main/sc3/sc3/sc3_ig/group_cevni.html) [last access: May 2015].

<sup>55</sup> UNECE Resolution No. 22 Doc. of 12 November 1982; Doc. ECE/TRANS/SC.3/108/Rev.2.

<sup>56</sup> Available online at [http://www.ccr-zkr.org/files/conventions/convrev\\_e.pdf](http://www.ccr-zkr.org/files/conventions/convrev_e.pdf) [last access: May 2015]; see also Cécile Tournaye. *The CCNR: A Model of Stability Through Flexibility and a Strong Identity*. The Journal of International Maritime Law (JIML) 21 (2015), Editorial, pp. 165 (166).

the Navigation of the Danube.<sup>57</sup> As already emphasized above, the Rhine is Europe's most important shipping "artery" since it is navigable from the North Sea to Switzerland and it has also been connected to the wider European continental river and canal network.<sup>58</sup> As a result, the Rhine has been recognized as an integral part of Europe's transport system.<sup>59</sup>

The following analysis will not address three other important European legal regimes, i.e. the local rules for navigation of the rivers Danube, the Moselle and the Sava River Basin.<sup>60</sup> Nevertheless, regional rules for local regimes add to the legal complexity of European inland water transportation.<sup>61</sup>

Concentrating on the Rhine regime, the historic Revised Mannheim Act of 1868 represented already a very early but progressive concept for the navigation on the Rhine. Its updated versions still contain parts of the original rules.<sup>62</sup> The key areas of the Revised Mannheim Act are:

- freedom of navigation;
- immunity from taxes;
- equal treatment;<sup>63</sup>

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<sup>57</sup> Available online at <http://www.danubecommission.org/uploads/doc/convention-en.pdf> [last access: May 2015].

<sup>58</sup> The overall length of the Rhine extends over more than 1.200 km, accommodating eighteen waterway ports in four EU countries; see World Port Source (2005-2012), Rhine River Port Map, available at [www.worldportsource.com/waterways/Rhine\\_River\\_215.php](http://www.worldportsource.com/waterways/Rhine_River_215.php) [last access: May 2015].

<sup>59</sup> See Woehrling, Jean-Marie. *Chancen und Bedrohungen für die Rheinschifffahrt im heutigen Verkehrssystem und Rolle der Zentralkommission für die Rheinschifffahrt*, Transportrecht 2009, p. 141; BIMCO Seascapes: *Does the Rhine River make a Difference?*, available online at [https://www.bimco.org/Education/Seascapes/Questions\\_of\\_shipping/2014\\_02\\_04\\_Does\\_the\\_Rhine\\_River\\_make\\_a\\_difference.aspx](https://www.bimco.org/Education/Seascapes/Questions_of_shipping/2014_02_04_Does_the_Rhine_River_make_a_difference.aspx) [last access: May 2015].

<sup>60</sup> For more information on the other three regimes see, e.g., UNECE. *White Paper on Efficient and Sustainable Inland Water Transport in Europe*. Geneva 2011, p. 38, available online at <http://www.unece.org/transport/resources/publications/inland-water-transport-publications.html> [last access: May 2015].

<sup>61</sup> Bieber, Roland/Maiani, Francesco. *Europäisches Verkehrsrecht*. Baden-Baden 2015, pp. 136.

<sup>62</sup> For the text of the Revised Convention for Rhine Navigation see [http://www.ccr-zkr.org/files/conventions/convrev\\_e.pdf](http://www.ccr-zkr.org/files/conventions/convrev_e.pdf) [last access: May 2015]; the signatory states are Germany, Belgium, France, The Netherlands and Switzerland.

<sup>63</sup> Incorporated into EU law via Council Regulation EEC/2919/85 of 17 October 1985

- support for improvement of navigable waterways;
- basic rules for the navigation of the Rhine.<sup>64</sup>

Three different organizations now regulate the navigational use and other activities of the Rhine, specializing in navigation and safety provisions, environmental protection and other legal questions: Based on the Revised and Updated Mannheim Act,<sup>65</sup> one of Europe’s oldest regulatory bodies – the Central Commission for the Navigation of the Rhine (CCNR, situated in Strasbourg) – regulates inland waterway transport on the Rhine for two centuries, celebrating its “bicentenary” in 2015.<sup>66</sup>

The CCNR traditionally guarantees a high level of safety for navigation of the Rhine to protect its shipping capacities and the river environment. The other two bodies regulating the Rhine are the International Commission for Hydrology of the Rhine Basin (CHR)<sup>67</sup> and the International Commission for the Protection of the Rhine (ICPR).<sup>68</sup> However, the following analysis will focus exclusively on the regulatory activity of the CCNR.

In contrast, e.g., to the regulatory regime for inland navigation on the Danube, the decisions of the CCNR are legally binding for the members of the regime, i.e. Belgium, Germany, France, the Netherlands and Switzerland (notably a non-EU Member State of the CCNR). The member states also designated domestic courts as Rhine navigation

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laying down the conditions for access to the arrangements under the Revised Convention for the navigation of the Rhine relating to vessels belonging to the Rhine Navigation, OJ L 280/4 of 22 October 1985.

<sup>64</sup> Bieber, Roland/Maiani, Francesco. *Europäisches Verkehrsrecht*. Baden-Baden 2015, pp. 137.

<sup>65</sup> The last update to the Revised Mannheim Act occurred in 1963.

<sup>66</sup> See, e.g., Cécile Tournaye. *The CCNR: A Model of Stability Through Flexibility and a Strong Identity*. The Journal of International Maritime Law (JIML) 21 (2015), Editorial, pp. 165; see also <http://www.200years-ccnr.org/> [last access: May 2015]. The creation of the CCNR dates back to 5 August 1816, see further resources on the history and development of the CCNR at <http://www.ccr-zkr.org/11010200-de.html> [last access: May 2015].

<sup>67</sup> For more information on the work of the CHR see <http://www.chr-khr.org/> [last access: May 2015].

<sup>68</sup> For more information on the work of the ICPR see <http://www.iksr.org/> [last access: May 2015].

tribunals with specialized jurisdiction over civil and criminal matters. There is also an option of appealing to the CCNR (or to the designated appellate court of the country where the initial judgment was handed down).

### **3.2.1 Regulating the Transport of Dangerous Goods on Inland Waterways**

A good example for original regulatory activity of the CCNR – and subsequent interaction with other organisations – is the Regulation for the Carriage of Dangerous Substances on the Rhine. Already in 1838, the CCNR created its first rules for the transport of dangerous goods on the Rhine. These rules contained general and standard provisions for the transport of substances like cannon powder and explosive materials on the Rhine. In 1971, the CCNR developed updated regulations for the transportation of dangerous goods on the Rhine, known in the past as the ADNR.<sup>69</sup> Later the ADNR was aligned to the respective regimes for road (ADR) and rail (RID) transport. At the CCNR, there is even a visible coordination with regulatory steps taken at the level of the International Maritime Organization (IMO).<sup>70</sup>

Aiming at common international regulations for the transport of dangerous goods on all European inland waterways, the UNECE joined forces with the CCNR and developed a new agreement on dangerous goods (ADN) which entered into force in 2008.<sup>71</sup> In 2011, the CCNR finally accepted the supersession of the ADNR by the ADN. Completing

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<sup>69</sup> The ADNR 1971 was based on the 1957 road-based Agreement on Dangerous Goods Regulations (ADR). It was a 600 pages detailed legal instrument containing requirements like a certificate of approval for every vessel that transports dangerous goods and also a certificate proving that one crew member has specialized knowledge of the regulations.

<sup>70</sup> For example, in 2007 the CCNR introduced a phase-out scheme for single-hull inland waterway vessels able to transport toxic substances, the IMO had agreed on a comparable phase-out scheme for ocean-going oil tankers already some years before.

<sup>71</sup> The convention was signed by Austria, Belgium, Bulgaria, Croatia, the Czech Republic, France, Germany, Hungary, Italy, The Netherlands, Poland, Romania, the Russian Federation, Slovakia and Switzerland, see [www.unece.org/trans/danger/publi/adn/adn\\_history/historical\\_info.html](http://www.unece.org/trans/danger/publi/adn/adn_history/historical_info.html) [last access: May 2015].

the regulatory picture, the EU had earlier launched Directive 2008/68/EC<sup>72</sup> demanding from every EU member with inland waterways of international relevance to transpose the ADN requirements into national law by June 2011.<sup>73</sup> As a result, the multi-layered legal framework has been aligned in this area, however, the EU had (only) a supporting role. In fact, the applicable rules for the river Rhine (i.e. the ancient but constantly updated CCNR regime) form the legal foundation for large parts of current EU inland waterway legislation.<sup>74</sup>

### 3.2.2 Regulating the Safety of Navigation on Inland Waterways

Of course, traditional regulatory areas for the CCNR were not only the carriage of dangerous substances but also traffic rules, a regime for river inspection and regulations for crew and staff. Some fundamentals of these technical rules are summarized in the next sections to give an impression of the multitude of non-EU based regulatory activity in this area. Reference is also made to some complementary EU actions which mostly followed after the decisions of the UNECE and the CCNR.

#### 3.2.2.1 *The “Rules of the Road” (Police Regulations for Navigation)*

The origins of regulatory work on traffic rules applicable on the Rhine date back to 1830. Common police regulations for navigation on the Rhine were adopted by the CCNR in 1850.<sup>75</sup> This framework is now commonly known as the RPNR, i.e., the Police Regulations for the Navigation of the Rhine.<sup>76</sup> It has also been a legal role model for later

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<sup>72</sup> Directive 2008/68/EC of 24 September 2008 on the inland transport of dangerous goods, OJ L260/13 of 30 September 2008.

<sup>73</sup> See [www.ccr-zkr.org/12020400-en.html#02](http://www.ccr-zkr.org/12020400-en.html#02) [last access: May 2015].

<sup>74</sup> Woehrling, Jean-Marie. Chancen und Bedrohungen für die Rheinschifffahrt im heutigen Verkehrssystem und Rolle der Zentralkommission für die Rheinschifffahrt, *Transportrecht* 2009, p. 141.

<sup>75</sup> Orlovius, Volker. *155 Jahre internationale Vorschriften der Zentralkommission für die Rheinschifffahrt*, *Binnenschifffahrt* 1993, p. 10.

<sup>76</sup> See <http://www.ccr-zkr.org/12020100-en.html> [last access: May 2015].

regulations, such as the UNECE's CEVNI code. The general structure of the RPNR is separated into three parts, followed by additional Annexes with visualizations and examples for the "rules of the road":<sup>77</sup>

- Part 1 (Chapter 1 to 8) covers general provisions and applicable rules for the whole Rhine. It handles the berthing, general "rules of the road" like the crossing situations or sound signals on vessels, visual signs, marks, draught scales, tonnage size and other provisions.
- Part 2 (Chapter 9 to 14) provides special rules for particular sections of the Rhine and gives instructions to the navigating and berthing, maximum dimensions of vessels, the use of canal péniches on the upper Rhine and information about high water and low water issues.
- Part 3 (Chapter 15) represents a rule on the protection of the river environment and rules for waste disposal.

Over the years, the RPNR were amended on numerous occasions and have been adjusted several times.

### 3.2.2.2 *The River Information System (RIS)*

One major development was the establishment of a legal regime for information on the use of the river (including the necessary equipment).<sup>78</sup> The origins of this River Information System (RIS) date back to the 1990s. Its main objective is the establishment of a common transboundary river information system to enhance the safety and commercial attractiveness of inland waterway navigation as well as an improvement of the efforts to protect the river environment, e.g. via traffic information about waste disposal points.<sup>79</sup> The EU has played a more active supporting role in this context as it adopted a specialized RIS Directive (2005/44/EC)

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<sup>77</sup> The rules apply primarily to the masters as the ones having the responsibility to ensure that RPNR are observed. In this context, the master is under the supervision of the national water police authorities.

<sup>78</sup> See Articles 4.05-4.07 and Article 12.01 of the RPNR.

<sup>79</sup> See [www.ccr-zkr.org/12040200-en.html#04](http://www.ccr-zkr.org/12040200-en.html#04) [last access: May 2015].

utilizing also European research programs.<sup>80</sup> The implementation of the RIS directive now provides the technical requirements for the exchange of river information in the EU.<sup>81</sup>

### 3.2.2.3 *Technical Rules (Safety and Equipment)*

At a very early stage of the regulatory history, Articles 1 and 22 of the Revised Mannheim Act mandated the CCNR to establish technical rules relating to the safety and equipment of inland navigating vessels. The first regulatory framework came into existence here in 1905. Reacting to technological improvements these rules have been updated constantly until today. Accompanying Rhine Vessel Inspection Regulations (RVIR) were adopted as well. The RVIR set up technical requirements for inland waterway vessels, such as their stability and manoeuvrability as well as provisions on environmental protection and rules relating to safety of work.<sup>82</sup> Each vessel navigating on the Rhine has to have a license from an inspection commission which confirms the technical requirements of the RVIR.<sup>83</sup> The Rhine navigation license is accepted as a document of compliance in all other European waterway regions because it conforms to the highest technical standards.

In 2006, as another example of a follow-up and supporting act of the EU, a long-time existing EU act on technical requirements for vessels on inland waterways (Directive 82/714/EEC) was significantly updated.<sup>84</sup>

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<sup>80</sup> Directive 2005/44/EC of 7 September 2005 on harmonised river information services (RIS) on inland waterways in the Community, OJ L/255/152 of 30 September 2005; see also the Implementing Commission Regulations (EC) No 414/2007, 415/2007, and 416/2007; and RIS Portal, available at [www.ris.eu/background/what\\_is\\_ris\\_/description](http://www.ris.eu/background/what_is_ris_/description) [last access: May 2015].

<sup>81</sup> See further: Panteia, *Evaluation of RIS Implementation for the period 2006-2011 – Main Report and Country Reports*, available at [http://ec.europa.eu/transport/modes/inland/studies/inland\\_waterways\\_en.htm](http://ec.europa.eu/transport/modes/inland/studies/inland_waterways_en.htm) [last access: May 2015].

<sup>82</sup> See, e.g., Article 9.1 of the RVIR establishing a need for a special attestation for the usage of radar to demonstrate the professional knowledge of boat masters; see SPIN – TN, *The Integration of European Waterways*, Vers.1 (2004), p. 42.

<sup>83</sup> See [www.ccr-zkr.org/12020200-en.html](http://www.ccr-zkr.org/12020200-en.html) [last access: May 2015].

<sup>84</sup> Directive 2006/87/EC of 12 December 2006 laying down technical requirements for inland waterway vessels and repealing Council Directive 82/714/EEC, OJ L389/1 of 30 December 2006, later amended by Directive 2006/137/EC; see further

Notably, the revision process for this Directive which aimed to introduce harmonised technical requirements on all EU waterways, including the Rhine, lasted almost a decade, not least because of the fragmentation of the institutional framework of inland waterway transport at the international level.<sup>85</sup> The revision finally split up the European waterways in four different regions with different technical needs. This initiated a harmonisation of technical requirements for navigation of vessels on the Rhine and was accepted by the CCNR through an additional protocol in 2007 (Protocol 2007-II-21).<sup>86</sup>

Moreover, in 2008, the CCNR amended Article 7.06 RVIR in order to enhance the safety of navigation even further. The CCNR thus introduced basic technical requirements for AIS equipment (Automatic Identification System). This is another practical example for the correlation of safety concepts in maritime law and inland waterway legislation: Four years before, the AIS System had already been introduced by the IMO to avoid collisions (see SOLAS Chapter V). The AIS provides the constant exchange of information between vessels about their identity, current position, course, speed and other additional messages such as the type of cargo. It also has a commercial impact as it improves the use of infrastructure and the efficiency of terminals.<sup>87</sup>

#### 3.2.2.4 *Rules for navigational personnel (RPN)*

The CCNR's first step to regulate the competencies of the navigational personnel of inland waterway vessels was carried out in 1922 via the Rhine Patent Regulations. These Rhine Patent Regulations required a master's certificate, medical fitness, a minimal age and the professional

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Implementing Commission Directives: 2008/59/EC; 2008/68/EC; 2008/87/EC; 2008/126/EC; 2009/46/EC; 2012/48/EC; 2012/49/EC; 2012/64/EC; 2013/49/EU; and also Implementing Commission Decisions 2012/64; 2012/65; 2012/66/EU.

<sup>85</sup> See Commission Staff Working Document of 10 January 2008. Report on the impact assessment of proposals aiming to modernise and reinforce the organisational framework for inland waterway transport in Europe, SEC(2008)23, p. 13 (para. 2.4, note 12).

<sup>86</sup> See <http://www.ccr-zkr.org/12020200-en.html> [last access: May 2015].

<sup>87</sup> See [http://www.ris.eu/background/what\\_is\\_ris\\_/ais](http://www.ris.eu/background/what_is_ris_/ais) [last access: May 2015].



knowledge for navigation on the Rhine.<sup>88</sup> The certificate could be issued by any identified authority of the CCNR Member States and exists in four different types (relating to different navigational purposes on the river).

In 2004, the CCNR established regulations for navigational personnel on inland waterway passenger vessels. However, overlapping regulatory areas with the RVIR and an applicable technical regulation (Point 23, equipment of vessels with regard to manning) triggered a new Resolution to streamline all elements in 2010. These new regulations for navigational personnel of the Rhine (RPN) have been in force since July 2011.<sup>89</sup>

The RPN is now separated in three parts and different Annexes (A-D) covering safety requirements for the personnel on board, manning requirements and working hours of crews and also the need of qualifications and licenses like the masters certificate.

The CCNR has also harmonized the use of another masters certificate for navigation on the Rhine (e.g. EU documents) if those are equivalent to the Rhine Patent.<sup>90</sup> Notably, the EU had enacted a very early Directive in this regulatory field enabling the reciprocal recognition of navigability licenses for inland waterway vessels.<sup>91</sup>

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<sup>88</sup> The regulations applied to all commercial vessels with a minimum length of 20m, see: Single Market Inland Waterways, Complementary Actions in the Internal Waterways Market, p. 95, available at [http://www.pikle.co.uk/eci/TransportPolicies\\_Ch7.pdf](http://www.pikle.co.uk/eci/TransportPolicies_Ch7.pdf) [last access: May 2015].

<sup>89</sup> See <http://www.ccr-zkr.org/12020300-en.html> [last access: May 2015].

<sup>90</sup> For background information see: Europe Economics Chancery House. *Proposal for a Legal Instrument on the harmonisation of boatmasters certificates in Inland Waterway Transport*, London 2009, p. 5; available at [http://ec.europa.eu/transport/modes/inland/studies/doc/2009\\_harmonisation\\_of\\_boatmasters\\_certificates.pdf](http://ec.europa.eu/transport/modes/inland/studies/doc/2009_harmonisation_of_boatmasters_certificates.pdf) [last access: May 2015].

<sup>91</sup> Council Directive (EEC) No 76/135 on reciprocal recognition of navigability licenses for inland waterway vessels, amended by Council Directive 78/1016/EEC modifying Council Directive 76/135/EEC.

### **3.3 The Limitations of the Civil Liability Regime Applicable to European Inland Waterway Transport**

All of the topics mentioned above relate to a complex multitude of public law aspects of inland waterway navigation. In fact, the complexity results to a large extent from international legislative activities of different regulators. Unfortunately, these activities are not all subject to reciprocity which is rather a decision made „topic by topic“.

It has to be admitted that the above discussion is far from being complete when it comes to the legislative specifics of technical regulations for inland waterway traffic. However, to complete the picture of the general legal framework, some private law aspects of European inland waterway transport have to be addressed as well. Remarkably, the creators of the private law framework are mostly identical with the initiators of the public law regulations.

The objective to also harmonize the private law rules for the carriage of goods by inland waterway dates back to 1959. At the time, the UNECE developed an early standardized contract for cross-border carriage of goods on inland waterways. However, this attempt did not attract enough attention and it failed.

The establishment and modernization of further European waterways, most prominently the connection between the Rhine and the Danube (via the Main-Danube Canal) contributed to the creation of a new approach from 1993, initiated first by the Technical Committee for Inland Navigation Law of the Association for European Inland Navigation Waterways (VBW).<sup>92</sup> A draft for a new convention was later submitted to the CCNR proposing to set up a conference in Budapest consisting of a group of experts of the UNECE, the Danube Commission and the CCNR. Ultimately, in 2000, these efforts led to the adoption of the Budapest Convention on the Contract for the Carriage of Goods by Inland

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<sup>92</sup> See the internet presence of the VBW and the committee at <http://www.vbw-ev.de/en/technical-committees/technical-committ/tc-water-transport-law.html> [last access: May 2015].

Waterway (CMNI).<sup>93</sup> This convention has now been ratified by 15 countries and entered into force on 1 April 2005. The European Economic and Social Committee had urged all EU members to ratify and implement the CMNI.<sup>94</sup> As a result, the ratifying countries now include almost all riparian states. However, apart from the non-ratifications of the CMNI by Poland and Ukraine (having both signed the CMNI), a very notable exception is still Austria because it has not even signed the CMNI. Taking into account the importance of the river Danube for integrated multimodal transport in Austria this absence is surprising.<sup>95</sup>

It is also worth mentioning that – complementing the CMNI – there are also two other agreements on civil liability for inland waterway carriers aiming to harmonize the pan-European legal framework for inland navigation: First, the Strasbourg Convention on the Limitation of Liability in Inland Navigation (CLNI) and, second, the private-based “Bratislava Agreement” of 1955/1968 covering general terms and conditions of international carriage of goods on the Danube (freight policies, general average, mutual assistance at accidents, harbor agency relations, transport of large containers, repairs). Since the CMNI entered into force in 2005, it is currently unclear whether an updated “Bratislava Agreement” will continue to have a noteworthy practical relevance for inland waterway shipping in the future.

In contrast, and as a “CCNR-driven” instrument the CLNI will

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<sup>93</sup> The current ratification status of the CMNI and its text is, e.g., available at [http://www.unece.org/trans/main/sc3/sc3\\_legalinst.html](http://www.unece.org/trans/main/sc3/sc3_legalinst.html) [last access: May 2015]; on the creation of the CMNI see also Hoeks, Marian. *Multimodal Transport Law*. Alphen aan den Rijn 2010, p. 226.

<sup>94</sup> See para 7.4 of the Opinion of the European Economic and Social Committee “*Towards a pan-European system of inland waterway transport*”, OJ C 010 of 14 January 2004, pp. 49.

<sup>95</sup> There is obviously some (informal) degree of pressure exerted by the European Commission on Austria not to ratify the CMNI, however, this cannot be confirmed officially and it also seems to be illogical. In a recent statement, the former EU Transport Commissioner *Siiim Kallas* took a completely neutral position on the CMNI describing it as: “[...] *an intergovernmental convention in which the EU is not involved. The Commission doesn’t have the intention to propose legislative measures in these fields nor to take steps aiming the adherence of the EU to the Convention.*”, see: Written questions by Members of the European Parliament and their answers given by a European Union institution, OJ CE 19/1 of 22 January 2014.

probably have such a role in the future. Already in 1988, the CCNR had negotiated this instrument taking the London Convention on the Limitation of Liability for Maritime Claims (LLMC) as a legal role model.<sup>96</sup> This is yet another example for a legal correlation between conceptual approaches in maritime law and inland waterway law. The original scope of application of the CLNI 1988 was limited to states which are connected to the Rhine and the Moselle. However, the CLNI has been revised in 2012 *inter alia* to update the liability limits limitation of liability reflecting an adequate compensation<sup>97</sup> and to extend its scope of application to all European inland waterways.<sup>98</sup> After the ratification of the CLNI 2012 by Serbia (2013) and Luxembourg (2014) the new instrument still needs two further ratifications to enter into force and to extinguish the “old” CLNI 1988.

Turning back to the CMNI, only one of its unique legal elements can be analyzed in more detail in the context of this Article, i.e., its scope of application. A necessary requirement for the application of the CMNI is a cross border contract for the carriage of goods on inland waterways. More specifically, pursuant to Article 2(1) CMNI it covers “*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.*” In the case of a transport by sea transport, maritime law is only applicable if a maritime bill of lading has been issued or if the longer transportation distance has been covered by a sea going vessel (Article 2(2) CMNI). These terms are applicable independently of the

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<sup>96</sup> See <http://www.ccr-zkr.org/12050400-en.html> [last access: May 2015].

<sup>97</sup> The limits of liability were doubled to a minimum of 400.000 SDR for personal injury and death claims and to a minimum of 200.000 SDR for other claims, see Article 6 (1) d) of the CLNI 2012. The liability for injuries of persons of passenger vessels is 100.000 SDR (multiplied by the number of passengers) with no less than 200.000 SDR, see Article 8 CLNI 2012. The CLNI 2012 also covers additional liability limits for claims involving the carriage of dangerous goods resulting in deaths or injuries with a minimum compensation amount of 10 million SDR, see Article 7 (1) CLNI 2012.

<sup>98</sup> Apart from the websites of the CCNR the text of the new CLNI 2012 is also available at <http://www.unece.org/fileadmin/DAM/trans/doc/2012/sc3wp3/ECE-TRANS-SC3-2012-inf04e.pdf> [last access: May 2015].

home port, nationality, register place or classification of the inland waterway vessel (Article 2(3) CMNI).

Thus, the CMNI only requires one of the mentioned places to be in a Member State. At first sight, Article 2 CMNI seems to indicate an extensive scope of the instrument. The provision is clearly derived from the older conceptual approach to European road transport, i.e. from the CMR. However, the term “*contract of carriage*” in itself restricts the geographic scope mechanism: Article 1 CMNI defines “contract of carriage” as “any contract, of any kind, whereby a carrier undertakes against payment of freight to carry goods by inland waterway.” The wording and the intention of the instrument strongly suggest that this has to be construed as a purely *unimodal* contract of carriage on inland waterways.<sup>99</sup>

Moreover, the CMNI’s creators are institutions solely concentrating on regulatory activities in the area of European inland waterway transport and navigation. It cannot be assumed that the UNECE, the Danube Commission and the CCNR did intend to regulate the multimodal context as well. Consequently, the CMNI is legally inapplicable to commercially-based intra-European inland navigation based on multimodal contracts (and performed technically by different sub-carriers).<sup>100</sup> This assessment affects, in particular, container transport on barges while the transport of heavy bulk commodities on rivers is still often subject to unimodal contracts.<sup>101</sup>

As result, if an inland waterway carriage is performed on the basis of a *single* contract of carriage and this contract is also performed by other modes of transport it cannot be categorized as a “*contract of carriage*” under the CMNI regime. It is a conceptual weakness of the CMNI to

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<sup>99</sup> Freise, Rainer. Unimodale transportrechtliche Übereinkommen und multimodale Beförderungen, *Transportrecht* 2012, pp. 1 (at 5); Holland, Hubert in: von Waldstein, Thor/Holland, Hubert. *Binnenschiffahrtsrecht*, 2007, Art. 2 CMNI, para. 6; Czerwenka, Beate. Das Budapester Übereinkommen (CMNI), *Transportrecht* 2001, pp. 277 (at 278).

<sup>100</sup> See for further references: Hoeks, Marian. *Multimodal Transport Law*. Alphen aan den Rijn 2010, p. 226.

<sup>101</sup> “2014 Analysis of the EU Combined Transport”, p. 82.

adhere to a strict “*all or nothing approach*” as this concept hampers the effective legal integration of carriage by goods on inland waterways into existing contractual solutions available to multimodal transports.

This self-imposed restraint of the CMNI is kind of unfortunate. In fact, the CMNI is a modern and appropriate legal regime for cargo claims and other disputes involving inland waterway transport both from a perspective of establishing legal clarity in this area and from the perspective of inland waterway carriers.<sup>102</sup> Additionally, ten years after the CMNI entered into force, national jurisprudence on the CMNI is now slowly evolving as two recent German appellate judgments evidence: One of those appellate judgements clarified, e.g., that a “*transport document*” (in accordance with Article 20(1) CMNI and as defined by Article 1(6) CMNI) cannot be a document issued by someone else but the carrier.<sup>103</sup> Furthermore, this case was especially interesting for its further elaborations on payment obligations resulting from general average (in particular relating to the issuance of general average bonds and payments affected on claims resulting from an average guarantee). These payment obligations were characterized as “*damage to goods*” in the sense of Article 19(2) CMNI, i.e. the carrier shall be liable only to the extent of the loss in value. The other appellate court judgment clarified that a slot charterer who has booked space on an inland waterway barge is allowed to limit its liability (in accordance with national law).<sup>104</sup> Most importantly, the judgement elaborated further on the standard of a carrier’s “*diligence*”

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<sup>102</sup> For example, Article 16(1) CMNI refers to a “*diligent carrier*” (having the opportunity to show that a loss was due to circumstances which could not have prevented and the consequences of which he could not have averted). Some national legal orders might be a little bit stricter on this. For example, § 426 of the German Commercial Code (HGB) relieves the carrier of liability only “*if the loss, damage or delay in delivery was caused by circumstances which the carrier could not avoid even by exercising the utmost diligence and the consequences of which he was unable to prevent*”. This seems to be the standard for an ideal inland waterway carrier and not just a diligent inland waterway carrier.

<sup>103</sup> See Higher Regional of Düsseldorf, judgment of 26 February 2014 (file nos. I-18 U 27/12, 18 U 27/12) see *Transportrecht 2014*, pp. 234.

<sup>104</sup> Higher Regional Court of Hamburg, judgment of 5 December 2013 (file nos. 6 U 194/10), see *Recht der Transportwirtschaft 2014*, pp. 239 or *Transportrecht 2014*, pp. 228.

under Article 16(1) CMNI, possibly exonerating him from liability claims.<sup>105</sup>

### 3.4 EU Regulatory Activity – The General Legal Framework

This text has mostly stressed – so far – the traditional legislative activities of non-EU bodies in the area of inland waterway legislation, the most prominent regulators being the CCNR and the UNECE. Their long-standing history of sector-specific regulation evidences that the EU (i.e. formerly the “Community”) often encountered already existing regional and compelling acts in the area of inland waterway legislation. The Rhine river regime is “*indivisible*”, superseding even conflicting EU law in relation to the Members of the Rhine River regime.<sup>106</sup> Thus, in many cases, the EU was often limited to confirm, support and stress the existing regulatory activities of the previous specialized legislative acts of the CCNR as well as of the UNECE as part of its own common transport policy (now Article 90 to 100 TFEU).<sup>107</sup>

Consequently, the EU has not been ignorant to the regulatory activities initiated outside of its realm in relation to this particular mode of transport. But obviously the focus of the EU’s common transport policy – especially until 1985 – has not been as intense in the area of inland waterway legislation as compared to other transport modes.<sup>108</sup> Admittedly, the EU also faced difficult political challenges, resulting even in failed legislative drafts which were deemed necessary both by the European

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<sup>105</sup> See note 102 on Article 16(1) CMNI.

<sup>106</sup> Bieber, Roland/Maiani, Francesco. *Europäisches Verkehrsrecht*. Baden-Baden 2015, pp. 138, referring to Riphagen, Willem. *The Transport Legislation of the European Communities, its Relationship to International Treaties and its Effects in Member States*, CMLR 1965, pp. 291 (at 320).

<sup>107</sup> See also Cécile Tournaye. *The CCNR: A Model of Stability Through Flexibility and a Strong Identity*. *The Journal of International Maritime Law (JIML)* 21 (2015), Editorial, pp. 165 (166).

<sup>108</sup> See Regner, Richard. *Das Binnenschiffsverkehrsrecht der EG*. Vienna 2008, p. 303, has identified this phase as a period of “*stagnation*”.

Commission and by the CCNR.<sup>109</sup> However, from 1985 to 2000 an “internal market phase” was initiated which also covered more and more regulatory activity in EU inland waterway transport.<sup>110</sup> In fact, the complete liberalisation of the EU inland waterway transport market was accomplished faster (in 1996) as compared to, e.g., the railway regime.<sup>111</sup>

All in all, in inland waterway transport regulation, the EU has adopted a constantly growing number of binding Regulations and Directives. The bulk of those legal acts have addressed the functioning and liberalization of the EU’s internal market. One of the most important historic acts was Council Regulation EC/718/99 on a Community fleet capacity policy to promote inland waterway transport, thus establishing an EU-fleet capacity policy.<sup>112</sup> The current legal relationship of this Regulation with the Rhine River regime is unresolved, in the past, the Members of the Rhine river regime had rejected the applicability of Council Regulation EC/718/99 on the Rhine because of an alleged distortion of the freedom of navigation.<sup>113</sup> Thus, this is a good example of insufficiently coordinated legal acts in European inland waterway legislation.

All in all, the most relevant EU acts on the liberalization of the internal market are (in chronological order):

- Council Directive 96/75/EC on the systems of chartering and pricing in national and international inland waterway transport in the Community<sup>114</sup> (as amended by Regulation EC/1882/2003),<sup>115</sup>

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<sup>109</sup> Bieber, Roland/Maiani, Francesco. *Europäisches Verkehrsrecht*. Baden-Baden 2015, pp. 138 (with further references).

<sup>110</sup> Regner, Richard. *Das Binnenschiffsverkehrsrecht der EG*. Vienna 2008, p. 303.

<sup>111</sup> See Scheele, Jonathan. *Transport- and inland navigation policy of the European Union*. Transportrecht 2009, p. 139.

<sup>112</sup> Council Regulation EC/718/1999 of 29 March 1999 on a Community-fleet capacity policy to promote inland waterway transport, OJ L090/1 of 2 April 1999.

<sup>113</sup> See Bieber, Roland/Maiani, Francesco. *Europäisches Verkehrsrecht*. Baden-Baden 2015, pp. 147.

<sup>114</sup> Council Directive 96/75/EC of 19 November 1996 on the systems of chartering and pricing in national and international inland waterway transport in the Community, OJ L 304/12 of 27 November 1996.

<sup>115</sup> Regulation EC/1882/2003 of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in



- Council Regulation EEC/3912/92 on controls carried out in the field of (inter alia) inland waterway transport in respect of means of transport registered or put into circulation in a third country;<sup>116</sup>
- Council Regulation EC/1356/96 on common rules applicable to the transport of goods or passengers by inland waterway between Member States with a view to establishing freedom to provide such transport services;<sup>117</sup>
- Council Regulation EC/718/99 on a Community fleet capacity policy to promote inland waterway transport;<sup>118</sup> as amended by Regulation EC/411/2003 (amending Regulation EC/805/1999)<sup>119</sup> and as further amended by Regulation EU/546/2014;<sup>120</sup>
- Council Regulation EC/169/2009 applying rules of competition to transport by rail, road and inland waterway.<sup>121</sup>

It could be included in the list of market-based measures that Regulation EU/1177/2010, a binding act to protecting the rights of passengers when travelling by sea also covers the rights of passengers when travelling by

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the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty, OJ L 284/1 of 31 October 2003.

<sup>116</sup> Council Regulation EEC/3912/92 of 17 December 1992 on controls carried out within the Community in the field of road and inland waterway transport in respect of means of transport registered or put into circulation in a third country, OJ L 395/6 of 31 December 1992.

<sup>117</sup> OJ L 175/7 of 13 July 1996; see further Bieber, Roland/Maiani, Francesco. *Europäisches Verkehrsrecht*. Baden-Baden 2015, pp. 142.

<sup>118</sup> As quoted above.

<sup>119</sup> Commission Regulation (EC) No 411/2003 of 5 March 2003 amending Regulation (EC) No 805/1999 laying down certain measures for implementing Council Regulation (EC) No 718/1999 on a Community-fleet capacity policy to promote inland waterway transport OJ L 62/18 of 6 March 2003. Also relevant here was Commission Regulation EC/181/2008: Pursuant to the "old for new" rule, this Regulation established the special contribution rates for various types of vessels and laid down the parameters to be used for the calculations concerning the operation of the Community fleet capacity policy.

<sup>120</sup> Regulation EU/546/2014 of 15 May 2014 amending Council Regulation EC/718/1999 on a Community-fleet capacity policy to promote inland waterway transport, OJ L 163/15 of 29 May 2014.

<sup>121</sup> OJ L 61/1, 5 March 2009.

inland waterways (including even non-EU rivers).<sup>122</sup> However, a real correlation of EU legislative action with the work of the CCNR and/or the UNECE is more evident in other areas. For example, on access to the profession the EU has over time adopted different Directives establishing the reciprocal recognition of national boat masters' certificates and harmonizing the conditions for obtaining national boat masters' certificates:

- Council Directive 87/540/EEC on access to the occupation of carrier of goods by waterway in national and international transport and on the mutual recognition of diplomas, certificates and other evidence of formal qualifications for this occupation;<sup>123</sup>
- Council Directive 91/672/EEC on the reciprocal recognition of national boat masters' certificates for the carriage of goods and passengers by inland waterways;<sup>124</sup>
- Council Directive 96/50/EC on the harmonisation of the conditions for obtaining national boat masters' certificates for the carriage of goods and passengers by inland waterway in the Community.<sup>125</sup>

It has already been stressed that the EU has also reacted to the various

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<sup>122</sup> Regulation EU/1177/2010 of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004, OJ L 334/1 of 17 December 2010.

<sup>123</sup> Council Directive 87/540/EEC of 9 November 1987 on access to the occupation of carrier of goods by waterway in national and international transport and on the mutual recognition of diplomas, certificates and other evidence of formal qualifications for this occupation, OJ L 322/20 of 12 November 1987; see further Bieber, Roland/Maiani, Francesco. *Europäisches Verkehrsrecht*. Baden-Baden 2015, pp. 139.

<sup>124</sup> Council Directive 91/672/EEC of 16 December 1991 on the reciprocal recognition of national boatmasters' certificates for the carriage of goods and passengers by inland waterway, OJ L 373/29 of 31 December 1991.

<sup>125</sup> Council Directive 96/50/EC of 23 July 1996 on harmonizing the conditions for obtaining national boatmasters' certificates for the carriage of goods and passengers by inland waterway within the Community, OJ L 235 of 17 September 1996, as amended by Regulation EC/1882/2003 of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty, OJ L 284/1 of 31 October 2003.

safety and technical requirements and the river information system (RIS) – as established earlier by the CCNR and the UNECE – with some follow-up Directives (and a number of updated implementing Commission Directives:<sup>126</sup>

- Council Directive 76/135/EEC on reciprocal recognition of navigability licenses for inland waterway vessels,<sup>127</sup> amended by Council Directive 78/1016/EEC;<sup>128</sup>
- Directive 2005/44/EC on harmonised river information services (RIS) on inland waterways in the Community<sup>129</sup> (as amended by Regulation EC/219/2009);<sup>130</sup>
- Directive 2006/87/EC<sup>131</sup> laying down technical requirements for inland waterway vessels (amended by six other Directives between 2006 and 2009 and last supplemented by Commission Directives 2012/48/EU and 2012/49/EU);
- Directive 2008/68/EC<sup>132</sup> on the inland transport of dangerous goods, incorporating the ADN regime<sup>133</sup> into EU law.

In a wider context, the EU has also adopted two Directives linking environmental standards to inland waterway shipping:

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<sup>126</sup> In the following, specific sources for the Legal Acts of the European Commission are omitted.

<sup>127</sup> Council Directive 76/135/EEC of 20 January 1976 on reciprocal recognition of navigability licences for inland waterway vessels, OJ L 21/10 of 29 January 1976.

<sup>128</sup> Directive 2009/100/EC of 16 September 2009 on reciprocal recognition of navigability licences for inland waterway vessels, OJ L 259/8 of 2 October 2009.

<sup>129</sup> Directive 2005/44/EC of 7 September 2005 on harmonised river information services (RIS) on inland waterways in the Community, OJ L 255/152 of 30 September 2005; for further information see also [http://www.ris.eu/background/parties\\_involved/eu\\_organisations](http://www.ris.eu/background/parties_involved/eu_organisations) [last access: May 2015].

<sup>130</sup> Regulation EC/219/2009 of 11 March 2009 adapting a number of instruments subject to the procedure referred to in Article 251 of the Treaty to Council Decision 1999/468/EC with regard to the regulatory procedure with scrutiny, OJ L 87/109 of 31 March 2009.

<sup>131</sup> Directive 2006/87/EC of 12 December 2006 laying down technical requirements for inland waterway vessels and repealing Council Directive 82/714/EEC, OJ L 389/1 of 30 December 2006.

<sup>132</sup> Directive 2008/68/EC of 24 September 2008 on the inland transport of dangerous goods, OJ L 260/13 of 30 September 2008.

<sup>133</sup> *Supra*, section 3.2.1.

- Directive 2004/26/EC on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery;<sup>134</sup>
- Directive 2009/30/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions;<sup>135</sup>
- Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.<sup>136</sup>

Notwithstanding the multitude of these EU legal acts, from a holistic regulatory point of view, a genuine EU policy in this area is still evolving. Rather, the summary of acts appears more like a legal patchwork fitting into the agenda of EU policy goals and often overlapping with the respective regimes of the CCNR and the UNECE.<sup>137</sup> Moreover, there are still only some intra-organisational administrative agreements concluded between the EU and the River Commissions,<sup>138</sup> however, there is still no binding treaty clarifying the relationship and competencies between the EU, third States and the River Commissions (as once envisioned but

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<sup>134</sup> Directive 2004/26/EC amending Directive 97/68/EC on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery, OJ L/146/1 of 30 April 2004; and Directive 2009/30/EC amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions and amending Council Directive 1999/32/EC as regards the specifications of fuel used by inland waterway vessels, OJ L/140/88 of 5 June 2009.

<sup>135</sup> Directive 2009/30/EC of 23 April 2009 amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions and amending Council Directive 1999/32/EC as regards the specification of fuel used by inland waterway vessels and repealing Directive 93/12/EEC, OJ L 163/15 of 29 May 2014.

<sup>136</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (as amended), OJ L 206/7 of 22 July 1992. for further information of this massive legal act see [http://ec.europa.eu/environment/nature/legislation/habitatsdirective/index\\_en.htm](http://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm) [last access May 2015].

<sup>137</sup> Supra, introductory remarks to Section 3., in particular the gap analysis of the 2004 the “*European Framework for Inland Navigation*”.

<sup>138</sup> Supra, note 47.

never realized in the early 1990s).<sup>139</sup> However, in June 2015, the CCNR adopted a resolution creating a “*European committee for the elaboration of common standards for European inland waterway transport*” (the “CESNI”).<sup>140</sup> This reflects a further political and legal convergence of the work of the CCNR and the EU.

As indicated above, the complete liberalization of inland waterway shipping within the EU’s internal market has been achieved already for about twenty years. As a result of the EU’s enlargement after 2004, the largest parts of the Rhine, the Danube and the other major interconnected river corridors are now covered geographically by EU Members. At least in the opinion of the European Commission, it now seems kind of outdated to still maintain different institutions and separated laws regulating effectively the same commercial activity.<sup>141</sup> There is some merit to this view, at least the current situation results in a constant conservation of a legal status of fragmentation and it also means squ-

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<sup>139</sup> Bieber, Roland/Maiani, Francesco. *Europäisches Verkehrsrecht*. Baden-Baden 2015, pp. 156; see more extensively Klein, Stephan. *Die Kompetenz der Europäischen Union in Anbetracht der Schifffahrt auf Rhein und Donau*, 2004, pp. 183.

<sup>140</sup> CCNR Resolution 2015-I-3 of 3 June 2015, see also Cécile Tournaye. *The CCNR: A Model of Stability Through Flexibility and a Strong Identity*. *The Journal of International Maritime Law* (JIML) 21 (2015), Editorial, pp. 165.

<sup>141</sup> Commission Staff Working Document of 10 January 2008. Report on the impact assessment of proposals aiming to modernise and reinforce the organisational framework for inland waterway transport in Europe, SEC(2008)23, p. 13 (para. 2.4): “*While the objectives (e.g. harmonised legislation) may still be achieved in the current framework, this will come at higher aggregate costs and within longer time spans than might be possible otherwise. Combining the efforts and resources of the different actors in a more institutionalised way might lead to a situation in which a more effective output can be achieved with the same amount of resources. Without major efforts to modernise of the framework, regulatory harmonisation between the different legal systems would continue to progress at a slow pace. Rather than on common rules, the regulatory environment would be based on mutual recognition of standards or legislation adopted under the respective legal framework and according to the relevant working methods of each individual organisation. The legal situation for navigation on the Danube would remain fragmented. The recognition of Community certificates for navigation on the river Rhine would continue to depend on four EU Member States and Switzerland. Consequently, market barriers would dissolve more slowly and the potential of the Internal Market in inland waterway transport would not be used to its full economic potential. [...]*”.

andering scarce administrative and political resources.<sup>142</sup>

### 3.5 EU Policy Activity to Promote Inland Waterway Transport – “NAIADES I and II”

Instead of confirming and supporting existing acts of other regulators, the most recent EU decisions in inland waterway legislation tend to be more dynamic and supportive for the commercial providers of this mode of transport. Above all, the latest EU actions in the field of inland waterway transport are more tied into the general financial framework for establishing a “Single European Transport Area”.<sup>143</sup>

Since 2006, the focus of political attention within the EU has shifted to the (financial) promotion of inland water transport as being unique, indispensable and able to contribute significantly to the sustainability of the European transport system, as it represents the most environmentally-friendly mode of transport. For this purpose, the EU’s “NAIADES I” Action programme listed over 30 specific actions to promote inland navigation within the EU.<sup>144</sup>

In fact, via “NAIADES I” the EU’s policy objectives for inland waterway transport were clearly set out in a comprehensive and coherent medium term action programme for the first time.<sup>145</sup> “NAIADES I” addressed not only the specialized agencies and organisations but all stakeholders, in particular the industry itself. This has definitely been one of the new elements of the EU’s strategic attitude in this policy area.

In order to improve the competitiveness and attractiveness of inland

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<sup>142</sup> See already above, note 41.

<sup>143</sup> See the relevant White Paper of the EU Commission. *Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system*. Brussels, 28 March 2011, COM(2011) 144 final, see, e.g., a policy goal as stated in para. 35: “[...] stimulate the integration of inland waterways into the transport system and promote eco-innovation in freight transport.”

<sup>144</sup> Communication from the Commission the promotion of inland waterway transport - “NAIADES” - An Integrated European Action Programme for Inland Waterway Transport, COM(2006)6, see: <http://www.naiades.info/> and [http://ec.europa.eu/transport/modes/inland/promotion/naiades\\_en.htm](http://ec.europa.eu/transport/modes/inland/promotion/naiades_en.htm) [last access: May 2015].

<sup>145</sup> Scheele, Jonathan. *Transport- and inland navigation policy of the European Union*. Transportrecht 2009, p. 139.

navigation, first “NAIADES I” tackled five major strategic areas,<sup>146</sup> i.e.:

- the improvement of market conditions (in particular, extending inland waterway transport services to new growth markets by improving access to capital by means of fiscal incentives);
- the modernization of the fleet urging for more technical innovation in the sector;
- the development of the “human capital”, (in particular, improving working and social conditions and guaranteeing mutual recognition of qualifications throughout the EU)
- the strengthening of the image of the industry;<sup>147</sup> and
- infrastructure (in particular, eliminating bottlenecks at the rivers).

According to the EU Commission many of the objectives of “NAIADES I” have now been finalised and the programme needed a follow-up to refocus the policy on the key issues of improving the economic and environmental performance of the sector. Thus, in its follow-up staff working document on “NAIADES II” of May 2012,<sup>148</sup> the EU Commission *inter alia* emphasized the need to strengthen institutional cooperation and international coordination in the field of inland waterway navigation. This would mean further deepening the exchange with existing CCNR and UNECE expertise in a number of areas and the streamlining of regulatory frameworks. In sum, via “NAIADES II” the EU will raise the quality of EU inland waterway transport by:

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<sup>146</sup> See Regner, Richard. *Naiades and Beyond: Stand und Perspektiven der geplanten “Modernisierung der Organisationsstruktur” für die Binnenschifffahrt in Europa*, in: International law between universalism and fragmentation: Festschrift in honour of Gerhard Hafner. Leiden 2008, pp. 1027; Bieber, Roland/Maiani, Francesco. *Europäisches Verkehrsrecht*. Baden-Baden 2015, pp. 136.

<sup>147</sup> One of the major innovations in the “*image area*” has been the establishment of the excellent information platform “*PLATINA*”, see extensive information at <http://naiades.info/> [last access: May 2015].

<sup>148</sup> European Commission. *Towards quality inland waterway transport – NAIADES II*. Brussels, 10 September 2013, COM(2013) 623 final, the complete text is available online at [http://ec.europa.eu/transport/modes/inland/promotion/doc/naiades2/com\(2013\)623\\_en.pdf](http://ec.europa.eu/transport/modes/inland/promotion/doc/naiades2/com(2013)623_en.pdf) [last access: May 2015].

- further strengthening intra-organizational governance;
- further harmonizing safety standards and education;
- further increasing environmental standards;
- further integrating inland waterway transport with other modes of transport; and
- further harmonizing and modernizing professional qualifications.

The policy goals of “NAIADES II” are now also tied into the wider institutional framework of the EU’s funding instruments such as the transport element of the EU’s Trans-European network framework (“TEN-T”)<sup>149</sup> and other instruments, in particular the Connecting Europe Facility.<sup>150</sup> To sum it up, more money is on the table for inland waterway transport. However, only time will tell whether the finance element will be the decisive factor in making both “NAIADES I and II” a success story of EU transport policy.

## 4 Conclusions

It remains doubtful, whether the EU will manage to overcome the diverse (“*dispersed*”) nature of inland waterway regulation as described earlier

<sup>149</sup> The EU has established a long-term strategy for the development of a complete trans-European transport network (TEN-T) consisting of infrastructure for railways, maritime and air transport, roads, inland waterways and rail-road terminals. Applicable guidelines cover the technical standards as well as the requirements for interoperability of infrastructures and define priorities for the development of the TEN-T. The regulation replaces guidelines originally agreed in 1996 and introduces a network with a dual-layer structure. It will consist of comprehensive network and of core network. The aim is to complete the core network by 2030 and comprehensive network has a binding by 2050, see Regulation (EU) No 1315/2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU, OJ L 348/1 of 20 December 2013; see also Decision EC/1692/96 of 23 July 1996 on Community guidelines for the development of the trans-European transport network, OJ L228/1 of 9 September 1996.

<sup>150</sup> Regulation EU/1316/2013 of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation EU/913/2010 and repealing Regulations EC/680/2007 and EC/67/2010, OJ L348/129 of 20 December 2013).



in this paper. Ultimately, it is highly unlikely that the Member States of the CCNR – in particular the non-EU Member State Switzerland – will agree on transfers of the traditional regulatory power of this River Commission to the EU, as such a step would restrain a tradition of 200 years of unlimited regulatory sovereignty of the CCNR. It is also unlikely that inland waterway transport will integrate better into multimodal transport chains and contracts in the future as long as the EU seems to ignore the existence of the CMNI and as long as the other stakeholder organisations do not think of a conceptual approach to multimodality (together with the EU).

However, concentrating on its own institutional machinery, with “NAIADES I and II” the EU has now truly initiated a comprehensive and coherent long-term action programme for the period of 2006 to 2020. This programme will also survive various changes in the staff composition of the European Commission. Thus, at least policy continuity has been secured and it is unlikely that the level of political attention will decrease significantly until 2020.

It could be criticized that the whole “NAIADES” framework is still kind of “blurry” and, all in all, it sets rather unambiguous targets to reach results. For example, the Commission has stated after “NAIADES I” that many of its objectives had been finalised but this achievement is difficult to evaluate specifically and a lot of physical and legal “bottlenecks” still remain. But definitely and as a first successful step, there has been significant improvement in changing the image of the inland waterway sector and informing the general public about its relevance.

It is also most positive that the EU – via “NAIADES II” – has now interwoven inland waterway policy even more with other complex EU action levels, especially in the field of integrated infrastructure policy. With an overall budget of about 26 billion Euros available for the Trans-European transport networks, the integration of major EU inland waterways into this network will definitely create more opportunities to remove existing bottlenecks and to achieve a status of high-quality and interconnected waterways. In fact, this is the overarching goal of the EU: Despite all environmental advantages of transporting goods and pas-

sengers via rivers, inland waterway transport in Europe is not yet a true quality mode of transport, relieving the roads noticeable from the problem of traffic congestion. However, all in all, European inland waterway transport is definitely on track to emerge as a “congestion beater” and to become such a quality mode in the future.



# Different Methods of Organizing Green Carriage



# Sea Shuttle Concept in North- Eastern Europe

Violeta Roso, Chalmers University of Technology,  
Gothenburg

Linda Styhre, IVL Swedish Environmental  
Research Institute, Stockholm/Gothenburg

Johan Woxenius, School of Business, University of  
Gothenburg

Rickard Bergqvist, School of Business, University  
of Gothenburg

Kent Lumsden, Chalmers University of  
Technology, Gothenburg

## **Abstract**

Short sea shipping is an important part of regional transport networks in many parts of the world, and efficient container shipping is vital for trade and industry in Northern Europe. The purpose of this paper is to define a container shipping concept, the Short Sea Shuttle concept, and to analyse the conditions under which the concept is competitive in a north-eastern European setting. The Short Sea Shuttle concept resembles feeder shipping, but it requires a higher degree of functional inland connections and fixed and stable schedules as well as high reliability and departure frequency. As such, it contains features of dryport systems with rail shuttles. Workshops and interviews with industrial stakeholders have revealed that a high punctuality is particularly important as it allows the transfer of cargo to sea, which currently is transported by other modes.

## **Keywords**

Short sea shipping, Short Sea Shuttles, Port, Intermodal transport

## **Contacts**

Violeta Roso, Chalmers University of Technology, Logistics and Transportation, Sweden, E-mail: [violeta.roso@chalmers.se](mailto:violeta.roso@chalmers.se)  
Corresponding author.

Linda Styhre, IVL Swedish Environmental Research Institute, Sweden.

Johan Woxenius, School of Business, Economics and Law at University of Gothenburg, Sweden

Rickard Bergqvist, School of Business, Economics and Law, University of Gothenburg, Sweden

Kent Lumsden, Chalmers University of Technology, Logistics and Transportation, Sweden.

# 1 Introduction

Except for the troublesome year 2009, seaborne trade has grown faster than the world gross domestic product, and the world merchandise trade has grown even faster (UNCTAD, 2013, p.4). Container shipping is now the backbone of the global trade of intermediate and consumer products. The latest decade has been globally characterised by a strong maritime economy, and the number of vessels in the global merchant fleet has grown by 20% since 2002 (Copenhagen Economics, 2012). Meanwhile, the average size of vessels has increased, which means that the capacity of the global merchant fleet has grown even more. The aim toward lower unit costs has focused on the core network of trans-ocean legs leading to giant vessels carrying more than 19 000 twenty-foot equivalent units (TEU), while development of the capillary network has lagged behind. Despite heavy investments in container terminal capacity, feeder shipping capacity and rail-based dry port systems (see, e.g., Roso, et al., 2009 and Bergqvist, et al., 2013), many larger ports face capacity shortages in both port operations and hinterland connections.

The European Commission promotes short sea shipping to reach its sustainability targets for the transport sector (European Commission, 2011) since well-executed shipping is more energy efficient and can relieve congested road and rail networks. Well-developed shipping services are of great importance for the creation of an efficient transport system. However, despite its inherent advantages, strong political support and improvements within the shipping industry, short sea shipping has untapped potential in Northern Europe. In order to be profitable, a shipping service requires critical cargo volumes so that the fixed costs can be distributed over a larger number of units. Intermodal transport has far from reached its full market potential in some markets, and better coordination and synchronisation between different modes of transport should be given higher priority.

The purpose of this paper is to define the Short Sea Shuttles concept, which is intended as a complement to existing land-based and waterborne



transport services, and to analyse the conditions under which the concept is competitive in a north-eastern European setting. The work has been carried out in close cooperation with firms within the maritime cluster in order to obtain guiding input and to facilitate the implementation of the shuttles.

The paper is structured as follows: after the introduction, the research approach is explained, followed by the frame of reference in which the overview of the related research is given. The findings and discussion section starts with the proposed short sea shuttle definition and is followed by an analysis of the concept based on interviews and workshops. The paper closes with conclusions.

## **2 Research approach**

The Short Sea Shuttle concept, in this paper, is developed and adjusted to the conditions in Northern Europe, including countries around the Baltic Sea and part of the North Sea, to investigate their potential for the region. The basic idea is, however, suitable for many other parts of the world with similar conditions.

Literature reviews, together with interviews and three workshop discussions, resulted in a description of the Short Sea Shuttle concept and an increased understanding of its pros and cons. Literature studies were carried out throughout the research period with the purpose of identifying the state of research and areas of interest for further investigation, followed by an examination of reports and an investigation into infrastructure requirements and new regulations. Face-to-face interviews were conducted with nine different transport actors in 2013, followed by site visits. The following companies were interviewed: freight forwarder GAC Sweden, maritime consultant Green Consulting Group AB, ship agent Joship, maritime consultant Maritime Insight, shipping company NYK Group Europe Ltd – Scandinavia, Port of Gothenburg, Port of Tallinn, cargo owner Stora Enso and feeder operator Unifeeder Sweden.

Semi-structured, open-ended interviews were chosen as the most

appropriate method as they allowed the interviewees to introduce new issues and the interviewer to more fully follow up on topics. In accordance with recommendations by Stuart, et al. (2002), a case study protocol consisting of a semi-structured interview was developed in order to ensure reliability. The interviews were recorded, transcribed and categorised in pre-defined sections important for a common understanding and definition of the concept: expected function of the concept, type of cargo, implementation requirements, input to the SWOT-analysis and vessel size. In order to ensure validity, triangulation with multiple means of data collection was also carried out. Therefore, apart from having interviewees from different transport sectors, secondary data sources were also used, such as internal company reports, Internet-based documents and archival records. Additional phone interviews as well as e-mail correspondence were carried out in order to fill the gaps.

In February, May and November of 2013, three workshops were carried out in Gothenburg with researchers, representatives from local governments and the port authorities, terminal operators, shipping companies, cargo owners and shipping consultants. The following companies and institutes were present: Port of Gothenburg, Port of Oslo, Unifeeder, AMP Terminals, Volvo Logistics, IVL Swedish Environmental Research Institute, SSPA, Lighthouse, Maritime Forum, Region Västra Götaland, Swedish Transport Administration, University of Gothenburg and Chalmers University of Technology. The numbers of participants, including the research team, were 18 at the first and second workshop and 17 at the third. The first workshop ended with the development of a preliminary SWOT analysis (method to evaluate the strengths, weakness, opportunities and threats) that was further developed during the research period.

### **3 Frame of reference**

Four main areas have been of interest for the development of the Short Sea Shipping concept: Short Sea Shipping, hub and spoke system, vertical

and horizontal integration in transport and ports' inland access via dry ports.

### **3.1 Short sea shipping**

Short sea shipping is often defined as the movement of cargo and passengers by sea between ports that do not require an ocean crossing (European Commission, 1999). However, according to Douet and Cappuccilli (2011), there is a lack of a concise and unambiguous definition of short sea shipping, which creates problems for policy makers as well as for researchers. For example, Stopford (2009) uses a simple criterion and regards it as maritime transport within a region serving port-to-port feeder traffic, often in competition with land transport. This definition does not include any other criteria, only the geographical scope of the routes. Other criteria suggested by some other authors are: technical criteria such as ship size, cargo handling methods, ports, networks (e.g. Marlow, et al., 1997) and ship characteristics (e.g. Criley and Dean, 1993). Further, Paixão and Marlow (2005) made the definition more comprehensive by including criteria such as ship type, markets, logistics requirements and service offerings.

Short sea shipping is a vital part of regional transport networks and an important component in supporting the commercial needs of transport and logistics in Europe and in other parts of the world with similar conditions. Currently, short sea shipping accounts for nearly 40% of all cargo moved in Europe, and its volumes have increased over the years while its market share has remained stable (European Commission, 2009). Compared to deep sea shipping, short sea shipping has attracted very little attention in the scientific literature (Woxenius, 2012) and in maritime text books like Stopford's (2009).

The main advantages of short sea shipping are an alleviation of congestion, a potential reduction of the environmental impact, a decrease in overall costs for the shippers and that it is much less prone to theft and damage (PROPS, 2008). Important factors for the development of the sector have been technological improvements, the growth of trade

and greater integration of parts of the supply chain (Heaver, 2001). Despite the advantages, short sea shipping has not yet been developed to its full potential. Obstacles may include the complex documentation and administrative procedures in the ports (MarNIS, 2006). Further, the market development for short sea shipping has faced challenges, such as the construction of fixed links, new regulations and the connected increase in the price of fuel (Notteboom and Vernimmen, 2009), and the sector has suffered throughout the recession following the financial crisis.

### **3.2 Hub and spoke system**

The container shipping lines use larger vessels on trans-ocean routes and limit their calls to a few and major hub ports in order to save time and enjoy economies of scale (Gelareh and Pisinger, 2011). The existence of hub ports is a consequence of economies of scale and density in shipping. Economy of density is a prevalent feature of the shipping industry, and the concentration of traffic demands and transport services exhibits a positive correlation with the efficiency of transport (Mori and Nishikimi, 2002). Therefore, companies can lower their shipping costs by taking routes linked to hub ports that process large volumes of cargo with developed, specialised services and large-scale infrastructure (Behrens, et al., 2006). A hub and spoke system requires feeder vessels that complement the container shipping line's trans-ocean network (Gouveral, et al., 2009). The feeders provide the link between hub ports and satellite ports, and they normally visit a string of ports; see Figure 1. They often operate under a schedule that is coordinated with the schedule of the deep sea vessels (Paixaõ and Marlow, 2002), yet they have a more flexible time schedule and provide a higher frequency of port calls than the deep sea vessels do (Imai, et al., 2009).

*Figure 1: Hub and spoke system of direct calls and feeder services (Styhre, 2010). See next page.*



transport system (Chang, et al., 2008). The small and medium-sized satellite ports that do not aim to attract the largest vessels can complement the hub ports by targeting niche markets, especially in feeder, rather than competing with them (Cullinane and Khanna, 2000).

### **3.3 Vertical and horizontal integration**

Both vertical and horizontal integration in the transport industry have resulted in a concentration of power on the port demand side, which has led to the shipping companies' increased market control over ports (Heaver, et al., 2001; Notteboom, 2002; Song, 2002; Ha, 2003). For many years, there have been organisational, technological and commercial changes with the aim of delivering door-to-door transport solutions rather than port-to-port services (e.g. Bergqvist, 2012; Paixão and Marlow, 2003; Robinson, 2002). This has enlarged the ports' hinterland and foreland, and there is currently competition among many ports to grow and become hub ports for large shipping companies. Ports have been developed in conjunction with industrial and commercial businesses (Paixão and Marlow, 2003) into important nodes in the transport network. Consequently, the ports' earlier narrow focus on cargo handling has been replaced with the establishment of a wide range of logistics and value-added activities. Thus, ports have gradually been breaking away from their traditional passive function in transport and have taken a more active role (Mangan, et al., 2008). Today, analysis of port selection criteria and a definition of the port's function in international supply chains are important parts of the shipping company's strategy when defining sailing schedules (Branch, 1998). Notteboom (2006) states that many ports, as well as shipping companies, integrate vertically to control hinterland transport. With an increasing level of functional integration, many intermediate steps in the transport chain have been removed.

### **3.4 Seaports' inland access via dry ports**

In order to maintain their market position, seaports have to improve their competitiveness by adding various value-added services to their

service range while keeping the price adequately low (Bask, et al., 2014). It is also of great importance that ports have a functional inland access that can be improved by implementation of dry ports. Dry ports are inland intermodal terminals directly connected to ports by rail – that is, rail shuttles – where customers can leave/pick up their units as if directly at a seaport (Roso, et al., 2009 and Bask, et al., 2014). This definition emphasises a higher level of integration with a seaports as well as the environmental benefit and promotion of intermodal transport. In addition to the basic terminal functions like transfer of cargo, consolidation and storage, services such as maintenance of containers, customs clearance and other value-added services should take place at a dry port terminal in accordance with customers' needs (Roso, et al., 2009). The quality of the access to a dry port and the quality of the road–rail interface determine the dry port's performance, and scheduled and reliable high-capacity transportation to and from the seaport is therefore necessary. The benefits of dry port implementation are highly contextual and thus vary between countries and transport systems and may include: increased seaport capacity and productivity, reduced congestion at seaports and in the port cities, reduced risk for road accidents, lower environmental impact, they may serve as a depot, improved seaport access to areas outside its traditional hinterland and support of regional development.

## **4 Findings and discussion**

This section lines out the Short Sea Shuttle concept and analyses its potential in a Scandinavia and Baltic Sea context.

### **4.1 The definition and basic ideas of the Short Sea Shuttle concept**

The starting point for the development of Short Sea Shuttles is the rail shuttles in the dry port concept (see, e.g., Roso, et al., 2009) and traditional feeders. The idea is to combine the two concepts to suggest a shipping

concept that is more integrated in the transport chain and with higher reliability than traditional feeders.

This work has resulted in a definition of the Short Sea Shuttle concept:

“High-frequency short sea liner shipping of standardised load units that is highly integrated into transport chains with functional inland connections”.

Compared to the other short sea shipping definitions from, for example, Marlow, et al. (1997), Criley and Dean (1993) or Paixão and Marlow (2005) that use technical criteria such as cargo handling methods, ports, networks, ship characteristics, markets, logistics requirements and/or service offerings, the definition emphasises logistics aspects like frequency of service and integration with other modes of transport all as parts of an intermodal transport chain. The main differences and similarities between the Short Sea Shuttle concept, conventional rail shuttles and traditional feeders are shown in Table 1.



*Table 1: Differences and similarities between rail shuttles, Short Sea Shuttles and traditional feeder services.*

	<b>Short Sea Shuttle</b>	<b>Rail Shuttle</b>	<b>Traditional Feeder</b>
<b>Timetable</b>	Fixed	Fixed	Semi-fixed but with short-term changes / adjustments
<b>Frequency</b>	At least 1/ week	Up to several times/week	Varies
<b>Punctuality</b>	High, deviation up to 1 hour	High, deviation up to 1 hour	Low, deviation up to day/s
<b>Time perspective</b>	Longer, months to years	Longer, months to years	Shorter, weeks to months
<b>Transport chain integration</b>	High	High	Low-medium

The Short Sea Shuttle requires high frequency of service and substantial goods volumes. It also requires engaged transport system actors in order to achieve the necessary coordination. Planning must originate from a door-to-door perspective. The concept aims to eliminate or minimise non-value adding activities in the transport chain related to time schedules and handling times. Coordination will become even more important in the future when the capacity of infrastructure will be highly limited during peak hours. Through volumes, frequency and economies of scale, there are prerequisites for the adoption of new technology that can make the transport chain even more seamless, such as tailored and automatic handling techniques at inland terminals, in ports and on vessels. Short Sea Shuttles can thus be viewed as extended infrastructure with high capacity and availability. Shuttles create a more agile and

seamless transport chain with regard to service (e.g. lead times), technology (e.g. handling, IT, tracking, security), timetables, interfaces, etc., with the aim of creating more sustainable, cost-efficient transport systems with high-quality transport.

If possible, Short Sea Shuttle links will be established on routes where they can function as a complement to rail; as suggested by Heaver (2001) important factors for the development of the sector is integration to other parts of the supply chain. In the context of Scandinavia, this potential would be especially interesting for the extension of existing rail shuttles to the Port of Gothenburg with sea links connecting countries and regions surrounding the Baltic Sea and the North Sea. This would also contribute to creating seamless intermodal transport solutions combining both rail and sea links. The Short Sea Shuttle can operate between two ports if the cargo flow is high enough as proposed for feeders by both Paixaõ and Marlow (2002) and Gouvernal, et al (2009); there are also cases where it calls a string of few ports to collect enough cargo.

The findings from the interviews show that actors in the transport system do have different opinions and expectations of the concept (see Appendix A); however, what they all have in common is a positive attitude towards the concept's application. The main purpose of the concept, according to the respondents, is the possibility to shift cargo to sea and to increase cargo throughput, and the same is supported in the literature (e.g. PROPS, 2008 and European Commission, 2011). Base cargo and non-time sensitive goods are suggested by most respondents to be the most suitable cargo, but re-positioning of empty containers has been raised as an issue. Further, cargo with high demands on punctuality but not on very short transport time can also be considered if reliability is kept high. In order to handle the relatively low cargo flows in north-eastern Europe, the vessels should not be too large. This is mainly due to the fact that potential volume in the Baltic Sea is expected to be too low for larger vessels operating high-frequency services rather than due to a basic characteristic of the concept itself. Thus, the suitable size of the vessels in this study is from very small vessels, such as a few hundred TEU, up to 1000 TEU. And, according to Marlow, et al (1997) the size of

the vessel is one of the important criteria when defining short sea shipping.

## **4.2 New business opportunities**

The Short Sea Shuttle concept also creates opportunities for new business models in which each actor in the system has the opportunity to sell and contract transport links operated by other actors in the system, thus maximising customer relations. Coordination related to the concept is thus focused on both the operational as well as the commercial level. New business models may include better coordination and use of intermediate stops in a feeder system and service and pricing of a rail-sea-rail service, such as rail service from Northern Sweden to Karlskrona, then by ferry to Gdynia for further transport by rail in eastern Europe. The opportunity to commercially package different transport services and modes can be of interest (Bergqvist, 2012) in particular in circumstances where competition from direct road transport is intense. In the case of Gothenburg, this is illustrated by the ferry connections to Gothenburg-Kiel in which the goods segment is becoming increasingly important and the competition from direct road transport is very evident. Other regions where there is a potential to better link hinterland services with sea shuttles and existing services are Stockholm, Blekinge and Scania.

## **4.3 Potential goods volumes**

Regarding potential goods flows in the Baltic Sea region, interesting routes and links could be ports located on the east coast of Sweden, Finland, Russia and the Baltic States. For example, linking a rail shuttle to and from Umeå with the existing ferry link between Umeå and Vasa while defining Vasa as a dry port in this link would enable Finish shippers to get a direct connection to the Port of Gothenburg and the direct calls associated with that port. Aligning schedules, information flows and security frameworks combined with innovative handling techniques and systems would then create an efficient intermodal linkage between Sweden and Finland. The extension into northern Finland has the potential to

attract substantial goods flows. The rail service would also open up the possibility of combining containers with semi-trailers, enabling even higher potential goods volumes. If the associated nodes/ports would work within the same organisational framework, the implementation might be further facilitated.

Other interesting potential routes for the Short Sea Shuttle concept are Stockholm and Norrköping, which have the advantage of being close to the metropolitan area of Stockholm and the industrially dense region of Mälardalen, respectively. Both have substantial shipping services to and from countries in the Baltic region of both LoLo and RoRo types. Besides the hinterland connectivity, there is also the potential to utilise intermediate stops on existing feeder services that already operate in the Baltic Sea region. This alternative would enable additional frequency and would complement both hinterland connections and existing ferry connections.

Short Sea Shuttles, however, have special requirements for fast and efficient transshipment between sea and rail. Most of the ports mentioned above do not currently fulfil those requirements. There are, however, many techniques available that could be of interest and used to improve these ports. The estimated potential volumes should not be interpreted as “added” volumes to the existing system of feeder services since most of these volumes are already handled by the respective ports for transshipment. However, the potential goods volumes would constitute a substantial potential for Short Sea Shuttles and the existing system of rail shuttle services and its associated coordination and a likely concentration to gateway ports. Appendix B summarises the Total TEU per major ports and countries within the region today that could be associated with the Short Sea Shuttle concept.

The total market, as illustrated in Appendix B, constitutes some 8 million TEUs annually. These statistics and the container market mainly concern containers originating or designated for inter-continental destinations. The Short Sea Shuttle concept has the potential to further develop the intra-continental container flows and market segments by utilising existing container services – either direct services or feeder

services. This shift of volume would then most likely be from the RoRo segment to the LoLo segment as more volume is shifted to containers. Three main potential international segments have been identified related to the Short Sea Shuttle concept:

- For the Norway-Sweden-Denmark route, the potential container volumes could be as much as 100 000-300 000 TEU/year.
- For the Sweden-Finland-Russia connection, annual goods volumes could account for as much as 1 million TEU per year, given the stricter sulphur directive limits of 2015 and their impact on transport costs in general but on shipping in particular.
- Regarding the Sweden-Baltic states, this is the market segment most difficult to estimate since the hinterland connections that could be utilised are limited. However, we estimate these annual volumes would be less than 100 000 TEU/year.

In sum, the potential associated with the Short Sea Shuttle concept is substantial. However, implementation of the concept is a great challenge in many aspects, such as volumes, scale, infrastructure, number of actors and technology.

#### **4.4 The concept's pros and cons**

In order to investigate critical parameters for the introduction of Short Sea Shuttles, a SWOT-analysis was carried out. The SWOT-analysis is based on the interviews that are summarised in Appendix A, literature reviews and findings from three workshop sessions. The most important strengths, weakness, opportunities and threats are summarised in Table 2.

*Table 2: The SWOT analysis.*

<p style="text-align: center;"><b>Strengths</b></p> <ul style="list-style-type: none"> <li>• move goods from road and rail to sea</li> <li>• available infrastructure and vessels</li> <li>• inexpensive use of infrastructure</li> <li>• cargo security</li> <li>• availability of infrastructure, i.e. fairways open mostly 24/7</li> <li>• large volumes and large batches of cargo</li> <li>• potential reliability</li> <li>• increased capacity on rail</li> </ul>	<p style="text-align: center;"><b>Weaknesses</b></p> <ul style="list-style-type: none"> <li>• start-up risk (high entrance barriers)</li> <li>• high costs in port</li> <li>• poor adaptation to variations</li> <li>• complex documentation and administration in comparison with intra-European truck and rail transport</li> <li>• increase in lead time</li> <li>• non-existent concept</li> <li>• insufficient IT</li> </ul>
<p style="text-align: center;"><b>Opportunities</b></p> <ul style="list-style-type: none"> <li>• lower costs for shippers</li> <li>• regional development, e.g. industries around the ports</li> <li>• fewer accidents</li> <li>• lower congestion</li> <li>• potential lower emissions</li> <li>• lower external costs</li> <li>• lower entry barriers into the market</li> <li>• lower road/rail maintenance costs</li> <li>• technology driver</li> <li>• vessel capacity</li> </ul>	<p style="text-align: center;"><b>Threats</b></p> <ul style="list-style-type: none"> <li>• low profitability for shipping companies</li> <li>• SECA and new regulations</li> <li>• hard to market</li> <li>• need to reach critical volumes for profitability</li> <li>• difficulties in distributing costs and benefits among involved actors</li> </ul>

The main advantages of the Short Sea Shuttles concept are lower costs for shippers, potentially lower emissions and available infrastructure and

vessel capacity. The first two named advantages are greatly supported in the literature on short sea shipping in general (e.g. PROPS, 2008 and European Commission, 2011). However, even though waterborne transport is often viewed as an environmentally friendly alternative to road transport, and despite the large potential benefits that the Short Sea Shuttles would bring to the transport system, the concept faces challenges. These are foremost related to the high costs of bunker fuel and port charges and start-up risks, and new regulations and environmental charges are not negligible either. For example, the implementation of the SOx Emission Control Area (SECA) in the North Sea and Baltic Sea involves stricter limits for sulphur in marine fuel, which means a higher cost for bunkering. Stricter environmental regulations are important to accomplish significant reductions in emissions from shipping but need to be combined with a wish to move cargo from land to sea.

#### **4.5 The potential for the Short Sea Shipping Shuttle concept**

The Short Sea Shuttles do not preliminarily aim at economies of scale but rather aim to find their niche market by offering a high service level. The Short Sea Shuttles should be an integrated part of a longer transport chain, requiring a connection to the existing road and railway systems and deep-sea services, which are important success factors suggested by Heaver (2001). This allows transport buyers to get better access to their global markets and facilitates adaptation of their logistics systems and better planning. The concept also puts special requirements on fast and efficient transshipment between sea and rail, which many of the smaller ports do not have. There are techniques available that could be implemented to overcome this problem.

Another problem related to infrastructure is capacity deficiencies around port cities. This implies that there is a risk of delays and longer transport times that needs to be reconciled. Congestion and capacity deficiencies are, however, not only an issue for the Short Sea Shuttles but rather an issue for the whole transport system (see e.g. Parola and Scio-

machen, 2005). Finally, the potential volumes around the Baltic Sea were discussed at the workshops. The fairly low present volumes were described by the workshop participants as one of the major disadvantages for the implementation of short sea shipping in the near future.

Freight transport is highly contextual and different segments serve shippers with quite diverse demand patterns. Short Sea Shuttles aim at combining intra-regional flows of goods loaded in standardised load units (e.g. containers) with flows of standardised load units as part of deep sea shipping. This somewhat limits the scope of transport demands that need to be fulfilled. The estimated potential volumes should not be interpreted as “added” to the existing system of feeder services since most of these volumes are already using the respective ports for trans-shipment. However, a modal shift from land-based transportation is also expected to some extent as argued by PROPS (2008) as well.

The most suitable ports for the Short Sea Shuttles are the ones with large potential volumes, both in the port cities and in the hinterland. Potential volumes include both currently containerised cargo flows transported by other transport systems, including feeder shipping, and cargo not containerised today but likely to be so in the future. In the context of Scandinavia, the potential would be especially interesting for the extension of existing rail shuttles with sea links connecting other countries and regions surrounding the Baltic Sea.

## 5 Conclusions

In this paper, the Short Sea Shipping concept has been developed and defined as: *High-frequency short sea liner shipping of standardised load units that is highly integrated into transport chains with functional inland connections*. The definition of the Short Sea Shipping concept includes both the important demands on frequency and fixed schedules (liner shipping) as well as supply chain integration. These characteristics distinguish Short Sea Shuttles from traditional feeders.



The potential associated with the concept is substantial. The realisation of the concept could result in new markets for short sea shipping and that future capacity shortage in rail and road infrastructure could be handled. In addition, the integration of Short Sea Shuttles with existing dry ports and well-developed rail connections could lead to a gradual development of the “motorways of the sea”. Short Sea Shuttles, resembling feeder shipping, aim at improving transportation and trade in Northern Europe to better integrate the countries around the Baltic Sea and the North Sea. The successful implementation of Short Sea Shuttles would also mean that road transportation in Southern and Western Sweden could be reduced. Intermodal transport has far from reached its full market potential in some markets; therefore, better coordination between different modes of transport needs to be given higher priority.

However, the concept faces challenges. The major challenges are new environmental regulations that will result in higher propulsion costs for ship operators and the start-up risk and risk for low profitability due to low volumes. These mean additional costs for an industry that already currently faces downward pressure on price and low profitability in many segments.

## Table of references

- Bask, A., Roso, V., Andersson, D. and Hämäläinen, E., 2014.  
Development of seaport -dry port dyads: Two cases from Northern Europe. *Journal of Transport Geography*, 39(2014), pp. 85-95.
- Behrens, K., Gaigné, C., Ottaviano, G. I. P. and Thisse, J.-F., 2006. How density economies in international transportation link the internal geography of trading partners. *Journal of Urban Economic*, pp. 248-263.
- Bergqvist, R., 2012. Hinterland Logistics and Global Supply Chains. In: D-W. Song and P. Panayides eds. *Maritime logistics – A complete guide to effective shipping and port management*. Kogan Page. pp. 211-230

- Bergqvist, R., Wilmsmeier, G. and Cullinane, K., 2013. Introduction – A global perspective on dryports. In: R. Bergqvist, G. Wilmsmeier and K. Cullinane, eds. *Dryports – A global perspective, challenges and developments in serving hinterlands*. Ashgate Publishing Limited. pp. 1-12.
- Branch, A. E., 1998. *Maritime economics management and marketing*. Cheltenham: Stanley Thornes Ltd.
- Chang, Y.-T., Lee, S.-Y. and Tongzon, J. L., 2008. Port selection factors by shipping lines: Different perspectives between trunk liners and feeder service providers. *Marine Policy*, 32, pp. 877-885.
- Christiansen, M., Fagerholt, K., Nygreen, B. and Ronen, D., 2007. Maritime transportation. In: C. Barnhart and G. Laporte eds. *Handbook in OR & MS*. New York.
- Copenhagen Economics, 2012. *Svensk sjöfarts konkurrenssituation (The competitive situation for Swedish shipping)*. Copenhagen: Copenhagen Economics.
- Criley, J. and Dean, C.J., 1993. Short sea shipping and the world cargo-carrying fleet – a statistical summary. In: Ir.N. Windjnlst, C. Peeters, and P. Liebman, eds. *European shortsea shipping, proceedings from the first European roundtable conference on shortsea shipping*. LLP, London, pp. 1-21.
- Cullinane, K. and Khanna, M., 2000. Economies of scale in large containerships: optimal size and geographical implications. *Journal of Transport Geography*, 8, pp. 181-195.
- Douet, M. and Cappuccilli, J.F., 2011. A review of short sea shipping policy in the European Union. *Journal of Transport Geography*, 19, pp. 968-976.
- European Commission, 1999. *The development of short sea shipping in Europe: A dynamic alternative in a sustainable transport chain. Second two-yearly progress report*. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions. COM (99) 317 final, 29 June.

- European Commission, 2009. Maritime transport: short sea shipping, [online] Available at: [http://ec.europa.eu/transport/maritime/short\\_sea\\_shipping\\_en.htm](http://ec.europa.eu/transport/maritime/short_sea_shipping_en.htm) [Accessed 29 March 2014].
- European Commission, 2011. European strategies, roadmap to a single European Transport area - Towards a competitive and resource efficient transport system; White Paper.
- Gelareh, S. and Pisinger, D., 2011. Fleet deployment, network design and hub location of liner shipping companies. *Transportation Research Part E: Logistics and Transportation Review*, Vol. 47, No. 6, pp. 947-964
- Gouveral, E., Slack, B. and Franc, P., 2009. Short sea and deep sea shipping markets in France. *Journal of Transport Geography*, 18(1), pp. 97-103
- Ha, M-S., 2003. A comparison of service quality at major container ports: implications for Korean ports. *Journal of Transport Geography*, 11(2), pp. 131-137.
- Heaver, D. T., 2001. The evolving roles of shipping lines in international logistics. *International Journal of Maritime Economics*, 4, pp. 210-230.
- Iglebaek, O., 2008. Containers challenge rails and roads. *Journal of Nordregio*, 8(2), pp. 4-8.
- Imai, A., Shintani, K. and Papadimitriou, S., 2009. Multi-port vs. hub-and-spoke port calls by containerships. *Transportation Research Part E*, 45(5), pp. 740-757.
- Mangan, J., Lalwani, C. and Fynes, B., 2008. Port-centric logistics. *The International Journal of Logistics Management*, 19(1), pp. 29-41.
- Marlow, P.B., Pettit, S.J. and Scorza, A.D., 1997. Short sea shipping in Europe. analysis of the UK, Italian markets. Occasional Papers No. 42. Department of Maritime Studies and International Transport, Cardiff.
- MarNIS, 2006. Simplification of information flows, EU-project MarNIS, Deliverable reference number: DI.3.C.
- Mori, T. and Nishikimi, K., 2002. Economies of transport density and

- industrial agglomeration. *Regional Science and Urban Economics*, 32, pp. 167-200.
- Notteboom, T. E., 2002. Consolidation and contestability in the European container handling industry. *Maritime Policy & Management*, 29(3), pp. 257-269.
- Notteboom, T. E., 2006. Strategic challenges to container ports in a changing market environment. *Research in Transportation Economics*, 17, pp. 29-52.
- Notteboom, T. E. and Vernimmen, B., 2009. The effect of high fuel costs on liner service configuration in container shipping. *Journal of Transport Geography*, 17(5), pp. 325-337.
- Paixaõ, A.C. and Marlow, P.B., 2002. Strengths and weaknesses of short sea shipping. *Marine Policy*, 26, pp. 167-178.
- Paixão, C. and Marlow, P. B., 2003. Forth generation ports - a question of agility? *International Journal of Physical Distribution & Logistics Management*, 33(4).
- Paixaõ C. and Marlow, P.B., 2005. The competitiveness of short sea shipping in multimodal logistic chains: Service attributes. *Maritime Policy and Management*, 32(4), pp. 363-382.
- Parola, F. and Sciomachen, A., 2005. Intermodal container flows in a port system network: Analysis of possible growths via simulation models. *International Journal of Production Economics*, 97(1), pp. 75-88.
- PROPS, 2008. Analysis of EU goals and policies with references to SSS promotional issues. Deliverable D1.1.
- Robinson, R., 2002. Ports as elements in value-driven chain systems: The new paradigm. *Maritime Policy & Management*, 29(3), pp. 241-255.
- Roso, V., Woxenius, J. and Lumsden, K., 2009. The dry port concept: Connecting container seaports with the hinterland. *Journal of Transport Geography*, 17(5), 338-345.

- Stopford, M., 2009. *Maritime economics*. 3rd ed. London: Routledge.
- Stuart, I.; McCutcheon, D.; Handfield, R.; McLachlin, R. and Samson, D., 2002. Effective case research in operations management: A process perspective. *Journal of Operations Management*, 20(5), pp. 419-433.
- Song, D.-W., 2002. Regional container port competition and co-operation: the case of Hong Kong and South China. *Journal of Transport Geography*, 10(2), pp. 99-110.
- Stopford, M., 2009. *Maritime economics*. 3rd ed. London: Routledge.
- Stuart, I.; McCutcheon, D.; Handfield, R.; McLachlin, R. and Samson, D., 2002. Effective case research in operations management: A process perspective. *Journal of Operations Management*, 20(5), pp. 419-433. Styhre, L., 2010. Capacity utilisation in short sea shipping, PhD thesis. Chalmers University of Technology, Gothenburg, Sweden.
- UNCTAD, 2013. Review of Maritime Transport 2013, UNCTAD, Geneva.
- Woxenius, J., 2012. Flexibility vs. specialisation in ro-ro shipping in the South Baltic Sea. *Transport*, 27(3), pp. 250-262.

## Appendix A. Findings from the interviews

<b>Respondents</b>	<b>Expected function</b>	<b>Type of cargo</b>	<b>Implementation requirements</b>	<b>Input to the SWOT-analysis</b>	<b>Vessel size [TEU]</b>
<b>Feeder operator</b>	Cargo shift from land to sea.	Warehouse to warehouse.	Existing cargo flow. Operator.	Environmental friendly. Increased lead time.	700 - 1000
<b>Ocean shipping company</b>	Enhanced shipping profile. Possibility to reposition empty containers. Additional transport concept in the region.	Non JIT-products. Low value cargo such as steel, forest products, chemicals.	Vessels.	Enhanced possibilities. Flexibility. Capacity to handle large batches. Decreased punctuality. Increased lead time.	
<b>Satellite port</b>	Increased cargo throughput. Possibility to develop a reliable transport system.	All except JIT products. Manufacturing goods aimed for production. Food and products for supermarkets.	Need for large base of customers in start-up process. Organised as financially competitive concept.	More cargo – increased income. Punctual and reliable transport mode for customers. Non-existing concept. Conservatism in the industry and amongst potential customers.	
<b>Hub port</b>	Attract new cargo.	All except JIT products.		Increased utilisation of the port.	
<b>Cargo owner</b>	Possibility for large batches.	Non-time-sensitive cargo.	Flow of suitable cargo.	More transport options. Increased lead time.	
<b>Maritime consultant</b>	Cargo shift from land to sea.	Non-time-sensitive cargo.	Public-Private partnership. Political will.	Existing infrastructure. Conservatism.	700 - 1200
<b>Freight forwarder</b>	Cargo shift from land to sea. Additional transport alternative.	Low-value cargo.	Well integrated in supply chains. Public-private cooperation.	Possible environmental benefits. Flexibility.	

## Appendix B. The Nordic, Baltic and Russian container markets

COUNTRY	2000	2004	2005	2006	2007
St Petersburg	233 000	773 000	1 119 000	1 450 000	1 682 000
Kaliningrad	20 000	60 000	90 000	115 000	188 000
<b>Russia total</b>	<b>253 000</b>	<b>833 000</b>	<b>1 209 000</b>	<b>1 565 000</b>	<b>1 870 000</b>
Helsinki	376 500	500 000	460 000	420 000	431 000
Kotka	192 000	326 000	367 000	462 000	571 000
Others	360 000	487 500	485 000	540 500	605 500
<b>Finland total</b>	<b>928 500</b>	<b>1 313 500</b>	<b>1 312 000</b>	<b>1 422 500</b>	<b>1 607 500</b>
Göteborg	615 000	736 000	788 000	820 000	841 000
Helsingborg	97 500	99 000	108 000	136 000	200 000
Others	208 500	226 500	232 000	322 500	359 000
<b>Sweden total</b>	<b>921 000</b>	<b>1 061 500</b>	<b>1 128 000</b>	<b>1 278 500</b>	<b>1 400 000</b>
Aarhus	330 000	391 000	396 000	427 000	504 000
Copenhagen	112 500	113 000	125 000	138 000	148 000
Others	65 000	82 500	88 500	95 000	101 000
<b>Denmark total</b>	<b>507 500</b>	<b>586 500</b>	<b>609 500</b>	<b>660 000</b>	<b>753 000</b>
Oslo	138 500	174 000	170 500	170 000	194 000
Larvik	35 500	40 000	42 500	45 000	50 000
Others	322 500	372 000	415 500	423 500	430 000
<b>Norway total</b>	<b>496 500</b>	<b>586 000</b>	<b>628 500</b>	<b>638 500</b>	<b>674 000</b>
Gdynia	188 500	377 000	400 000	461 000	500 000
Gdansk	18 000	41 000	70 000	76 000	94 000
Others	18 500	23 000	27 000	30 000	50 000
<b>Poland total</b>	<b>225 000</b>	<b>441 000</b>	<b>497 000</b>	<b>567 000</b>	<b>644 000</b>
Reykjavik	140 000	146 000	156 000	160 000	160 000
Others	175 000	190 000	200 000	200 000	200 000
<b>Iceland total</b>	<b>315 000</b>	<b>336 000</b>	<b>356 000</b>	<b>360 000</b>	<b>360 000</b>
Klaipeda	40 000	174 000	214 000	232 000	321 000
<b>Lithuania total</b>	<b>40 000</b>	<b>174 000</b>	<b>214 000</b>	<b>232 000</b>	<b>321 000</b>
Riga	85 000	153 000	156 000	160 000	212 000
Ventspils	500	500	1 000	14 500	17 000
Others	2 000	2 500	3 000	8 000	8 000
<b>Latvia total</b>	<b>87 500</b>	<b>156 000</b>	<b>160 000</b>	<b>182 500</b>	<b>237 000</b>
Tallinn	77 000	113 000	128 000	152 000	200 000
<b>Estonia total</b>	<b>77 000</b>	<b>113 000</b>	<b>128 000</b>	<b>152 000</b>	<b>200 000</b>
<b>TOTAL</b>	<b>3 851 000</b>	<b>5 600 500</b>	<b>6 242 00</b>	<b>7 058 000</b>	<b>8 066 50</b>

Source: Based on interviews and website research

Source: Iglebaek, O. (2008)

# Cargo bundling – Contribution to the Sustainable Transportation

Marta Katarzyna Kołacz  
Erasmus University, Rotterdam



## **Abstract**

The concept of a sustainable transportation which is in the sphere of interests of the European Union together with the need to reduce costs of shipment and new entities emerging on the market result in giving more attention to the concept of cargo bundling performed by distribution companies. While it is proven that cargo bundling ensures efficiency gains, there is no certainty of the legal relations between parties involved. The following paper presents contentious points which highlight the uncertainties confronted by bundling cooperation.

## **Key words**

Cargo bundling, liability issues, networks.

## **Contact**

Marta Katarzyna Kołacz, PhD Candidate, Erasmus University Rotterdam, The Netherlands, Master of Laws Gdansk University Poland; LL.M. Commercial and Company Law Erasmus University Rotterdam The Netherlands.

E-mail: [m.k.kolacz@gmail.com](mailto:m.k.kolacz@gmail.com)

# 1 New demands

The introduction of the container has considerably supported the growth of international commerce.<sup>1</sup> In order to seek further growth and make it more sustainable, a solution is to be found for some problems that are inherent to the specific characteristics of the container. The standardization of containers' size made them relatively large.<sup>2</sup> This creates a high threshold for small enterprises to start exporting (to new markets) and makes it more difficult for medium size enterprises to respond immediately to changing demands as the volume of cargo might not allow for example for weekly shipments.

The standardisation of the vehicles' capacity as such is another factor which needs to be taken into consideration. For example, the Directive of 25 July 1996 (96/53/EC) laying down for certain road vehicles circulating within the Community the maximum authorized dimensions in national and international traffic and the maximum authorized weights in international traffic by allowing increased vehicle length and weight on appointed road networks, has laid down new standards for the European transportation. Its aim was to provide a possibility to combine the existing loading units (modules) into longer and heavier vehicle combinations in order to lower the number of trucks for the same transport work. However, in order to assure complete efficiency, the average load utilization<sup>3</sup> must be increased especially for the return way.

These characteristics result in multiple problems in practice which are inherent to the issue of sustainability. Traditionally, answers to these problems are offered by carriers (operating as consolidators) who bundle

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<sup>1</sup> Albert Veenstra, Juha Hintsa, Gerwin Zomer, "Smart Container Chain Management - Transport including Aeronautics", 7th Framework Programme Theme 7 (2010): 124-127, <http://www.smart-cm.eu/LinkClick.aspx?fileticket=x5bKRMvx2p4%3D&tabid=69&mid=433>

<sup>2</sup> World Shipping Council, "Containers", <http://www.worldshipping.org/about-the-industry/containers>

<sup>3</sup> Kenth Lumsden, "Truck Masses and Dimensions, Impact on Transport Efficiency", ACEA (2006): 15, [http://www.acea.be/uploads/publications/SAG\\_8\\_Trucks\\_Masses\\_Dimensions.pdf](http://www.acea.be/uploads/publications/SAG_8_Trucks_Masses_Dimensions.pdf)

cargo of different shippers and look for a retour cargo. However, for bigger companies, which can execute logistic functions in-house and for small companies lacking bargaining strength, the costs of contracts with such consolidator might be disproportionate in comparison with shipping from the beginning full load containers.<sup>4</sup> Due to that, the practise to bundle cargo before engaging a carrier is present.

The shippers who operate on the same shipping lines collaborate, organize polling of their cargo, send it to a common destination and achieve by this efficiency gains. Cargo bundling can be beneficial for parties, but also for the society as such consolidation can limit external effects of the transportation. Because of these benefits for the parties and due to the fact that the European Union<sup>5</sup> and local governments strongly support eco-friendly initiatives, several widescale projects are ongoing or were successfully accomplished last years. Among others there are initiatives with local origins<sup>6</sup> but still a vast majority is funded from the European Union, for example from the EU 7th Framework Programme<sup>7</sup>.

As a result, representatives of the shipping industry know how to load and bundle effectively, that it reduces costs, that it is to the high extent environmental friendly and that it is profitable to outsource this activity. However, there is almost no knowledge of how to organize it from the legal point of view. Undoubtedly, awareness of the legal pitfalls, thus allowing to factor in resulting risk exposure, can contribute to cargo bundling gaining in popularity.

The following paper aims to present an overview of the already achieved results concerning the cargo bundling and efficient transportation and further to present the legal problems which still cast unfavorable light on the investigated ideas.

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<sup>4</sup> Konstantinos Selviaridis, Martin Spring, Vassilios Profillidis, George Botzoris, "Benefits, Risks, Selection Criteria and Success Factors for 3PLs", *Maritime Economics & Logistics* 10 (2008): 380–392.

<sup>5</sup> Community Research and Development Information Service, [http://cordis.europa.eu/fp7/home\\_en.html](http://cordis.europa.eu/fp7/home_en.html)

<sup>6</sup> Eg. Click A Point <https://www.clickapoint.de>, Vlaanderen In Actie <http://www.vlaandereninactie.be/>

<sup>7</sup> Research and Innovation Funding [http://ec.europa.eu/research/fp7/index\\_en.cfm](http://ec.europa.eu/research/fp7/index_en.cfm)

## 2 Knowledge that it is environment friendly

The problem of empty running vehicles (27% in 1982<sup>8</sup>, 30% in 2005<sup>9</sup>, 24% in 2009 and 2010<sup>10</sup>) together with the average loading of 57% of the rest of them and 43% of the overall efficiency<sup>11</sup> is influencing the scale of the traffic congestion.<sup>12</sup> Furthermore, in 2009 transport contributed 24% to greenhouse gases emissions<sup>13</sup> and more than 30% to the air pollution<sup>14</sup>. Currently, it is 96% dependent on oil for its energy needs.<sup>15</sup>

Cargo bundling operations enable shipping and transportation companies to respond to the aforementioned problems and operate more ecologically. It has been widely proven that even the slightest improvement of the modal split<sup>16</sup> and the number of empty running vehicles may result in the reduction of the total energy cost of transportation (approximately 2.3 million liters of diesel) and consequently, in decreasing the CO<sub>2</sub> emission (by 6.5 million tones CO<sub>2</sub>).<sup>17</sup>

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<sup>8</sup> Ken Cmilt, “Empty running: a waste of space?” *CILT UK* (2008): 43, <http://www.transportplanningsolutions.com/pdfs/empty-running.pdf>

<sup>9</sup> EUROSTAT <http://ec.europa.eu/eurostat>

<sup>10</sup> Ibid.; World Economic Forum, “Supply chain decarbonization – The role of logistics and transport in reducing supply chain carbon emissions.” *Logistics and Transport Partnership Programme, with support from Accenture* (2009): 19, [http://www3.weforum.org/docs/WEF\\_LT\\_SupplyChainDecarbonization\\_Report\\_2009.pdf](http://www3.weforum.org/docs/WEF_LT_SupplyChainDecarbonization_Report_2009.pdf)

<sup>11</sup> World Economic Forum, „Supply chain decarbonization – The role of logistics and transport in reducing supply chain carbon emissions.” *Logistics and Transport Partnership Programme, with support from Accenture* (2009): 19, [http://www3.weforum.org/docs/WEF\\_LT\\_SupplyChainDecarbonization\\_Report\\_2009.pdf](http://www3.weforum.org/docs/WEF_LT_SupplyChainDecarbonization_Report_2009.pdf)

<sup>12</sup> EUROSTAT, “Transport Database”, <http://ec.europa.eu/eurostat/web/transport/data/database>

<sup>13</sup> International Energy Agency, “Energy Technology Perspectives 2010”: 423, <http://www.iea.org/publications/freepublications/publication/etp2010.pdf>

<sup>14</sup> European Environment Agency, “Laying the foundations for greener transport, TERM 2011: transport indicators tracking progress towards environmental targets in Europe” (2011): 31.

<sup>15</sup> Ibid., footnote 26.

<sup>16</sup> EUROSTAT, “Modal Split of Freight Transport”, <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tsdtr220&plugin=1>

<sup>17</sup> Get Service Project, <http://getservice-project.eu/>

### 3 Knowledge of effective and economical solutions for bundling of orders that are less than one container load.

The cargo bundling is a process of transporting cargo, which belongs to cargo flows with different origins and destinations in common transport or load units on their common routes. Its main advantages are: the increased level of loading of the transport units but decreased transport frequency. Furthermore, it not only reduces costs but also improves the quality of intermodal services.<sup>18</sup>

As the costs relating to trade operations are changing continuously, the shipping sector is incessantly looking for the optimal bundling concepts, especially for less than container loads. Several methods of loading have been investigated<sup>19</sup> which as a consequence provide the information to the industry where to bundle, how to organize it and how to make it efficiently<sup>20</sup>. Each of the presented solutions can facilitate cargo bundling on different stages of the shipment.

With regard to the place of bundling hubs and intermodal terminals are mostly taken into consideration. They obviously streamline transport coordination and foster cooperation between industries involved in the chain.<sup>21</sup> A container transferium is an example of these initiatives. “It is an inland container terminal located near a port and its functional pattern is aimed at improving efficiency in and around the sea-port by means of combining container flows on the port-transferium link.”<sup>22</sup> Due to fre-

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<sup>18</sup> Albert Veenstra, Juha Hintsa, Gerwin Zomer, “Smart Container Chain Management - Transport including Aeronautics”, *7th Framework Programme Theme 7* (2010): 7.

<sup>19</sup> F. Minarini, P. Mercier-Handisyde, “Terminet Project,” Delft University of Technology, (2000): 9-11, <http://www.transport-research.info/Upload/Documents/200310/terminet.pdf>

<sup>20</sup> e.g. David Pisinger, “Heuristics for the container loading problem:”, *European Journal of Operational Research* 141 (2002): 382–392.;

<sup>21</sup> Fei-Yan Shiao, Shangyao Yan, You-Lin Shih, “Optimal cargo container loading plans under stochastic demands for air express carriers”, *Transportation Research Part E* 44 (2008): 555–575.

<sup>22</sup> Market-up Project, ‘Maritime and Inland Waterway Transport Container

quent barge connections with the port, it serves trucks away from the port and eventually contributes to the reduction of the costs per unit of shipped goods. A container transferium is managing the movements of the local cargo volumes and plays a part as a bundling hub lowering the number of trucks going to the hinterland.<sup>23</sup> Above all, it adjusts reloads according to the transport leg and due to that removes barriers of reaching new markets.

Moreover, such bundling terminals reduce the shipment costs because of speeding up transportation activities by the usage of improved technologies such as for example shuttle trains.<sup>24</sup> Hubs and intermodal terminals are supporting the policy of the European Union favoring the modal shift from road towards rail and sea because all these modes of transport can cooperate in those strategic places.<sup>25</sup>

In addition, the management methods have been investigated. In this area research objectives include tracking technologies and communication systems. The efficient scheduling of the logistics through the IT systems results in time saving as well as cost, administrative and environmental benefits. It means that they contribute to the process of decreasing of the CO<sub>2</sub> emission per freight movement even more than 15%.<sup>26</sup>

Consequently, the Directive 2010/40/EU adopted on 7 July 2010 on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of trans-

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Transferium show case', (2014): 2, [www.market-up.org](http://www.market-up.org)

<sup>23</sup> Ibid.: 1-8.

<sup>24</sup> F. Minarini, P. Mercier-Handisyde, 'Terminet Project', Delft University of echnology, (2000): 19-20, <http://www.transport-research.info/Upload/Documents/200310/terminet.pdf>

<sup>25</sup> European Rail Research Advisory Council, "ERRAC WORK PACKAGE 02: Encouraging modal shift (long distance) and decongesting transport corridors - Draft Freight Roadmap" (2011): 12. [http://www.transport-research.info/Upload/Documents/201204/20120404\\_120654\\_619\\_errac\\_freight\\_roadmap\\_2011\\_final\\_draft\\_version.pdf](http://www.transport-research.info/Upload/Documents/201204/20120404_120654_619_errac_freight_roadmap_2011_final_draft_version.pdf)

<sup>26</sup> „Important savings in costs and CO<sub>2</sub> for Baxter and Donaldson through orchestrated co-loading of transports between Belgium and Ireland". Press release. Brussels, 13.02.2013. <http://www.trivizor.com/download/Press%20Release%20BAXTER%20DONALDSON%20TRI-VIZOR%20ECS.pdf>

port supports the exploitation of innovative transport technologies across Europe. The larger their distribution, the higher the value of a transport network is raised for every user belonging to it. The usage of IT systems has increased the effective communication from multiple vehicles and broaden the possibilities to penetrate the market through the advanced notification procedures. In the long run, parties can develop jointly profitable allocations of orders.<sup>27</sup>

Several studies have developed systems which integrate advanced communication and precise navigation and provide effective location and mobility applications (freight management, dangerous goods transportation control, intermodal transport).<sup>28</sup> Apart from that, web platforms of services for the logistics and freight transport industry are widely popular due to their simplicity, practicality and providing the information both to the supply and the demand side.

## 4 Knowledge that it is wise to outsource it

It is the case that whereas own-account operators are sending vehicles to deliver their own goods and then returning empty, third-party operators<sup>29</sup> are able to access a greater variety of companies and easily find a return load.

The third party operators possess necessary expertise to handle complex activities. Thus, they can make a decision about whether the order in consideration can be transported or not with the fleet on hand. All the dynamics of the logistics system are taken into consideration including the previously accepted orders, the positions of the resources,

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<sup>27</sup> Booiman Henk-Jan (eds), Cooperative Vehicle- Infrastructure Systems Costs, benefits and business Models, CVIS Project (2010): 72 – 73.

<sup>28</sup> eg. Valentin Robu, Han Noot, Han La Poutre, Willem van Schijndel, “A multi-agent platform for auction-based allocation of loads in transportation logistics”, *Expert Systems with Applications* 38 (2011): 3483–3491;

<sup>29</sup> Due to the fact that there is a disagreement concerning the exact meaning of 3PLs and 4PLs, here by using 3PLs I mean all logistic providers.

the physical capacities of the containers, governmental regulations and updated road information. While making their planning decisions, they focus also on the load consolidation alternatives in order to find an economic way of transportation. Consequently, bundling of orders using an intermediary can result in saving approximately up to 20% of the costs.<sup>30</sup>

## **5 Little knowledge how to organize it legally**

The strength of the supply chain depends on every link in the network. When one party in the network stops to contribute, the service provided can collapse or at least cause accounting losses. Therefore, it will be necessary that every party, apart from receiving a fair share of the profit generated by the chain, knows what are the legal consequences of its commitment. The following paper in the entire hereunder provided content examines situations where the enterprises agree between themselves and sign a multilateral agreement whose subject is the cargo bundling and shipping it to common destination (direct bundling) and where the parties conclude the same agreement but engage simultaneously a professional party – the Transport Orchestrator who administers their cooperation (indirect bundling).

In order to establish the legal consequences, parties must know what kind of liability can be imposed on them in case of the aforementioned multilateral agreements, how they can be classified within the chain, and finally if they can exonerate themselves. This is a matter of vital importance especially when the international cooperation is the everyday life. With regard to that, the following issues should be researched: the basis of the cooperation and within this the existence of a partnership or mere agreements (5.1); the role of certain members particularly as far the

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<sup>30</sup> Sander van der Putten, Valentin Robu, Han La Poutré, “Automating Supply Chain Negotiations using Autonomous Agents: a Case Study in Transportation Logistics”, ACM (2006): 1511, [http://users.ecs.soton.ac.uk/vr2/putten\\_transportation.pdf](http://users.ecs.soton.ac.uk/vr2/putten_transportation.pdf)



existence of the agency, trust and transport intermediation are concerned (5.2); compliance with antitrust regulations (5.3); and the scope of the liability in case of a delay in delivery, damaged goods or partner's bankruptcy (5.4).<sup>31</sup>

## 5.1 Bundling cooperation based on the existence of a partnership or mere agreements

As there is no unified and obligatory European contract law<sup>32</sup> and consequently courts autonomously qualify contracts according to divergent national rules<sup>33</sup>, it may turned out that the same bundling agreement in different countries can be treated as separate bilateral agreements or be considered as a more complex structure. In case of a conflict, normally as a first step, the court seized will attempt to qualify the contract as a certain type as it facilitates the process of ascertaining the intention of the parties involved.<sup>34</sup> In consequence, the practical considerations regarding the qualification of the multilateral bundling agreement must be analyzed. The analysis starts with the partnership since it is the core legal instrument oscillating between simple contracts and corporate structures (5.1.1) and then based on that continues with the concept of networks as it seems to be the evolving trend – some European jurisdictions (5.1.2).

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<sup>31</sup> The analysis in the paper takes into consideration the following jurisdictions: *olish, German, English and Belgian*.

<sup>32</sup> Existing: Common Frame of Reference, Draft Common Frame of Reference ([http://ec.europa.eu/justice/policies/civil/docs/dcfr\\_outline\\_edition\\_en.pdf](http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf)) and Principles of European Contract Law ([http://ec.europa.eu/justice/contract/files/european-private-law\\_en.pdf](http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf)) are not legally binding instruments.

<sup>33</sup> Bettina Heiderhoff, Grzegorz Żmij, eds., *Interpretation In Polish, German and European Private Law* (Munich: European Law Publishers, 2011), 64.; Communication from the Commission to the European Parliament and the Council, *A more coherent European Contract Law, An Action Plan*, Brussels 2003, p. 8-13, [http://www.isda.org/c\\_and\\_a/pdf/com\\_2003\\_68\\_en.pdf](http://www.isda.org/c_and_a/pdf/com_2003_68_en.pdf)

<sup>34</sup> Hugh Collins, ed., *Standard Contract terms in Europe – A basis for and a challenge to European Contract Law*, (Kluwer Law International, 2008), 285.

### 5.1.1 Cargo bundling agreement as a partnership.

The interactions between the parties indicate that the perception of completely independent contracts must be rejected in favor of more connected relations. The structure resembles rather a partnership. However, in order to be considered as a partnership it must fulfill prerequisites prescribed by the law. To put it in a nutshell, by the establishment of partnership parties oblige themselves to promote the achievement of a common purpose (common business) and make the agreed contributions.<sup>35</sup> The contributions constitute the joint assets of the partners.<sup>36</sup>

The parties of the bundling agreement aim at facilitation of their businesses and look for the possibilities to save on costs. Mostly, they do not want to cooperate within strictly formalized and rigid form. At the same time, it seems unjustified to consider bundled cargo as a constitution of joint co-ownership, especially in the face of transport frequency and multiplicity of consignees. Hence, the issue whether cargo bundling can be considered as a common business with joint assets is to the high extent doubtful. Moreover, it would also be an overstatement to classify potential savings as money profits. The same concerns treating the bundled cargo as required shares. As a result, if there is no will to establish partnership, it cannot be presumed.<sup>37</sup>

The situation is even more complicated when the Transport Orchestrator is engaged. He assumes the responsibility to search the market for companies which regularly ship certain amounts of cargo to common destinations. Then, the Transport Orchestrator is to arrange for those companies to conclude a contract under which they undertake to provide a certain quantity of goods to be shipped per certain period of time. Furthermore, he prepares a loading plan, once a number of shippers is engaged. Finally, a carrier is required to carry out the shipments with a common agreement between him and all the shippers involved. For

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<sup>35</sup> e.g. art. 860 Polish Civil Code, section 705 German Civil Code.

<sup>36</sup> e.g. art. 863 Polish Civil Code, section 718 German Civil Code,

<sup>37</sup> Peter Shears and Graham Stephenson, *James' Introduction to English Law*, Butterworths (Thirteenth edition 1996), p. 92

the retour trip the Transport Orchestrator is looking for another set of merchants.<sup>38</sup> Therefore, he seems to prefer flexible relations, where there is no contributions constituting joint assets, allowing him because of that to cooperate with many different entities and not necessarily with strictly enumerated traders.

### 5.1.2 Cargo bundling agreement as a network

An in-depth analysis of the correlations seems to depict the structure which is something in between simple contracts and a corporate organization and is based more on cooperation and self-organization.<sup>39</sup> Inasmuch as the network structure seems better for the attention to the single party's own interest, its members as independent entities are required to carry out their own interest to the extent that it does not harm the network. Further, there is no common property. This leads to the conclusion that the network gives more autonomy as to the commercial relations, allowing for the flexible creation of entry exit/ rules<sup>40</sup> which is contradictory to the standard corporate forms.

However, it is only a concept not the legal institution and further, national legislators are rather cautious with establishing new rules for networks.<sup>41</sup> As a result, regulations for bilateral agreements or possibly concerning solidarity of debtors are applicable. On the other hand, the courts and doctrine move with the times and respond quicker to the new forms of the trade cooperation. Thus, they play a huge role in recognizing networks.

Unfortunately, the doctrine is to a high extent incongruent with the establishment of a coherent concept of collectivity: *groupe de contrats* in

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<sup>38</sup> e.g. the World's First Cross Supply Chain Orchestrator®, [www.trivizor.com](http://www.trivizor.com)

<sup>39</sup> Gunther Teubner, "And if I by Beelzebub cast out Devils,...": An Essay on the Diabolics of Network Failure', *German Law Journal* 4 (2009): 395-416.

<sup>40</sup> Gunther Teubner, "The Many-Headed Hydra: Networks as Higher-Order Collective Actor" in *Corporate Control and Accountability Changing Structures and the Dynamics of Regulation*, eds. Joseph McCahery et al. (Oxford University Press, 1993), 42-50.

<sup>41</sup> e.g. in UK The Package Travel, Package Holidays and Package Tours Regulations 1992 reg.15.

the French related countries, connected contract in the countries influenced by the English tradition, *Vertragsverbund* in the German speaking countries.<sup>42</sup> The national courts, while extending the rules related to typical bilateral obligations are also driven by different reasons. For example, for the British courts the issue of proximity between the parties and their contracts allows to sue third parties in tort<sup>43</sup>. In Belgium, on the other hand, the liability of third party may arise out of the fact that the multiparty agreement, in which each party holds its own legal status and their rights and obligations are indivisible linked together, cannot be divided into sub-agreements.<sup>44</sup> Germany though, gives an opportunity to bind somebody by piercing the veil when the claim in tort is impossible.<sup>45</sup>

Relations within the bundling agreement can influence as such also the nullity sanction. It must be underlined that although generally an unlawful cause on the side of one party is sufficient to ensure that the entire contract is void (a direct application of the rules for bilateral agreements), some authorities indicates that such agreement shall be found void only if the party responsible for the unlawful cause was essential for the contract.<sup>46</sup>

To summarize, in case where there is no certain will as to a partnership establishment, the structure placed somewhere in between the bilateral contracts and corporate form results in emerging unclear situations differently interpreted by national courts.

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<sup>42</sup> Fabrizio Cafaggi, “Contractual Networks and the Small Business Act: Towards European Principles”, EU Working Papers (2008): 49, [http://cadmus.eui.eu/bitstream/handle/1814/8771/LAW\\_2008\\_15.pdf](http://cadmus.eui.eu/bitstream/handle/1814/8771/LAW_2008_15.pdf)

<sup>43</sup> *Junior Books* [1983] 1 A.C. 520.

<sup>44</sup> Cass. 17 oktober 2008, *Pas.* 2008, 2270, *RW* 2008-09, 1640 (Philips Group case) mentioned in: Ilse Samoy, Sanders Van Lock, „De toepassing van het klassieke verbintenissenrecht op de meerpartijenovereenkomst vanuit Belgisch perspectief” (2014), par. 37, not published as of the day of paper submission on 21.08.2015.

<sup>45</sup> Gunther Teubner, “Hybrid Networks: Constitutionalizing Private Governance Networks” in *Legality and Community*, eds. Robert Kagan and Kenneth Winston, (Berkeley Public Policy Press, 2002), 311-331.

<sup>46</sup> Ilse Samoy, Sanders Van Lock, “De toepassing van het klassieke verbintenissenrecht op de meerpartijenovereenkomst vanuit Belgisch perspectief” (2014), par. 57, not published as of the day of paper submission on 27.08.2015.

## 5.2 Role of certain players

The complicated structure established above becomes even worse when one takes a closer look at the participants of bundling activities. It may turn out that assuming certain obligations means taking unknowingly additional responsibility. Namely, in case of a direct bundling when the one party coordinates all the activities and in the event of the Transport Orchestrator's engagement when he de facto professionally organizes a carrier, other parties and prepares the loading plan. As a result the role of an agent (5.2.1), trustee (5.2.2.) and transport intermediary (5.2.3) must be taken in consideration.

### 5.2.1 Coordinator as an agent

The party (namely the shipper) of the direct bundling agreement may be found to be an agent acting in the name of a bigger group when he imposes on himself the duties to find a carrier and prepare a cycle of deliveries. In consequence, for example in Poland, if he acts without an agreement, the general rules regarding *negotiorum gestio*<sup>47</sup> might be applicable. This means that the coordinator must act to the others' advantage. Nonetheless, a contract and received remuneration can lead to the application of service contract rules<sup>48</sup> whereas proving additionally that he acts in respect of the commercial activities performed by his company can impose on him the status of a freight forwarder.<sup>49</sup> In the end he may also bear the responsibility for the actual carriers.

### 5.2.2 Transport Orchestrator as a trustee

The situation of the Transport Orchestrator must be analyzed taking into consideration different jurisdictions. This is a consequence of a fact that a cooperation for cargo bundling might involve foreign shippers who provide for a return freight. Moreover, carriers might in case of a dispute address courts in another country since the Transport Con-

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<sup>47</sup> Articles 752-757 Polish Civil Code.

<sup>48</sup> Articles 734-751 Polish Civil Code.

<sup>49</sup> Article 794 Polish Civil Code.

ventions allow for forum shopping.<sup>50</sup> In addition, the situation needs a wider perspective since the Transport Orchestrator who is in charge of administering the transport chain, including preparation of the loading plan, acts in fact as a group manager who has goods at his disposal and due to that under certain circumstances may be considered as a trustee.

The principal idea of a trust derived from the English law – precisely equity, supposes that the ownership and management are separated and a trustee can manage a trust fund on behalf of the beneficiaries. He cannot however, make it available to the potential claims from trustee's creditors. The property is administrated according to the rules of a trust instrument and, in case there are no such rules, pursuant to equitable principles. All benefits of a trust go on the account of beneficiaries. In the commercial world trusts protect the assets given to the one party for the benefit of another from the first party's bankruptcy creditors.<sup>51</sup> Trust may also support the commercial transaction where it protects fractional interest.<sup>52</sup>

On the ground of the aforementioned, a creation of a trust for bundling activities seems to be very profitable since there is no need to create very close trade relations with other trading partners, there is no transfer of the ownership of goods and the parties additionally benefit from the established management.<sup>53</sup> One must however keep in mind that the idea of a trust, in spite of the fact that is recognized, is not widely regulated in civil law countries. Usually, regulations concern institutions of the succession or investment law which are only 'trust-like' devices and their creation is possible within the limits of statutory law. The civil law countries with their legal tradition based on the Roman law and categories

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<sup>50</sup> e.g. Art. 33(1) Montreal Convention, Art 31(1) CMR.

<sup>51</sup> Gerry Moffat, Gerry Bean, Rebecca Rebecca, *Trust Law Text and Materials*, (Cambridge University Press 2009), 3-5.

<sup>52</sup> Basil Markesinis, *The British Contribution to the Europe of twenty first century*, (Hart Publishing 2002), 20.

<sup>53</sup> The comparative research conducted under the supervision of CO3 supports the idea of creating structures with the element of trust for the purpose of cargo bundling performed by shippers. Jikke Biermasz, Mirjam Louws, „Legal Framework Transforation”, CO3 Project <http://www.co3-project.eu/wo3/wp-content/uploads/2011/12/CO3-D-2-9-Legal-Framework-excl-contr.-august-2014.pdf>

of mandate<sup>54</sup> and limited forms of property<sup>55</sup> are currently far away from establishing something strictly similar to a common law trust. For example the German *Treuhand* is a construction by which a person (*Treugeber*) transfers the full right *in rem* to another person (*Treuhänder*) who is obliged by a contract to deal with the assets in a specific manner. A *Treuhänder* as a legal owner can transfer the legal title to a third person, whereas a *Treungeber* has only damages claims against the *Treuhänder* in case he violates the contractual obligations.<sup>56</sup> In consequence, instead of the ownership and management separation, there is a clear transfer of property. Therefore, a *Treuhand* under German law would not be suitable for the purpose of bundling activities.

The situation is intensified by the fact that only in five European Union Member States the Convention On The Law Applicable To Trusts And On Their Recognition from 1985 entered into force<sup>57</sup>, whereas one of its aims is to provide rules for the law applicable to the trust and recognition of the trust established by this law. A positive adoption of the Convention would assure that the countries without a trust law have at least the possibility to incorporate it under English law and certainty of its recognition.<sup>58</sup>

In any event, the Transport Orchestrator might be deprived of the trustee status and fall under a strict liability regime. Worse followed, the whole structure might not be considered as a trust and in consequence be opened to unexpected creditors.

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<sup>54</sup> Michele Graziadei, Ugo Lattei, Lionel Smith, *Commercial Trusts In European Private Law*, (Cambridge University Press (2005), 49-55.

<sup>55</sup> E.g. in Germany and Poland: sole property, joint property, co-ownership property.

<sup>56</sup> Alexander Grimm and Johannes Rehahn, "Country Report: Germany", *The Columbia Journal of European Law Online* 18 (2012), 100-102; Frederic Maitland, "Trust and Corporation", 5-12, <http://socserv.mcmaster.ca/econ/ugcm/3ll3/maitland/trusts.pdf>

<sup>57</sup> Status Table [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=59](http://www.hcch.net/index_en.php?act=conventions.status&cid=59)

<sup>58</sup> Jan Smits, *The Making of the European Private Law: Towards a Ius Commune Europaeum as a Mixed Legal System*, (Intersentia, 2002), 261-262.

### 5.2.3 Transport Orchestrator as a transport intermediary

As a consequence it must be checked whether his rights and obligations fit into the existing legal framework for the special types of agents dealing with transportation services (freight forwarders and carriers). It is a result of a substantial differentiation of prerequisites which influence their classification.

By assuming the responsibility to search the market for the carrier and companies which regularly ship cargo to common destinations and further assisting the clients to conclude a contract under which they undertake to provide a certain quantity of goods, the Transport Orchestrator commits himself to arrange the carriage. Thus, he is acting as an agent on behalf of his clients<sup>59</sup>. Despite certain particularities, it is enough to qualify him as a Belgian *commissionair-expediteur*<sup>60</sup> or German *Spediteur*<sup>61</sup>. He performs mainly services ancillary to the carriage as his main task is to search and choose the performing enterprises and by concluding the multilateral agreement, although for the future activities, the conclusion of the carriage contract.

Moreover, the article 460 of the German Commercial Code introduces the freight forwarder performing a groupage service, meaning when he arranges for the dispatch of the goods of different senders on the basis of a contract for a collective consignment concluded for his own account. By collecting companies which regularly ship cargo to common destinations and consolidating their goods, the Transport Orchestrator is merely aiming to group cargoes for monetary efficiency although he is not signing the final agreement with the carrier. Thus, in certain situations he can be considered by a German court to perform collective consignment services and therefore, to have the rights and duties of a carrier.

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<sup>59</sup> In the UK Transport Orchestrator will be judged pursuant the agency rules as a matter of the fact that there is no legislation prescribing the conditions for the carriers and freight forwarders.

<sup>60</sup> Belgian Law of 26 June 1967 on the status of intermediaries in the field of transport (BS 09/27/1967).

<sup>61</sup> Articles 453-454 German Commercial Code.



The outcomes of the aforementioned can be summarized as follows. It is possible to categorize certain activities of the Transport Orchestrator which means that although he offers a new service (cargo bundling) in trust, he can be placed within an old framework for transport intermediaries. As a result he may be obliged by the particular legislation to assume additional duties for example: insuring the goods or clearing customs, due care or loyalty to the principal and in case of non-compliance with those he will be liable. He might also be subject to the compulsory liability.

### 5.3 Cargo bundling as an antitrust safe cooperation

Whereas to the high extent complicated from the point of view of big enterprises, the issue might not bother so much small and medium<sup>62</sup> entities, especially if they come from different product markets.<sup>63</sup> As the harmful effect of a cooperation, or rather a collaboration in terms of competition law, must be considered taking into account article 101 of the Treaty on Functioning of the European Union, the target is to clarify the scope of a ‘free zone’ for cargo bundling activities conducted between Member States.<sup>64</sup>

To say nothing on the rather controversial fact whether the bundling agreement could have an abusive impact on Community trade or not<sup>65</sup>,

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<sup>62</sup> Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises(2003/361/EC): Small enterprise which employs fewer than 50 persons and which have an annual turnover not exceeding 10 million euro, and/or an annual balance sheet total not exceeding 10 million euro. Medium enterprise employs fewer than 250 persons and which have an annual turnover not exceeding 50 million euro, and/or an annual balance sheet total not exceeding 43 million euro.

<sup>63</sup> Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1997:372:FULL&from=EN>

<sup>64</sup> Case 22/78, *Hugin v. Commission* [1979] ECR 1869 established the rule that EU has no authority over the cases where the effect of the agreement comes down to one Member State.

<sup>65</sup> Jikke Biermasz, Mirjam Louws, ‘CO3 Position Paper, Legal Framework Transformation’ CO3 Project (2014) 76, <http://www.co3-project.eu/wo3/wp-content/uploads/2011/12/CO3-D-2-9-Legal-Framework-excl-contr.-august-2014.pdf>

it is important to indicate situations where it is certainly legal. The European Court of Justice (ECJ) in *Völk v. Vervaecke* stated that prohibition from article 101(1) is applicable only if the agreement in question aims at prevention, restriction or distortion of competition within the common market (appreciability). On the other hand, it was also clearly underlined that the agreement of minor importance concluded by the parties with a weak position on the market falls outside this prohibition.<sup>66</sup> Further, the Commission clarified that the appreciability shall be measured in terms of a turnover and market share. To clarify, if the aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed five per cent, and in case of agreements between competitors the aggregate annual Community turnover of the undertakings concerned in the products covered by the agreement does not exceed 40 million Euro, this cannot in principle affect trade between the Member States. The same concerns vertical agreements where the aggregate annual Community turnover of the supplier in the products covered by the agreement does not exceed 40 million Euro.<sup>67</sup>

In addition to that, the Commission Notice (2014/C 291/01) on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) indicates, with the help of market share thresholds, the circumstances in which agreements concluded by market players do not constitute an appreciable restriction of competition. The most important, with regard to the bundling agreement, is the fact that the Notice shields companies whose market shares do not exceed 10% for agreements between competitors or 15% for agreements between non-competitors. Nevertheless, agreements with an anti-competitive object still cannot be exempted.

Furthermore, also block exemptions and Article 101(3) can play a pivotal role in the growing popularity of bundling activities. Since Article

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<sup>66</sup> Case 5/69, *Völk v. Vervaecke* [1969] ECR 295, 302.

<sup>67</sup> Commission Notice – *Guidelines on the effect on trade concept* contained in Articles 81 and 82 of the Treaty (Official Journal C 101 of 27.4.2004) par. 52.

101(3) can be applied to individual cases or to categories of agreements and concerted practices by way of block exemption regulation, those who wish to benefit from it have the burden of proving that all its criteria are satisfied. The agreement must lead to an improvement of goods distribution, allow consumers a fair share of the resulting benefits, contain indispensable restrictions and cannot eliminate competition.<sup>68</sup>

To conclude, cargo bundling may be a solution of primary importance especially for small and medium enterprises due to the fact that in many circumstances they will not cross mentioned thresholds. On the other hand, with regard to aforementioned, big enterprises should mostly rely on Article 101(3) bearing also in mind such particularities as a transparency of cooperation.

## **5.4 Liability in case of a delay in delivery, damaged goods or bankruptcy**

The question is an issue not only for the parties of the bundling agreement but also for the carrier who is shipping the bundled cargo under a carriage contract. Generally, three types of liability should be taken in consideration: joint, joint and several, full. Furthermore, the liability issues must be examined on different levels of cooperation: between the parties of the bundling agreement (5.4.1) and between the parties, Transport Orchestrator and carrier (5.4.2. and 5.4.3.).

### **5.4.1 Relation between the parties.**

Since parties of cargo bundling may chose between a flexible contract or a more rigid partnership agreement, their rights and obligations towards each other will depend on the chosen structure and on the applicable law. Nevertheless, ‘inside’ relations will not play a role in case the cooperation causes a damage to a third party.

Choosing a partnership assures a clear division of the rights and obligations of the partners. If they are not defined in detail in the agree-

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<sup>68</sup> Alison Jones, Brenda Sufrin, *EU Competition Law. Text, Cases, and Materials*, (Oxford University Press, 2014), 252-262.

ement, general rules will be applicable. For example in Germany a partner is only liable, in discharging the duties incumbent upon him, for the care he customarily exercises in his own affairs.<sup>69</sup> In addition, the German Civil Code provides that if the partner is the managing partner he may do all the acts of management which the interest of the partnership requires.<sup>70</sup> In consequence, the delay in delivery or causing a damage to the goods designated for transportation may be found as acts against the partnership's existence or noncompliance with the representation mandate. Moreover, a bankruptcy on the part of the one partner would result in dissolution of the partnership.<sup>71</sup>

In addition to the aforementioned and point 5.2. of the paper, the situation of the Transport Orchestrator left outside of the partnership must be investigated. Unexpectedly, it may turn out that he will be held liable under English law for misrepresentation. Section 14 of the Partnership Act 1890 states that “everyone who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner”. In consequence, although the Transport Orchestrator does not want to belong to the partnership, in the absence of a clear dissociation from it while he is running his business, he will be considered as its part.

Due to the complex nature of a network<sup>72</sup> the second option is where the parties try to base their relations on a specific contract type which indicates certain liability grounds.<sup>73</sup> However, one must take into consideration that if the agreement does not fall within an established scheme, general rules are again applicable. It seems, no matter whether under one agreement or linked contracts, that the parties' main aim is to load cargo in bigger units which are further transported under a carriage contract. There is no doubt whatsoever, especially in case of a direct

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<sup>69</sup> Section 708 German Civil Code.

<sup>70</sup> Section 713 German Civil Code

<sup>71</sup> e.g. Section 728 German Civil Code; compare with: Section 33 English Partnership Act 1890.

<sup>72</sup> Supra note 39.

<sup>73</sup> Hugh Collins, ed., *Standart Contract terms in Europe – A basis for and a challenge to European Contract Law*, (Kluwer Law International, 2008), 285.

bundling, that also additional services can be included in the agreement. Namely, the one company obliges itself to prepare a delivery and loading plan, the second arranges the carrier whereas the third one provides the place for the main bundling. The nature of different activities can broaden the scope of the parties obligations.<sup>74</sup> Moreover, the agreement must be flexible enough to reduce costs of other party's insolvency or production standstill.

For example, in Poland the court, if it finds that the agreement provides the provision of services but does not fall within the established legal scheme, will adapt the rules regarding service contracts.<sup>75</sup> In that case the delay in delivery or damage to the goods would be judged taking a duty of care and negligence into account.

#### **5.4.2 Relation between the parties, Transport Orchestrator and the carrier –carrier as a defendant**

Finally, the liability must be determined taking into account all players and potential collision points.

The carrier would first of all, try to exonerate himself in case a delay or damage of the goods occur. Although the mandatory regime imposed on a carrier by the Transport Conventions<sup>76</sup> obliges him to take the goods in custody, there are situations where he will be exempted from the liability. Since the cargo interests need only to prove that the “result of transportation” was not achieved to make the carrier *prima facie* liable, he must acquit himself by showing what caused the damage or delay and

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<sup>74</sup> Supra point 5.2. of the paper.

<sup>75</sup> Art. 750 Polish Civil Code.; in its judgment from 2003 (I CKN 414/01) the Polish Supreme Court held that agreements arranging the parties to sign the agreement or providing the possibilities to conclude the contract between principal and third parties, or looking for a trading partners will be governed by the rules regarding the service contract.

<sup>76</sup> The analysis take into consideration: 1) Convention on the Contract for the International Carriage of Goods by the Road 1956(CMR), International Convention for the Unification of Certain Rules of Law Relating to Bill of Lading (the Hague Visby Rules) 1968 (HVR), Convention concerning International Carriage by Rail 1999 (COTIF CIM) and Convention for the Unification of Certain Rules for International Carriage by Air 1999 (Montreal Convention)

why he is not liable for that.<sup>77</sup> The following paragraphs consider the situations when the defective means of transportation, defective packing or the partner's delay in delivery occur and there is no wilful misconduct<sup>78</sup> or intent to cause the damage<sup>79</sup> by the carrier which implies full liability.

The transportation regimes provide the carrier's responsibility for the damage of goods. Moreover, almost all apart from HVR – the liability for the delay. Eventually, all of them indicate that under some circumstances the carrier is relieved. The defective packaging or loading and delay are some of those reasons if they occur through cargo interest fault.<sup>80</sup> Therefore, the burden of the responsibility is switched to the shipper unless the defect was apparent or known to the carrier at the time when he took over the goods and made no reservations concerning it and when he proves the right custody over entrusted goods. In case the carrier is relieved from the liability, the parties to the bundling agreement have to look for a redress from the bundling partners. Thus, the same damage caused by two or more persons determines their joint liability and any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of that damage.<sup>81</sup> Unless there is possibility to ascertain who caused the damage each participant is hold liable.<sup>82</sup> However, in case each bundling party caused different damage, each will be liable only for the damage individually caused.<sup>83</sup>

As there is an absolute responsibility for the means of transportation

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<sup>77</sup> Duygu Damar, *Willful misconduct in International Transport Law*, (Springer, 2011), 251-257.

<sup>78</sup> Art. 29 CMR

<sup>79</sup> Art. 8 HR, Art. 36 COTIF-CIM, Art. 4§5(e) HVR.

<sup>80</sup> 17.2(b) CMR, 18.2(b) Montreal Convention, 23.2.3 COTIF-CIM, Article IV§2(n) HVR

<sup>81</sup> e.g. Section 1 Civil Liability (Contribution) Act 1978; Art 1382 Code Civil.

<sup>82</sup> e.g. Section 830 German Civil Code; under Polish law the liability would result from an indivisible obligation to provide a full-loaded container – art. 380 Polish Civil Code.

<sup>83</sup> Raymond Youngs, *English, French and German comparative law*, (Oxon: Routledge, 2014), 472.

under the article 17 CMR and 18 Montreal Convention, the carrier shall not be relieved of a liability because of the defective condition of the vehicle used by him. However, in case of the carriage performed under COTIF-CIM the carrier must only exercise the due diligence to avoid the occurrence of the damage and its consequences (art. 23(2)). The lowest liability thresholds are set by HVR which contain an obligation to provide the seaworthy ship limited to the time before and at the beginning of the voyage (Article III§1(a)).<sup>84</sup> In consequence, the damage or loss of the cargo resulting from the defective transportation cannot be exonerated under the Montreal Convention and CMR and further under COTIF-CIM but only if the carrier was negligent. Furthermore, regardless of the limited liability under HVR the party who is claiming damages may invoke Article III(2) and the continuous duty of care for cargo provided by that regulation.

In addition, it must be clarified who has the title to sue the carrier namely, whether the shipper who suffers the loss or everybody concluding the bundling agreement. The damage caused to the partnership entitles the partners to start with the proceedings. No partnership on the side of cargo interests gives the right to claim only to the one whose goods are damaged. Otherwise, it would be a case when bringing a case to court is impossible because of no reason to claim as there is no legal interest.

### **5.4.3 Relation between the parties, Transport Orchestrator and the carrier – carrier as a claimant**

In a reverse situation when the carrier is the one who wants to claim, again the two options regarding the existence of either a partnership or network shall be considered. The joint and several liability resulting from the nature of the partnership<sup>85</sup> and from the indivisible obligation<sup>86</sup> causes

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<sup>84</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the ‘Rotterdam Rules’) has made this obligation continuous (art. 14). This is at present also required by the provisions of the International Safety Management (ISM) Code.

<sup>85</sup> e.g. Section 9 Partnership Act 1890, Article 864 Polish Civil Code.

<sup>86</sup> A delivery of a certain amount of goods is to be found as one obligation: Art. 1218 Belgian Civil Code: ‘An obligation is indivisible, although the thing or act which is its

that the carrier will be able to claim the whole performance from anyone of the debtors including the Transport Orchestrator if he is found liable for misrepresentation. After all, the performance of the whole obligation by one of the shippers discharges the others, however one can recover the excess from the others in equal shares, subject to any agreement to the contrary. If the share in losses attributable to a joint and several debtor cannot be obtained from him (because for example he ceases to exist), it is to be borne by co-debtors.<sup>87</sup> That means that among the others, the problem of insolvency lies in parties' hands and it is in their interest to predict how to mitigate its consequences. However, what does happen in a situation where all the partners who delivered a package with defects become bankrupt? Does it endanger the position of the Transport Orchestrator dissociating himself from the group?

Above all, it must be reminded that the Transport Orchestrator looks for the carrier, prepares loading plan and organizes shippers. However, he does not enter in the contract of carriage and take additional responsibility for the delivery of the goods. Due to the fact, that his situation to the high extent resembles a situation of an agent acting on behalf of somebody, a few points must be underlined. First of all, the bankruptcy leads to the termination of the relation between the principal and the agent.<sup>88</sup> Second of all, an agent who enters into a contract on behalf of another person does not give any promise that his principal is able to perform his obligations under the contract. There is only an implication that an agent is authorized to bind his principal.<sup>89</sup> In case an agent concludes a contract in the name of a disclosed party and within his authority, he is neither liable to the third party nor can he sue the third

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object is divisible by its nature, where the way in which it is considered in the obligation does not render it susceptible to part performance.' See further: Art. 1222 Belgian Civil Code and Section 427 German Civil Code.

<sup>87</sup> Hugh Beale, ed., *Chitty on Contracts, 31 ed.*, (Sweet & Maxwell, 2012), 1360.; article 376 Polish Civil Code; the Section 426 German Civil Code.

<sup>88</sup> Roderick Munday, *Agency: Law and Principles*, (Oxford University Press, 2010), 333-334.

<sup>89</sup> *Ibid.* p.41-73.



party because, in this event, he is not a party to the contract.<sup>90</sup> This suggests that the position of the Transport Orchestrator is safe unless he acts on behalf of an undisclosed principal.<sup>91</sup> However, the trends in particular jurisdictions mentioned in the point 5.1.2. should be taken into consideration.

## 5.5 Law applicable when the dispute arises between the partners

Contractual networks as such are complicated matter for the law, however international networks are even more. Transnational contractual networks have not been regulated in the private international law. As a result, the general rules, which are based on bilateral exchange contracts, apply and have to be adapted to the networks.<sup>92</sup> The key questions here are: how big is the contractual interdependence and what is the applicable law.

The pivotal convenience of Rome I Regulation<sup>93</sup> (law applicable to contractual relations) is, assured by the Article 3, the possibility to make a choice of law. In case there is no choice of law Article 4 based on a characteristic performance or the close connection of the law is applicable. As the application of Rome I seems not to be problematic when several enterprises conclude a contract and define the applicable law, the situation is rather different where the contract is missing a choice of law clause.

Assuming that different laws are applicable to govern different links, the issue of various qualification of validity, breach or ability to bring a

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<sup>90</sup> See further: ECJ Judgment from 24.10.1995 Case C-266/93: ‘Representatives can lose their character as independent traders only if they do not bear any of the risks resulting from the contracts negotiated on behalf of the principal...’

<sup>91</sup> David Glass, *Freight Forwarding and Multimodal Transport Contracts*, (Informa Law, 2013), 60-61.

<sup>92</sup> Fabrizio Cafaggi, *Contractual Networks and the Small Business Act: Towards European Principles*, EU Working Papers (2008), 4-10, [http://cadmus.eui.eu/bitstream/handle/1814/8771/LAW\\_2008\\_15.pdf](http://cadmus.eui.eu/bitstream/handle/1814/8771/LAW_2008_15.pdf)

<sup>93</sup> 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).

claim can emerge.<sup>94</sup> For example, a contract valid in one country can be considered invalid in another. This means that the different consideration of avoidance may bring about different consequences to the stability of the network. Furthermore, according to Art. 16 of Rome I, if a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the law governing the debtor's obligation towards the creditor also governs the debtor's right to claim recourse from the other debtors.

Another controversial issue concerns relationship between characteristic performance and closely connected country due to the fact that national courts do not interpret it identically.<sup>95</sup> Finally, it may turn out that the law closely connected to the Transport Orchestrator is applicable as a result that he is in the organizational center of the created supply chain and despite the fact that all shippers come from different countries.

## **6 Need for improvements in order to promote cargo bundling and avoid its rejection.**

It seems that the legal instruments cannot provide unitary solutions for the complex agreements and new entities emerging on the market. As a result, despite the fact that certain commercial trends are highly profitable, they cannot assure legal certainty. Thus, money saved on the factual transportation is wasted on the extra bargaining costs and unexpected liability claims. It would be changed if the equalization of the admissible risk connected with cargo bundling to the standard transportation is achieved.

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<sup>94</sup> Supra point 5.1. of the paper.

<sup>95</sup> Ulrich Magnus, "Article 4 Rome I Regulation: the applicable law in the absence of choice", in: *Rome I Regulation: the Law Applicable to Contractual Obligations in Europe*, eds. Ferrari Franco, Leible Stefan, (Munich: Sellier European Law Publishers, 2009), 30-31.

However, the potential solutions must consider cross-border trade and different jurisdictions. Further, those solutions must take into consideration very big demands of the shippers. Namely, they must fit to the need of flexible and clear transactions. By creating a legal framework which can assure that the consequences of the cargo bundling are similar in different countries, the advantages of the activities mentioned in the first part of this paper would be supported by legal certainty and clear rules for the allocation of the liability. Even if it turns out that unified solutions are impossible, at least policy recommendation should be suggested in order to support current market trends.

# Are Liability Systems of any Interest in European Multimodal Transport?

Views from Finnish Logistics Service Providers  
and Shippers

Anu Bask

Aalto University School of Business, Helsinki

Mervi Rajahonka

Aalto University School of Business, Helsinki

Ellen Eftestøl-Wilhelmsson

Institute of International Economic Law (KATTI),

University of Helsinki

Scandinavian Institute of Maritime Law,

University of Oslo

## **Abstract**

Sustainability is a core issue of the rapidly developing European Common Transport Policy. The European Commission has put forward a number of programmes and projects on sustainable transport. A modal shift from road carriage to multimodal carriage, where one contract of carriage is performed by more than one mode of transport, forms part of this policy. The most interesting project, from a legal point of view, is the project on a regional legal regime for European multimodal carrier liability. The lack of a harmonised liability regime for multimodal contracts of carriage is recognised by the Commission as an obstacle to the desired modal shift, because it leads to an unpredictable liability system. Accordingly the Commission is working for a regional liability regime applicable to multimodal transport in Europe. However, economists have questioned the impact of a regional harmonised liability system as regards increased use of multimodal transport. Economic research shows that the friction costs of an unpredictable liability system are minor and accordingly have an insignificant impact on the choice of transport alternatives. Thus, in order to explore the industry's view on the need shown for a harmonised European multimodal transport liability system, we have collected data from Logistic Service Providers (LSPs) and Shippers (logistics service buyers) operating in Finland. The following two questions were posed: (1) Are liability issues a problem in the current legal framework, and: (2) Is there a need for a harmonised legal instrument for better support of intermodal transport? Our findings from this qualitative study indicate the same as earlier economic research on liability; a harmonised liability regime is not an efficient tool to enhance a modal shift.

## **Key words**

Multimodal transport, Intermodal transport, Liability system, Logistics service, Contract

## **Contacts**

Anu Bask, Aalto University School of Business, Department of Information and Service Economy, Logistics, P.O. Box 21220, (Runeberginkatu 22-24, Helsinki), FI-00076 AALTO, Finland.

E-mail: [anu.bask@aalto.fi](mailto:anu.bask@aalto.fi)

Mervi Rajahonka, Aalto University School of Business, Department of Information and Service Economy, Logistics, P.O. Box 21220, (Runeberginkatu 22-24, Helsinki), FI-00076 AALTO, Finland.

E-mail: [mervi.rajahonka@aalto.fi](mailto:mervi.rajahonka@aalto.fi)

Ellen Eftestøl-Wilhelmsson, University of Helsinki, Institute of International Economic Law, P.O.Box 4 (Yliopistonkatu 3, Helsinki), FIN-00014 University of Helsinki, Finland and University of Oslo, Scandinavian Institute of Maritime Law, Norway.

E-mail: [ellen.eftestol-Wilhelmsson@helsinki.fi](mailto:ellen.eftestol-Wilhelmsson@helsinki.fi)

# 1 Introduction - Questions Addressed

Sustainability is a core issue of the rapidly developing European Common Transport Policy. Increased use of multimodal or intermodal transport is an important part of this policy, as multimodal transport consisting of at least one rail or sea leg is considered a greener alternative to the dominant and increasing road carriage in the EU. When discussing transport carried out by two or more transport modes, the terms intermodal transport, multimodal transport, and combined transport are often used interchangeably in logistical research.<sup>1</sup> The terms multimodal and intermodal are both in use in legal research literature, but the term multimodal is more common. One of the more commonly used definitions of intermodal transport is from the European Conference of Ministers of Transport (1997) and the United Nations, and is “*The movement of goods in one and the same load unit or vehicle by successive modes of transport without handling of the goods themselves when changing modes*”. The OECD Glossary of Statistics also uses the same definition.<sup>2</sup> Moreover, in legal theory the terms intermodal and multimodal carriage are interchangeable.<sup>3</sup> Both cover “*carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract*”, which is the internationally accepted definition.<sup>4</sup> The difference between the two definitions is that the legal view focuses on contracts while the view of the European Conference of Ministers of Transport focuses on transport flow and load unit.

In order to promote multimodal carriage, the Commission is working on different projects. The most interesting project, from a legal point of view, is the project on a *regional legal regime for European multimodal*

<sup>1</sup> Eng-Larsson, F., Kohn, C.: Modal shift for greener logistics - the shipper's perspective. *International Journal of Physical Distribution & Logistics Management*, 2012, Vol. 42, No. 1, pp. 36 – 59.

<sup>2</sup> OECD, 2013. *OECD Glossary of Statistics*, available at: <http://stats.oecd.org/glossary/search.asp> (accessed 3 May 2013).

<sup>3</sup> Ulfbeck, V.: *Multimodal Transport in the United States and Europe—Global or Regional Liability Rules*. *Tulane Maritime Law Journal*, 2009, Vol. 34, pp. 37-90.

<sup>4</sup> De Wit, R., 1995. *Multimodal Transport*. London: Lloyd's of London Press (book).

*carrier liability*. International multimodal carriage has for decades suffered from lack of a harmonised legal regime. The legal position of the parties to a contract of carriage is thus unpredictable and unclear. Legal scholars have addressed the problem<sup>5</sup> and several attempts have been made in order to remedy the problem,<sup>6</sup> unfortunately with no success so far.<sup>7</sup> Nor has the European attempt achieved any result as yet.

International conventions in the area of carriage of goods are normally justified by the need for a harmonised and balanced legal system. For example, the aim of the Comité Maritime International (CMI) has always been to achieve total uniformity.<sup>8</sup> Moreover, the European Commission, which has been preparing for a European legal system on multimodal carriage, has called for uniformity. However, the question is addressed

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<sup>5</sup> See for example Marian Hoeks: *Multimodal Transport Law, The Law Applicable to the Multimodal Contract for the Carriage of Goods*, Kluwer 2010. (Hoeks 2010). The author devotes the first chapter to explaining the problems related to lack of uniform multimodal carriage law. See also Simone Lamont-Black: *Claiming Damages in Multimodal Transport: A need for Harmonisation*. In: *Tulane Maritime Law Journal*, 2012, Volume 36, p 707-724. Another example is Malcolm Clarke, *The transport of goods in Europe: patterns and problems of uniform law*. In: *Lloyd's Maritime and Commercial Law Quarterly*, 1999, p 36-70.

<sup>6</sup> An overview of previous attempts is given by K.F. Haak, *The harmonization of intermodal liability arrangements*. In: *European Transport Law*, 2005, pp. 13-51. Haak strongly argues for a harmonised liability system to minimize the problems of the existing laity systems. See also Jan Ramberg, *Harmonization of Law of Carriage of Goods*. In: *Scandinavian Studies of Goods*, 1973, p 211-252. Jan Ramberg also calls for a harmonised system for all modes of transport (at p. 252).

<sup>7</sup> On the contrary, scholars point out that the trend is going in the opposite direction. So called "hybrid carriage regimes" are developing both on a national and a unilateral level. See Paul Myburgh: *Uniformity or Unilateralism in the Law of Carriage of Goods by Sea?* In: *Victoria University Wellington Law Review*, 2000, Volume 31, p. 355-382.

<sup>8</sup> See Francesco Berlingieri: *Uniformity in Maritime Law and Implementation of International Conventions*, in: *Journal of Maritime Law and Commerce*, 1987, Volume 18 Issue 3, p. 317-350. Berlingieri argues that the different methods for implementation of international conventions might hamper the goal of uniformity. See also, on a general level, Michael Joachim Bonell: *International Uniform Law in Practice – Or Where the Real Trouble Begins*, in: *The American Journal of Comparative Law*, 1990, Volume 38, p 865-888. In addition to pointing out common acceptance of the feasibility and desirability of unifying various areas of law at an international level, Bonell also addresses the obstacles preventing this harmonisation.



from a slightly different point of view. According to the European Commission, the unpredictable liability situation in multimodal transport is identified as a *bottleneck that prevents the parties from choosing the multimodal transport alternative*. Changing from unimodal to multimodal transport is considered not only a change of transport means, but a *change of transport systems* which entails a different legal framework. Such a change generates an unpredictable legal situation, mostly related to the liability problem but also to the conglomerate of different transport documents between modes and operators.<sup>9</sup> In economic terms this change is, according to the European Commission, leading to *friction costs* which prevent the parties from choosing the multimodal transport alternative. According to the Commission, “[m]ulti-modal transport suffers from friction costs induced by the absence of a uniform, cross-modal liability regime.”<sup>10</sup> By providing the multimodal industry with a regional legal regime containing predictable liability rules, the European Commission intends to remove these friction costs, thus making the change to environmentally friendly multimodal transport an easier alternative.

One might, however, question the whole idea of legitimating a regional multimodal liability regime by claiming that the lack of such a regime hampers multimodal transport. As will be pointed out, economists question the impact of a regional harmonised liability system as regards increased use of multimodal transport. In fact, economic research shows that the friction costs of an unpredictable liability system are minor and accordingly have an insignificant impact on the choice of transport alternatives.

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<sup>9</sup> The Commission is accordingly working towards a uniform system for electronic transport documents and procedures. See e.g. Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system. COM(2011) 144 at p. 19 where the action needed to enhance multimodal transport of goods is stated. In addition to ensuring that liability regimes promote rail, waterborne and intermodal transport, the Commission aims to: “Put in practice the concepts of ‘single window’ and ‘one-stop administrative shop’; by creating and deploying a single transport document in electronic form (electronic waybill), and creating the appropriate framework for the deployment of tracking and tracing technologies, RFID etc.”

<sup>10</sup> The Freight Transport Logistics Action Plan. COM (2007) 607 at 2.3.3.

## 2 Is a Multimodal Liability Regime the Right Tool?

### 2.1 The Economic Impact Study

As outlined above, the EU initiative on a regional multimodal liability regime is justified by the idea that lack of such a regime hinders multimodal transport. The economic reasoning behind this is that a change of transport system (from unimodal to multimodal) creates “*friction costs*” which prevent the formation of competitive multimodal transport chains. Friction costs are defined as a measurement of the inefficiency of a transport operation: They are expressed in the form of higher prices, longer journeys, more delays, less punctuality, lower availability of quality services, limitations on the types of goods available, higher risk of damage to cargo and more complex administrative procedures.<sup>11</sup> In order to strengthen the multimodal transport chain, friction costs, according to the Commission, would have to be identified and reduced. The unpredictable liability situation was, accordingly, identified as a part of the administrative bottlenecks which needed to be removed.<sup>12</sup> However, exactly how the lack of a legal framework would hamper multimodal transport in the Union was not clear, so the Commission engaged a group of economists to quantify the underlying economics of the situation. The result was published in 2001 under the title: “*The Economic Impact of Carrier Liability on Intermodal Freight Transport*”, (hereinafter the Economic Impact Study).<sup>13</sup> The scope of the study was multiple: Partly to analyse the loss and damage characteristics of shippers and their use

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<sup>11</sup> Commission Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, on Multimodality and Multimodal freight transport in the EU. COM(97)243 finale at 26.

<sup>12</sup> Op. cit. at 81-82.

<sup>13</sup> The Economic Impact study of Carrier Liability on Intermodal Freight Transport: European Commission, IM Technologies (England) and Studiengesellschaft für den kombinierten Verkehr e. V (Germany): “The Economic Impact of Carrier Liability on Intermodal Freight Transport”, London 22 January 2001.

of insurance to mitigate risk, and partly to analyse current freight transport liability arrangements for all actors from the perspective of the supply chain. Additionally, the impact of internet and e-commerce was examined.<sup>14</sup> Here the results as regards friction costs will be highlighted.

In line with the Commission's assumptions, the Economic Impact Study defined the legal, liability related, friction costs as those arising from loss, damage, delay and consequential losses (*actual losses*) plus those arising from the administration of the regime that supplies insurance and deals with claims (*administrative costs*).<sup>15</sup> In the study the friction costs of all stakeholders - the shipper, carrier and insurers - were calculated. The Economic Impact Study revealed that friction costs in multimodal transport are generally low and that they vary for different types of assignment depending particularly on consignment (cargo) value, journey length and level of risk.<sup>16</sup> In order to illustrate the share of friction costs in *total transport costs/freight charges*, the study referred to three markets: National, Intra-Europe (including non EU-Eastern European Countries), and Extra-Europe (transfer between Europe and North America).<sup>17</sup> In national EU transport the level of friction costs was the highest, with an average of 6.3% of freight charges. Intra-Europe (including East-European countries) transport had a friction cost level of 3.9% whilst extra-European transport (in this study a transfer between Europe and North America) had the lowest friction cost level of 2.4%.<sup>18</sup> By using the share of friction costs in the three markets and weighting them by their share of intermodal consignments, the level of intermodal transport friction costs in the EU was calculated at approximately 450-550 million Euro yearly.<sup>19</sup>

The most interesting part of the study is that the introduction of a

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<sup>14</sup> L.c.

<sup>15</sup> Op. cit. at p. 27.

<sup>16</sup> Op. cit. at p. 31.

<sup>17</sup> Op. cit. at p. 31.

<sup>18</sup> Op. cit. at pp. 32-33

<sup>19</sup> Op. cit. at p. 34.

strict and full liability regime, which was the original recommendation from the Commission, would not change the situation very much. Eliminating the three types of uncertainty related to location of damage/loss, identification of carrier/contract and the question of applicable liability regime<sup>20</sup> would only reduce friction costs by 20 %. The savings would thus amount to 50 million Euros per annum.<sup>21</sup> The Economic Impact Study consequently concludes that:

“Strict and full liability on balance might therefore lead to some reduction in the administrative friction costs, though the potential for reduction may not be as large as some proponents suggest.”<sup>22</sup>

In other words, introducing a voluntary, uniform liability system would probably not reduce the legal friction costs to a large degree. The results of the Economic Impact Study seem to be contradictory to the perception of the Commission when mapping the obstacles preventing multimodal transport of goods within the Union. However, despite the results of the Economic Impact Study, efforts towards a legal regime for European Multimodal Carriage of Goods continued.<sup>23</sup> A proposal for a Liability Regime for European Multimodal Transport was published in 2005 by a group of legal experts appointed by the Commission.<sup>24</sup> Furthermore,

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<sup>20</sup> As identified by the 1999 legal expert group in: *Intermodal transportation and carrier liability*. European Communities, 1999. ISBN 92-828-7824-4, p. 16-17.

<sup>21</sup> The Economic Impact study at pp. 39-40.

<sup>22</sup> L.c.

<sup>23</sup> One might ask why the Commission chose to continue the process towards a harmonised European liability regime, despite research showing that such a liability regime will not have any impact on the transport patterns within the Union. The decision is rather puzzling, but there is no information on why the Commission decided to go on with the project and there has not been any public discussion on this issue. We accordingly decided to not examine the question further.

<sup>24</sup> The proposal contained an opt-out regime, with rules on strict liability except for matters out of the control of the freight integrator; a legal entity that would include both traditional carriers as well as freight forwarders. See: *Integrated Services in the Multimodal Chain (ISIC) Final Report Task B: Multimodal liability and documentation*. Research report commissioned by the European Commission – DG TREN provided by an independent panel of legal experts. Published by ECORYS Nederland BV, Rotterdam 2005.

in the Freight Logistic Action Plan published by the Commission in 2007, different alternatives for a European legal regime on multimodal carrier liability were highlighted for further studies.<sup>25</sup> Additionally, the last Communication from the Commission: Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system rests<sup>26</sup> on the idea of a multimodal liability regime for Europe. However, in the latter communication the Commission has realised that the Rotterdam Rules have to be considered together with other possible solutions.<sup>27</sup> Accordingly, the results of the Economic Impact Study seem to have been somewhat ignored by the European Commission. That is, despite the fact that the Study indicates that a harmonised liability regime will not change transport patterns in Europe, the Commission is still driving the issue. Accordingly, in order to further explore the industry's view on the indicated need for a harmonised liability system for European multimodal transport, we collected data from Logistics Service Providers (LSPs) and Shippers operating in Finland and asked them for their views. The following questions were posed: (1) Are liability issues a problem in the current legal framework, and: (2) Is there a need for a harmonised legal instrument for better support of intermodal transport? The results of the interviews will be outlined below (Section 3).

Liability issues are the number one topic in legal research related to multimodal contracts of carriage.<sup>28</sup> However, liability systems are rarely mentioned in business and logistics research. We accordingly wanted to address this question and performed a literature review on the search

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<sup>25</sup> The Freight Logistics Action Plan, COM (2007) 607 at 2.3 Simplification of transport chains.

<sup>26</sup> COM (2011) 144.

<sup>27</sup> The Commission Staff working Document accompanying the White paper states: "Any comprehensive multimodal proposal of the Commission will have to take the global convention [the Rotterdam Rules] into account". In: Commission Staff working Document Accompanying the White paper – Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system. SEC(2011) 391 at 189.

<sup>28</sup> Eftestøl-Wilhelmsson, E., Bask, A. and Rajahonka, M.: Intermodal Transport Research - A Law and Logistics Literature Review with EU Focus. *European Transport Law*, Vol. XLIX. No. 6, 2014 pp. 609-674. Available at SSRN: <http://ssrn.com/abstract=2572866>

string “liability” in three different databases where business and logistic research articles are normally found. The outcome of this study is revealed below.

## 2.2 Systematic literature review on liability

The aim of a systematic review is to describe the current state of research regarding a particular topic. Thus, an integrative research review summarizes past research and draws conclusions from distinct studies.<sup>29</sup> The method has been applied in several fields of study, but it is rather unfamiliar in legal research. A systematic review summarizing past research and drawing conclusions from distinct studies is also of interest from a legal point of view as it might provide a methodological addition to legal research and provide new insights on current research. In this study, however, we are primarily interested in the current state of research on carrier liability issues from an economic point of view.

Previously systematic literature review has been used to reach an increased understanding of the characteristics of the intermodal research field and current scientific knowledge base.<sup>30</sup> In the article “*Is a new*

<sup>29</sup> Cooper, H.M.: Integrating research: a guide for literature reviews. In: Applied Social Research Methods Series, vol. 2. SAGE Publications, Newbury Park/London/New Delhi, 1989; Tranfield D., Denyer, D. and Smart, P.: Towards a Methodology for Developing Evidence-Informed Management Knowledge by Means of Systematic Review, *British Journal of Management*, 2003, Vol. 14, pp. 207–222. See also Bontekoning, Y.M., Macharis, C., and Trip, J.J.: Is a new applied transportation research field emerging?—A review of intermodal rail–truck freight transport literature, *Transportation Research Part A*, 2004, Vol. 38, pp. 1–34; Pittaway L., Robertson M., Munir K., Denyer D and Neely A.: Networking and innovation: a systematic review of the evidence”, *International Journal of Management Reviews*, 2004, Volume 5/6, Issue 3&4, pp. 137–168; Karjalainen, K., Kempainen, K., van Raaij, E: Non-Compliant Work Behaviour in Purchasing: An Exploration of Reasons Behind Maverick Buying., *Journal of Business Ethics*, 2009, Vol. 84, No. 2, pp. 245–261; Bask A., Lipponen M., Rajahonka M. and Tinnilä M.: The Concept of Modularity: Diffusion from Manufacturing to Service Production, *Journal of Manufacturing Technology Management*, 2010, Vol. 21, No. 3, pp. 355–375; Bask, A., Lipponen, M., Tinnilä, M.: E-commerce logistics: A literature research review and topics for future research, *International Journal of E-Services and Mobile Applications (IJESMA)*, 2012, Vol. 4, No. 3, pp. 1–22. .

<sup>30</sup> Bontekoning, Y.M., Macharis, C., and Trip J.J.: Is a new applied transportation research field emerging?—A review of intermodal rail–truck freight transport literature,

*applied transportation research field emerging?—A review of intermodal rail–truck freight transport literature*” Bontekoning et al. concluded that the intermodal research field is in a pre-paradigmatic phase and carried out in a number of different small research communities.<sup>31</sup> For future development the researchers called for integration of these research communities. In this study, however, the aim is merely to examine the present status of economic research on liability issues in intermodal transport.

A systematic literature review is normally performed in three stages: 1) planning (defining objectives and review protocol for a review), 2) conducting the review (selection of studies, analysis and synthesis of data), and 3) reporting and dissemination.<sup>32</sup> The objective of this systematic literature review is to summarise current discussions on a liability system for multimodal (intermodal) transport in Europe, in databases where business and logistical articles are normally found. To obtain a holistic view, we used three search engines: Ebsco Business Source Complete (All databases), Emerald Insight (Journals) and ProQuest. The searches and search strings are shown in Table 1. The search words were chosen to obtain a wide perspective on liability, and to be sure that relevant articles were covered.

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Transportation Research Part A, 2004, Vol. 38, pp. 1–34..

<sup>31</sup> Op.cit.

<sup>32</sup> Cooper, H.M.: Integrating research: a guide for literature reviews. In: Applied Social Research Methods Series, vol. 2. SAGE Publications, Newbury Park/London/New Delhi, 1989; Tranfield D., Denyer, D. and Smart, P.: Towards a Methodology for Developing Evidence-Informed Management Knowledge by Means of Systematic Review, British Journal of Management, 2003, Vol. 14, pp. 207–222.

**Table 1.** Searches in Ebsco Business Source Complete (All databases), Emerald Insight (Journals) and ProQuest.

Database	Search word(s)	Search results	Decision based on Abstracts	Decision after check of articles	Overlap with databases	Final amount for analysis
Ebsco Business Source Complete (All databases)	intermodal AND liability	2	0	0		0
Ebsco Business Source Complete (All databases)	multimodal AND liability	11	5	5	0	5
Ebsco Business Source Complete (All databases)	Transport AND liability	116	6	5	5	0
Ebsco Business Source Complete (All databases)	Transport AND contract AND liability	11	2	1	1	0
Ebsco Business Source Complete (All databases)	Logistic service AND liability	2	0	0		0
Ebsco Business Source Complete (All databases)	Logistic service AND contract AND liability	1	0	0		0
Ebsco Business Source Complete (All databases)	Transportation AND liability	143	2	1	1	0
Ebsco Business Source Complete (All databases)	Transportation AND contract AND liability	13	1	1	1	0
Emerald Insight (Journals)	Transport AND liability	11	0	0		0
Emerald Insight (Journals)	Transport AND contract contracts (Match: Any) AND liability	3	0	0		0
Emerald Insight (Journals)	Transportation AND liability	1	0	0		0
Emerald Insight (Journals)	Logistic service AND liability	1	0	0		0
ProQuest	intermodal AND liability	6	0	0		0
ProQuest	Multimodal AND liability	21	8	3	2	1
ProQuest	Transport AND liability	35	4			
ProQuest	transport AND liability AND (contract OR contracts)	32	6	1	0	1
ProQuest	Transportation AND liability	22	0	0		0
ProQuest	Transportation AND (contract OR contracts) AND liability	38	0	0		0
ProQuest	Logistic services AND liability	26	0	0		0
ProQuest	Logistic services AND (contract OR contracts) liability	6	0	0		0
<b>Total</b>		<b>501</b>	<b>34</b>	<b>17</b>	<b>10</b>	<b>7</b>



The searches resulted in altogether 501 abstracts. The same protocol was used in all selection processes. In all searches abstracts from the articles were gathered and evaluated in two steps; first by the researchers individually and thereafter a joint comparison were performed within the research team. Articles with abstracts that seemed relevant to the topic were chosen for further analysis. After reading the articles the final selection decisions were made, again in a joint meeting of the research team. Seven articles were finally included as relevant. A selected article should deal with *liability* issues concerning *intermodal freight transports*, and be relevant for the *European* perspective. For example articles on unimodal, country-specific (outside Europe), or passenger transports and articles not written in English, were excluded.

After the first review round, based on the abstracts, we selected 34 articles for further analysis and made a further selection ending up with 17 relevant articles. As 10 of the articles were the same in at least two searches, they were counted only once. As a result we ended up with 7 articles for in-depth review. Despite the fact that the articles were gathered from typical “business” databases, the result was that all the articles approached liability from a legal point of view. In other words we found no articles approaching the question of a liability regime for multimodal contracts of carriage from logistics or business point of view or a combination of these two, although the legal framework under which the transport industry is working is recognised as an important part of the supply chain.

**Table 2.** *Summary of the seven articles selected for analysis.*

Year	Article title	Authors	Published	Objective	Result
2013	Global Requirement and Early Praxis of Multimodal Transport	Licievici-Breezeanu, Alexandru-Petru.	<i>Contemporary Readings in Law &amp; Social Justice</i> , 2013, Vol. 5 Issue 2, p.705-715. 11p.	The objective of the article is to present the development of an international regulation for sea carriage of goods.	Concludes that the Rotterdam Rules will have both positive and negative effects. It will generate uniformity as regards sea carriage and multimodal carriage with a sea leg. In other contexts it will just be an extra legal instrument.
2012	Breaking the Liability Limits in Multimodal Transport	Damar, Duygu	<i>Tulane Maritime Law Journal</i> , Summer 2012, Vol. 36 Issue 2, p. 659-683. 25p.	Analyses the different rules for when the carrier loses its right to limit liability under different liability conventions.	Concludes that all the conventions, except the Montreal convention, recognise loss of liability limits when destruction of the goods in question is intentional.
2012	Claiming Damages in Multimodal Transport: A Need for Harmonisation	Lamont-Black, Simone	<i>Tulane Maritime Law Journal</i> , Summer 2012, Vol. 36 Issue 2, p.707-724. 18p.	To highlight the complexities of claiming damages under a multimodal contract. Focus on procedural steps and English case law.	Discusses several differences between the existing unimodal conventions, such as application range, calculation of damage, limits of liability and the breaking of those limits. Time limits are also discussed. Concludes that a simple and straightforward regime is still called for.
2012	A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive AND Efficient, or Just Another One for the Shelves?	Nikaki, Theodora, Soyer, Baris	<i>Berkeley Journal of International Law</i> , 2012, Vol. 30 (2), pp. 303-348. 45p.	The aim of the article is to contribute to the political debate on the Rotterdam Rules, considering the impact of the rules on different stakeholders, not restricted to shippers and carriers, but also as regards traders, bankers, insurers, lawyers and other sectors providing services to the shipping sector.	Discusses the aims of the convention; promotion of clarity, harmonization and modernization of the rules governing international contracts of carriage, promotion of the development of trade in an equal and mutually beneficial manner, enhancement of efficiency. Finds that the rules provide clarification on a range of problems, although problem areas remain. Both in relation to the basic question of what constitutes a contract of carriage, and to the question of applicable liability in multimodal contracts with a sea leg.
2011	A Brief Approach to The Rotterdam Rules: Between Hope and Disappointment	Pallares, Lorena Sales	<i>Journal of Maritime Law and Commerce</i> , 42 (3), pp. 453-463.	Describes the development of the Rotterdam Rules from the Hague Rules to today's situation.	Critical towards the question whether or not the Rotterdam Rules will be a success. The increase in liability limits might be hard to swallow despite modernization in many other aspects.
2009	Multimodal Transports in the United States and Europe - Global or Regional Liability Rules?	Ulfbeck, Vibe	<i>Tulane Maritime Law Journal</i> , Dec 2009, Vol. 34 Issue 1, pp. 37-90. 54p.	The article discusses how modern multimodal transport has become regionalized rather than globalized, traces the reasons for this and discusses whether the European and US systems can merge.	Advocates that neither the Rotterdam Rules nor the 2005-EU proposal will be able to become truly global as long as different regional rules mandatorily regulate inland liability regimes.
1994	New and Improved? The UNCTAD/ICC Multimodal Rules Reviewed	Kindred, Hugh M., Brooks, Mary R	<i>Transportation Journal</i> (American Society of Transportation & Logistics Inc), Spring 94, Vol. 33 Issue 3, pp. 5-14. 10 p.	The article analyses and compares the effect of three sets of model rules for multimodal transport on shippers and operators. The sets of rules are: The ICC Rules 1975, The MITC 1980 and the UNCTAD/ICC Rules 1991.	All three sets of rules apply a network liability system. However, none of the model rules control what sort of losses should be compensated. The question of consequential losses remains open. However all compensation will be limited. The UNCTAD/ICC rules include consequential damages in the scope of the limitation rule. The authors are critical of the new sets of rules which "offer little incentive for adoption by cargo interests".

The legal articles found in the business databases all very much discussed the same topic as do all other articles on multimodal carrier liability: Mending the regulatory gap in international multimodal carriage.<sup>33</sup> To a large degree the articles discussed different international attempts at mending the gap. The first article, from 1994, is inspired by the opt-in model rules provided by UNCTAD/ICC in 1991 and analyses the model rules in the light of previous model rules. The result is not very positive and the author finds the model rules useless for the industry, particularly the cargo side. However, the author does predict that the rules will probably be in use, due to a lack of alternatives.<sup>34</sup> The following article discusses different attempts at harmonising the rules applicable to multimodal transport of goods by comparing the liability system applicable to land based carriage in the US and Europe. As the systems differ tremendously, the author predicts that no international harmonisation will take place as long as the inland systems vary to such an extent as they do today.<sup>35</sup>

The five last articles all deal with the Rotterdam Rules and the question whether or not these rules answer the needs of the transport industry today. There is no clear answer to this; on the one hand the Rotterdam Rules promote legal certainty and clarification in different areas.<sup>36</sup> Nevertheless, the multimodal liability questions in particular are complicated.<sup>37</sup> The increased liability limits that the Rotterdam Rules entail for

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<sup>33</sup> Eftestøl-Wilhelmsson, E., Bask, A. and Rajahonka, M.: Intermodal Transport Research - A Law and Logistics Literature Review with EU Focus. *European Transport Law*, Vol. XLIX. No. 6, 2014 pp. 609-674. Available at SSRN: <http://ssrn.com/abstract=2572866>

<sup>34</sup> Kindred, Hugh M.; Brooks, Mary R: New and Improved? The UNCTAD/ICC Multimodal Rules Reviewed. In: *Transportation Journal* (American Society of Transportation & Logistics Inc. Spring 94, Vol. 33 Issue 3, pp. 5-14.

<sup>35</sup> Ulfbeck, V.: Multimodal Transports in the United States and Europe -- Global or Regional Liability Rules? In: *Tulane Maritime Law Journal*. Dec 2009, Vol. 34 Issue 1, pp. 37-90.

<sup>36</sup> Nikaki, T and Soyer, B: A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive AND Efficient, or Just Another One for the Shelves? In: *Berkeley Journal of International Law*, 2012, Vol. 30 (2), pp. 303-348.

<sup>37</sup> Ibid.

maritime carriage will probably be difficult to accept.<sup>38</sup> Furthermore there are still divergences in the procedural rules that are not resolved<sup>39</sup> while the rules on when liability limits can be broken also still vary.<sup>40</sup> There is in other words a great risk that the Rotterdam Rules could end up as “just an extra legal instrument.”<sup>41</sup> The attempt by the European Union to create a harmonised liability regime for Europe is not discussed.

The result of the literature review shows that business and economic research seem not interested in liability issues. This reflects the result of the Economic Impact Study, which disclosed that liability regimes are nothing the industry as such is concerned about. Next we take a look at the views of the Finnish Logistic Service Providers and Shippers, and if the findings indicate the same.

### **3 Finnish Service Providers’ and Service Buyers’ Points of View**

#### **3.1 Finnish Transport Patterns**

Finland’s geographical position in the Baltic Sea is like an island. For this reason most exports and imports to and from other European countries are intermodal in nature. Transport always includes a sea leg and frequently also a road leg (sea-road combinations). Europe’s role in

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<sup>38</sup> Pallares, L. S.: A Brief Approach to The Rotterdam Rules: Between Hope and Disappointment. In: *Journal of Maritime Law and Commerce*, 2011, Vol. 42, No.3, pp. 453-463.

<sup>39</sup> Lamont-Black, S.: Claiming Damages in Multimodal Transport: A Need for Harmonisation. In: *Tulane Maritime Law Journal*. Summer 2012, Vol. 36 Issue 2, pp.707-724.

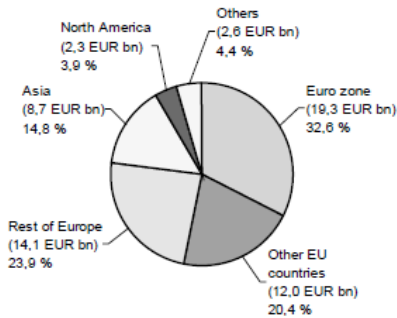
<sup>40</sup> Damar, D.: Breaking the Liability Limits in Multimodal Transport. In: *Tulane Maritime Law Journal*. Summer 2012, Vol. 36 Issue 2, pp. 659-683.

<sup>41</sup> Licievici-Breezeanu, Alexandru-Petru: Global Requirement and Early Praxis of Multimodal Transport. In: *Contemporary Readings in Law & Social Justice*, 2013, Vol. 5 Issue 2, pp.705-715.

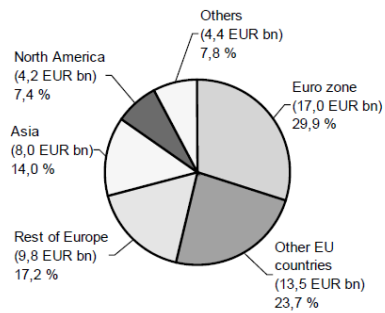
Finland's exports and imports is important, as seen in figure 1. Almost half of Finland's imports are metal, machinery and transport equipment or chemical industry products. These same products and forest industry products constitute most of Finland's exports.<sup>42</sup>

**Figure 1.** *Finland's imports and exports by countries.* <sup>43</sup>

**Imports by groups of countries in 2012**



**Exports by groups of countries in 2012**



Based on statistics, 70.3% of Finland's seaborne trade was with EU countries.<sup>44</sup> In 2012 Finland's major seaborne trading partners in the EU were Germany (16.8 per cent), Sweden (14.4 per cent) and the Netherlands (8.8 per cent). Outside the EU, the main seaborne trading partner was Russia (14.3 per cent). In 2012, of all Finnish exports, sea transport accounted for 88.4 per cent, road transport for 8.5 per cent and rail for 2.5

<sup>42</sup> Finnish Customs 2013. Pocket 2012. <http://www.tulli.fi/fi/tiedotteet/ulkomaankauppatilastot/katsaukset/tiedotteet/taskutilasto2012/liitteet/pocket2012.pdf> [Accessed February 26, 2014].

<sup>43</sup> Finnish Customs 2013. Pocket 2012. <http://www.tulli.fi/fi/tiedotteet/ulkomaankauppatilastot/katsaukset/tiedotteet/taskutilasto2012/liitteet/pocket2012.pdf> [Accessed February 26, 2014].

<sup>44</sup> Finnish Transportation Agency, 2013. Statistics, Seaborne international transports by country in 2012. [http://portal.liikennevirasto.fi/portal/page/portal/f/aineistopalvelut/tilastot/vesiliikennetilastot/ulkomaan\\_meriliikenne/mlt\\_ta\\_maittain.htm](http://portal.liikennevirasto.fi/portal/page/portal/f/aineistopalvelut/tilastot/vesiliikennetilastot/ulkomaan_meriliikenne/mlt_ta_maittain.htm). [Accessed February 26, 2014].

per cent. The situation with imports was similar: sea transport accounted for 79.7 per cent, rail for 10.6 per cent and road for 3.9 per cent.<sup>45</sup> However, please note that all trucks transported by ship are counted as sea freight in the statistics (transport modes are defined based on the mode of crossing the border). Most Finnish foreign trade by rail goes to Russia, either directly or by transit. The track gauge of Finnish railways fits with the track gauge in Russia. This offers a good opportunity for distribution of goods and raw materials to and from Russia.<sup>46</sup> When looking at transport activities in Europe, in 2010 total goods transport in the EU-27 was estimated to amount to 3 831 billion tkm, and of this total road transport accounted for 45.8 per cent, rail for 10.2 per cent, inland waterways for 3.8 per cent and oil pipelines for 3.1 per cent.<sup>47</sup>

Still after all the EU's efforts toward sustainable development the proportion of intermodal transport within the EU is rather low. We are therefore interested in the (potential) impact of the lack of a harmonized liability regime in Europe.

### **3.2 Finnish Service Providers' and Service Buyers' Views on the Assumption of the Commission**

The aim of our research is, hence, to examine whether or not the assumption of the Commission, that is, on the need for a legal instrument, is representative of the industry itself. Thus, in order to explore the industry's view, we collected data from 14 LSPs and 8 Shippers operating in Finland. Two questions were posed: (1) *Are liability issues a problem in the current legal framework, and:* (2) *Is there a need for a harmonised*

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<sup>45</sup> Finnish Customs 2012. [http://www.tulli.fi/en/finnish\\_customs/statistics/graphics/liitteet/Kuviot\\_2011EN.pdf](http://www.tulli.fi/en/finnish_customs/statistics/graphics/liitteet/Kuviot_2011EN.pdf) [http://www.tulli.fi/fi/tiedotteet/ulkomaankauppatilastot/tilastot/kuljetukset/kuljetukset12/liitteet/2013\\_M08.pdf](http://www.tulli.fi/fi/tiedotteet/ulkomaankauppatilastot/tilastot/kuljetukset/kuljetukset12/liitteet/2013_M08.pdf), Suomen virallinen tilasto (SVT): Tavaroiden ulkomaankauppa [verkkojulkaisu]. Helsinki: Tulli. <http://www.tilastokeskus.fi/til/tavu/index.html>, [Accessed 26.2.2014]

<sup>46</sup> Hilmola, O-P.; European railway freight transportation and adaptation to demand decline: Efficiency and partial productivity analysis from period of 1980-2003. *International Journal of Productivity and Performance Management*, 2007, Vol. 56, No. 3, pp. 205 – 225.

<sup>47</sup> EC, 2012. *EU Transport in figures – Statistical pocketbook 2012*.

*legal instrument for better support of intermodal transport?* We focused particularly on the LSPs' and Shippers' views on obstacles (including liability issues) related to rail-based intermodal transport, because the vast majority of Finnish foreign trade already includes a sea leg. The load units under analysis included containers and trailers.

In qualitative research design, case studies can provide description and prediction on a smaller scale, while multiple case studies can be used to describe a phenomenon.<sup>48</sup> For collecting data we used a multiple case-study design and a sample of 14 LSPs and 8 Shippers operating in Finland, all with transport operations in Europe. Each sample included both users and potential users of rail-based intermodal transport. Eight (57%) of the 14 LSP and six (75%) of the 8 Shipper respondents reported that they use rail-truck intermodal transport in the EU. The 14 selected LSPs represented different types of company, offering different kinds of service such as logistics and transportation (some with a broader set of services and some focusing on a certain transport mode in an intermodal transport chain), and freight forwarding. We selected several types of service providers from intermodal transport chains with the aim of obtaining a holistic view. There were four large international conglomerates and two smaller Finnish-based companies with wide service offerings, two large international specialized conglomerates, four smaller Finnish-based specialized companies, and two logistics affiliates of large Finnish companies. Based on previous research<sup>49</sup> and on the research group's earlier experience, it was reasoned that this number of LSP companies interviewed was enough to provide new knowledge on the topic. The interviewed persons in the LSPs were CEOs (8 persons) or logistics or traffic managers (4 persons) or legal experts (4 persons). Three of the interviewed companies had employed experts for legal issues (contracts, insurance, risk etc.). The 8 selected Shippers were big operators in Finland, and with experience

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<sup>48</sup> Ellram L. M.: The use of the case study method in logistics research, *Journal of Business Logistics*, 1996, Vol. 17, No. 2, pp. 93-138; Yin, R.K.: *Case Study Research: Design and Methods*, 3rd Ed., Sage Publications, London, UK, 2003.

<sup>49</sup> Guest, G., Bunce, A., & Johnson, L.: How many interviews are enough? An experiment with data saturation and variability, *Field methods*, 2006, Vol. 18, No. 1, pp. 59-82.

of transport in Europe. All of the interviewed persons were logistics directors or vice presidents in logistics. Two of the Shippers were manufacturers of forest products, three were manufacturers or wholesalers of other business to business products, and three of consumer products. Before final selection of the companies we pre-examined their www pages. In a case study protocol, the two keys to reliability are (1) an interview guide and (2) development of a case study database.<sup>50</sup> To ensure reliability, we developed a questionnaire to ensure that we would obtain answers to the multidimensional issue of obstacles in intermodal transport. We used a semi-structured interview protocol with a combination of open and scaled questions to obtain an in-depth view of the factors. The results discussed in this article form part of a larger questionnaire in which other questions were also posed. The respondents in the companies were chosen on the basis of their expected knowledge of intermodal transport, business development and transport liability issues; the interviewees were CEOs, Vice presidents of logistics, logistics managers and legal counsel with the companies concerned. Some of the interviews included two persons from a company. In order to avoid bias in data collection it is often recommended that interviews are done in teams of several researchers.<sup>51</sup> All interviews thus included two or three members of the research team. An interview guide was sent to interviewees beforehand.

As mentioned, our aim in this study is to examine whether or not the assumption of the Commission on the need for a legal instrument is representative of the industry itself. The questions posed in the questionnaire with the focus on legislation, insurance and liability are presented in Table 3.

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<sup>50</sup> Ellram L. M.: The use of the case study method in logistics research, *Journal of Business Logistics*, 1996, Vol. 17, No. 2, pp. 93-138.

<sup>51</sup> Eisenhardt, K.M.: Building theories from case study research. *Academy of Management Review*, 1989, Vol. 14, No. 4, pp. 532-550.



**Table 3.** *Questions focusing on legislation, insurance and liability in the questionnaires.*

	For LSPs	For shippers
<b>Legislation</b>	<ul style="list-style-type: none"> <li>• Are you aware of the current liability regulations? Why / why not?</li> <li>• Do you think that the existing legal framework is satisfactory currently / in the future?</li> <li>• Is there a need for a (international) legal instrument for full coverage of the entire intermodal logistics chain? Why / why not?</li> <li>• Would an EU intermodal liability regime be beneficial?</li> <li>• What kind of a liability system would you prefer?</li> <li>• Do the regulations, especially liability regulations, favor or hinder the use of one transport mode rather than another, or prevent the usage of rail-based intermodal transports? Why / why not?</li> </ul>	<ul style="list-style-type: none"> <li>• Are you aware of the current liability regulations?</li> <li>• What kind of a liability system would you prefer?</li> <li>• Do the regulations, especially liability regulations, favor or hinder the use of one transport mode rather than another, or prevent the usage of rail-based intermodal transports? Why / why not?</li> </ul>
<b>Insurances</b>	<ul style="list-style-type: none"> <li>Who takes the cargo insurance?</li> <li>Are liability and insurance issues discussed with your customers or network partners or included in your contracts?</li> <li>When and what kinds of cargo insurances are used?</li> <li>What is the percentage of transports insured?</li> </ul>	<ul style="list-style-type: none"> <li>• Who takes the cargo insurance?</li> <li>• Are liability and insurance issues discussed with your customers or network partners or included in your contracts?</li> </ul>
<b>Damages</b>	<ul style="list-style-type: none"> <li>How often do damages or losses occur in your transports? What are their percentages of transports / percentages of cargo value?</li> <li>• Are the risks of damage, loss or delays more or less common in intermodal transports?</li> <li>How relevant are liability issues in choosing of the mode of transport or the route for transports (i.e. responsibility for damage or loss)?</li> <li>Is the liability situation in intermodal transports unpredictable?</li> <li>• If yes, does this prevent the use of intermodal transport alternatives?</li> <li>How are damage/loss situations handled in the customer interface and with your network partners?</li> <li>• Are intermodal choices different and/ or handled differently compared to unimodal? Why / why not?</li> </ul>	<ul style="list-style-type: none"> <li>• How often do damages or losses occur in your transports? What are their percentages of transports / percentages of cargo value?</li> <li>• How relevant are liability issues in choosing of the mode of transport of the route for transports (i.e. responsibility for damage or loss)?</li> <li>• How are damage/loss situations handled in the customer interface and with your network partners?</li> </ul>

### 3.2.1 LSPs' views

Our results from the LSP industry representatives indicate that liability issues are not a problem in intermodal transport, at least from the Finnish perspective. Our findings are thus in line with the Economic Impact Study. Regarding damage, the interviewees commented that damage seldom occurs and court cases are very much the exception. Examples of comments from LSP interviews are in table 4. Sometimes when damage occurs it is difficult to identify where in the transport chain the damage has occurred and thus to identify the applicable liability regime. These

problems normally arise in relation to other LSPs (sub carriers) and are, according to our interviewees, normally solved by negotiation. In these cases there might be a loss for the LSP. However, these cases typically do not end up in court.

Table 4. LSPs' views on liability risks.

Example comments	Type of liability risk	Risk level
<i>"We have very little damage. It is a couple of perilles. Damage occurs in less than one percent of our all transport"</i>	Damage risk	Low
<i>"Damage is an extreme exception. Damage is not really a problem. The share of damage of the value of goods is clearly less than one percent."</i>	Damage risk	Low
<i>"I don't think that any cases have gone to court"</i>	Court	Low
<i>"They (the customer) make us an official claim. According to legislation, we are required to give an answer to that claim. If needed the insurance company is involved. In the worst case we go to the court, but this happens very seldom. We go to court maybe once in 3 years"</i>	Court	Low
<i>"Most of the claims are quite small or they are covered by the insurance. So the cost here is not very high compared to our business turnover. So it's not a major issue we're discussing"</i>	Court	Low
<i>"There is only minimal damage and there is even less damage where the responsible party can't be found"</i>	Responsible party not found	Low

We also asked LSP's views whether liability or damage occurring in the cargo has an impact on selection of transport modes. Thus, based on the interviews, interviewees did not find damage and liability to be a limiting issue for selecting and using intermodal transport as a transport option. Examples of comments from LSP interviews are in Table 5.

*Table 5. LSPs' views on impact of liability issues in choosing of the mode of transport.*

Example comments	Why not importance
<i>"Liability issues don't really affect the choice of transport mode".</i>	No impact
<i>"Liability issues are not a barrier for the use of intermodal transport. Intermodal transport is already included in the rules."</i>	Rules are clear
<i>"(In respect to the customer,) the load is under the forwarder's responsibility regardless of the transport mode"</i>	Responsible party is the same
<i>"The risks aren't higher in intermodal transport."</i>	Risk is not higher
<i>"Liability aspects are always included in contracts. Customers have to know what is offered to them and what our responsibility is"</i>	Contracts are clear
<i>"We sell maritime transport and even if we provide some additional services like domestic transport, our liabilities are based on the bill of lading...We always have the same responsibilities."</i>	Same responsibilities in different modes

Moreover, the results indicate that LSPs find shared responsibilities between customers and themselves relatively clear and often governed by the CMR Convention (Convention on the Contract for the International Carriage of Goods by Road, Geneva 1956), as in many cases the trailer is not unloaded from the truck for a sea or rail leg. Also, because cargo insurances are used by customers to ensure compensation in case of possible damage, liability and damage are not huge economic risks to LSPs. Examples of comments from LSP interviews are in table 6. LSPs also seem to discuss and advise their customers about liability and insurances issues. They are willing to openly discuss liability aspects – for example what damage is covered by the LSP and which not.

*Table 6. LSPs' views on the relationship between liability and insurance.*

Example comment	Way to manage liability risk
<p><i>“Usually the customer takes out cargo insurance that covers the whole transportation; at least if they are aware of common practices. We have forwarder liability insurance, which covers damage caused by us and our subcontractors such as rail operators. The customer usually gets compensation from the insurance company, which in turn claims compensation from the party that caused the damage. This is the common practice”</i></p>	<p>Insurances</p>
<p><i>“Customers typically have their own insurance. But if our service quality is not satisfactory, the customer goes elsewhere”.</i></p>	<p>Insurances Service quality</p>
<p><i>“We have liability insurance for our own operations. The customer’s insurance is their own responsibility”.</i></p>	<p>Insurances</p>
<p><i>“If they (customers) have high value cargo, almost 100% is covered by their own insurance”.</i></p>	<p>Insurances</p>
<p><i>“Of course we advise customers in some cases if they are small exporters or importers. We encourage them to take a distinct transport insurance of their own”.</i></p>	<p>Advising customers</p>
<p><i>“We discuss liability and insurance issues with customers. Also the terms of transport restrict liability. It is usually part of the contract, but we usually still discuss with the customer and guide them and explain what is reasonable. Sometimes the customer doesn’t seem to have enough information. We tell openly what our responsibility is and how they should protect themselves against possible damage.”</i></p>	<p>Advising customers</p>

When summarizing the comments regarding the need for a harmonized legal instrument for better support of intermodal transport, the results indicate that the interviewees did not see a need for a new instrument.

In general for their purpose they find the current instruments clear enough. However, a scarce number of interviewees commented that having the same liability rules for all types of transport could be beneficial. Some commented that if harmonization were to be realized, it must be done at the global level. Examples of comments from LSP interviews are in table 7.

*Table 7. LSPs' views on need for harmonized legal instrument.*

Example comments	Need for harmonized legal instrument
<i>"I think that the legislation is completely satisfactory at the moment. I don't see any problems with it when we are for example on the claiming side".</i>	No
<i>"The current liability system is not unclear as far as I can see".</i>	No
<i>"Unpredictable? Certainly not, there is legislation for that."</i>	No
<i>"Liability aspects are not a problem. We have the international liability regulations and waybill contracts etc. They are not an issue. Everything is very clear. They are not a barrier at all."</i>	No
<i>"Yes, and they (current legal instruments) have been in place for so long that I don't know about anything else. They are generally accepted in the industry, also by most of our customers. But nowadays big multinational companies sometimes come up with their own proposals, where the carriers are expected to be more liable than the conventions are saying. In most cases their proposals are based on the insurance setup that they have."</i>	No

<p><i>“We have cases where the customer comes to us and says that they don’t care about the international conventions. They just want us to be responsible for any damage that happens. “You cause this, you pay it.” What the law says, they don’t care.”</i></p>	<p>No</p>
<p><i>“Liability regulations for different transport modes shouldn’t be harmonized. They can’t be made similar. Maritime cargo is maritime cargo. There is a whole different set of rules for road transport.”</i></p>	<p>No</p>
<p><i>“We have been discussing that CMR is working very well for us at the European level, but if we intend to have an intermodal system, it should be a global one.”</i></p>	<p>If yes, global</p>
<p><i>“Europe can’t harmonize legislation without international maritime law. Of course the rules for road and rail transport inside Europe can be harmonized, and this has been done for example for dangerous substances. Europe is such a small area that it is not very useful”</i></p>	<p>If yes, global</p>

### 3.2.2 Shippers’ views

Our results from the Shippers are in line with LSPs’ views and thus indicate that liability issues are not a problem in intermodal transport. Damage occurs rather seldom compared to the number of transactions that companies have. In addition, court cases are very unusual. Examples of comments from Shippers’ interviews are in Table 8.

*Table 8. Shippers’ views on liability risks.*

Example comments	Type of risk	Risk level
<p><i>“Damages are rare considering our volumes. Thefts are most common. Let’s say that if we have 4 000 transports, we have around twenty cases during the year.”</i></p>	<p>Damage</p>	<p>Low</p>

<i>“Damage does not occur often, actually very rarely compared to the number of transactions”.</i>	Damage	Low
<i>“Damage happens but I would not say often. It is not a monthly problem.”</i>	Damage	Low
<i>“Luckily (damage occurs) very seldom. One could expect that, when considering the type of products we transport, there would be more thefts and breakages but they take place very seldom, only a couple of times a year”.</i>	Damage	Low
<i>“Damage occurs, bigger damage, a couple of times a year. Amount-wise it is small but money-wise typically pretty big.”</i>	Damage	Low

When discussing the influence of liability issues in relation to choice of transport, the results indicate that liability aspects are not issues when selecting a transport mode. One respondent raised the importance of service reliability in terms of transport lead-time. In addition, when asking about risks, even though according to the interviewees losses or delays could be somewhat more frequent in intermodal transport, the general conclusion is that risks are not a big issue in intermodal transport. Some even commented that there seems to be less risk for example in terms of thefts. On the other hand, one commented that there could be a higher risk as there are significant forces when shunting or when a train stops and it might end up damaging the product. Examples of comments from Shippers’ interviews are in Table 9.

*Table 9. Shippers’ views on relevancy of liability issues in choosing of the mode of transport.*

Example comments	Why not relevant
<i>“It (liability) doesn’t really influence our choice of transport mode as we buy the transport from our partner. It doesn’t play any role whether the liability is based on NSAB or CMR insurance.”</i>	Regulations are about the same

<p><i>“I imagine that the risk (in intermodal transport) would be a bit smaller.”</i></p>	<p>Risks lower in intermodal transports</p>
<p><i>“I don’t really see risk as an important aspect. I’m more interested in knowing the lead-time from point A to point B. This is a more critical issue for us. I trust that if a transportation mode is offered, it can be operated reliably.”</i></p>	<p>Risks are minor</p>
<p><i>“Vice versa, rail transport has less risk in loss. I haven’t ever heard that someone would have stolen a trailer from a train but thefts occur in trailer parks every once in a while.”</i></p>	<p>Risks lower in intermodal transports</p>

We asked respondents whether it is possible always to localize where damage has happened, and whether this is a problem in terms of compensation. The respondents found that there are sometimes cases where localization is difficult, but they typically did not find this problematic. They see that responsibilities are pretty clear and their corresponding party is the LSP, which is responsible for the whole transport chain. Examples of comments from Shippers’ interviews are in Table 10.

*Table 10. Shippers’ views on localizing damage.*

Example comments	Localization
<p><i>“One cannot always tell if there is a broken pallet, for example, where it broke.”</i></p>	<p>Sometimes vague</p>
<p><i>“I wouldn’t say that we have had a lot of problematic cases. Usually it is pretty clear who is responsible.”</i></p>	<p>Usually clear</p>



<p><i>“If the transport has been organized by us, we claim compensation from our own insurance company. The insurance company and the transport operator settle their own issues then. We haven’t ever needed to think whether the damage happened in a train or on a ferry or on the road. This is not an issue for us and I don’t see that it would be an issue in the future either.”</i></p>	<p>Not relevant, because insurance covers</p>
<p><i>“Responsibility issues have no influence on choice of type of transport. Sometimes we have “arm wrestling” when the operator tries to avoid responsibility, but the responsibilities are specified in the contracts. We have a single contract with the operator and they are responsible for their subcontractors. Of course there are sometimes disagreements if the operator tries to explain its way out of responsibility. Thus it is their responsibility.”</i></p>	<p>Not relevant, because operator always responsible</p>

Based on interviews we can conclude that all companies have their own insurance for transport damage. Insurance covering transport damage is typically part of a company or corporate insurance package. Respondents also noted that the handling process is pretty clear. Examples of comments from Shippers’ interviews are in Table 11.

**Table 11.** *Shippers’ views on insurance.*

Example comments	Way to manage damage risk
<p><i>“All our transports are insured on a group level”.</i></p>	<p>Group level insurance</p>
<p><i>“We have a group-wide insurance contract for all our transport: exports, imports, and domestic transports. Everything is insured with one insurance company.”</i></p>	<p>Group level insurance</p>
<p><i>“We have global insurance covering all transports everywhere around the world. We don’t take additional insurance on top of that.”</i></p>	<p>Insurance covering all transports</p>

<p><i>“Yes we do insure our transport. Naturally there is a limit for own risk. Transport is included in our insurance portfolio.”</i></p>	<p>Insurance portfolio (transport included)</p>
<p><i>“We have only a group level insurance that covers all transport independent of the country of origin or the transport operator”</i></p>	<p>Group level insurance</p>
<p><i>“We have insurance for the part that transport companies’ insurances do not cover. So they cover bigger cases”.</i></p>	<p>Transport companies’ insurance primary; own insurance secondary</p>
<p><i>“Primarily we try to get compensation from the transport operator based on common euros per kilogram regulations. Compensation is often less than the value of our products and the remaining part is covered by our own insurance.”</i></p>	<p>Regulations primary, own insurance secondary</p>
<p><i>“We have insured our own transport so the insurance company handles these things. Probably the reason is that it makes the work easier. We don’t need to negotiate with the transport operator about who compensates damage.”</i></p>	<p>Insurance company handles</p>
<p><i>“We require CMR insurance from our partners. Most often the transport operator’s CMR insurance covers damage if something happens. The value of our goods is on that kind of level that CMR insurance covers our insuring needs quite well. In addition to that our company has an insurance of its own that covers all the transports in group level. This insurance is useful if something exceptional happens.”</i></p>	<p>Transport companies’ insurance primary; own insurance secondary</p>

We also asked respondents whether they were familiar with the existing legal framework and whether they find this satisfactory for multimodal contracts of carriage or whether there is a need for changes. The overall conclusion from the interviews is that respondents are not very familiar with the legal framework. However, the findings from the liability aspects

also indicate that from the Shippers' view point there is no need for changes.

## 4 Conclusion and suggestions for future research

The results of our literature review and empirical study indicate that the unpredictable liability situation in intermodal transport has not been seen as a problem in business and logistics research or by the industry, either LSPs or Shippers. In other words, the assumption of the Commission, on the need for a harmonised legal instrument on multimodal contracts of carriage, is not relevant for the industry itself. Of course as in any study this study has limitations. The data in our empirical research included a limited set of companies. Even though they were carefully selected and the results therefore provide good preliminary indications of the pragmatic views of industry actors there is a need for further collection of data, through both qualitative and quantitative methods. LSPs and Shippers included in our research were big companies, so we cannot be certain if our conclusions also apply regarding small and medium sized enterprises' (SMEs') views on liability issues. It can be assumed that for SMEs the legal situation seems more unpredictable than for bigger companies, because they might be less knowledgeable of regulation and for them the consequences of a single harmful incident are bigger. We suggest that in future studies more participants representing SMEs should participate.

Friction costs related to change of transport mode are low and have only a minor impact on the choices made by transport integrators and their customers. The total outcome of the European liability project seems accordingly to be marginal and not at all in line with the rather extensive policy goal on reduction of CO<sub>2</sub> emissions from transport, which according to the Commission should be 80-95% below 1990 levels by 2050.<sup>52</sup>

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<sup>52</sup> White Paper: Roadmap to a Single European Transport Area- Towards a competitive

If nothing is done, CO2 emissions from transport will remain one third higher than their 1990 level by 2050 and congestion costs will increase by about 50%.<sup>53</sup> It seems clear that a harmonised liability regime is *not a sufficient tool to promote sustainable, multimodal transport in the EU*. Leaving the issue to the transport industry is not an alternative either. So far this has merely produced negative results: European Transport is constantly growing and road carriage is expanding its already high share.<sup>54</sup> Current development is in other words inconsistent with transport policy. If the Commission is serious about its environmental commitment, other tools should be considered. A harmonised contractual liability regime is apparently not efficient. *Whether and how contract law can otherwise be used as a tool to promote sustainable carriage of goods* is thus a topic for future research.

Our main conclusion is that liability issues are not an obstacle for the wider use of intermodal transport in the EU even though the Commission seems to expect that; the liability issues are perceived as minor by the interviewed LSPs and Shippers. Thus our research supports the conclusions of the previous Economic Impact Study. Results addressed in this study were part of the wider research project. Our preliminary findings from the interviews in our wider research project indicate, the key challenge limiting the use of rail-based intermodal transport in particular is a *perceived lack of services*.<sup>55</sup> As long as this challenge is of high importance the current situation cannot be unravelled by solving minor issues such as liability challenges. This indicates that collaboration between the EU and the industry actors as well as legal and logistics experts etc. is needed for future development. This question is also subject to further research.

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and resource efficient transport system. COM(2011) 144 final at 1.6.

<sup>53</sup> L.c.

<sup>54</sup> See above at 2.1.

<sup>55</sup> Raitasuo, P., Bask, A., Rajahonka, M., Kuula, M. and Eftestøl-Wilhelmsson, E.: Why the share of intermodal transport with a rail leg is low in the EU – Finnish LSPs' perspective. Presentation at Nofoma 2013 Conference, Gothenburg, Sweden; Raitasuo, P., Bask, A., Rajahonka, M., Kuula, M. and Eftestøl-Wilhelmsson E.: Challenges in the Use of Rail-based Intermodal Transport in Europe: case Finland. 201x, Unpublished paper.

Another aspect which should be considered in future studies is the role of *insurance*. Our study shows that both LSPs and Shippers are not very concerned about liability issues. Instead, they rely on insurance. The cost of insurance in the logistical industry is accordingly an area in need of research. Our study indicates that the industry might be over-insured, and that additional costs in relation to the regulatory gap in multimodal carriage are probably covered by insurance.

## 5 Acknowledgements

The authors would like to express our gratitude to the anonymous reviewers for their helpful comments for developing the paper. The authors are also grateful to the Academy of Finland and the Scandinavian Institute of Maritime Law for partly funding this study.

## English interpretations of acronyms in the text

ADN	Agreement on Dangerous Goods
ADNR	Regulation for the Carriage of Dangerous Substances on the Rhine
ADR	Agreement on Dangerous Goods Regulations
AGN	European Agreement on Main Inland Waterways of International Importance
AIS	Automatic Identification System
BIMCO	Baltic and International Maritime Council
BPO	Bank Payment Obligation
BW	Dutch Civil Code
CA	Court of Appeal
CCNR	Central Commission for the Navigation of the Rhine
CEVNI	European Code for Inland Waterways
CHR	Commission for Hydrology of the Rhine
CIM	Uniform Rules Concerning the Contract for International Carriage of Goods by Rail
CISG	Contracts for the International Sale of Goods
CLNI	Strasbourg Convention on the Limitation of Liability of Owners of Inland Navigation Vessels
CMI	International Maritime Committee
CMNI	Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway
CMR	Convention on the Contract for the International Carriage of Goods by Road
COGSA	Carriage of Goods by Sea Act

COTIF	Convention concerning International Carriage by Rail
CPC	Civil Procedure Code
DCFR	Draft Common Frame of Reference
ECJ	European Court of Justice
EEC	European Economic Community
ENI	European Vessel Identification Number
EU	European Union
FMC	Finnish Maritime Code
FOB	Free on board
HGB	German Commercial Code
HVR	Hague-Visby Rules
ICC	International Cargo Control
ICPR	International Commission for the Protection of the Rhine
IMO	International Maritime Organization
IMTM	Mediterranean Institute of Maritime Transport
ISIC	Integrated Services in the Multimodal Chain
ISM	International Safety Management
IT	Information technology
JIT	Just in time
KLM	Royal Dutch Airlines
LLMC	Limitation of Liability for Maritime Claims
LSP	Logistic Service Providers
MC	Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention)
MTO	Multimodal transport operator

NAIADES	An Integrated European Action Program for Inland Waterway Transport
NSAB	General Conditions of the Nordic Association of Freight Forwarders
OLG	(German) court of appeal
OST	Oslo, Southampton and Tulane
P&I	Protection and indemnity
RID	Regulations concerning the International Carriage of Dangerous Goods by Rail
RIS	River Information System
RPN	Rules for navigational personnel
RPNR	Police Regulations for the Navigation of the Rhine
RR	Rotterdam Rules
RVIR	Rhine Vessel Inspection Regulations
SDR	Special Drawing Right
SECA	SOx Emission Control Area
SIGNI	Signs and Signals on Inland Waterways
SME	Small and medium sized enterprises
SOLAS	Safety of Life at Sea
SVT	Official Statistics of Finland
SWOT	Strengths, weaknesses, opportunities and threats
TEU	Twenty-foot equivalent units
UN	United Nations
UNCTAD	United Nations Conference on trade and development
UNECE	United Nations Economic Commission for Europe
URBPO	Uniform Rules for Bank Payment Obligations



US	United States of America
VBW	Technical Committee for Inland Navigation Law of the Association for European Inland Navigation Waterways
WC	Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw Convention)
ZARA	Zeebrugge, Antwerp, Rotterdam and Amsterdam

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ISSN: 0332-7868

