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The harmonization of intermodal liability arrangements

1. Introduction

Considering the growth of international trade, a prerequisite for the European Union's competitiveness is the existence of an efficient transport system. Our present system however is unbalanced and does not make use of the spare capacities we have. At this moment road transport is by far the largest transport sector in Europe and it is likely to further increase its market share, thereby increasing the imbalance. To clarify this with an example, the share of road transport in the total transport market within the Union is approximately ten times larger than the share of inland navigation¹.

The enormously grown usage of the road for freight transport has caused the rising of concerns about road congestion, accidents and the negative impact of increasing road transport on the environment. Apart from paving over whole provinces, improvement of this situation may be found in using the reserve capacity of currently underestimated modes of transport such as the aforementioned inland navigation. Thus realizing a new balance between growth and environmental protection.

Inland navigation is a mode of transport which offers future possibilities. Research has proven that inland navigation in general can grow substantially, due to considerable reserve capacity both in infrastructure and fleet capacity. Also worthy of consideration is that inland waterway transport is the most environmentally-sound mode of freight carriage besides guaranteeing very high safety standards. This mode of transport however, suffered from underestimation during the past decades and as such needs some maintenance. Although progress has been made, there are still very serious impediments to the full development of inland navigation which are mainly related to infrastructure, legal procedures and lack of harmonisation. One of these impediments, namely the lack of a unified legal regime for transport of goods by inland waterways, is about to be undone. The CMNI, the Convention of Budapest on the contract of carriage by inland waterways, is now open for ratification by all states having navigable inland waterways, and will unify the rules that apply to all crossborder transports by inland waterway.

To develop all its potentialities, inland water transport must be made part of an integrated transport system, comprising all modes, since the waterway network doesn't cover all the important economic regions. In other words; to promote the use of inland waterway transport it is also necessary to promote intermodal transport and to try to smooth over any difficulties that might occur while making use of a combination of transport modalities. One of these difficulties is the fact that the liability regimes concerning loss, damage or delay (hereafter "loss") of goods during transport have developed on a unimodal basis. Consequently factors like liability limitation change in accordance with the transport mode used. The intermodal operators should be able to offer their customers a clear set of transparent liability conditions and procedures for any cargo that is damaged or lost on its journey. In order to minimize disadvantages like these harmonization of the existing liability regimes seems necessary.

2. Problems due to the lack of an international multimodal carrier liability instrument

2.1 Problems regarding localized loss

Since most carrier liability regimes are modal based, multimodal transport operations encounter many problems in practice, such as the determination of the law to be applied to a specific transport operation whenever several transport modes are used². Even in the 'simple' cases where the place the loss or damage of the goods occurred can be pinpointed, also known as localized loss, transport operators do not always know which liability regimes apply to their operations. Ascertaining the applicable regime however is not an unnecessary luxury since the existing regimes differ greatly when it comes to the basis of carrier liability or the extent thereof.

¹T. Hacksteiner, "Developments of inland waterway transport in the Pan-European Field", IVR Rotterdam 2004.

²UNECE, Inland Transport Committee, Working Party on Combined Transport, "Possibilities for reconciliation and harmonization of civil liability regimes governing combined transport", results of two expert group meetings ("hearings") on civil liability regimes for multimodal transport, Thirty-fourth session, 4-6 September 2000, agenda item 8.

Luckily they tend to agree on the definition of multi- or as some arrangements call it, intermodal transport, which is: The carriage of goods by at least two different modes of transport on the basis of a single multimodal transport contract. This means transports using different modalities, each with its own unimodal contract, are excluded³.

Freight forwarders are inclined to act as principal and provide the shipper with a single contract. In practice these freight forwarders are also known as Multimodal Transport Operators, MTO's for short⁴. The single multimodal transport contract is seen in general as a 'chain' contract, a contract that is nothing more than the contracts concerning each individual unimodal part of the transport chained together.

Especially in Germany, but also in other nations another perspective on the essence of the multimodal transport contract has supporters. This perspective declares that the multimodal transport contract is not a chain contract at all, but is an atypical contract with an autonomous character, a *sui generis* contract. The multimodal transport contract in this vision is a contract whereby the (principal) carrier or freight forwarder takes on a responsibility that goes a lot farther than just the mere transport of the goods, it also contains responsibility for the transshipment of the goods, the storage and other cares that come with the organisation of the total transport. It will not be surprising that the above mentioned term Multimodal Transport Operator is favoured by adherents of this viewpoint.

Nonetheless, since the majority sees the multimodal transport contract as a 'chain' contract this is the viewpoint that will be followed in the rest of this piece.

2.1.1 Some critical differences between the various regimes

Uniform, network or modified system

In a uniform liability system, the same set of rules apply irrespective of the unimodal stage of transport during which loss, damage or delay occurs. There is no difference between cases where loss can or cannot be localized. The clear advantage of this type of liability system is its simplicity and transparency, as the applicable liability rules are predictable from the outset and do not depend on identifying the modal stage where a loss occurs⁵.

The opposite of the uniform system is called the network liability system⁶, which can be said to weld different liability regimes together. In this system the liability regime applicable on a multimodal transport agreement is comparable to a chain that is composed of the regimes that normally apply on each trajectory of the total voyage using a different mode of transport. In other words, different regimes apply to the separate parts of the journey as if the involved parties had drawn up separate contracts for each of them.

To a large extent, the present international legal framework governing multimodal transport contracts can be characterized as a network system by default: due to the absence of an applicable international instrument on multimodal transport, liability varies according to the stage of transport to which a particular loss can be attributed and any relevant international or national unimodal liability rules.

A compromise between these two systems also exists and is known as the modified system. Such a system essentially seeks to provide a middle-way between a uniform and a network system. Various arrangements are possible, making a system more uniform or more network-like. In practice a lot of use is being made of this kind of system in the form of contractual standard rules like the UNCTAD/ICC Rules.

In a modified system, as the name already suggests, some provisions are uniform and some depend upon the modality where the loss originated. One of the last category is the liability limit which can cause a lot of problems seeing that these limits tend to vary greatly from transport mode to transport mode as will be shown further on.

³ A. van Beelen, *Multimodaal vervoer. Het kameleonsysteem van Boek 8 NBW*, (diss. Leiden, 1996) Zwolle, W.E.J. Tjeenk Willink, 1996, p. 13.

⁴ Or Combined Transport Operators, CTO's for short.

⁵ UNCTAD, Multimodal transport: The Feasibility of an international legal instrument, UNCTAD/SDTE/TLB/2003/1, 13 January 2003, p. 16-17.

⁶ Also known as the 'chameleon' system which term describes the changing of the applicable legal regime depending on the environment the transported goods are in perfectly.

Fault-based or strict liability

Usually the transport agreement is seen as an agreement to achieve a certain result. When the agreed upon result, namely the transport and delivery of the undamaged shipment, is not achieved the carrier is liable irrespective of fault. This is called strict liability. Other regimes stipulate that there can be no liability if there is no fault, presumed or otherwise, on the part of the carrier, which is called fault-based liability.

Even in a strict liability regime however, there are exceptions to the rule. These exceptions generally include the exception of *force majeure*, although the interpretation of this term tends to vary. Other possible exceptions are a wrongful act or neglect on the claimants part, the inherent vice of the goods or as used in maritime regimes the perils of the sea.

Damages qualified for redress

Besides the basis of liability or the exceptions thereupon there is also a difference between regimes in what kind of damages can be claimed. A claimant only used to be able to claim redress for loss or damage of the shipped goods. The Hague-Visby Rules for example only include provisions that address these kinds of damages. But as delay is becoming increasingly important in connection with effective supply chain management, especially when it comes to multimodal transport chains, several regimes like the CMR convention⁷ have incorporated mandatory rules to regulate liability for delay in delivery.

The liability of the MTO for his servants, agents and other persons

Also of influence on the extent of the carrier's liability is the variance in responsibility for people in his employ. In some regimes the multimodal transport operator is responsible for the acts and omissions of his servants or agents, when any such servant or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the performance of the contract, as if such acts and omissions were his own, like in the UNCTAD/ICC Rules. Other regimes relieve the carrier (in some situations) of the responsibility for his underlings. The Hague-Visby rules for example state in article IV that: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship".

This is what is called the "nautical error" exception, and it is this exception in combination with the exception of liability in case of fire that makes the maritime liability regime the odd one out in the range of unimodal liability regimes when it comes to exceptions.

Liability limitations

All transport law conventions currently in force provide for monetary limitation of liability, but the relevant levels vary considerably. The limit for transport of goods by air for instance is almost nine times higher than the limit for maritime conveyances. If one keeps in mind that the goods transported by air usually have a much higher value than their counterparts that are being shipped by sea, this is very understandable.

For a better appreciation of the issue, an overview of the relevant amounts is provided in table 1.

	SEA		ROAD	RAIL	AIR
Hague Rules:	HVR:	Hamburg Rules:	CMR:	COTIF/CIM:	Warsaw convention /Montreal convention:
£ 100/pkg	2 SDR/kg or 666,67 SDR/pkg	2,5 SDR/kg or 835 SDR/pkg	8,33 SDR/kg	17 SDR/kg	17 SDR/kg

Table 1: Overview of liability limits per mode of transport and international unimodal conventions.

It is obvious the turnover of recourse actions by MTO's against unimodal subcontracting carriers varies greatly.

In spite of this the limitation of liability does have an important role. It guarantees a reliable basis for the shipper as well as the carrier to calculate their economic risks. The limitation of liability enables

⁷ Article 17 CMR convention.

them to acquire adequate insurance at acceptable costs while on the other hand the victim or owner of damaged property can be sure to receive reasonable compensation⁸.

Time limits regarding legal proceedings

On the whole, the timeframe in which a legal action is possible under the various rules of transport law is relatively short. Time bars vary from 9 months up to 3 years, which can make it difficult to bring a timely suit against the right carrier in the right forum. Contractual limitation periods, which are even shorter (for example, the nine-month limitation period in the FIATA FBL 6.1992, clause 17) may be misleading, as they are invalid in cases where a particular mandatory national or international legal regime applies⁹.

Rules of evidence

Rules of evidence differ from regime to regime. Usually there is a system of strict liability or even a fault-based one in combination with presumed fault of the carrier. In these systems it falls to the carrier to prove that there was force majeure or some other acquitting circumstance. It is nonetheless possible that in some arrangements the claimant has to prove the fault of the carrier after damage, loss or delay has occurred. The degree of severity of this proof is not a stable factor but usually the casting of suspicion is enough. Which is reasonable since the cargo owner has limited access to information about the origin of the damage, so that placing the burden of proving facts establishing the operator's liability on him is a large impediment to the recovery of damages.

The difficulty of proving force majeure or lack of fault by the carrier also differs per set of regulations. Under the CMR convention for instance this is quite difficult since it is seen in relation to the burden of proof regarding the existence of wilful misconduct of the carrier. The latter is to be proven by the claimant but since this term is to be filled in accordance with the law of the court or tribunal where the trial is held, uncertainty thrives.

Document rules

In some regimes the transport document is merely a tool, like in the CMR convention, where article 4 states: "The absence, irregularity or loss of the consignment note shall not affect the existence or the validity of the contract of carriage which shall remain subject the provisions of this convention." But in others the terms named in the transport document mandatorily define the contract and the applicability of the regime itself, like for instance the bill of lading mentioned in the Hague-Visby Rules.

Yet other sets of rules are contractual like the ICC-rules or the CMI Uniform Rules for Sea Waybills. These are to be incorporated in transport contracts, but function as a "default" liability regime. Default since they only apply during periods when the multimodal transport is not subjected to a mandatory regime and during times when a mandatory regime is applicable the contractual rules can only apply insofar as the mandatory regime leaves room.

2.2 Problems regarding non-localized loss

The lack of fitting regulation becomes blatantly obvious when we tackle the problems concerning non-localized loss. Only a few of the unimodal oriented conventions provide guidance in this area, almost unintentionally it seems, because it is a typically multimodal problem. Under unimodal regimes, every time a loss occurs, what actually happened has to be investigated.

It is however an increasingly difficult undertaking to ascertain during which leg of the journey damages have occurred since an ever large amount of multimodal transport takes place in containers. How can one be sure when and where a loss occurred, that is, on which mode the container was situated when the loss occurred? We have seen that liability varies in terms of incidence and extent depending on the applicable regime. Which regime applies, in turn, depends on whether it is possible to identify the modal stage where the loss or damage occurred.

These questions towards carrier liability are so far still unsolved at the international level and even national regimes have gaps in this legal area.

If the only guidance available is to be found in the unimodal regimes with their variation in liability limitation the height of the damages to be paid will not be determined easily. On the one hand, each

⁸ T. Hacksteiner, "Developments of inland waterway transport in the Pan-European Field", IVR Rotterdam 2004.

⁹ UNECE, Inland Transport Committee, Working Party on Combined Transport, "Possibilities for reconciliation and harmonization of civil liability regimes governing combined transport", results of two expert group meetings ("hearings") on civil liability regimes for multimodal transport, Thirty-fourth session, 4-6 September 2000, agenda item 8, p. 6.

transport operator has an interest to establish that the loss has occurred during the transport operation to which the lowest liability limit can be applied, whereas the shipper is interested to provide that the loss occurred during the transport leg to which the highest limit applies. This could lead to long court proceedings¹⁰. Often these disputes are settled out of court on a commercial basis.

Which is possible since shippers typically make separate arrangements for individual shipping contracts, carrying some of the liability and insuring part of it.

Another practice that has sprung up is that of logistics companies operating like a carrier, assuming liability up to set standard limits. If shippers want higher coverage, additional coverage can be worked into the contract. Liability issues can thus be resolved between the logistics firm and the client. The third-party logistics firm resolves claims on the front end with the customer and then subrogates the matter with truck, rail, ocean, or air carriers involved. The success or failure of the final resolution is transparent to the customer. In effect, logistics providers in Europe have positioned themselves as part of the solution to complicated liability regulations.

But even while these makeshift solutions bring a little more clarity to this field of business for the shipper the circumstances are still far from ideal. The logistics companies that provide this kind of service are sure to charge more for their labours than they might when the recourse actions they have to institute against their subcontractors were less risky and time consuming.

2.3 Friction costs

This sort of uncertainty with regard to the applicable legal rules tends to lead to additional costs and hence would reduce the attractiveness of intermodal freight transport to the detriment of the consumers and the environment¹¹. Examples of these costs, that are also known as friction costs, are the costs of extended legal proceedings, extra administration costs, higher insurance premiums, losses without recourse possibility etc.

With this in mind it doesn't come as a surprise that most parties involved in multimodal transport do not consider the existing legal framework to be cost-effective, citing the named factors as increasing overall transport costs.

With regard to insurance premiums the representatives of the insurance industry confirmed that difficulties in obtaining liability cover for multimodal transport operators usually do not exist. This situation appears to be quite different however, for transport operations to and from third-world countries and other regions without any or clear legislation in the field of multimodal transport carrier liability. Uncertainty with regard to the applicable legal rules in these cases seems to lead to higher transport prices as a result of higher insurance premiums.

Companies shipping large volumes usually have few problems in this respect as they are able to impose their general conditions on their counter parties. They work with a small number of selected carriers depending on the transport mode and the area the goods are shipped to. On the other hand, in times of out-sourcing and production on demand, even large companies often no longer ship large volumes at the same time in the same direction and are thus also forced to accept the liability conditions of transport operators.

Small operators have to face the economical power of their counter parties which may force them to conclude contracts of carriage which are not favorable for them (i.e. ferry operators imposing their general liability conditions).

All in all harmonization of the legal framework concerning multimodal transport carrier liability could yield savings in friction costs of up to 50 million Euro a year¹².

¹⁰ UNECE, Inland Transport Committee, Working Party on Combined Transport, "Possibilities for reconciliation and harmonization of civil liability regimes governing combined transport", results of two expert group meetings ("hearings") on civil liability regimes for multimodal transport, Thirty-fourth session, 4-6 September 2000, agenda item 8, p. 6.

¹¹ European commission, "The economic impact of carrier liability on intermodal freight transport", final report, London, 10 January 2001, IM Technologies Limited, Studiengesellschaft für den kombinierten Verkehr e.V., p. 3.

¹² UNECE, Inland transport committee, working party on Combined Transport, "Possibilities for reconciliation and harmonization of civil liability regimes governing combined transport", study of the economic impact of carrier liability on intermodal freight transport, executive summary transmitted by the European Commission, Thirty-seventh session, 18-19 April 2002, agenda item 9, p. 6.

2.4 Uncertainty reigns

It is clear that the complex array of international conventions designed to regulate unimodal carriage, diverse regional agreements, national laws and standard term contracts creates a tapestry in many hues. As has been outlined in the above, both the applicable liability rules and the degree and extent of a carrier's liability vary greatly from transport mode to transport mode and are as such unpredictable. And that is in the best case scenario, when the mode where the loss occurred is identifiable.

A worrisome observation is that the current civil liability regimes even have some gaps. Some are so large that the regime does not apply at all to movements which, if the drafters had addressed the question, would have been subject to the regime. For example, the Hague and the Hague-Visby Rules apply only to contracts evidenced by bills of lading, but do not apply to shipments evidenced by waybills in widespread use on short sea routes, such as in the North Sea and the English Channel¹³. Another obstacle to discerning the appropriate legal system is the fact that when goods are moved from one mode to another and damage occurs during transshipment between the train, lorry or boat, it is not always easy to establish which of the modal regimes will apply. There is, for example, uncertainty if a trailer being towed onto a roll on-roll off ferry is damaged when it strikes a bulkhead: is that occurrence governed by the road or the sea regime?

The uncertainty as to what set of rules, if any, apply that is created in this manner is most detrimental to the competitiveness of multimodal transport.

3. Multimodal carrier liability arrangements

While much of international trade is now carried out on a door-to-door basis, under one contract and with one party bearing contractual responsibility, we have seen that the current legal framework fails to appropriately reflect these developments.

In view of the absence of an international uniform regulation of carrier liability, there has been a proliferation of diverse national, regional and sub regional laws and regulations on multimodal transport. Legislation of this type is not only found in specifically multimodal oriented regimes, but also incorporated in unimodal regimes like the CMR, albeit marginally.

The conventions regarding sea transport, like the Hague Rules and the Hague-Visby Rules, do not extend their scope of application beyond transport by sea and as such they will not be discussed in the following.

3.1 Unimodal regimes

3.1.1 Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention)/ 1999 Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention)

current status

Article 31 of the Warsaw Convention states: "In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this convention apply only to the period of the carriage by air".

While the convention recognizes the reality of door-to-door transport it does not try to expand its applicability to other modalities, except for the minimal extension in article 18 (3), and then only within very strict parameters. Article 18 (3) mentions:

"The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air."

Roughly translated this means that in case of non-localized loss within the mentioned parameters, the rules of the Warsaw convention also apply to other transport modes.

The conditions defined by the Warsaw convention are uniform and mandatory.

¹³ UNECE, Inland Transport Committee, Working Party on Combined Transport, "Possibilities for reconciliation and harmonization of civil liability regimes governing combined transport", results of two expert group meetings ("hearings") on civil liability regimes for multimodal transport, Thirty-fourth session, 4-6 September 2000, agenda item 8, p. 7.

prospects

In the future the effect of the Warsaw convention is destined to disappear due to the new Montreal convention (1999) regarding air transport that has come into effect in November 2003. The provisions found in the Montreal convention are also uniform and mandatory. The two conventions will continue to exist alongside each other for some time to come, until the majority of countries that ratified the Warsaw convention will have switched to the newer Montreal convention.

The Montreal convention has regulations concerning multimodal transport similar to those of the Warsaw convention.

Article 38 of the Montreal convention for instance, replaces article 31 of the Warsaw convention. It states: *'1. In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of Article 18, apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.'*

Under article 18 of the Montreal convention however some divergence is noticeable. This article, as opposed to its predecessor, asserts that all modes of carriage would be deemed to have been by air, and thus covered by the Montreal convention, if the contract of carriage only reflects intended movement by air. So if the agreement between parties concerns air transport and lacks any indication that the cosignor has consented to the (possible) use of alternative modes of transportation the Montreal convention applies to the whole transport, even if the carrier decides to substitute the air carriage by road carriage¹⁴.

For example, if you book a through air move from Rotterdam to New York any ocean or road links will be considered to have been air moves, and thus covered under the Montreal convention, even though the actual airport of departure was London, Heathrow.

All that will be required for this result is that the air waybill did not mention any road or ocean links.

The specific content of article 18 Montreal convention is as follows:

"If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air."¹⁵

In this manner the Montreal convention extends its applicability to other modes of transport, but only within strict limits.

3.1.2 Convention on the Contract for the International Carriage of Goods by Road (CMR)

current status

The scope of application of the convention, whose provisions are both uniform and mandatory, can be found in article 1 (1), which reads:

"This Convention shall apply to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties."

This provision seems very clear, but unfortunately appearances can be deceiving. In this day and age of multimodal transport situations arise in which the extent of the CMR condition is subjected to ample discussion.

To clarify this, let's illustrate the problem with the following example: fourteen crates of tin soldiers are being shipped from Paris (FR) to Manchester (GB). Parties have agreed that the soldiers shall travel the first part of the journey, from Paris to Rotterdam (NL) by road, the second part from Rotterdam to London (GB) by ship¹⁶ and the last part of the voyage from London to Manchester they will be transported by road again. Regrettably the driver falls asleep behind the wheel on the last trajectory of the trip and the tin soldiers end up bruised and battered in a ditch.

The point of discussion is, does the CMR convention apply on this last part of the transport? The answer depends on the explanation one gives article 1 (1) and article 2 (2).

¹⁴ Thereby defaulting on his agreement.

¹⁵ M.S. McDaniel, *The Proposed Montreal Convention of 1999. An Act To Replace The Warsaw Convention of 1929. A Courtesy Reference from*, WWW <http://www.cargolaw.com/presentations_montreal_con.html>, Rotterdam , 27 September 2000.

¹⁶ the goods being transferred from the truck into the ship.

One viewpoint is that this trajectory falls within the scope of the CMR convention, since article 1 (1) does not literally demand that the whole voyage has to be made by road, just that it has to have a road trajectory.

An example of this is a decree of the British Court of appeal¹⁷ in which it applied the CMR on a road trajectory in Great Britain in circumstances where the contract embraced more than one type of carriage, thus declaring that a contract for the carriage of goods by road does not necessarily mean a contract for the carriage of goods only by road. This road trajectory was part of the contracted carriage by air from Singapore to Paris followed by the agreed upon road carriage of the goods from Paris to Dublin. The goods were stolen in the course of being carried by road in England, still on board the same trailer vehicle onto which they had been loaded in Paris.

Advocates of this view add furthermore that to declare the CMR not applicable on such a trajectory would mean an unnecessary limitation of the scope of application of the convention which is contrary to the purpose of the convention to standardize conditions under which this kind of carriage is undertaken¹⁸.

These advocates also use an a contrario explanation of article 2 which extends the applicability of the convention to some forms of multimodal transport as an argument for their beliefs.

Article 2 (1) states: “Where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air, and, except where the provisions of article 14 are applicable, the goods are not unloaded from the vehicle, this convention shall nevertheless apply to the whole of the carriage”.

The a contrario explanation is as follows: if the truck is put on the ship with goods and all, like a kangaroo carrying its young, the CMR rules apply to the whole journey including the sea leg¹⁹, but if there is transshipment of the tin soldiers, the CMR does not apply to the sea leg²⁰ though it still applies to both of the road trajectories.

Application of this perspective has a practical advantage in the more troublesome cases; courts can apply the internationally known CMR convention regulations instead of the national laws that might otherwise apply.

The other viewpoint is that the last inland road trajectory of the transport from Paris to Manchester does not fall within the range of the CMR convention. The first line of reasoning that is given to support this opinion is that article 1 (1) does literally demand that the contract only concerns road carriage. This means that the CMR convention would never apply on multimodal contracts, which would severely limit its scope of application. It is not a view that is widely adhered to as can be deduced from the aforementioned decree of the British Court of appeal²¹.

An opinion that is food for thought however, is the idea that, even though the CMR convention can apply on multimodal contracts, it does not apply on the last inland road trajectory of the transport from Paris to Manchester since this trajectory starts and ends in the same country so that British national law applies²². Under this way of thinking the CMR convention only applies on those parts of the transport that are by road and international in nature. This line of thought is also adhered by the German Supreme Court, the Bundesgerichtshof, which explicitly declares concerning a transport from Neunkirchen to Portadown (Northern Ireland)²³ that the CMR convention is solely applicable on the road trajectory from Neunkirchen to Rotterdam²⁴ and not on the Northern Irish road trajectory from Belfast to Portadown²⁵.

Article 2 can also be seen as in favor of this point of view since it can be said that the drafters took up this provisions to state how far exactly they were willing to extend the scope of the convention to other modes of transport and no further²⁶.

Another consideration supporting this point of view is the fact that even patrons of the above mentioned “pro CMR” perspective seem to agree that it would be stretching the scope of application of

¹⁷ Court of Appeal 27 march 2002, LLR 2002/2, (Quantum Corporation/Plane Trucking).

¹⁸ Rb Rotterdam, 24 January 1992, Schip en Schade (S&S) 1993, 89.

¹⁹ An exception to this rule emerges when the damage exclusively occurred on the non-road trajectory without any help from the road carrier.

²⁰ Under those circumstances the relevant regime of the other modality is applicable provided that it is mandatory.

²¹ Court of Appeal 27 march 2002, LLR 2002/2, (Quantum Corporation/Plane Trucking).

²² P.G. Fitzpatrick, Combined Transport and the CMR Convention, The Journal of Business Law 1968, p. 313.

²³ Bundesgerichtshof, 24 June 1987, Transportrecht 1987, p. 447.

²⁴ thereby also declaring that article 1 (1) does not demand a contract solely concerning road transport.

²⁵ A. van Beelen en R.E. Japikse, *CMR en overlading*, Vergelijkend Zeerecht, Leiden 1994. p. 35-50.

²⁶ The British delegation proposed the addition of article 2 since without it the convention would be of little use to them: it would never apply to roadtransport in Great Britain.

the CMR to much to declare it applicable on a road trajectory that does not cross any borders even if it is part of an international multimodal transport if it is the only road trajectory in the transport²⁷. If consequently adhered to, the “pro CMR” perspective should mean that the CMR provisions also apply in such a case and not only in cases where there are two road trajectories, namely one at the beginning and one at the end of the transport. The convention does not supply any basis on which to support this differentiation.

prospects

Since all European countries and even some outside of Europe like Morocco or Tunisia are members of the CMR convention it can be considered quite a success. Not only do its regulations seem to work very well in the international road transport industry, some of them have also been used as a template for conventions pertaining to other modes of transport. Nor is its influence only felt on the international level; a fair number of countries party to the convention suffered of severely aged legislation on the subject of road transport and as a consequence the CMR has been used by several of them²⁸ as a template for new national regulations.

3.1.3 Convention concerning International Carriage by Rail (COTIF)

current status

The COTIF convention is a new jacket which has been hung around two somewhat older conventions that have been incorporated in the new COTIF convention in the form of appendices. The objective of the convention is to regulate the international carriage by rail of passengers via the CIV appendix²⁹, and the international carriage of goods by rail via the CIM³⁰ appendix, but only as far as it concerns transport over lines that are included in an accompanying list. The COTIF convention however extends its scope beyond mere railway transport by declaring itself applicable on other transport modes when certain terms are met.

In article 2 it states:

(1). The principal aim of the Organization shall be to establish a uniform system of law applicable to the carriage of passengers, luggage and goods in international through traffic by rail between Member States, and to facilitate the application and development of this system.

(2). the system of law provided for in § 1 may also be applied to international through traffic using in addition to services on railway lines, land and sea services and inland waterways. Other internal carriage performed under the responsibility of the railway, complementary to carriage by rail, shall be treated as carriage performed over a line, within the meaning of the preceding subparagraph.

In other words, the rules of the Cotif convention are also applicable on the carriage of goods by other transport modes if this transport occurs regularly and complementary to the rail transport on a line that is included in the prescribed list. This is not restricted to the type of “kangaroo”-transport as mentioned concerning the CMR convention. Even if the goods are transferred to another container or vehicle the CIM rules still apply.

In case a line consists of rail-sea transport a special opportunity arises. In such a case each member state may, by requesting that a suitable note be included in the list of lines or services to which the CIM rules apply, indicate that certain grounds for exemption from liability specifically tailored to sea transport will apply in addition to those already provided by the convention. The carrier may only avail himself of these grounds for exemption if he proves that the loss, damage or exceeding of the transit period occurred in the course of the sea journey between the time when the goods were loaded on board the ship and the time when they were discharged from the ship.

prospects

Members of the COTIF convention, that came into effect in 1980 and has been modified in 1991 and 1996, are almost all of the European countries, the Ukraine, North Africa, Turkey and Iran. Seeing that even as recent as 1998 new additions to this list have occurred³¹ and alterations have been made as recent as 1999 in the form of the Vilnius protocol which will be expected to enter into force in 2005, one may conclude that it is deemed suitable for modern day rail transport.

²⁷ Rb Rotterdam, 5 June 1992, Schip en Schade (S&S) 1993, 107.

²⁸ The Dutch and German transport laws concerning road transport are examples of this.

²⁹ Appendix A. Uniform Rules concerning the Contract for International Carriage of Passengers and Luggage by Rail (CIV).

³⁰ Appendix B. Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM).

³¹ *Russia is Not a Black Hole Any More: Integrating East-West Freight Transport Networks*, The Ukraine; International Business Magazine “JURA” (Sea). Issue 2002/2. Intermodal transportations, WWW <http://www.jura.lt/2002_02/article10_e.htm>.

3.1.4 UNCITRAL/CMI Draft Instrument for a New Convention on the Carriage of Goods [by Sea]

current status

The Draft Instrument, which is still in its draft stages as the name suggests, is an example of the international inclination to incorporate makeshift solutions regarding multimodal transport in unimodal transport conventions for want of a better answer. Whereas the CMR convention only aimed to extend its scope of application to the above-mentioned “kangaroo”-transport, and the COTIF convention restricts its extension of applicability to documented lines, this draft intends to regulate all multimodal transport including a sea leg. Simply put it would regulate, besides the international sea transport trajectory, all parts of a multimodal transport that includes a sea journey that are not subject to an international³² mandatory regime of their own.

This way the Draft Instrument provides for door-to-door coverage, which is somewhat narrower than full multimodal coverage. In a truly multimodal regime, the contract of carriage could provide for *any* two (or more) modes of carriage.

The Instrument can be described as a “maritime-plus” convention. Since the existing liability regimes concerning sea transport are port-to-port or narrower, “maritime-plus” was initially controversial. Many feared that the new regime would conflict with existing unimodal regimes, particularly the CMR and the COTIF convention³³.

The Draft Instrument attempts to deal with these concerns by establishing a “network” system of liability, albeit a minimal one. Under article 8, liability is based on the relevant international mandatory unimodal regime in case of localized loss, only declaring itself applicable in case such a regime is lacking. The draft instrument leaves it open for countries adhering to it to exclude it wholly or in part from the inland carriage by giving any future international convention mandatory status, whether for a particular mode of inland transport, or for the inland part of any contract for carriage by sea which includes such transport.

The essence of the outlined limited network system is that the mandatory provisions applicable on inland transport³⁴ apply directly on the contractual relationship between the carrier on the one hand and the shipper or consignee on the other. In case the inland transport has been subcontracted by the carrier, the rules that apply to the relationship between the carrier and subcontractor are still under discussion at the Uncitral level. But in respect of the first relationship the provisions of this draft instrument may supplement the provisions mandatorily applicable to the inland transport³⁵.

For the limited network system to apply, the damage must have occurred during the pre-carriage or on-carriage. In this respect a choice can be made between the place where the damage is caused, where it occurs and where it is detected. The time of detection is often after delivery and, thus, would not produce a balanced result. The place where the damage is caused may be before the voyage begins, e.g. in case of the damage caused by the shipper having the cargo badly stowed in a container. The most serious objection against the place where the damage is caused is that the question of proper causation according to the applicable law has to be resolved before it can be determined whether the provisions of this draft instrument or of another convention are applicable. The place where a damage has occurred is a factual matter, is usually relatively easy to establish and may be expected to produce fair results. Therefore, the place of occurrence is suggested as the proper choice within the scope of the network system and article 8 so provides.³⁶

In total however the adhered system should be characterized as a modified one; the system of liability may operate on the network principle, but on other issues like jurisdiction the draft declares itself solely applicable thereby combining the network approach with the uniform one. For this to work however, it is necessary to insert in each unimodal convention appropriate conflict of convention provisions (which

³² In article 8 of the draft ‘or national law’ has been placed between brackets indicating that the inclusion of this part of the provision is uncertain as yet.

³³ M. F. Sturley, *the treatment of performing parties*, CMI Yearbook, transport law document 6, 2003.

³⁴ Whether this means all mandatory provisions in the convention or solely the specific provisions for carrier's liability, limitation of liability or time for suit mentioned in draft article 8 (1 sub b number ii) is at this moment still unclear.

³⁵ UNCITRAL, Working Group III (transport law), “Transport Law: Preparation of a draft instrument on the carriage of goods [by sea]”, General remarks on the sphere of application of the draft instrument, eleventh session, New York, 24 March - 4 April 2003, (A/CN.9/WG.III/WP.29), p. 16.

³⁶ W. Tetley, *Preliminary Draft Instrument on the Carriage of Goods by Sea*, WWW <<http://tetley.law.mcgill.ca/maritime/uncitral.htm>>, 2002, no. 51.

may be complicated) in order to avoid conflicts between the various ‘non carrier’s liability’ provisions of the unimodal conventions involved³⁷.

Non-localized loss is resolved in article 18 (2) of the Instrument which so far reads as follows:

“[2. *Notwithstanding paragraph 1, if the carrier cannot establish whether the goods were lost or damaged during the sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international and national mandatory provisions that govern the different parts of the transport shall apply*]”.

The article is placed between brackets since the liability limit set forth in the article is still under deliberation³⁸. With regard to this proposal it was also argued that the parties should share the burden of proof rather than, as at present, the carrier having to prove he was not liable for the part of the loss claimed. The new solution was naturally supported by the organizations representing ship owners’ interests³⁹.

The draft does not contribute to an overall solution to the multimodal problem, rather it aggravates it since it adds another possibility to an already ample supply. To illustrate this one can use the example of the transport from Paris to Manchester given under the paragraph on the CMR convention. This is a multimodal transport including a sea leg (from Rotterdam to London) so the draft instrument would at least be applicable on that part of the voyage. It would not apply on the first road trajectory since this part of the transport falls without a doubt under the CMR which is an international mandatory regime. But what about the last part of the transport? There the draft instrument adds a new possibility. Now one has not only to look at the CMR provisions but also at the provisions of the draft instrument to ascertain if they apply and if there is any discussion possible even the British national law might be rearing its head again.

Also, a new regime should not exclude some modes of transport, such as air or maritime transport, given the increasing integration of all modes of transport into the international logistic chain⁴⁰.

All in all the draft instrument does not seem to contribute to the aspired goal of legal uniformity.

prospects and feasibility

The responses to the UNCTAD questionnaire on multimodal transport regulation⁴¹ held under a wide array of governments and transport industry representatives indicate that, with the important exception of the maritime industry as represented by the CMI organization, there only appears to be limited support for the approach adopted in the draft instrument on transport law. The prospects for ratification by a sufficient number of countries may turn out to be a lot better if the provisions making it more than unimodal are deleted from the draft or sufficiently modified.

Uncitral however, has high hopes regarding this draft. In their opinion the draft will surely be implemented in the near future if the European reservations against it can be overcome.

3.1.5 Budapest Convention on the Contract for the carriage of goods by Inland Waterway (CMNI)

current status

The CMNI Convention, which has not come into effect yet, was brought into being to govern the contract of carriage of goods by inland waterways whereby the port of loading is situated in a different country than the port of discharge. At least one of these ports has to be located in a member state. Point of departure for the CMNI is an all encompassing set of regulations concerning the transport contract to achieve a unification reaching as far as possible.

³⁷ UNCITRAL, Working Group III (transport law), “Transport Law: Preparation of a draft instrument on the carriage of goods [by sea]”, Proposal by the Netherlands on the application door-to-door of the instrument, twelfth session, Vienna, 6-17 October 2003, p. 6.

³⁸ UNCITRAL, Working Group III (transport law), “Transport Law: Preparation of a draft instrument on the carriage of goods [by sea]”, Provisional redraft, thirteenth session, New York, 3-14 May 2004, p. 4.

³⁹ P. Poyhonen, American Institute of Marine Underwriters (AIMU), International Union of Marine Insurance, Liability committee, *Report of the liability committee IUMI conference New York 2002*, WWW <<http://www.aimu.org/iumi2002/poyhonenword.htm>>, Helsinki, 15 August 2002.

⁴⁰ J. Ramberg, *The future of international Unification of Transport Law*, WWW <<http://www.forwarderlaw.com/feature/ramberg2.htm>>, updated 6 March 2001.

⁴¹ UNCTAD, Multimodal transport: The Feasibility of an international legal instrument, UNCTAD/SDTE/TLB/2003/1, 13 January 2003.

It was drafted by the Verein für europäische Binnenschifffahrt und Wasserstrassen e.V. (VBW) in Duisburg and grounded on its predecessor the CMN⁴². This precursor however, failed to attract sufficient ratifications due to the reigning discord concerning the exoneration of liability by the carrier for navigation errors, also referred to as a nautical error. Even during the second attempt fifteen years later consensus regarding this issue still could not be reached⁴³.

The basic principles on which the CMNI are founded include a carrier liability regime which is, to a large extent, independent of the existence of guilt on the part of the carrier, analogous to the CMR convention. Since sea transport and inland navigation usually operate side by side, the exceptions to this carrier liability do not only include the usual causes of loss or damage to the transported goods, but also some specifically marine based ones. Also showing its connection with marine law are the low liability limitations which are based on the limitations customary in sea transport. Concerning the aforementioned nautical error exoneration article 17 of the CMNI is of importance. It stipulates that the carrier is responsible for omissions of his staff, which means the much debated exception for a “nautical error” has not been integrated in the convention. This provision puts the new CMNI in line with the CMR and COTIF/CIM conventions, but is in contradiction to the maritime regime under the Hague-Visby Rules. Derogation from this provision however is allowed by contracting parties⁴⁴.

Though the convention’s main focus is the regulation of inland waterway transport, it has, to some extent, regulations concerning multimodal transport. To be specific, it states in article 2 (2) of the convention that it is also applicable if the purpose of the contract of carriage is the carriage of goods, without transshipment, both on inland waterways and in waters where maritime regulations apply, unless a maritime bill of lading has been issued in accordance with the maritime law applicable, or the distance to be traveled in waters to which the maritime regulations apply is the greater. This extension of applicability is relatively small; the goods stay in the same vessel during the whole journey and the sea leg has to be subordinate to the inland shipping part of the journey. The thus created increase of CMNI ‘playground’ however, might in the future generate the exact conflicts we intended to solve. A foreseeable problem might in the future be for example a clash with the scope of application of the draft instrument mentioned in § 3.1.4 concerning sea transport.

prospects and feasibility

At present this convention has not yet entered into force seeing that one more ratification is needed⁴⁵. Prospects concerning the attraction of this last necessary ratification are optimistic however, several countries are momentarily engaged in the national processes on the road to ratification. Another consideration touching upon this subject is the fact that some of the Donau countries have only recently converted to free market economies and consequently might benefit from new regulations concerning inland navigation. International unification of inland navigation regulations may not be an end in and of itself but it is recognized that it is a necessity. Where other modalities have already been making use of their own international sets of rules for decades, the lack of international unification in the regulations pertaining to inland navigation can only be seen as a serious hindrance to its economic competitiveness.

3.2 Multimodal regimes

3.2.1 United Nations Convention on the Multimodal Transportation of Goods (the MT convention)

current status

The MT convention is a mandatory uniform carrier liability system regarding international multimodal transport. This convention sadly did not attract sufficient ratifications to enter into force. One of the

⁴² Convention relative au contrat de transport de marchandises en navigation intérieure; a 1949 draft convention by UNIDROIT. The definitive version was readied by the ECE’s Inland Transport Committee in 1959.

⁴³ T.K. Van den Heuvel-Hacksteiner, “Het ontwerp-verdrag inzake het internationaal goederenvervoer in de binnenvaart (CMNI)”, *Tijdschrift voor vervoer en recht*, 1998-2, p. 40-41.

⁴⁴ UNECE, Inland Transport Committee, Working Party on Combined Transport, “Possibilities for reconciliation and harmonization of civil liability regimes governing combined transport”, results of two expert group meetings (“hearings”) on civil liability regimes for multimodal transport, Thirty-fourth session, 4-6 September 2000, agenda item 8, p. 4.

⁴⁵ In total five are needed, Hungary, Romania, Switzerland and Luxembourg have already ratified the convention.

reasons for this unfortunate turn of events could be that the required number of needed ratifications for its entry into force was particularly high (30).

One of the underlying reasons for the identified lack of support, even resistance could be the fact that the convention is closely associated with the Hamburg Rules, which had been adopted in 1978, but failed to gain much support among the main shipping nations. In particular, three factors can be highlighted as giving rise to concern among the carrier interests about increased liability. The first being the basis of liability, which is modeled after the Hamburg Rules, rather than the Hague-Visby Rules⁴⁶.

The second inhibiting factor existed in the monetary limitation of liability, which was by some considered as too high⁴⁷.

Under the 1980 MT Convention, the liability of the MTO is uniform for both localized and non-localized loss, but, in cases of localized loss the limits of liability are determined by reference to any applicable international Convention or mandatory national law which provides a higher limit of liability than that of the 1980 MT Convention (Art. 19). The limits of liability set out in the 1980 MT Convention are 2.75 SDR per kg or 920 SDR per package, but for contracts, which do not include carriage of good by sea or inland waterway, the CMR limit of liability of 8.33 per kg has been adopted⁴⁸.

The third factor was constituted of the principle of uniform liability which was considered to be giving rise to concerns in relation to recourse actions by an MTO against a subcontracting unimodal carrier and as introducing mandatory liability levels in relation to transports otherwise not subject to mandatory law (e.g. road and rail transport not covered by the CMR or CIM/COTIF conventions).

On the other hand, a much simpler reason for the failing of the convention can also be pointed out. It may just have been the fact that 20 years ago the market share of multimodal transportation was much less significant than nowadays and that the timing of the 1980 MT Convention was unfortunate.

prospects

As it has been some 24 years since the convention became ready for ratification chances are slim that it will ever come into effect. Nonetheless voices are heard that indicate that this 1980 convention should be used as a model for a new uniform international multimodal treaty, or even that it should be revised and considered anew.

3.2.2 National regulations

National regulations concerning multimodal transport exist in a myriad of nations. Examples are China, The Netherlands, Germany and a few countries on the South American continent. Covering them all would be impractical, that is why only the national regulations existing in Germany and The Netherlands will be discussed. The Dutch system because of its apparent network nature and the German system since it is relatively new and has merged the regulations concerning several different transport modes in one uniform set of rules.

3.2.2.1 Dutch national law

current status

Dutch law regarding multimodal transport, or as it is called in the Dutch law books combined transport, consist of a mandatory network system⁴⁹ with a safety net construction concerning non-localized loss. It has been placed in the articles 40 through 43 of the eighth book of the Dutch civil law book (BW for short) which deals with all national law concerning transport.

Article 8:40 BW describes a combined transport agreement as the agreement concerning the transport of goods in which the carrier pledges himself to transport the goods partly by sea, by the inland waters, by road, by rail, by air or through a pipeline or any other mode of conveyance under a single contract. The suitability of the combined transport rules is based on the content of the agreement regardless of the transport in actual fact.

⁴⁶ Both the sufficiently ratified CMR and CIM/COTIF conventions have similar liability bases.

⁴⁷ Even if it was only 2,75 SDR instead of the 2 SDR of the maritime conventions.

⁴⁸ UNCTAD, Multimodal transport: The Feasibility of an international legal instrument, UNCTAD/SDTE/TLB/2003/1, 13 January 2003, p. 18.

⁴⁹ The Dutch system has been based on the system used in the ICC Rules, before they were revised into the UNCTAD/ICC Model Rules which are described in 3.2.4.2.

The network character of the Dutch system can be found in article 8:41 BW which states that in case of an agreement concerning the combined transport of goods the applicable regime with regard to a certain part of the journey is the regime that is relevant to this part of the journey. For instance when goods are transported from Rotterdam (NL) to Nijmegen (NL) by rail and from Nijmegen to Venlo (NL) by road, then Dutch rail transport law is applicable on the first leg of the journey and Dutch road transport law on the second.

As mentioned above there are also rules concerning non-localized loss. These can be found in the articles 8:42 and 8:43 BW. Article 8:42 stipulates that in case of non-localized loss the combined transport operator (CTO) is liable unless he proves that he isn't liable under any of the regimes relevant to the parts of the journey where the loss could have occurred. Article 8:43 states that if the CTO is liable for non-localized loss the regime applies that has the highest liability limit of the regimes concerning the parts of the journey where the damage may have occurred. Deviation from these last two articles by contract is not possible since they are mandatory.

prospects

If in the future a new international treaty on multimodal transport is created the Dutch government will most likely ratify it and will probably adapt the national legal system to accommodate the new regulations.

3.2.2.2 German national law

current status

Recent efforts regarding transport law legislation in Germany resulted in the reforming of the part of the Handelsgesetzbuch (HGB) dealing with carriage, freight forwarding and warehousing in an Act dated 25 June 1998.

This recently introduced system of legislation not only regulates road and rail transport but also inland waterway transport in a uniform way. These provisions can be found in § 407 through 475 HGB. The carrier liability regime employed in the German legislation is based on the regime found in the CMR convention. If the question rises if such a regime is also suitable for rail transport, it is answered by recalling that the liability regime in the CMR convention was derived from the carrier liability rules in the 1952 CIM convention⁵⁰.

Specific rules regarding multimodal transport have been incorporated in § 451 through 451d HGB in the form of a network system⁵¹.

If the part of the voyage where the damage or loss has occurred is known, the carrier is liable according to the rules that apply to the agreement that would have been made between the shipper and the carrier had it been a solely unimodal transport on the referred trajectory⁵².

In cases where the occurrence of the loss or damage has not been identified, or as it was named in the above in case of non-localized loss, the general transport rules apply. This is on the whole reasonably acceptable since the general rules are made to apply to road-, rail and inland waterway transport. This solution is less satisfactory however if sea- or air transport is a part of the voyage.

prospects

The described German transport law is quite unique in the sense that it has a uniform groundwork of rules for three different modalities. Hopefully the future will tell us a system like this works since that could be taken as an indicant that true harmonization of the various international transport conventions is possible.

The above mentioned difficulty concerning non-localized loss in case of a multimodal transport including an air- or sea leg should not arise very often since it is a national regime after all. Germany's domestic air or sea commodity transport in a multimodal setting probably does not have a large share in the total bulk of domestic conveyances.

⁵⁰ K.F. Haak, 'Naar een nieuw Duits vervoerrecht', *Tijdschrift vervoer & recht* 1998, p. 76.

⁵¹ In the transport law section of the HGB regulation concerning the expedition and relocation agreement can also be found.

⁵² K.F. Haak, 'Naar een nieuw Duits vervoerrecht', *Tijdschrift vervoer & recht* 1998, p. 78.

3.2.4 Contractual standard rules

3.2.4.1 ICC Rules or Uniform Rules for a Combined transport document (URC)

current status

These rules have been drawn up by the ICC, the international chamber of commerce, in 1973. The terms are based on the network principle as found in the 1969 Tokyo Rules by the Comité Maritime International and the 1972 TCM draft by Unidroit⁵³.

prospects

The URC have been incorporated in numerous contracts since their creation in 1975⁵⁴, but since 1992 they seem to have been replaced by their younger sibling, the UNCTAD/ICC Rules which will be discussed below.

3.2.4.2 UNCTAD/ICC Rules for Multimodal transport documents (URM)

current status

The UNCTAD/ICC Rules can be said to be a merger between the URC and the UNCTAD's provisions found in the 1980 MT convention. The URM demonstrate a remarkable turnover by the ICC however, the URC after all were based on a network system whereas the new amalgamated URM are uniform⁵⁵. This standard set of contract rules has filled the gap in the field of international multimodal transport liability legislation that was to have been filled by the 1980 MT convention.

They have been incorporated in widely used multimodal transport documents such as the FIATA FBL 1992 and the Multidoc 95 of the Baltic and International Maritime Council (BIMCO).

Although these Rules give the impression of simplicity they mask the precedence of the international conventions and the contracts adopting these Rules are effectively private contracts which are subject to different interpretations by different courts. The result is remaining uncertainty in the terms of liability and legal position⁵⁶.

The Rules apply when they are incorporated into a contract of carriage, however this is made, in writing, orally or otherwise, by reference to the "UNCTAD/ICC Rules for multimodal transport documents". Whether there is a unimodal or a multimodal transport contract or whether a document has been issued or not is of no consequence.

They only cover part of the customary contents of a multimodal transport contract. Thus, an MTO wishing to use the Rules as a basis for his multimodal transport contract would have to add other clauses dealing with matters such as jurisdiction, arbitration and applicable law, to satisfy his particular needs. Such additions could, of course, also be made with respect to matters covered by the Rules, but only to the extent that they are not contradictory thereto⁵⁷. This flows from Rule 1.2 which reads: "Whenever such a reference is made, the parties agree that these Rules shall supersede any additional terms of the multimodal transport contract which are in conflict with these Rules, except insofar as they increase the responsibility or obligations of the multimodal transport operator."

Similar to the MT convention, specific provisions on limitation of liability of the MTO are made for cases of localized loss. In a such a situation the limits of liability are determined according to Rule 6.4, by reference to any applicable international Convention or mandatory national law, which would have provided another limit of liability, had a contract been made separately for that particular stage of transport. The limits of liability set out in the UNCTAD/ICC Rules correspond to those in the Hague-Visby Rules (as amended in 1979), being 2 SDR per kg or 666.67 SDR per package, but for contracts, which do not include carriage of good by sea or inland waterway, the CMR limit of 8.33 per kg has been adopted. As such they are lower than those of the MT convention.

In relation to contracts, which include carriage of goods by sea or inland waterway, the

⁵³ Transport Combiné international de Marchandises, draft convention by ECE/IMCO, EVR 1972, p. 680.

⁵⁴ among other things by incorporation in the BIMCO's Combidoc which was later replaced by the Multidoc 95 encompassing the new UNCTAD/ICC Rules.

⁵⁵ The UNCTAD did not turn over; the MT convention made use of a uniform liability system.

⁵⁶ UNECE, Inland transport committee, working party on Combined Transport, "Possibilities for reconciliation and harmonization of civil liability regimes governing combined transport", study of the economic impact of carrier liability on intermodal freight transport, executive summary transmitted by the European Commission, Thirty-seventh session, 18-19 April 2002, agenda item 9, p. 6.

⁵⁷ UNCTAD/ICC Rules for Multimodal Transport Documents, WWW <<http://www.forwarderlaw.com/archive/uncrules.htm>>, as seen on 26 July 2004.

carrier is also entitled to rely on certain exceptions to liability in cases of negligence, which have been modeled after the Hague-Visby Rules.

In particular, under Rule 5.4, the MTO is not liable for "loss, damage or delay in delivery with respect to goods carried by sea or inland waterways when such loss, damage or delay during such carriage has been caused by: - act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or management of the ship; - fire, unless caused by the actual fault or privity of the carrier". These defenses however, are made subject to an overriding requirement that whenever loss, damage or delay resulted from the unseaworthiness of the vessel, the MTO must prove that due diligence was exercised to make the ship seaworthy at the beginning of the voyage⁵⁸.

The provisions of Rule 5.4 are intended to make the liability of the MTO compatible with the Hague/Visby Rules.

prospects

As long as there is no international regime regulating multimodal transport the transport sector will be making use of these kinds of contracts to negate as much of the insecurity concerning the applicable legal regime as possible. That this system seems to working to a large extent can be deduced from the fact that there are voices of experts indicating that there is no need for a new regulatory system since the existing private law arrangements are satisfactory⁵⁹. Logic tells us however, that a new system would be more effective since contractual rules such as the UNCTAD/ICC Rules do not set aside any mandatory arrangements that also apply on the contracted transport and thus the insecurity regarding the legal regime that applies is not lifted entirely. Unless of course one adheres to the theory that a multimodal contract is a sui generis contract so that none of the unimodal conventions apply. It is probable that this theory would be construed by a judge as being an evasion of the law and as such not acceptable which is mentioned in the explanation accompanying the URM.

In conclusion a very real prospective would be the creation of a new international instrument for the regulation of multimodal transport based on the widely appreciated UNCTAD/ICC Rules.

4. Solutions/recommendations

4.1 a harmonized intermodal liability regime

It seems to be high time for the establishment of a unified international liability regime. Such an instrument would reduce uncertainty costs and increase efficiency in international multimodal and combined transport operations. But although there is a general willingness to engage in an exchange of views on future regulation of liability for multimodal transport, these views on how the aim of achieving uniform international regulation may be accomplished are divided, partly as a result of conflicting interests, partly due to the perceived difficulty in agreeing a workable compromise, which would provide clear benefits as compared with the existing legal framework⁶⁰.

In the following some light will be shed on the possible approaches on how to create the best suited uniform international regulation of intermodal transport.

4.1.1 a new international intermodal liability convention

4.1.1.1 Uniform system

The uniform system has always had supporters in the third world nations, who are, when seen in an international perspective, mostly senders⁶¹. These countries see the creation of a mandatory autonomous regime as a possible escape from under the skirts of the existing unimodal conventions who generally are more focused on the wants and needs of the carrier than those of the sender. The uniform systems that have been realized so far incorporate less possibilities for exoneration and the

⁵⁸ UNCTAD, Multimodal transport: The Feasibility of an international legal instrument, UNCTAD/SDTE/TLB/2003/1, 13 January 2003, p. 18.

⁵⁹ UNECE, Inland Transport Committee, Working Party on Combined Transport, "Possibilities for reconciliation and harmonization of civil liability regimes governing combined transport", Overview of provisions in existing civil liability regimes covering the international transport of goods, Thirty-third session, 10-11 April 2000, agenda item 11, p.9.

⁶⁰ UNCTAD, Multimodal transport: The Feasibility of an international legal instrument, UNCTAD/SDTE/TLB/2003/1, 13 January 2003, p. 30.

⁶¹ large amounts of coffee, wood, cocoa etc. are being shipped from these area's.

carrier liability tends more towards the strict variety than the fault-based. Article 16 of the 1980 MT convention for instance proclaims the carrier liable unless he proves that he, or those that assisted him, “took all measures that could reasonably be required to avoid the occurrence and its consequences”. Exceptions like the ‘nautical error’ which relieve the carrier of liability even in cases where his subordinates were intent on causing the damage are no longer encountered. Even the liability limits are higher in the uniform systems than those in their network counterparts⁶².

benefits

The clear advantage of this type of liability system is its simplicity and transparency, as the applicable liability rules are predictable from the outset and do not depend on identifying the modal stage where a loss occurs. For one, the scope of application problems accompanying the existing unimodal conventions like the CMR with which one has to contend in a network approach disappear. This is of particular benefit from the point of view of the transport user (consignor/consignee), as a carrier's liability vis-à-vis a cargo claimant would be uniform throughout a multimodal transaction and would not vary depending on whether a loss can be attributed to a particular mode of transport and the rules considered applicable to that mode in a given forum⁶³.

One can imagine this would reduce friction costs considerably.

In addition, it is said that an autonomous international uniform regime regulating multimodal transport would further harmony in transport law as a whole. Such a regime would, from the moment it came into effect, regulate by far the largest part of the total international transport. Moreover, as such it would probably also influence future revisions of the existing unimodal regimes. Ultimately this might not be the shortest route to ‘modal uniformity’, but it may well be the only feasible one⁶⁴.

disadvantages

In view of the continued existence of diverse unimodal liability regimes with different rules on incidence and extent of a carrier's liability, two main concerns may arise from the point of view of an MTO. First, there is a concern that a carrier's liability exposure would increase in comparison with the current situation. If uniform rules applied irrespective of the modal stage of transport during which a loss occurs, a carrier would no longer be able to take advantage of potentially less onerous liability rules, which may otherwise apply to the particular mode of transport during which a loss occurs. Secondly, there is a concern arising from the commercial practice of subcontracting with unimodal carriers for parts of the performance of a multimodal transport contract. A contracting MTO would be liable to the cargo claimant under uniform rules, but would wish to seek recourse against any responsible unimodal subcontracting actual or performing carrier. In any such recourse action, a unimodal carrier would continue to be able to rely on any applicable unimodal liability rules, which, in some cases, may be less onerous⁶⁵.

All the same this problem, although realistic, is not a reason to abandon the efforts to produce an acceptable international uniform regime since the same problem occurs even without the existence of such a system. This phenomenon has already been mentioned in the above under 2.1.1 concerning the variety in liability limits in the various regimes.

If it is anything it is rather a sound plea for a stimulating countries to incorporate the provisions of the newly drafted convention in their national legislation.

A more serious hindrance is the fact that if a uniform convention is to properly coexist with the unimodal transport conventions, an adjustment of the scope of application provisions of the unimodal conventions is also required⁶⁶. It has to be made clear that the scope of these conventions is restricted to a contract for a certain unimodal carriage and that they do not apply to ‘their’ mode when this mode is part of a transport under a contract for multimodal carriage⁶⁷.

⁶² A. van Beelen, *Multimodaal vervoer. Het kameleonsysteem van Boek 8 NBW*, (diss. Leiden, 1996) Zwolle, W.E.J. Tjeenk Willink, 1996, p. 40.

⁶³ UNCTAD, Multimodal transport: The Feasibility of an international legal instrument, UNCTAD/SDTE/TLB/2003/1, 13 January 2003, p. 17.

⁶⁴ E.A. Massey, *Prospects for a New Intermodal Legal Regime: A Critical Look at the TCM*, JMLC 1972, p.725

⁶⁵ UNCTAD, Multimodal transport: The Feasibility of an international legal instrument, UNCTAD/SDTE/TLB/2003/1, 13 January 2003, p. 17.

⁶⁶ Unless the theory that a multimodal contract is in fact a sui generis contract finds itself adhered to worldwide.

⁶⁷ UNCITRAL, Working Group III (transport law), “Transport Law: Preparation of a draft instrument on the carriage of goods [by sea]”. Proposal by the Netherlands on the application door-to-door of the instrument, twelfth session, Vienna, 6-17 October 2003, p. 6.

feasibility

Concerted international actions, in concept, appear necessary and logical.

Are they possible? In principle, an international convention would be ideal.

Yet, the uniform liability system, while potentially best suited to the needs of the transport user tends to meet with the resistance of the transport industry on account of the recourse difficulties mentioned in the above. Any debate considering the adoption of a uniform liability system would need to seek to address potentially conflicting interests by formulating mutually acceptable rules on liability and limitation of liability⁶⁸.

Yet, an international convention involves an unmanageably large number of parties, each of which is rightly worried about its own interests. As a result, such an approach may attempt to address all of the "ifs" and "buts", leading to a very complex framework.

History has taught us that to get all the noses in the same direction on this subject is exceptionally difficult, and even if agreement could be reached, a convention may never be ratified, as experience with the 1980 Multimodal Convention illustrates.

Still, considering all the time and effort various organizations are to this day putting into research on this topic and since almost all affected parties seem to agree that a uniform regulation of the issue probably is the best solution it may yet come to pass in the long run.

4.1.1.2 Network system

To a large extent, the present international legal framework governing multimodal transport contracts can be characterized as a network system by default: due to the absence of an applicable international instrument on multimodal transport, liability varies according to the stage of transport to which a particular loss can be attributed and any relevant international or national mandatory unimodal liability rules; for cases where a loss cannot be localized, standard form contracts typically provide "fall-back" rules on terms which tend to be favorable to the carrier. Increasingly, sub regional, regional or national mandatory laws relating to multimodal transportation may also be relevant; typically, these regimes provide for a modified system, based on the 1980 MT Convention and/or the UNCTAD/ICC Rules.

benefits

The main advantage of the network system is that by its automatic adaptation to the specifics of the relevant mode of transport it does not interfere with any of the existing unimodal regimes. Thus applying rules that are specifically designed for the mode of transport under scrutiny.

Also mentioned as an advantage of the network system is the synchronicity of recourse actions. While it is certainly true that the chances that the same set of rules apply on an MTO's recourse action against one of his responsible unimodal subcontracting actual or performing carriers as are applicable on the action the shipper has taken against the MTO are better under the network system than under a uniform system, they are not always the same. Variances do occur, especially in cases where one of the subcontractors only executes national carriage. For instance, if we took the example with the tin soldiers used to explain the application difficulties of the CMR convention, and added that the MTO used two subcontractors for the first road trajectory from Paris to Rotterdam, namely one to drive the tin soldiers from Paris to Breda (NL), and one from Breda to Rotterdam, this leads to an asynchronous recourse action if an accident occurs on the road near Rotterdam. In a situation like this the MTO would be liable according to the CMR convention, while the subcontractor can only be addressed on the basis of Dutch national transport law.

As another benefit of the network system might be named it's flexibility. When a unimodal convention is being revised with respect to it's content the network approach conforms itself seamlessly⁶⁹.

disadvantages

The disadvantage of this approach, particularly for transport users, is that applicable liability rules, as well as incidence and extent of a carrier's liability are not predictable, but vary from case to case, thus placing an extra burden on cargo-claimants in the form of increased insurance premiums and ultimately

⁶⁸ UNCTAD, Multimodal transport: The Feasibility of an international legal instrument, UNCTAD/SDTE/TLB/2003/1, 13 January 2003, p. 17.

⁶⁹ A. van Beelen, *Multimodaal vervoer. Het kameleonsysteem van Boek 8 NBW*, (diss. Leiden, 1996) Zwolle, W.E.J. Tjeenk Willink, 1996, p. 36.

higher costs of legal proceedings and administration. Simply put it can be said that as long as the network principle is applied, no real harmonization can be reached.

Other problems are that attribution of liability to a certain mode of transport is not always possible, with the result that also a residual liability system is needed regarding this non-localized loss and the actuality that there is a risk of gaps between the different modes of transport.⁷⁰

In cases where there are multiple causes regarding the loss, causes that have occurred on different parts of the intermodal transport, the network system may even be called inoperable⁷¹.

feasibility

For a network based system to function properly it would be advisable to avoid discomfiture concerning the application of the relevant regimes by inserting an adjustment to the scope of application provisions in each unimodal convention in order to clarify that such a convention applies to a certain mode of transport and not to a certain type of contract⁷². Adjustments like these take a lot of time and lobbying to achieve and are as such of negative influence on the feasibility of a network based regime.

Besides that, within the scope of the network system not much attention has been paid to the other contractual matters than the liability of the carrier for damage to the cargo.

Regarding these 'non liability' matters, it is inconceivable that different parts of a single transport would be governed by conflicting provisions. For example, if a negotiable document is issued for a door-to-door carriage, does that document become non negotiable as soon as the road haulage part begins? If such would be the case, it would severely upset buyers and sellers under an international sales contract⁷³. Keeping this in mind one can deduce that a complete system based on the network approach is not a realistic possibility; at least some of the provisions will have to be uniform based.

4.1.1.3 Modified system

As was said, in a modified liability system, some rules apply irrespective of the unimodal stage of transport during which loss occurs, while the application of other rules depends on the unimodal stage of transport during which it occurs. A modified system essentially seeks to provide a compromise or midway between a uniform and a network system.

Both the 1980 MT Convention and the UNCTAD/ICC Rules operate a modified system under which in cases of localized loss only the monetary limits of liability may be determined by reference to mandatory unimodal regimes. Both regimes have clearly influenced regional, sub regional and national laws, which have been adopted over recent years⁷⁴.

benefits

The potential advantage of this approach is that it may effectively provide a workable consensus, taking into account conflicting views and interests. In a modified system controversial issues can be based on the network system while still giving legal security by providing the rest of the regulations with a uniform validity. Agreeable is also that provisions especially designed for a certain mode of transport, like aforementioned liability limits, can stay in use under such a regime by applying the network system on them.

disadvantages

The disadvantage of a modified system is that application of its provisions may be excessively complex. It may also fail to appeal widely, as it provides neither the full benefits of a uniform system, nor fully alleviates the concerns of those who favor a network-system, but it does entail almost all of the disadvantages to both systems, like the necessity to adapt the existing unimodal conventions.

⁷⁰ UNCITRAL, Working Group III (transport law), "Transport Law: Preparation of a draft instrument on the carriage of goods [by sea]", Proposal by the Netherlands on the application door-to-door of the instrument, twelfth session, Vienna, 6-17 October 2003, p. 5.

⁷¹ A. van Beelen, "De nieuwe UNCTAD/ICC Rules for Multimodal transport documents", *Schip en Schade*, juni 1992, supplement 4, p. 75-86.

⁷² UNCITRAL, Working Group III (transport law), "Transport Law: Preparation of a draft instrument on the carriage of goods [by sea]", Proposal by the Netherlands on the application door-to-door of the instrument, twelfth session, Vienna, 6-17 October 2003, p. 6.

⁷³ UNCITRAL, Working Group III (transport law), "Transport Law: Preparation of a draft instrument on the carriage of goods [by sea]", Proposal by the Netherlands on the application door-to-door of the instrument, twelfth session, Vienna, 6-17 October 2003, p. 6.

⁷⁴ UNCTAD, Multimodal transport: The Feasibility of an international legal instrument, UNCTAD/SDTE/TLB/2003/1, 13 January 2003, p. 18.

feasibility

Provisions concerning the largest impediments to reaching accordance regarding a new multimodal regime such as the basis and the limitation of carrier liability can be based on the network principle so that concord on these issues is no longer strictly necessary for such a convention to be ratified. Seeing that the UNCTAD/ICC Rules work in this way with considerable worldwide success a convention based on this system might certainly be one of the more realistic options in the struggle to bring harmony in the field of intermodal transport.

4.1.1.4 Mandatory or non-mandatory

The possibility of addressing the issue concerning multimodal transport by providing a “default” non-mandatory liability is an option that merits further thought.

An interesting new methodology is signaled in the amendments to the Handelsgesetzbuch of 1998 mentioned earlier. Here, in Section 449, on "Abweichende Vereinbarungen" it is permitted to depart from the mandatory rules on liability but in principle only by an agreement reached after detailed negotiations, whether for one or several similar contracts between the same parties.

Theoretically, the methodology to disallow agreements on limitations of liability by standard form contracts rather than by "detailed negotiations" is correct, since it quite rightly recognizes the disappearance of real contractual intent in modern contracting techniques with standard form contracts and the exchange of electronic messages. A re-establishment of the traditional requirement of real contractual intent is understandable and, if such real intent could be proven, the important principle of freedom of contract is recognized even in the field of transport law. But, one might ask, how is it envisaged that this would work in practice? Whether we like it or not we are quickly moving into the "paperless society" with all of its consequences⁷⁵.

benefits

It would be in keeping with the axiom of freedom of contract to implement an international convention which, like the amendments of the German Handelsgesetzbuch, would permit the contracting parties to agree on a more workable system than under the contemporary unimodal conventions. If the carriers would like to enjoy more or other benefits than the convention provides they merely would have to opt out of it.

With the demand for detailed negotiations the involved parties would always be certain of the appropriate legal regime so that legal security would also be served by a system like this.

disadvantages

In practice, the permitted departure from the mandatory rules of liability becomes difficult to achieve if "detailed negotiations" are required, since carriers and their customers will normally not engage in such activity. Furthermore, competition between carriers might induce them to abstain from opting out of the convention even if it is detrimental to them, since a non mandatory arrangement would not provide as much protection to the weaker players than a mandatory regime would. This, indeed, explains the remarkable art. 41 of CMR which prohibits an extension of the carrier's liability in favor of the customer. Provisions such as art. 41 CMR however, are incompatible with modern principles relating to restraints of trade, not only under the European Union's Rome Treaty but also under competition laws of other regions and countries⁷⁶.

feasibility

A non-mandatory convention might prove to be a viable solution to the intermodal predicament. Insurmountable objections from the various factions active in the transport business are not to be expected since the freedom of contract principle will not be violated. Parties will still be able to use the popular standard contractual rules like the UNCTAD/ICC Rules, but if they do not there is a 'safety net; the provisions of the convention will be applicable.

The drawback in this scenario is the fact that, as was mentioned concerning a new mandatory uniform system, a system based on the "opting out-technique" would have to define the situations falling under the convention. It is necessary to avoid the scope of the convention overlapping the unimodal conventions. Defining the contract of carriage as *sui generis* would avoid any such overlapping, but as

⁷⁵ J. Ramberg, *The future of international Unification of Transport Law*, WWW <<http://www.forwarderlaw.com/feature/ramberg2.htm>>, updated 6 March 2001.

⁷⁶ J. Ramberg, *The future of international Unification of Transport Law*, WWW <<http://www.forwarderlaw.com/feature/ramberg2.htm>>, updated 6 March 2001.

was touched upon earlier, the theory that a multimodal transport contract is a sui generis contract is not widely adhered. Considering this it is clear that for a non-mandatory uniform system to become an 'over-all' system, adjustments would have to be made in the existing unimodal conventions concerning their scope of application.

4.2 alternatives

4.2.1 modifying existing regulations

Harmonizing the current chaos of legislation on the subject of the transport of goods worldwide would go a long way in terms of solving the problems mentioned earlier. One method of achieving this would be to modify the existing regimes in this area.

A plan of action for this scenario would, apart from steps to equalize the current provisions, also contain indications of which provisions need attuning to each other.

If for example the periods during which carriers are liable were better attuned to each other a percentage of the non-localized loss would become localized loss and cause less extensive legal proceedings. A possible consequence of this objective might be the necessity to abolish the effectiveness of 'before and after' clauses that are being used in maritime transport contracts⁷⁷.

Though the provisions mentioned in paragraph 2.1.1 should be the first to be equalized, they may also prove to be the hardest to change. Especially changing the monetary liability limits and the possible exceptions concerning liability would reap a lot of opposition. Harmonization of the first would probably be strongly contested by the insurance companies which stand to lose a lot of income and on the attempt to equalize the second provision protest of carrier organizations will surely be heard.

benefits

Ever since the beginning of for-hire haulage, in which an independent contractor transports goods for others, liability issues have been important. How much am I liable for? How does this amount change depending upon whether the cargo is lost, missing, or damaged? Who must pay? What is my exposure? What is the exposure of everyone else in the process?

These issues became more complex with the development of intermodal transport, which, by its very nature, involves carriage on two or more modes and entails transferring cargo between modes.

It follows that legal security would be very much served if the various unimodal conventions and other regulations would give the same answer to each of these questions.

The abatement of uncertainty this way means the shipper as well as carrier are better able to calculate their risks which in its turn means there is less chance of over insurance or unanticipated high losses. Legal proceedings like recourse actions and actions involving non-localized loss would become less time consuming if the differences in liability provisions would be cleared away since in those circumstances parties would not be such strong adversaries when it comes to finding the applicable liability regime.

disadvantages

It remains to be seen if the loss of all transport mode specific provisions is a step forward. Legal security might be served by equalizing the international transport conventions, but the differences between them did for the most part evolve in the everyday transport practice according to its needs. The difference between the liability limits in sea and air transport for instance are quite reasonable if one looks at the difference in the nature of the goods transported by each modality; goods transported by air tend to be far more expensive per kilogram than the bulk goods transported by sea.

Another disadvantage of an attempt in this direction is that it would not be sufficient. Even if all international transport conventions equalized their provisions that still would leave the issue of non-localized loss unsolved. A new set of rules most likely in the form of a new international convention would then be needed to regulate the situations where the place the loss occurred can not be determined. Ultimately it would probably be easier and more efficient to create a new convention incorporating not only provisions regarding all modes of transport but also regarding the issue of non-localized loss.

⁷⁷ these clauses exonerate the shipper from any liability for damage or loss caused before the goods have been loaded on the ship or after they have been unloaded.

feasibility

Clearly complete harmonization in this manner is not a viable option. It would take an enormous amount of work to adapt even only the international unimodal conventions like the CMR and the Montreal convention, even though a lot of those liability regimes are derived from each other. Moreover the work would probably be a waste of resources since the majority of countries that are party to these conventions would have to be in agreement regarding the modifications. If not, the modifications would only lead to an even larger amount of applicable liability regimes globally instead of creating more uniformity. An example of this is the creation of the Hague-Visby Rules; not all member states of the Hague Rules ratified the protocol with the modifications and now both sets of rules are in use alongside each other. Even later the Hamburg Rules were created but again not every state party to either the Hague Rules or the Hague-Visby Rules ratified these Rules with the result that contemporary international sea transport is governed by a myriad of regulations.

Harmonization to a lesser extent should be possible over time though, keeping the goal of complete harmony always in mind. Even if not all differences are leveled in one stroke, or even should be, even small steps towards this goal will have positive economic consequences.

Take for instance the monetary liability limits, in the above it was mentioned that there are understandable reasons as to their differences between transport modes. If only national and international limits concerning the same mode of transport would be equalized it would cause a reduction of costs in view of the yield of recourse actions.

4.2.2 Integration of a multimodal arrangement in the CMNI.

As was elaborated on in the above the CMNI convention already contains some provisions concerning multimodal transport. It not only applies on contracts concerning the carriage of goods solely by inland waterway but it is also applicable if the purpose of the contract is the carriage of goods, without transshipment, both on inland waterways and in waters where maritime regulations apply, unless a maritime bill of lading has been issued in accordance with the maritime law applicable, or the distance to be traveled in waters to which the maritime regulations apply is the greater.

Extending its range to all multimodal transports including an inland navigation leg, in other words making it “unimodal plus” like the Draft Instrument for a New Convention on the Carriage of Goods [by Sea], is a whole new ballgame, seeing that the current regime applying on the road carriage which usually precedes and or follows the inland navigation, the CMR, differs somewhat from the CMNI even if the some of the CMNI’s provisions are based on those in the CMR convention.

One critical difference between the new inland navigation regime and the road and rail arrangements lies in the basis on which they ground a carrier’s liability. Under the CMNI the carrier is not liable when he has observed due diligence while under the land oriented regimes the carrier is only not liable in case of circumstances which the carrier could not avoid and the consequences of which he was unable to prevent; the first is a fault-based liability system and the second a strict one.

It is not hard to see that an attempt like this to shove aside conventions like the CMR will be met with a lot of scepticism.

benefits

An advantage of such a unimodal plus approach is the fact that putting the responsibility for the whole door-to-door transport in the hands of the MTO safeguards shippers from the gaps between the unimodal regimes, thus creating more legal security for this group.

disadvantages

The scope of application of such a far reaching convention will almost certainly conflict with that of other conventions or national laws. To alleviate this the use of a network based system might be considered but even this cannot solve the problem completely as can be deduce from the discussions surrounding the Draft Instrument for a New Convention on the Carriage of Goods [by Sea].

Another drawback is that since this is meant to be a mostly European convention, thus being regional in nature and it is restricted to transports including an inland navigation stretch, it cannot possibly create complete harmony in the field multimodal transport regulation. As a consequence it does not only not solve the problem concerning the proliferation of regional arrangements, it even aggravates it.

feasibility

The CMNI's chances of coming into effect within the near future are rather good with the contents of the convention as they are now. Integrating more extensive provisions concerning multimodality than it already incorporates diminishes those chances considerably as a consequence of the controversy of the topic.

4.2.3 Drawing up new contractual standard forms

Although an international convention is, in general, seen as the best method of ensuring a unified system throughout the world, it is also true that such a convention can be seen as a rigid tool, difficult to change and adapt to new circumstances.

A set of contractual model rules would not have that impediment, it is a more flexible instrument, able to change according to the demands of the everyday transport practice.

Adding zest to the consideration of model rules as a solution to the intermodal liability regime problem is the fact that the convention approach has resulted in limited success in recent years, as witnessed by the results garnered by the 1980 Multimodal Convention and the Hamburg Rules.

benefits

When using contractual terms no conflicts with the mandatory provisions of unimodal conventions like the CMR will arise, since a mandatory provision will always have precedence over a contractual one.

Moreover, they may even serve as a supplement to the applicable conventions, filling up the gaps.

Also adding to the popularity of model rules is the unwillingness of merchants to subject themselves to mandatory regimes.

disadvantages

Private law arrangements as well as general conditions, which differ considerably, cannot overcome existing international conventions and mandatory national law. Adding an extra set of contractual standard terms would therefore not provide legal security for the parties involved. The actual settlement of claims often depends on which court the matter is brought to and the court's views on which regime is mandatory. While general coverage may be unambiguously spelled out in bills of lading or other transport documents, if damage or loss is localized, then the liability may be subject to other limits, no matter what the general contract terms say.

feasibility

Several sets of successful standard rules are already in use worldwide. The drafting of a complete new set would probably not add anything sorely needed by the transport sector since the existing contractual standard rules have evolved out of and alongside the demands of this sector. As was mentioned above, contractually based rules are very flexible.

4.3 next steps

The apparently broad divide in opinion on closely linked key issues, such as type of liability system and, importantly, limitation of liability may be seen as an obstacle to the development of a successful international instrument. However, it may equally be seen as a reflection of the fact that - despite the expansion of multimodal transportation and a proliferation of national multimodal liability regimes - there has, in recent times, been little focused debate, involving all interested parties at the global level⁷⁸.

The need for increased dialogue on controversial matters as well as on potential ways forward is illustrated by the fact that some possible options have yet to be explored in any international forum. Agenda's for the near future should therefore include thorough international deliberations, possibly concerted by an organization like the UNCTAD or the UNCITRAL.

⁷⁸ UNCITRAL, Working Group III (transport law), "Transport Law: Preparation of a draft instrument on the carriage of goods [by sea]". General remarks on the sphere of application of the draft instrument, eleventh session, New York, 24 March - 4 April 2003, (A/CN.9/WG.III/WP.29), p. 7.

5. Summary and conclusions

An ideal situation of course would be a blank slate while trying to solve the international multimodal transport regulations problem. Without having to allow for prior conventions of any kind a new international convention could be designed that applies to all carriage of goods worldwide irrespective of transport mode(s). Since we do not live in an ideal world this is not a realistic objective, we can only build on the foundations we have and try to profit from the knowledge that we have accumulated in the course of the last hundred years while building these foundations.

According to the responses to the aforementioned UNCTAD questionnaire, which were submitted by a large number of public and private interested parties a large majority of respondents, both among Governments and non-governmental and industry representatives, consider the present legal framework unsatisfactory, with a clear majority considering the present system not to be cost-effective. They consider an international instrument to govern liability arising from multimodal transport to be desirable and virtually all indicated they would support any concerted efforts made in this direction. In practice, it is clear that the level of support would depend on the content and features of any possible new instrument.

As to what is deemed the most suitable approach, views are divided. On the whole around two thirds of respondents appear to prefer a new international instrument to govern multimodal transport or even a revision of the 1980 Multimodal Transport Convention.

Concerning the type of liability system which may be most appropriate an 'over-all' uniform liability system which applies on a mandatory basis would seem the way to go, even if it means adjustments have to be made to existing conventions. A unified and predictable system of rules would greatly reduce the uncertainty and expense involved in litigating which contract terms or convention terms apply to a given case. Seeing however, that the lack of consensus on the key issues may end up preventing the newly made convention from coming into effect as has happened with the 1980 Multimodal Transport Convention, a modified system may also be considered, albeit one leaning towards uniformity. In a modified convention such as this only the limitation provisions should vary depending on the unimodal stage where loss, damage or delay occurs.

The number of ratifications needed for the convention to come into effect should be as high as is practically possible; this way it will truly generate harmony if it does come into effect. If it does not become operative this will then be the consequence of a lack of general support which, in case the ratification rate had been lower, would only have led to the newest in a long line of conventions with a limited sphere of action and thereby aggravating the proliferation problem.

This proposed approach is a long term one and will presumably take more than a few years and a great deal more detailed debate and willingness to further engage in an exchange of views to implement. The largest pitfall to avoid in the meantime is the creation of legislation of a stopgap nature that will only partly solve the problems at hand and moreover even hinder the development of the aimed for convention, since a makeshift solution would only add to the current complexity without providing any long-term benefits. Unfortunately, which initiatives can be described as a stopgap and which can serve as a possible stepping stone to a more permanent solution is hard to determine. Only time (and a lot of lobbying) will tell.

Keeping this in mind it is clear that the transport sector would be best served if local conventions, as the CMNI is, would not aspire to solve the complex of problems surrounding multimodal transport and legislation. Any new international liability regime attempting this would have to offer clear advantages as compared with the existing legal framework in order to succeed.

An intermediate solution for the inland waterway sector could be found in the promotion of the use of contractual standard rules like the UNCTAD/ICC Rules or their derivatives, so that at least the gaps in the existing regulations are covered. Even the compilation of model rules specially designed for intermodal carriage including an inland navigation leg may be an option.