

## MULTIMODAL ASPECTS OF THE ROTTERDAM RULES

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### 1. *The transition from a pure maritime instrument to a “maritime plus” instrument*

When the Hague Rules were adopted in 1921 not only in the tramp trade, but also in the liner trade were the goods normally received and delivered alongside. That explains why the scope of application of the Hague Rules, and the 1924 Brussels Convention in which they were incorporated, was tackle to tackle since that was the period of responsibility of the carrier. Later on, however, in the liner trade it proved necessary for the carrier, in order to avoid delays, to receive and deliver the goods in its port warehouses or in those of its agents and, consequently, the period of its responsibility became wider than the period of application of the Hague Rules as well as of the Hague-Visby Rules wherein the relevant provisions were left unaltered. Consequently the liability of the carrier in respect of loss of or damage to the goods occurring between receipt of the goods and their loading on board the ship and as well as between completion of discharge and delivery was governed by the applicable national law.

A solution that normally avoids such duality of regimes was found by the Hamburg Rules, pursuant to which the period of responsibility of the carrier covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge. Normally, but not always, because the terminals at which the goods are taken in charge and are delivered may be outside the port areas.

But none of the existing instruments applies to the whole contract period when the carrier undertakes to take the goods in charge at the door of the shipper and to deliver them at the door of the consignee, as gradually has become more and more frequent with the advent of containers.

The industry has since 1971 felt the need for a unique instrument governing the whole transport performed by different modes. BIMCO issued a form of combined transport bill of lading which, after setting out general rules on the liability and limitation of liability of the carrier, provides that if it can be proved where the loss or damage occurred, the carrier and the merchant shall be entitled to require such liability to be determined by the provisions contained in any international convention or national law that cannot be departed from to the detriment of the merchant and would have applied if the merchant had made a separate contract with the carrier in respect of that

particular stage of transport where loss or damage occurred. Twenty years later, in June 1991 the International Chamber of Commerce and UNCTAD adopted the UNCTAD-ICC Rules for Multimodal Transport Documents, the multimodal transport contract being defined as a single contract for the carriage of goods by at least two different modes of transport.

All the attempts to regulate generally through an international instrument multimodal transport have failed. They had been made first by the CMI prior to and at the Tokyo Conference in 1969<sup>1</sup>, by UNIDROIT in conjunction with the CMI<sup>2</sup> and then by UNCTAD with the UN Convention on International Multimodal Transport of Goods of 1980.

The decision to extend to land carriage connected with carriage by sea the scope of application of the new draft instrument prepared by the CMI was prompted by the awareness that such extension would respond to the needs of the trade, for already in 2002 about fifty per cent of containers carried by sea were carried door-to-door<sup>3</sup>. The Rotterdam Rules have not therefore been conceived with the view to regulating generally multimodal carriage, but only with a view to regulating contracts of carriage by sea in which the carrier agrees to extend its services also to the transportation by other modes that precedes and follows carriage by sea. They were not intended to be a multimodal instrument since carriage by other modes must only be a complement to carriage by sea.

## 2. *The scope of application of the Rotterdam Rules*

The application of the Rotterdam Rules also to the carriage by modes of transport other than sea and the need for such carriage by other modes to be complementary to the carriage by sea results from the coordination between the definition of contract of carriage in article 1.1, pursuant to which the contract must provide for carriage by sea and may also provide for carriage by other modes of transport in addition to the sea carriage, and the provision on the general scope of application in article 5, in which the four geographical links take the two alternatives into account: if the contract is wholly by sea, only the port of loading and the port of discharge are relevant; if the contract is partly by sea, also the place of receipt and the place of delivery, that do not coincide with the port of loading and the port of discharge, are relevant and it suffices that

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<sup>1</sup> CMI Documentation 1968, IV, p. 56; Tokyo 1969 Containers 1, Report and questionnaire; CMI Documentation 1969, III Draft Convention on Combined Transport-Tokyo Rules, p.56

<sup>2</sup> Draft Convention prepared at the round table arranged by UNIDROIT in Rome on January 1970, CMI Documentation 1970, II, p. 80.

<sup>3</sup> UNCITRAL Note by the Secretariat, document A/CN.9/WG.III/WP.29 at para. 25.

anyone of them be in a Contracting State; provided, however, that the sea leg be international.

This widens considerably, in case of door-to-door contracts, the scope of application of the Rotterdam Rules as respects the Hague-Visby Rules and the Hamburg Rules, since in a door-to-door contract it is sufficient for the Rotterdam Rules to apply that the in-land place of delivery be in a contracting State, provided the sea leg is international.

3. *The legal regime applicable to door-to-door contracts of carriage under articles 26 and 82 and the coordination between such articles.*

In order to establish a correct coordination between article 26 and article 82 of the Rotterdam Rules their legal nature ought to be established: a task that is not so easy, at least in so far as article 26 is concerned. Originally it was conceived as a conflict provision<sup>4</sup> but after the wording of the reference to other conventions was changed from “provisions of an international convention that...according to their terms apply to all or any of the carrier’s activities under the contract “<sup>5</sup> to “provisions of another international instrument that... would have applied to all or any of the carrier’s activities if the shipper had made a separate and direct contract with the carrier in respect to the particular stage of carriage...”<sup>6</sup>, the view was expressed that it was no longer a conflict provision because the hypothetical contract formula had been adopted<sup>7</sup>. The *travaux préparatoires* are not of great assistance, since during the 41<sup>st</sup> session of the Commission different views were put forward as it appears from the following summary of the debate<sup>8</sup>:

“It was suggested that, as draft article 27 was clearly no longer a provision governing conflict of conventions, the use of the phrase “do not prevail” in its chapeau might be misconstrued. In its place, it was suggested that the phrase

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<sup>4</sup> During the 11<sup>th</sup> session of the Working Group the following summary of the discussion was made (document A/CN.9/526, paragraph 250): “After discussion, the Working Group agreed provisionally to retain the text of subparagraph 4.2.1 as a means of resolving possible conflicts between the draft instrument and other conventions already in force. The Secretariat was instructed to prepare a conflict of convention provision for possible insertion into article 16 of the draft instrument...”

<sup>5</sup> Document A/CN.9/WG.III/WP.21.

<sup>6</sup> This wording is taken from clause 12(1)(b) of the “Combiconbill” form of combined transport bill of lading.

<sup>7</sup> Van der Ziel, *Multimodal aspects of the Rotterdam Rules*, CMI Yearbook 2009 – Athens II, 301, at p. 305. The same opinion, on the basis however that the real conflict provision had become article 82, has been expressed by Hancock, *Multimodal transport and the new UN Convention on the carriage of goods*, (2008) 14 JIML 484, at p.493. The opinion instead that article 26 is still a conflict provision has been expressed by Fujita, *The comprehensive coverage of the new Convention: performing parties and the multimodal implications*, Texas International Law Journal, vol.44, p.360.

<sup>8</sup> Document A/CN.9/645, paragraph 97.

“do not apply” might be preferable. However, it was observed that simply replacing the phrase as suggested could be problematic, as the conflicting provisions would not simply be inapplicable, but would be inapplicable only to the extent that they were in conflict with the provisions of the draft Convention. Further, it was recognized that a more substantial redraft of the text of draft article 27 would probably be necessary in order to achieve the suggested result. The Commission agreed that the current text of draft article 27 was acceptable”.

It appears, therefore, that there was a clear agreement that the words “do not prevail” mean what they say, and that consequently the provisions of the other transport conventions apply only if, and to the extent to which, the provisions of the Rotterdam Rules are in conflict with them. In view of this conclusion, the question whether or not the amendment of paragraph (a) of article 26 has changed the nature of the provision becomes immaterial: whether or not article 26 may be qualified as a provision on conflict of conventions, its effect is precisely that.

As regards the order in which articles 26 and 82 should be considered, it appears that article 26 should come first, both because it has been the first to be adopted and because article 82 has been adopted as a complement to article 26<sup>9</sup>.

#### 4. *The analysis of article 26*

##### 4.1. *Introduction*

Although the rubric of article 26 is “Carriage preceding or subsequent to sea carriage”, its scope of application is wider, since its provisions apply to loss, damage or delay occurring before the loading of the goods onto the ship or after their discharge from the ship. Therefore in a door-to-door contract of carriage the provisions of article 26 apply also to all the obligations of the carrier, such as handling, storage, movement within the port area, to be performed between the time the goods are discharged from the ship and the time they are loaded on another ship or a road or railroad vehicle. Since, however, only other international instruments may prevail over the Rotterdam Rules, there are at present no instruments that may be applicable to activities other than international carriage by road, rail or air. The only international convention that could become relevant is the U.N. Convention on the Liability of Operators of Transport Terminal in International Trade, 1991 which, however, is not yet in force.

During the sessions of the UNCITRAL Working Group the proposal was made to extend the scope of this article also to national laws<sup>10</sup>, but that proposal was ultimately

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<sup>9</sup> Report of the 18<sup>th</sup> session of the Working Group, document A/CN.9/616, paragraph 232; Report of the 20<sup>th</sup> session, document A/CN.9/642, paragraphs 228-232.

rejected. The extension of article 26 to national laws would in fact have adversely affected uniformity at a very high degree, since inter alia it would have allowed the application of national laws to all activities performed within the port areas and it would have allowed Contracting States at any time to enact new laws governing carriage by modes of transport other than carriage by sea, thereby unilaterally preventing the application of the Rotterdam Rules .

The failure to extend article 26 to national laws has been criticized from two opposite angles. It has in fact been stated that that would alter the presently existing dynamics between shipper, carrier, performing parties and insurers, because the existing national limits may be significantly lower than the Rotterdam Rules limits. On the opposite side it has been stated that in several jurisdictions the CMR limit has been adopted for national road carriage and that the application of the Rotterdam Rules would significantly reduce the recovery of the claimant in case of loss or damage during the road leg of a door-to-door carriage.

With respect to the first criticism it must first be pointed out that the Rotterdam Rules limit does not affect the position of the road haulier, who is a performing party, for the Rotterdam Rules do not apply to him. It would instead, if the national limits are lower, affect the position of the Rotterdam Rules carrier, who, however, would be aware of his risk, consisting of the inability to recover from the land carrier (his performing party) a portion of the sum paid to the shipper or consignee; but, in case of this risk being too great, he would not accept to enter into a door-to-door contract of carriage. With respect to the second criticism, while it cannot be denied that the CMR limit per kilogram is much higher than the corresponding Rotterdam Rules limit, it must be pointed out that in case of packages of relatively light weight the Rotterdam Rules package limit would yield a significantly higher indemnity than the CMR limit per kilogram: in respect of a package of 50 kilograms the CMR limit is 450 sdr and the Rotterdam Rules package limit is 875 sdr.

#### 4.2. *The conditions for the operation of article 26*

The first of such conditions relates to the time when the event has occurred: the loss of, or damage to the goods or the event or circumstance causing a delay must have occurred solely before their loading on or after their discharge from a ship. An event

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<sup>10</sup> Report of the 11th session, document A/CN.9/526, paragraphs 245-263; Report of the 19<sup>th</sup> session, document A/CN.9/621, paragraphs 187-193; Report of the 41<sup>st</sup> session of the U.N. Commission on International Trade Law, document A/63/17, paragraphs 93-96.

occurs when it comes into being<sup>11</sup>; but it may come into being during some period of time and in such latter case for the purposes of this provisions it is necessary that all such time precedes loading or follows discharge. It follows that if for example a damage started prior to loading and worsened thereafter or started on board the ship and worsened after discharge, as may be the case for goods loaded in refrigerated containers, article 26 does not apply<sup>12</sup>.

The second condition is that the other international instrument would have applied if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of damage to the goods or the event or circumstance causing a delay occurred. If, for example, the last stage of the carriage of the goods is from Genoa, where the goods have been unloaded from the ship, to Milan and the goods are damaged during that stage of the carriage, this condition would not materialize since the CMR applies only to international contracts of carriage. It would instead apply if the road haulage is from Genoa to Zurich.

The third condition is that the provisions on the carrier's liability, limitation of liability or time for suit be mandatory or cannot be departed from to the detriment of the shipper.

#### 4.3. *The allocation of the burden of proof*

Although the shipper pursuant to article 17(1) has only the burden of proving that the loss of or damage to the goods or the event or circumstance that caused or contributed to the delay took place during the period of the carrier's responsibility, the general rule under the Rotterdam Rules is that their provisions apply to the whole period between receipt of the goods from the shipper and their delivery to the consignee. Article 26 is, therefore, an exception to such general rule, since the burden of proving that the conditions for its application have materialized lies on the party who invokes its application, be it the carrier or the shipper/consignee. It has been pointed out that in the container trade the loss or damage is very often concealed and identifying the moment when it has occurred is difficult, if not impossible. If the loss consists of the contents of the container being partly missing at destination the first observation is that when such contents are, as is almost always the case, described in the transport document, it is

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<sup>11</sup> Oxford Shorter Dictionary. In the French version two different terms are used: in the opening sentence reference is made to the time when the loss or damage (or event causing a delay) "*survient*" and then under (a) reference is made to the stage of carriage where the loss or damage (or event causing a delay) "*s'est produit*": the verb *produire* seems to be more appropriate than *survenir* since this latter verb indicates something that comes into existence unexpectedly (*inopinément*: Petit Larousse).

<sup>12</sup> It has been observed that the occurrence in most cases is reasonably easy to establish: van der Ziel, supra note 5, p. 305.

probably the carrier that is interested to invoke the application of the convention to a non maritime stage of the carriage, if such a stage is by land (road or railroad) or inland waterway: if by land, the limit per kilogram, albeit higher than that of the Rotterdam Rules, will be lower than the limit per package of the Rotterdam Rules, whenever the average weight of the packages stuffed in the container is less than 105 kilograms: if, for example, the average weight of the packages is 50 kilograms and 50 packages are missing, under the Rotterdam Rules the limit based on the number of packages would be 43,850 SDRs while under the CMR or COTIF-CIM the limit based on weight would be 20,825 SDRs. Even under the Montreal Convention the limit would be lower: 42,500 SDRs<sup>13</sup>. The second observation is that the loss may be localized if the seals are broken or the container has been weighed when unloaded from the container ship<sup>14</sup>. In case the goods are damaged, it is likely that also the container be damaged (e.g. on account of rough handling), in which event there may be external evidence of such damage.

#### 4.4. *The scope of application of other international instruments pursuant to article 26*

As previously observed, other transport conventions prevail over the Rotterdam Rules only to the extent that they contain provisions that are in conflict with those of the Rotterdam Rules in the areas specified in article 26. In order that a conflict may arise it is necessary that a) such other convention would have been applicable if the shipper had made a separate and direct contract with the carrier and, b) the relevant provisions of such other convention differ from those of the Rotterdam Rules. An analysis will be made hereafter of the provisions of the Rotterdam Rules that are not affected by any provisions of the other transport conventions and those that instead may be so affected in respect of each of the three areas to which article 26 applies: liability of the carrier, limitation of his liability and time for suit. The other transport conventions that will be considered are the Convention on the Contract for International Carriage of Goods by Road, 1956, as amended by the 1978 Protocol (CMR), the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 in the version of the Protocol of Modification of 3 June 1999 to its Appendix B, containing Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM), the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, 2000 (CMNI) and the Convention for the Unification of Certain Rules for the International Carriage by air, 1999 (Montreal Convention).

<sup>13</sup> Similar remarks and examples are made by van der Ziel, *supra* note 5, p. 308.

<sup>14</sup> The portailers have normally a system that records the weight of the containers when they are lifted during the loading and unloading operations.

4.4.1. *Liability (including allocation of the burden of proof and notice of loss, damage or delay)*

*a) Articles of the Rotterdam Rules that are not affected by article 26*

Articles 11 (*Carriage and delivery of the goods*), 12 (*Period of responsibility of the carrier*), 13 (*Specific obligations*), 16 (*Sacrifice of the goods*), 18 (*Liability of the carrier for other persons*) and 19 (*Liability of maritime performing parties*) continue to apply because they are not in conflict with any provisions of other international instruments. Articles 14 (*Specific obligations applicable to the voyage by sea*), 16 (*Sacrifice of the goods during the voyage by sea*), 24 (*Deviation*) and 25 (*Deck cargo on ships*) are not affected by article 26 because they regulate rights and obligations during the carriage by sea.

*b) Articles of the Rotterdam Rules that are affected by article 26*

- Articles 15 (*Goods that may become a danger*) and 32 (*Special rules on dangerous goods*) do not prevail over articles 22 of the CMR, 9 of COTIF-CIM and 7 of CMNI.
- Article 17 (*Basis of liability*) does not prevail over articles 17-18 of the CMR, 23-25 of COTIF-CIM, 16-18 and 24-25 of CMNI and 18 of the Montreal Convention.
- Article 20 (*Joint and several liability*) does not prevail over article 27 of COTIF-CIM and article 4 of CMNI but its scope of application is wider since it applies to all maritime performing parties while articles 27 of COTIF-CIM and 4 of CMNI only apply to substitute (or actual) carriers.
- Article 21 (*Delay*) does not prevail over articles 19-20 of the CMR, 16 of COTIF-CIM, 5 of CMNI and 19 of the Montreal Convention.
- Article 22 (*Calculation of compensation*) does not prevail over articles 23 of the CMR, and 19 of CMNI.
- Article 23 does not prevail over articles 30 of the CMR, 44(2) of COTIF-CIM, 23 of CMNI and 31 of the Montreal Convention.

4.4.2. *Limitation of liability*

*a) Articles of the Rotterdam Rules that are affected by article 26*

- Articles 59 (*Limits of liability*), 60 (*Limits of liability for loss caused by delay*) and 61 (*Loss of the benefit of limitation of liability*) do not prevail over articles 23-27 of the CMR, 30 and 33 of COTIF-CIM, 20 and 28 of CMNI and 22 of the Montreal Convention.



#### 4.4.3. *Time for suit*

##### *a) Articles of the Rotterdam Rules that are not affected by article 26*

Article 65 (*Actions against the person identified as the carrier*) is not affected by article 26 because it has no equivalent in any other convention.

##### *b) Articles of the Rotterdam Rules that are affected by article 26*

- Article 62 (*Period of time for suit*) does not prevail over articles 32 of the CMR, 47 and 48 of COTIF-CIM, 24 (1-3 and 5) of CMNI and 35 of the Montreal Convention.
- Article 64 (*Action for indemnity*) does not prevail over article 24 (4) of CMNI.

#### 4.5. *Provisions of the Rotterdam Rules not covered by article 26*

In view of article 26 applying only to the liability and limitation of liability of the carrier and the time for suit, a conflict between the Rotterdam Rules and other transport conventions may arise in respect of other matters. It is therefore convenient to find out whether and, if so, to which extent such conflict is conceivable. In this connection the rules laid down in article 30 of the Vienna Convention on the Law of Treaties, 1969 ought first to be considered in order to find out which of the two criteria indicated therein should be applied. Pursuant to article 30(2) when a treaty specifies that it is subject to an earlier treaty, the provisions of such earlier treaty prevail. The assumption, therefore, is that there may be a conflict between two treaties and to the extent of such conflict the provisions of the earlier treaty prevail. Then pursuant to article 30 (4) when the parties to the later treaty do not include all parties to the earlier one as between a State party to both treaties and a State party to only one of such treaties, the treaty to which both States are parties governs their mutual rights and obligations. The application of this latter criterion would entail that the later treaty would not apply. This might be a rule applicable when the two treaties relate to exactly the same subject matter, but not when, as in the present case, the scope of one treaty, the Rotterdam Rules, is much wider than that of the earlier treaties. In such a case the rule laid down in article 30(2) should apply. And the reason for its application is also that the present situation falls within the scope of that provision, because article 82, albeit within certain limits, provides that the earlier treaties prevail and article 26 provides that, again, within certain limits, certain matters covered by the Rotterdam Rules are governed by earlier treaties. Therefore the conclusion should be that earlier treaties prevail only when, and to the extent to which, there is a conflict.

The analysis that follows aims therefore at identifying the areas in which such a conflict may exist. It is limited to the provisions relating to the areas that may be considered more relevant, namely the following: (a) obligations of the shipper, (b) transport documents, (c) delivery of the goods, (d) right of control, (e) jurisdiction (f) arbitration and, (g) freedom of contract. It will be conducted with reference to the CMR, COTIF-CIM, CMNI and the Montreal Convention.

#### 4.5.1. *Obligations of the shipper*

In order that the provisions of another convention apply it is necessary that the loss, damage or delay takes place before loading or after discharge of the goods and be the consequence of a breach by the carrier of his obligations under the Rotterdam Rules. If, as it is very likely, if not certain, the non maritime leg of the carriage is performed by a performing party, the loss or damage is suffered by the performing party who may claim damages from his shipper who is the Rotterdam Rules carrier on the basis of the terms of his contract or of the applicable convention or national law . In such a case, that does not seem very likely to occur, the Rotterdam Rules carrier may in turn claim damages from the shipper who may reject the claim if his liability would not exist under the Rotterdam Rules.

#### 4.5.2. *Transport documents*

No conflict is conceivable between the provisions of the Rotterdam Rules , that apply to the relationship between the shipper and the Rotterdam Rules carrier, and those of each of the other transport conventions, that apply to the relationship between the Rotterdam Rules carrier and the road, railroad, inland waterway or air carrier as the case may be. The claimant would have no contractual relationship with the sub-carrier that is not a carrier by sea and, therefore, the documents that that sub carrier issues when receiving the goods from the Rotterdam Rules carrier may not be relevant vis-à-vis the Rotterdam Rules shipper.

#### 4.5.3. *Delivery of the goods*

The provisions of the Rotterdam Rules apply to the relationship between the Rotterdam Rules carrier and the Rotterdam Rules shipper or consignee. They cannot apply in respect of any sub carrier, in respect of whom the shipper and consignee have no contractual rights or obligations. Normally, if the last leg of the carriage is performed

by a sub carrier, be it a road, railroad, inland waterway or air carrier, it is the Rotterdam Rules carrier or its agent that collects the goods from the sub carrier and delivers them to the Rotterdam Rules consignee. If the Rotterdam Rules consignee collects the goods directly from the sub carrier, that occurs pursuant to an assignment by the Rotterdam Rules carrier of his right to obtain delivery and, therefore the provisions of the Rotterdam Rules would not apply vis-à-vis the sub carrier, but only vis-à-vis the Rotterdam Rules carrier.

#### 4.5.4. *Right of control*

The provisions on the right of control in chapter 10 of the Rotterdam Rules govern the relationship between the controlling party, which normally is the Rotterdam Rules shipper, and the Rotterdam Rules carrier. The Rotterdam Rules shipper cannot exercise his right of control vis-à-vis any sub carrier; such right, if it is provided by the rules applicable to the relevant sub contract<sup>15</sup>, may instead only be exercised by the Rotterdam Rules carrier, who is the person who enters into the sub contract of carriage.

#### 4.5.5. *Jurisdiction*

Chapter 14 of the Rotterdam Rules , if in force in the country in the jurisdiction of which the competent court is located, applies to judicial proceedings that may be instituted against the carrier under the Rotterdam Rules . If the Rotterdam Rules shipper or consignee wishes to bring proceedings against a sub carrier, be he a rail carrier, a railroad carrier, a carrier by inland waterway or an air carrier, he normally has two alternatives: either to bring an action in tort, in which case the rules on jurisdiction of the court seized of the case apply, or to bring an action in contract as assignee of the Rotterdam Rules carrier, in which case the provisions of the relevant transport convention apply.

Also in this case a conflict between the provisions of the Rotterdam Rules and those of any of the other transport convention is not conceivable.

#### 4.5.6. *Arbitration*

The provisions of chapter 15 of the Rotterdam Rules , if in force in the country in the jurisdiction of which the seat of the arbitration is located, apply only to arbitration

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<sup>15</sup> This is the case for the CMR (article 120), COTIF-CIM (article 18), CMNI (article 14) and the Montreal Convention (article 12).

agreements between the Rotterdam Rules carrier and the Rotterdam Rules shipper or his assignees. Even if the Rotterdam Rules shipper or consignee enters into an arbitration agreement with a sub-carrier, chapter 15 would not apply, for that arbitration agreement would not be, as stated in article 75(1), an agreement relating to the carriage of goods under the Rotterdam Rules . Any conflict with provisions on arbitration, if any, in other transport conventions is, therefore, unconceivable

#### 4.5.7. *Freedom of contract*

The question that arises in respect of derogations that are binding pursuant to article 80 of the Rotterdam Rules is whether the Rotterdam Rules carrier may invoke such derogations in respect of loss, damage or delay occurring during the period to which another transport convention applies. To the extent that the derogations relate to the carrier's liability, limitation of liability and time for suit, he may not do so, for article 80 does not prevail over articles 41 of the CMR, 5 of COTIF-CIM, 25 of CMNI<sup>16</sup> and 49 of the Montreal Convention, pursuant to which all their provisions on the carrier's liability, limitation of liability and time for suit are mandatory.

If the derogations relate to other provisions of the Rotterdam Rules it is necessary first to find out if the subject matter of such provisions is also the subject matter of corresponding provisions of anyone of such conventions and if their provisions are mandatory. If so, the derogation would not be permissible and the fact that there is no conflict between the provisions of the Rotterdam Rules and those of such other convention would be irrelevant, for the conflict would arise precisely as a consequence of the (permissible) derogation.

### 5. *The analysis of article 82*

#### 5.1. *The antecedents of article 82*

When during the 11<sup>th</sup> session of the UNCITRAL Working Group on Transport Law article 4.2.1 of the draft instrument (that later became article 27 and then article 26) was considered, the Working Group instructed the Secretariat "to prepare a conflict of convention provision for possible insertion into article 16 of the draft instrument"<sup>17</sup>. With a view to carrying out such instructions the Secretariat drew up draft articles 89

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<sup>16</sup> Article 25(2) of CMNI allows contractual stipulations exonerating the carrier from liability in respect of losses arising out of fault in navigation.

<sup>17</sup> Report of the 11th session, document A/CN.9/526, para. 250. Article 16 of the draft then in consideration (A/CN.9/WG.III/WP.21) contained provisions that now may be found, with amendments, in articles 83, 85 and 86.

and 90 of the subsequent edition of the draft instrument<sup>18</sup>. When those two articles were considered by the Working Group, the general view was that both such articles were not necessary and should be deleted, but at the same time since concerns had been raised regarding a possible conflict with the Montreal Convention it was suggested that, although the combination of air and sea transport in the same carriage was thought to be rare, additional clarification of the draft convention could be sought in order to avoid any possible conflict with the Montreal Convention<sup>19</sup>. In furtherance of that decision a new article 84 was included in the subsequent edition of the draft convention, worded as follows<sup>20</sup>:

Article 84. International conventions governing the carriage of goods by air

Nothing in this Convention prevents a Contracting State from applying the provisions of any other international convention regarding the carriage of goods by air to the contract of carriage when such international convention according to its provisions applies to any part of the contract of carriage.

The question raised during the 19<sup>th</sup> session whether other unimodal transport conventions should be mentioned in that provision in order to ensure the avoidance of conflicts<sup>21</sup> was considered during the subsequent session and after the rejection of the proposal to replace the text of article 84 with a provision of a general character covering all conventions<sup>22</sup>, in consideration of the concern that a very specific area of possible conflict could also arise with respect to the CMR and COTIF-CIM and in particular regarding the ferry traffic, after consideration of the two proposals that had been submitted<sup>23</sup> the Working Group expressed its support to the proposal to find “a resolution to the very narrow issue of possible conflict of laws outlined in the proposals presented”<sup>24</sup> and requested the Secretariat “to consider the two approaches, and to

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<sup>18</sup> A/CN.9/WG.III/WP.56. The text of articles 89 and 90 was the following:

*“Article 89. International instruments governing other modes of transport*

Subject to article 92, nothing contained in this Convention prevents a Contracting State from applying any other international instrument which is already in force at the date of this Convention and that applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than carriage by sea.”

*“Article 90. Prevalence over earlier conventions*

[As between parties to this Convention, it prevails over those][Subject to article 102, this Convention prevails between its parties over those] of an earlier convention to which they may be parties [that are incompatible with those of this Convention].”

<sup>19</sup> Report of the 18<sup>th</sup> session, A/CN.9/616, paras. 229-235.

<sup>20</sup> A/CN.9/WG.III/WP.81.

<sup>21</sup> Report of the 19<sup>th</sup> session, A/CN.9/621, paras. 204-205.

<sup>22</sup> Report of the 20<sup>th</sup> session, document A/CN.9/642, paras. 228-229. The text suggested was as follows: “Nothing in this Convention prevents a Contracting State from applying the provisions of any other international convention regarding the carriage of goods to the contract of carriage to the extent that such international convention according to its provisions applies to the carriage of goods by different modes of transport”

<sup>23</sup> Report of the 20<sup>th</sup> session, document A/CN.9/642, para. 232.

<sup>24</sup> Report of the 20<sup>th</sup> session, document A/CN.9/642, para. 233.

prepare draft text along the lines of the proposals aimed at meeting the concerns expressed”<sup>25</sup>.

The first of such proposals consisted in the addition to article 5(1) of the following paragraph 1bis:

Notwithstanding article 5, paragraph 1, if the goods are carried by rail or road under an international convention and where the goods for a part of the voyage are carried by sea, this Convention does not apply, provided that during the sea carriage the goods remain loaded on the railroad car or vehicle.

The second proposal, of greater interest because was taken by the Secretariat as basis of its draft, was instead worded as follows:

International conventions governing the carriage of goods

Nothing in this Convention prevents a Contracting State from applying the provisions of any of the following conventions in force at the time this Convention enters into force:

- (a) Any convention regarding the carriage of goods by air to the extent such convention according to its provisions applies to the carriage of goods by different modes of transport;
- (b) Any convention regarding the carriage of goods by land to the extent such convention according to its provisions applies to the carriage of land transport vehicles by a ship; or
- (c) Any convention regarding the carriage of goods by inland waterways to the extent such international convention according to its provisions applies to a carriage without trans-shipment both on inland waterways and on sea.

The draft prepared by the Secretariat was approved by the Working Group at its last session, held in January 2008<sup>26</sup>.

The comparison of draft article 84 and of the draft article submitted to the Working Group at its 20<sup>th</sup> session<sup>27</sup> with article 82 shows the following evolution of the text:

- the chapeau is based on that of the draft article submitted to the Working Group which in turn reproduced the first part of article 82, albeit with some changes: the replacement of “prevents” with “affects”, the addition of the words

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<sup>25</sup> Report of the 20<sup>th</sup> session, document A/CN.9/642, para. 234.

<sup>26</sup> Report of the 21<sup>st</sup> session, document A/CN.9/645, paragraph 258.

<sup>27</sup> Such text was the following (Report of the 20<sup>th</sup> session, document A/CN.9/642, para. 232):

“Nothing in this Convention prevents a Contracting State from applying the provisions of any of the following conventions in force at the time this Convention enters into force:

“(a) Any convention regarding the carriage of goods by air to the extent such convention according to its provisions applies to the carriage of goods by different modes of transport;

“(b) Any convention regarding the carriage of goods by land to the extent such convention according to its provisions applies to the carriage of land transport vehicles by a ship; or

“(c) Any convention regarding the carriage of goods by inland waterways to the extent such international convention according to its provisions applies to a carriage without trans-shipment both on inland waterways and on sea”.

“in force at the time this Convention enters into force, including any future amendments to such conventions” and the replacement of the words “regarding the carriage of goods” with “that regulate the liability of the carrier for loss of or damage to the goods”;

- in sub-paragraph (a) the words in draft article 82 “when such international convention according to its provisions applies to any part of the contract of carriage” that in the draft submitted to the Working Group had been replaced by “to the extent such convention according to its provisions applies to the carriage of goods by different modes of transport” have been reinstated save the initial word “when” replaced by “to the extent”;

- sub-paragraph (b) covers part of paragraph (b) of the draft submitted to the Working Group in which reference was made globally to carriage by road and by rail; it covers in fact carriage by road only and thus specifies its scope of application so to adhere to the situation envisaged in article 2(1) of the CMR: the phrase “to the extent such convention ...applies to the carriage of goods by different modes of transport” has in fact been replaced by “to the extent that such convention...applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship”,

- sub-paragraph (c) covers the remaining part of paragraph (b) of the draft submitted to the Working Group: it in fact makes specific reference to the situation envisaged in article 1 (4) of COTIF-CIM, namely that of a convention governing carriage of goods by rail that according to its provisions applies to carriage of goods by sea “as a supplement to the carriage by rail”;

- sub-paragraph (d) reproduces literally sub-paragraph (c) of the draft submitted to the Working Group and covers the type of carriage envisaged in article 2(2) of the CMNI.

From the discussion that has taken place within the Working Group and from the changes and additions made first to the text of article 84 and then to that of the draft article submitted to the Working Group it appears that the scope of application of article 82 in respect of carriage by air differs from that in respect of carriage by road, rail and inland waterways. Whilst in fact in the first case the provision now in article 82(a) was added “in order to ensure that there is no conflict between the draft convention and the Montreal Convention”<sup>28</sup>, in the second case the provisions now in sub-paragraphs (b)

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<sup>28</sup> Report of the 18<sup>th</sup> session, document A/CN.9/616, para.235. This was confirmed at the 19<sup>th</sup> session, during which it was stated that “Draft article 84, as it appeared in A/CN.9/WG.III/WP.81 was intended to respond to that request” (A/CN.9/621, para. 204) and then (para. 205) “it had been decided to include in the draft convention text like that found in draft article 84 only with respect to the Montreal and Warsaw

and (c) were added in consideration of the concern of a possible conflict with the CMR and COTIF-CIM in respect of “the specific situation in which goods being transported by road or rail would remain loaded on the vehicle or railroad cars during the ferry voyage”<sup>29</sup>: a general conflict provision in the first case and a specific conflict provision, intended to cover only the situation where other conventions may apply to carriage by sea, in the second case<sup>30</sup>. If it had been intended to draft a limited conflict provision also in respect of carriage by air, that could have been done through a specific reference to the situations covered by article 18(4) of the Montreal Convention.

### 5.2. *Introduction to the analysis of article 82*

By providing that nothing in the Rotterdam Rules affects the application of any of the conventions reference to which is made thereafter, article 82 indicates that the provisions of such conventions prevail over those of the Rotterdam Rules within the limits subsequently indicated in respect of each such convention. The description in the preamble of the conventions as conventions “that regulate the liability of the carrier for loss of or damage to the goods” is not meant to limit the scope of the article to their rules on the liability of the carrier for loss of or damage to the goods, but only to identify the general purpose of the conventions. This interpretation is confirmed by the term –“to the extent that” – used subsequently in order to limit the scope of the article in respect of each group of conventions.

The conventions that are relevant are those in force at the time of the entry into force of the Rotterdam Rules , including their subsequent amendments. Article 82 therefore does not apply to any new convention that will enter into force after the Rotterdam Rules .

The four paragraphs of this article will be considered hereafter.

### 5.3. *Carriage by air*

In view of the general nature, already discussed, of the provision in article 82(a), its effect is to cause the provisions of the conventions governing carriage of goods by air always to prevail over those of the Rotterdam Rules . In order to ascertain whether

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Conventions, which were unique in their intention to include multimodal transport to such an extent that a conflict between those conventions and the draft convention was inevitable”.

<sup>29</sup> Report of the 20<sup>th</sup> session, document A/CN.9/642, para. 230.

<sup>30</sup> The author is therefore unable to share the opinion (van der Ziel, *supra* note 2, p. 311) that the description used in the various parts of article 82 does not refer to a certain part or period of the carriage but rather to a certain type of carriage.



and to which extent such conflict may arise the situations where the convention governing carriage by air applies to carriage by sea and those where the Rotterdam Rules may apply to carriage by air will be considered separately and reference will be made in both cases to the Montreal Convention, 1999.

### 5.3.1. *Situations where the Montreal Convention applies to carriage by sea*

The relevant provisions are those of article 38 (1) and 18(4). Pursuant to article 38 (1) in case of combined carriage performed partly by air and partly by any other mode the provisions of the Montreal Convention shall apply only to the carriage by air except as otherwise provided by article 18. The general rule set out in paragraph 4 of article 18 is that the period of the carriage by air does not extend to any carriage by land, sea or inland waterway performed outside the airport. There are, however, two exceptions to it: the first is that in case of a carriage that takes place in the performance of a contract of carriage by air for the purpose of loading, delivery or transshipment any damage is presumed to have occurred during the carriage by air; the second is that if a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for carriage by air, the carriage by such other mode of transport is deemed to be carriage by air.

The first exception cannot apply to a contract of carriage governed by the Rotterdam Rules, because in case of a possible, though rather unlikely, air leg of such a contract the sea leg cannot be considered a carriage that takes place in the performance of a contract of carriage by air. The application of the second exception is instead conceivable in case the Rotterdam Rules carrier has undertaken to perform by air a section of the door-to-door carriage preceding or following the sea leg and in breach of such obligation employs a road or rail vehicle. As regards liability the consequences would not, however, be very significant because the liability regime of the CMR, applicable pursuant to article 26 in respect of the carriage by road or that of COTIF-CIM, applicable in case of carriage by rail, are similar to that of article 18 the Montreal Convention. As regards the question whether the consequences would instead be significant in so far as of the limits of liability are concerned reference is made to the comments made above in the occasion of the analysis of article 26<sup>31</sup> to which reference is made also in respect of the other provisions of the Rotterdam Rules that might be affected by the application of the Montreal Convention.

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<sup>31</sup> Supra, paragraph 4.3.

### 5.3.2. *Situations where the Rotterdam Rules may apply to carriage by air*

Such situations arise in the non likely event that one of the legs of the door-to-door contract of carriage to which the Rotterdam Rules apply is carriage by air. Also the analysis of possible conflicts between the provisions of the Rotterdam Rules and those of the Montreal Convention has been made in connection with article 26<sup>32</sup>.

### 5.4. *Carriage by road*

In respect of the carriage by road the provision reference to which is made in article 82(b) with the words “to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship” is that in article 2(1) of the CMR<sup>33</sup> and, therefore, the scope of article 82 is limited to the situation envisaged therein. For a conflict to arise is necessary, however, that both the CMR and the Rotterdam Rules apply and that requires the road carriage to be international.

In so far as the liability regime, the limitation of liability and the time for suit are concerned, where the goods remain loaded on the road vehicle article 82(b) supersedes article 26 since the allocation of the burden of proof is different: while pursuant to article 26 the CMR would apply only if it is proved that the loss, damage or delay occurred solely before the loading of the goods on or after their discharge from the ship, pursuant to article 2(1) of CMR the Rotterdam Rules would apply only if it is proved that the loss, damage or delay occurred during the carriage by sea and was not caused by an act or omission of the carrier by road, but was caused by some event which could only have occurred in the course of and by reason of the carriage by sea, and the burden of proof would rest on the person (normally the carrier) invoking the application of the Rotterdam Rules . This provision is not clear: while in fact it is reasonable that the carrier has the burden of proving that the event has occurred during the carriage by other means of transport, e.g. during the carriage by sea, because such event may be connected with the vehicle, the fact that it must be an event that could only have occurred by reason of the carriage by sea requires some clarification. If, for example, the cargo is lost by fire and the origin of the fire is within the vehicle the CMR should apply, while if instead the origin of the fire is outside the vehicle, the Rotterdam Rules should apply also if the event could have occurred elsewhere, as is the case of fire

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<sup>32</sup> Supra, paragraphs 4.4 and 4.5.

<sup>33</sup> Specific reference to article 2 of the CMR has been made during the 18<sup>th</sup> sessions of the Working Group: A/CN.9/616 para.221; general reference to the CMR has been made during the 20<sup>th</sup> session: A/CN.9/642, para. 230.

originating from another vehicle; similarly, if the cargo is stolen when the vehicle was on board a ship, the theft could also have occurred elsewhere: the fact that it occurred when the vehicle was on board the ship should suffice.

As regards the Montreal Convention, the other provisions of the Rotterdam Rules that may be affected by the application of the CMR have already been considered in connection with the analysis of article 26.

### 5.5. *Carriage by rail*

In respect of the carriage by rail the following analysis is based on the provisions of COTIF-CIM. A preliminary question arises in respect of such Convention and its Annex. In view of the fact that pursuant to article 14 of CIM its rules apply to carriage by sea when an international carriage by rail being the subject of a single contract includes carriage by sea as a supplement to carriage by rail<sup>34</sup>, and that the Rotterdam Rules apply to contracts of carriage that provide for carriage by sea “and may provide for carriage by other modes of transport in addition to the sea carriage”, thereby adopting the so-called “maritime plus” approach, it is conceivable that the Rotterdam Rules and COTIF-CIM be mutually exclusive. In such a case the Rotterdam Rules would not apply to a contract of carriage subject to COTIF-CIM. Since, however, article 82(c) of the Rotterdam Rules makes implied reference to COTIF-CIM with the words “to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail”, it must be assumed that the intention was to treat a contract of carriage by rail that includes a maritime leg, such as that covered by COTIF-CIM, as coming under the definition of “contract of carriage” of article 1.1<sup>35</sup>.

As noted above, the condition required under article 82(c) and the first condition required under article 1(4) of CIM is that the carriage by sea be a supplement to the carriage by rail. The word “supplement” conveys the idea of something that is complementary to something else and could not exist independently: for example, in a contract of carriage by rail from Paris to London the carriage of the railroad cargo vehicle on a ship across the Channel is a “supplement to the carriage by rail” but in a door-to-door contract from Singapore to Zurich via Genoa the carriage by sea from

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<sup>34</sup> Van der Ziel, *supra* note 5, p.312; HANCOCK, *supra* note 5, p. 487.

<sup>35</sup> This opinion is confirmed by frequent reference to COTIF-CIM in the *travaux préparatoires*: see “General remarks on the sphere of application of the draft instrument” (Note by the Secretariat), A/CN.9/WG.III/WP.29, paragraph 56-58; Proposal by the Netherlands on the application door-to-door of the instrument, A/CN.9/WG.III/WP.33, paragraph 22; Report of the 20<sup>th</sup> session, A/CN.9/642, paragraphs 230 and 233.

Singapore to Genoa can hardly be qualified as a “supplement” to the carriage by rail from Genoa to Zurich. Distance may, therefore, be a relevant feature for the qualification of the maritime leg as a supplement of the railroad leg. Another feature may be the nature of the main activity of the carrier: if a contract that includes both a railroad and a sea leg is made by a rail company, that may be relevant for the qualification of the carriage by sea as a supplement to the carriage by rail. But it would not suffice, it is thought, to qualify the carriage by sea from Singapore to Genoa as a supplement to the carriage by rail from Genoa to Zurich.

The second condition, which is not specified in article 82(c) but in article 1(4) of CIM, is that the carriage by sea be performed on services included in the list of services referred to in article 24(1)(b) of COTIF<sup>36</sup>.

Article 82 (c) supersedes article 26 in so far as the liability regime is concerned, because a contract of carriage subject to COTIF is entirely governed by that Convention and its Appendix B, wherever the loss, damage or delay occurs. The same conclusion holds also in respect of limitation of liability and time for suit.

#### 5.6. *Carriage by inland waterway*

In respect of the carriage by inland waterway the convention that may be relevant in connection with the words “to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterway and sea” is the CMNI<sup>37</sup>, article 2(2) of which provides that the Convention applies unless a marine bill of lading is issued in accordance with the maritime law applicable or the distance travelled in waters to which maritime regulations apply is greater. The problem that arises with that provision relates to the notion of “marine bill of lading”. While in fact a transport document, whether negotiable or not, may be deemed to be equivalent to a “marine bill of lading”, it may be questionable whether the same conclusion holds for a transport document covering a door-to-door transport. It is thought, however, that this should be the case, for if the carriage by sea and inland waterway is made without trans-shipment, the document issued at loading cannot but cover the whole carriage. It follows that whenever a transport document is issued under the Rotterdam Rules, its provisions prevail over those of the CMNI. It is thought that

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<sup>36</sup> From the website of the Intergovernmental Organisation for International Carriage by Rail the lines listed are for Belgium Zeebrugge-Harwich; for Italy Civitavecchia-Golfo Aranci, Villa S. Giovanni-Messina and Reggio Calabria-Messina; for the United Kingdom Harwick-Zeebrugge and Liverpool (Seaforth)-Dublin.

<sup>37</sup> Budapest Convention on the contract for the carriage of goods by inland waterway, 2000.

the same conclusion holds if an electronic transport record is issued, for its effect is the same as that of a transport document.

A conflict between the two conventions, therefore, is not conceivable.