

The Future Law of Transport Operators and Service Providers

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1 Introduction

Traditionally, transport law has developed differently for the different modes of transport. The old concept of “common carrier” has been maintained through the centuries signifying in principle a strict liability with exception of circumstances beyond control and this principle is still maintained in the international conventions governing carriage by rail, road and air.¹ In maritime law, the development has been different as the principle of freedom of contract has prevailed until the advent of the 1924 Brussels Convention on Bills of Lading, the so-called Hague Rules.² Although that convention requires for its applicability that a bill of lading or a similar document of title has been issued and governs the relationship between the holder of the bill of lading and the issuer, it could with some simplification be said that the convention normally applies in practice where the carrier has held himself out to customers generally thus making his services available to everyone without discrimination.³ If so, he would qualify as a common carrier⁴ as distinguished from a private carrier where the contract has been selectively made with his contracting party usually through the medium of brokers. In these cases, the carrier is qualified as a private carrier and his services would then still be governed by the principle of freedom of contract which extends to charter parties as distinguished from the bill of lading situations.⁵ Hence, in maritime law it is necessary to draw the borderline between mandatory and non-mandatory rules which from a juridical-technical viewpoint is a difficult matter.⁶

For anyone unfamiliar with the particularities of transport law it may seem strange that it has been necessary to distinguish between the different modes of transport. Why, one might ask, do we not have *one* convention dealing with the liability of common carriers irrespective of the mode of transport? As we shall

¹ Rail: COTIF/CIM 1999; road: CMR 1956; air: 1929 Warsaw Convention and the 1999 Montreal Convention. See for a comparison, P.B. Larsen, *International Carriage of Goods by Road in the Americas: Time to revise the Inter-American Convention?*, Uniform Law Review 1999, pp. 33-74. So far, there have been no legislative efforts to consolidate the different conventions into one convention dealing generally with carriage of goods. See J. Ramberg, *The Law of Carriage of Goods – Attempts at Harmonization*. Scandinavian Studies in Law 17 (1973) pp. 211-252 [also in European Transport Law 1974 pp. 2-43].

² Important additions to the Hague Rules were made in the 1968 Protocol, the so-called Hague-Visby Rules.

³ See L. Gorton, *The concept of the common carrier in Anglo-American Law*. Gothenburg Maritime Law Association publ. 1971:43.

⁴ See, e.g., *Liver Alkali Co. v. Johnson* (1872) L.R.9 Ex. 338 explaining the difference between a common carrier and special contracts where a ship is specifically chartered to a particular shipper.

⁵ This distinction becomes of vital importance where the convention applies to the “contract of contract” rather than, as the Hague Rules, upon the issuance of a particular document, the bill of lading. See J. Ramberg, *The vanishing bill of lading & the “Hamburg Rules Carrier”*, American Journal of Comparative Law 1979 pp. 391-406.

⁶ See J. Ramberg, *Freedom of contract in maritime law*, Lloyd’s Maritime and Commercial Law Quarterly 1993 pp. 178-191 and id., *The proper delimitation of mandatory rules in the law of carriage of goods by sea*, Liber amicorum Jacques Putzeys, Brussels 1996 pp. 339-352.

see, one explanation is the traditional method to focus on the vehicle of transport – the railway, the road vehicle, the aircraft and the ship – or in other words the hardware of transportation. Hence, the *contract* of carriage has to some extent been overshadowed by the need for particular legal regimes applicable to the respective modes of transport. Also, the mandatory rules of liability have been limited to matters concerning the carriage as such – liability for loss of or damage to the goods and delay in delivery – leaving out matters of greater concern for the customers, such as delay in shipment, non-performance of the contract and the carriers' right of remuneration.

In later years, the particular legal regimes applicable to various modes of transport have caused considerable problems. While, in earlier times, the customer would be happy to conclude a particular contract of carriage by road, rail, air or ship, it is now owing to the development of international carriage of goods frequently irrelevant whether one mode or a combination of different modes is used to take the goods from point of origin to point of ultimate destination. Thus, a customer may well be satisfied to conclude a contract where the mode of transport has been left unspecified. If so, we shall have to decide whether we will then have a contract carriage *sui generis* or whether the applicability of the international conventions relating to different modes of transport will be triggered *subsequently* when the goods start to move from point of origin to ultimate destination. Apart from the problems which arise where one does not know at the time of the conclusion of the contract which rules will apply, considerable problems arise due to the different types of liability applicable under the different international conventions. This has been considered to be one of the main problems relating to so-called multimodal transport where different modes of transport may be included in one and the same contract of carriage. This study purports to demonstrate that the applicability of the international conventions relating to the different modes of transport should be limited to cases where contracts have been made for one of these modes of transport – so-called unimodal transport as distinguished from multimodal transport – and in any event should not be extended to cover cases of unspecified transportation promises. Hence, the future law of transport operators requires a fresh approach in order to serve a useful purpose in the contemporary transportation industry.

2 The Development of International Transport Law Unification

Generally, international trade law has developed under the paradigm of freedom of contract and international unification has traditionally been achieved by the merchants themselves applying more or less common standards. This is particularly apparent with respect to international maritime transport. The need for such common standards was felt even before the advent of Roman law and is demonstrated by the classical example of general average. Here, the dangerous sea might expose the ship and its cargo to a common peril requiring extraordinary measures to salvage the ship and the cargo. Different alternatives might present themselves to the master and crew of the ship. One might be to force a ship having struck ground to come loose by hoisting further sails and

breaking off ground with considerable damage to the ship as a result. Another alternative might be simply to throw the cargo overboard and lighten the ship to take it off ground. But the latter alternative would, of course, be less attractive to the owners of the cargo while beneficial to the shipowner. The principle was then developed that the loss inflicted on the cargo owners should be shared between all interests salvaged, that is between the ship, the cargo and the pending freight. The value of what had been sacrificed should thus be distributed fairly in proportion between these salvaged values. This is what is called distribution in general average which dates back at least to the so-called *Lex Rhodia de jactu*. The principle was later adopted in Roman law and is still maintained in the York Antwerp Rules of 1994. It is interesting to note that this concept has survived through the centuries basically as a norm developed by the merchants themselves thus representing a clear example of the so-called *Lex Mercatoria*.⁷

Before the development of ocean liner shipping signifying that the ships on regular schedules would take cargo from one port to the other, ships were only engaged more or less on either an *ad hoc*-basis or under contractual arrangements covering longer periods of time. The majority of international trade is still performed by engaging ships by such contracts which are evidenced by charter-parties. These could be for a particular voyage (voyage charter-party) or for a longer period of time (time charter-parties). Also, voyage charter-parties could be used for carriage of goods by ship in series (consecutive voyage charter-parties). Such charter-parties represent contracts of carriage although a particular ship has been chosen and the charterer given various options or, in case of time charter-parties, a general right to direct the ship within specified trading limits and to give the master of the ship orders and instructions accordingly.⁸ From a juridical viewpoint the first sharp dividing line between *contracts* of carriage by sea and contracts for the *use* of the ship appears with the so-called bareboat or demise charter-party, where it is for the charterer to man the ship with his own master and crew and assume the management not only of the commercial activity of the ship as with voyage and time charter-parties but also the navigational and maintenance responsibility. In fact, bareboat charter-parties are frequently used as a way of financing the acquisition of the ship relieving the prospective buyer of the duty to pay for the ship up front. If a bareboat charter-party is extended through the expected life-time of the ship it would become equivalent to a purchase where the purchase sum is paid over the years in instalments. Such bareboat charter-parties frequently give the bareboat charterer the right to acquire the ship for a nominal sum upon the expiry of the bareboat time charter-party.

With the development of ocean liner shipping a need was felt to ensure common standards in particular with respect to the liability of the carrier. Charter-parties are standardized and appear in different forms some of which relate to the products to be carried while other are intended for general use

⁷ *Lex Rhodia de jactu* is reproduced in Digest 14-2: *Ut si levandæ navis gratia mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.*

⁸ The so-called employment clause, *see e.g.* the “Baltim 1939” clause 9 “Master” stipulating his duty to follow the orders of the Charterers.

irrespective of the type of goods to be carried.⁹ But a great variety of charter-party clauses regulating the shipowner's liability would be less suitable for goods carried regularly by liner shipping companies from port to port. In particular, where contracts of sale are made on such terms that the seller makes the contract of carriage but with the buyer as beneficiary – such as under the well-known CFR- and CIF-terms¹⁰ – there is a need to ensure that the distant buyer would at least have some common standard upon which he could rely. Under the afore-mentioned trade terms, it is for the seller to tender an ocean onboard bill of lading to the buyer¹¹ and, as under Incoterms 2000 the seller has fulfilled his duty to the buyer by making a contract of carriage on usual terms, it would be good for the buyer to know those terms in advance. This explains the advent of the 1924 international convention of bills of lading (the Hague Rules) where, indeed, the applicability seems to have been at least primarily adapted to take care of the position of the buyer under CFR- and CIF-contracts as the convention only applies to the relation between the bill of lading holder and the carrier.¹² In order to ensure an effective unification of the law it was thought that the liability had to be mandatory so that the carrier would be prevented to diminish the extent of liability by contractual provisions. As a *quid pro quo*, the carrier would benefit from the blessing of the legislator in acknowledging the carrier's exemptions and limitations of liability which previously required a solid support by clauses in the contract of carriage. Indeed, the regime under the Hague Rules triggered so-called Paramount Clauses whereby the rules of the convention could be made applicable to the contract of carriage also outside the scope of the applicability of the convention itself. Thus, the mandatory regime represented a sort of compromise whereby the carrier in exchange for the restriction of his freedom of contract would be accorded a rather modest liability. In particular, the old notion of the maritime adventure and the principle of risk distribution was maintained by the exceptions of liability for error in navigation and management of the vessel and of fire.¹³ Also, the monetary limit of liability has been kept at rather low figures first expressed in the limit of 100 £ Sterling in gold for each unit carried later to be transformed into 666,67 SDR (Special Drawing Rights) per unit and supplemented by 2 SDR per kilo of goods lost or damaged.¹⁴ Subsequently, this modest liability applicable to carriage of goods by sea under the Hague and Hague-Visby Rules has been challenged in the 1978 Hamburg Rules i.a. removing the particular defenses of error in navigation and management of the vessel and somewhat increasing the per unit limit to 835 SDR and the per kilo limit to 2.5 SDR. Efforts to change also appear

⁹ Such as "Baltimex 1939" and the "Gencon" voyage charter-party form.

¹⁰ See for an interpretation of these terms, Incoterms 2000, ICC publ. 560 pp. 57-71 and J. Ramberg, ICC Guide to Incoterms 2000, ICC publ. 620 pp. 107-121.

¹¹ J. Ramberg *op.cit* note 10 at pp. 111-113.

¹² Hague Rules Art. 1 b.

¹³ It is surprising that these defenses have been the subject of such intense debates as it is mainly a matter of insurance relating to the carrier's liability insurers' obligation to pay to cargo insurers. See the comments by J. Ramberg, *International Commercial Transactions*, ICC publ. 624, 2000 p. 178.

¹⁴ Hague-Visby Rules Art. 4. 5 a in combination with the 1979 SDR-Protocol.

in the on-going efforts to achieve a new international convention relating to carriage of goods by sea.¹⁵

The development within the other modes of transport has been less complicated. The starting point is here the principle of the strict liability of the common carrier with circumstances beyond control as the dominant exemption of liability. In addition, circumstances attributable to the customer, such as his own fault in giving wrong or inadequate instructions or insufficient package of the goods and the inherent vice of the goods themselves would qualify as exemptions of the carrier's liability. The monetary limit is considerably higher than the limit applicable to carriage of goods by sea, namely now for airtransport 17 SDR per kilo without any supplementary unit limitation.¹⁶ The principles applicable to rail transport under the convention known as COTIF/CIM were subsequently to be more or less copied for international carriage of goods by road in the convention known as CMR.¹⁷ Here, however, it was thought inappropriate to adopt the comparatively high monetary limit earlier applicable to rail transport and, as a result, this was reduced to 8.33 SDR per kilo. This may seem strange as there is no reason whatsoever to believe that goods carried by road on average represent a lower value than goods carried by rail. A possible explanation – apart from the bargaining strength of the organization representing road carriers (IRU; the International Road Union) – would be that the average road haulier is incapable to meet a liability beyond the monetary limit of 8.33 SDR per kilo. But, if this is so, one seems to have confused the very purpose of monetary limitations of liability with some sort of arbitrary principle of reasonableness (1999 the limit for rail transport was reduced to 8.33 SDR). Obviously, monetary limits can only be explained as a means to assess the average value of goods carried and will thus have very little to do with reasonableness or capability to pay for claims which, of course, boils down to the cost of liability insurance which should be regarded as a cost among other costs to uphold the necessary transportation service. Liability for carriage of goods by air has been internationally unified by the 1929 Warsaw Convention and the 1999 Montreal Convention. Here, after some initial hesitation,¹⁸ it has been natural to adopt the principle of a strict common carrier liability – i.e. more or less the same standard as applies to rail- and road transport. There is one particular aspect to carriage of goods by air, namely that the same convention applies to carriage of goods as to carriage of passengers which has caused considerable problems in international unification of the law due to the fact that

¹⁵ See “<http://www.uncitral.org/english/workinggroups/wg-3/WP.27-e.pdf>.” For a cautious approach see J. Putzeys, *Transport Law and the United Nations*, Uniform Law Review 2001 pp. 326-334.

¹⁶ See for a survey of the monetary limits CMI Yearbook 2002 pp. 226-231 and J. Ramberg op.cit. note 13 p. 191.

¹⁷ See in general R. Löwe, *Commentary on the convention of 19 May 1956 on the contract for the international carriage of goods by road (CMR)*, European Transport Law 1976 pp. 213 et seq.

¹⁸ The defense of error in conducting and managing the aircraft appeared in Art. 20.2 of the 1929 Warsaw Convention but was subsequently removed by the 1955 Protocol. See for the developments leading to the 1999 Montreal Convention, M. Milde, *Liability in international carriage by air: the new Montreal Convention*, Uniform Law Review, 1999 pp. 835-860.

it has been difficult to reach international consensus on the monetary limits of liability relating to passenger claims.

3 The Ocean Bill of Lading and Other Transport Documents

The particularities of maritime transport also appear with respect to the documents used by the carrier, namely the Ocean Bill of Lading. Transport documents are important in several respects. First, they evidence the terms of the contract of carriage by clauses usually appearing on the back of the document.¹⁹ Second, they constitute evidence of the carrier's taking the goods in charge for carriage. Third, they constitute a basis for the right of a person other than the contracting party of the carrier to take delivery of the goods at destination. Hence, by the transport document it could be said that there is a tripartite contract between the shipper of the goods – usually identical with the carrier's contracting party – the carrier and the receiver of the goods (the consignee). Contracts under bills of lading imply that the right to take delivery of the goods is accorded to the holder of the bill of lading and no one else. This is evidenced by the text usually appearing in the lower right hand corner in the front of the bill of lading. Rights under the bill of lading could be transferred from one party to the other by assignments in case of so-called order bills of lading (“to shipper's orders”) or by the shipper endorsing the bill of lading in blank whereupon it could be transferred to subsequent holders without any additional signature evidencing assignment. It follows therefrom that the contract of carriage by sea under bills of lading could *not* be regarded as a tripartite agreement between the shipper, the carrier and the consignee as the ultimate consignee is simply not known at the time of the conclusion of the contract. This is different for other modes of transport as the ultimate receiver of the goods is indicated in the transport document (the waybill) already from the outset. Nevertheless, the identified receiver could be exchanged for another one as long as the shipper in his capacity of the carrier's contracting party directs the carrier to replace the receiver. This possibility, however, under the principles of the international conventions for carriage of goods by rail, road and air disappears when the sender's copy of the transport document is handed over to the receiver. Thereupon the sender is estopped from giving further instructions to the carrier and the right of the receiver to take delivery at destination ensured. In a sales transaction, where the sender is the seller and the receiver the buyer, the transport document will thus function as a document “controlling the disposition of the goods“ in the sense of Art. 58 CISG.²⁰

Thus, the waybill-system is entirely different compared with the bill of lading-system which restricts the right to take delivery to the holder of the paper document. This affects the very nature of the documents so that bills of lading are said to be “negotiable” and to represent “documents of title”, while the other

¹⁹ In order to avoid criticism for having put the terms on the back of the document carriers often identify the back of document as p.l. as if that should help.

²⁰ See for comments on Art. 58 e.g. J. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, Deventer 1999.

transport documents are considered to be non-negotiable. The term “negotiable” has caused considerable confusion as a negotiable document usually will accord an assignee a better right than the assignor with the effect that the issuer of the document as against the assignee may be stripped of some of the objections he could be entitled to raise against the assignor. However, the important point with bills of lading is different and rather concerns the mere fact that the rights could be passed on from one party to another by the transfer of the document. Thus, one should focus on “transferability” rather than “negotiability”.²¹ The bill of lading serves the need of international commerce by providing a vehicle for transfer of rights while the goods are carried at sea. When the goods are intended for an identified person and no transfer of his right to another party is intended the waybill-system applicable to carriage of rail, road and air is more appropriate, since there is simply no need for a bill of lading. This has triggered the introduction of the waybill-system also for carriage of goods by sea first by the 1990 CMI uniform rules for sea waybills and subsequently by recognition in Carriage of Goods by Sea Acts.²² The method used consists in the sender’s stipulation in the sea waybill that the right to take delivery accorded to the receiver is irrevocable.²³ Only by such an instruction to the carrier the sea waybill would qualify as a document “controlling the disposition of the goods” in the sense of Art. 58 CISG.²⁴

The afore-mentioned rules and principles applicable to transport documents are of primary importance in the sales transaction when the goods are to be handed over to a carrier rather than to be made available at a particular place. The seller’s main obligation according to the usual trade terms is then to hand over the usual transport document to the buyer.²⁵ Any failure to do so would constitute a fundamental breach of contract. The carrier’s misdelivery of the goods to somebody not entitled to receive them would constitute a serious breach of contract resulting in unlimited liability for the carrier. It should also be noted that the monetary limitation of liability applies to the physical loss of or damage to the goods and not to mere pecuniary loss. It could be added that the risk of physical loss of or damage to the goods is usually adequately covered by cargo insurance and will thus be less important for the parties to the contract of sale than the carrier’s liability for breach of contract not covered by cargo insurance, such as liability for delay and misdelivery.

It is to be expected that electronic commerce will radically change the rules and principles applicable to paper documents. Electronic contracting is still in its infancy stage and to the surprise of many it has not developed as speedily as expected. Nevertheless, already in 1990 the International Chamber of Commerce introduced in Incoterms the possibility to replace transport documents by

²¹ See C. Debattista, *The Sale of Goods Carried by Sea*, London 1998 pp. 53-67.

²² Such as the English Carriage of Goods by Sea Act 1924 Section 1(3).

²³ See for an example the Sea Waybill used by P & O NedLloyd referring to the CMI Uniform Rules for Sea Waybills. See, in general, K. Grönfors, *Towards Sea Waybills and Electronic Documents*, Gothenburg Maritime Law Association publ. 70 passim.

²⁴ See J. Ramberg op.cit. note 13 pp. 68-71.

²⁵ See CFR and CIF Incoterms 2000 clause A8.

electronic data interchange messages²⁶ and at the same time CMI presented its rules for electronic bills of lading.²⁷ These rules are based on an agreed transferability-system through electronic messages between the parties concerned so that the rights of the carrier's original contracting party could be passed on to subsequent parties by making his electronic "key" to the goods ineffective and by issuing a new "key" to a subsequent holder. The goods would then be surrendered to the party in possession of the effective electronic key at destination. To my knowledge the system has not been put into practical use but has instead functioned as a "door-opener" to another system whereby the right to take delivery is notified to a so-called Trusted Third Party. Under a contractual arrangement evidenced by a so-called "Rule Book" the parties adopt this so-called electronic registration-system. Such a system is now operating under the name BOLERO and the creditability of the system is ensured by its sponsors, namely the commercial banks through SWIFT²⁸ and the TT-Club, the world's most well-known insurer of through transport liability.²⁹

4 Shortcomings of the Traditional Approach

Traditionally, the regulation of the different modes of transport relates to the "hardware" rather than the "software" of transportation. Legislators have for some reason preferred to discuss each and every mode of transport in isolation more or less disregarding the need for rules applicable to the transport of goods from one point to another. But one may well ask why this has been tolerated by the carriers' customers who should be less interested to be involved in the intricacies and complications following from the disparities of transport law. The efforts of legislators to avoid clashes between different modes of transport are admirable but ineffective. The first problems arose in connection with combined sea/rail and sea/road transport. Instead of simply adopting the well-known methodology to disregard any particular rules following from another type of contract by simply permitting the rules of the main contract to supersede,³⁰ the method was chosen to preserve the particularities relating to carriage of goods by sea. This is evidenced by Art. 63 of COTIF/CIM and Art. 2 of CMR. True, the principle of letting the main contract for carriage of goods by road supersede any other mode when the goods are not unloaded from the road vehicle is expressed. But then the difficulties start with the exception allowing the particular rules relating to another mode of transport to prevail when it is proved

²⁶ CFR and CIF Incoterms 1990 clause A8 *in fine*.

²⁷ See A.v.Ziegler et al. in *Electronic data Interchange (EDI)*, European Transport Law 1997 *passim*.

²⁸ Society for Worldwide Interbank Financial Telecommunication.

²⁹ The Through Transport Club offering full insurance cover to carriers and freight forwarders for their liabilities in connection with container- and multimodal transport. See also S. Ignarsky ed., *The Box celebrating the 25 years of containerisation and the TT-Club*, London 1996.

³⁰ See, e.g., the methodology of CISG Art. 3 (1) using the criterion "preponderant part" in order to exclude a service contract from the rules applicable to sale of goods.

that any loss, damage or delay in delivery of the goods was not caused by an act or omission of the carrier by road but by some event which could only have occurred in the course of and by reason of the carriage by that other means of transport. If so, the liability of the carrier by road shall be determined not by CMR but in the manner in which the liability of the carrier by the other means of transport would have been determined if a contract for the carriage of the goods alone had been made by the sender with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport. In the absence of such “prescribed conditions” the liability of the carrier should be determined by CMR. This famous – or rather infamous – provision of CMR based on a kind of hypothetical contract is unworkable, since there is no other international convention *prescribing* the rules in the same manner as CMR, which in Art. 41 provides that any direct or indirect derogation from the provisions of the convention should be null and void. Thus, Art. 41 CMR even prevents the carrier from extending his liability to the *benefit* of the customer except to the extent a declaration of value has been made and a surcharge agreed (Art. 24). However, there is nothing similar to be found in other international conventions which all permit the carrier to extend his liability if he so wishes. With some good will, however, it is possible to interpret CMR Art. 2 so that the rules applicable to the carriage of goods by sea under the Hague Rules or some similar type of convention is injected simply because any departure from these rules to the *detriment* of the customer would be disallowed.³¹

The methodology used in the afore-mentioned stipulations of COTIF/CIM and CMR constitute the very basis for the development of a system known as the network system. This could either be restricted in a manner corresponding to CMR Art. 2 or expanded to a pure network system signifying that the rules applicable to different modes of transport are triggered by the simple fact that loss or damage could be localized to a particular segment of the transport. If so, such rules would apply irrespective of whether they are to be found in an international convention, a national law or general conditions of transport. An exponent of such a pure network liability system is to be found in the general conditions of freight forwarders used in the region of northern Europe known as NSAB 2000.³²

A modified type of network liability is to be found in the 1992 UNCTAD/ICC Rules for Multimodal Transport documents. Here, the particular defenses available to the carrier for carriage by sea or inland waterways have been expressed in Art. 5.4, namely error in navigation and the management of the vessel as well as fire. Further, the monetary limits applicable to carriage of goods by sea have been made generally applicable in Art. 6.1 (666.67 SDR per package or unit or 2 SDR per kilo) but with a particular provision in Art. 6.3 to the effect that when the multimodal transport does not include carriage of goods

³¹ See J. Ramberg, *Deviation from the legal regime of the CMR* (Art. 2) [in J. Theunis, *International Carriage of Goods by Road (CMR)*, London 1987 pp. 19-30].

³² See J. Ramberg, *The Law of Freight Forwarding, Zürich 2000* [publ. by FIATA] p. 27 et seq. and id., *NSAB 2000 General Conditions of the Nordic Association of Freight Forwarders*, Stockholm 2001 [publ. by Nordiskt Speditörförbundet].

by sea or by inland waterways the liability is limited to an amount not exceeding 8.33 SDR per kilo (in other words the monetary limit applicable under Art. 23 CMR). An even more modified network liability principle appears from the 1980 United Nations Convention on International Multimodal Transport of Goods Art. 19. Here, with respect to so-called localized damage it is stipulated that “a higher limit of liability” than the limit that would follow from the application of the convention (920 SDR per package or 2.75 SDR per kilo or, in case of non-maritime carriage, 8.33 SDR per kilo) would apply provided it follows from an international convention or mandatory national law. Thus, the network principle does not apply to the basis of liability but only to the monetary limitation of liability. Further, it only applies to the benefit of the customer according him a right to claim compensation on top of the monetary limitation under the multimodal transport convention. He would then be in more or less the same position as if he had been given the right of a direct action against the performing carrier regardless of whether such performing carrier is identical with his own contracting party or appears as the contracting carrier’s subcontractor. Obviously, the rules of the multimodal transport convention took the 1978 Hamburg Rules as a point of departure, since under those rules the particular defenses of error in navigation or management of the ship had been removed.³³

The efforts of legislators to provide a workable liability system for multimodal transport have remained unsuccessful. The 1980 Multimodal Transport Convention has not entered into force and probably never will. The particular rules under COTIF/CIM and CMR are complicated and inappropriate. Within the confines of mandatory transport law, the efforts by UNCTAD and ICC in the 1992 Rules for Multimodal Transport Documents have been more successful as they have been reproduced in particular by FIATA in the Negotiable FIATA Multimodal Transport Bill of Lading (the “FBL”). Also, they have been used by BIMCO in its corresponding document known as “MULTIDOC”.³⁴ The ongoing efforts by UNCITRAL in co-operation with CMI to establish a new convention for carriage of goods by sea are facing the same type of problems as evidenced by the afore-mentioned network systems if the

³³ See J. Ramberg, *Claims under the Hamburg Rules* [in Memoriam of Demetrios Markianos, Athens 1988 pp. 63-75 at p. 67] and for general expositions of multimodal transport D. Richter – Hannes, *Die UN-Konvention über die Internationale Multimodale Güterbeförderung*, R. Herber, *The European Legal experience with multimodalism*, Tulane Law Review 1989 pp. 611-629, D. Faber et al., *Multimodal Transport – avoiding legal problems*, London – Hong Kong, 1997 passim, R. de Wit, *Multimodal Transport – carrier liability and documentation*, London 1995 passim, J. Ramberg, *Multimodal transport – a new dimension of the law of carriage of goods?* Études offertes à René Rodière, Paris, Dalloz 1981 pp. 481-492 [also in *Revista de Comité Martimo Venezolano*, 1982:2 pp. 223-240] and P. Vestergaard Pedersen, *Modern regulation of International Unimodal and Multimodal Transport of Goods*, Simply Yearbook 1999 publ. by the Scandinavian Institute of Maritime Law pp. 53-108.

³⁴ See J. Ramberg, *The UNCTAD/ICC Rules for Multimodal Transport Documents – Genesis and Contents* [Essays in honour of Hugo Tiberg, Stockholm 1996 pp. 513-523].

convention is to be expanded to cover more than the maritime segment.³⁵ It should be noted that the 1978 Hamburg Rules limit the application to maritime carriage port to port (Art. 6.1) as the particular aspects of multimodal transports were intended to be taken care of by the 1980 Multimodal Transport Convention. It remains to be seen whether the bold efforts in the ongoing UNCITRAL/CMI work will result and, if so, in what form. As we have seen from the limited success of the 1978 Hamburg Rules and the total failure of the 1980 Multimodal Transport Convention the prospects of reaching international consensus on an appropriate structure of “door-to-door liability” are rather bleak.

5 Logistics

While legislators have wrestled with transport law, seeking to preserve unimodalism in the form of particular rules for particular modes of transport with some modifications to take care of the injection of one unimodal regime into the other, the transport industry has developed considerably. Assisted by modern means of communication by electronic data interchange the focus has more or less shifted from unimodal transport to the only thing which really matters, namely that the goods should be carried from one point to another and preferably arrive just in time (JIT). Industry is clearly aware of the need to achieve a rational system whereby storage of goods and unavailability of the goods during prolonged transport is kept to a minimum. This is known as logistics³⁶ and the successful implementation of the principles of logistics is necessary for most types of economic activity. Under contracts of sale, it is important for sellers and buyers to achieve an efficient transportation system whereby the goods could be carried from point of origin to point of destination and arrive in right order and condition just in time. In addition, it is frequently possible to obtain added value services from the operators engaged for carriage and distribution. In many instances, it may be possible for suppliers of goods to obtain assistance from those storing, distributing or carrying the goods in receiving orders and confirming the same as well as adapting the goods to conform with the required specifications, packing the goods, clearing them for export and import and installing them at the buyer's place of business. The assistance could be further expanded to include collection of documents and money, labelling, relogging and marketing of the goods. In such cases, logistics would not be restricted to whatever takes place within one and the same enterprise, it could be expanded to the relation between a seller and a buyer under a contract of sale, and it is further expanded by introducing third parties

³⁵ At present this seems to be the majority view. See the references in note 15 and F. Berlingieri, *A New Convention on the Carriage of Goods by Sea: Port-to-Port or Door-to-Door?*, *Uniform Law Review* 2003 pp. 265-280 at p. 267.

³⁶ See for recent studies S. O. Johansson ed., *Transportören, speditören och juridiken*, Swedish Maritime Law Association publ. 76 (2003) and, in particular, the study by M. Knoblock, *Logistikerns ansvar för mervärdetjänster utförda i köparens lokaler* pp. 73-145.

into the logistic chain. Such third party logistics is known as “3PL”.³⁷ Through the development of electronic data interchange systems a considerable expansion of 3PL is expected.

It goes without saying that the methodology used in the afore-mentioned network liability systems is impossible to implement when a variety of transportation and ancillary services are included in contracts with a 3PL service provider (“3PLS”). The search for a great number of potential hypothetical contracts and the “localization” of physical loss of or damage to goods or simply pecuniary loss to each and every of such hypothetical contracts would be a hopeless task. Indeed, the peculiar injections of rules from a “foreign” mode of transport into the main contract of carriage, as we have seen in Art. 63 COTIF/CIM and Art. 2 CMR, is explained by the clashes between different types of *mandatory* transport law and we are now facing quite another type of problem, namely the clashes between mandatory and non-mandatory systems of law. This would require a different type of methodology, namely a distinction between transport law on the one hand and the general law of contract on the other hand.

6 Logistics and Freight Forwarding

The law relating to freight forwarding offers itself as a natural starting point when dealing with the more sophisticated service under 3PL contracts. Indeed, there is no difficulty to include such added value services to the more traditional services offered by freight forwarders. First, one will have to deal with the contractual obligations undertaken irrespective of whether the service provider is classified as a freight forwarder or a 3PLS. The extent of such obligations as well as liability for non-performance would in the same manner as applies to sale of goods and services worldwide be regulated by general conditions, preferably unhampered by the straitjackets of mandatory law. Such general conditions would instead be controlled by the superseding principle of an obligation for each contracting party to fulfil their obligations in good faith and in accordance with fair dealing.³⁸ Also, the increasing competition between the service providers will in most cases suffice to reach an appropriate balance between the affected interests, preferably in the form of agreed documents where organizations representing the parties in the transaction will participate in the

³⁷ Third Party Logistics which from the viewpoint of the party requiring such services means outsourcing to a third party. The term Fourth Party Logistics (4PL) has also been introduced but it is somewhat obscure, and perhaps not necessary if only an expansion of the Third Party Logistics services is intended. Possibly, the term might serve a useful purpose if it would catch a plurality of logistics service providers one (the 4PLS) using other (the 3PLS) as sub-contractor.

³⁸ See for such a superseding principle the 1994 UNIDROIT Principles of International Commercial Contracts Art. 1.7 and Principles of European Contract Law Art. 1:201.

elaboration of the conditions.³⁹ An exponent of such an agreed document appears in NSAB 2000 which contain two distinct parts, one dealing with the contractual liability outside the scope of mandatory law and the other relating to the liability of the freight forwarder as contracting carrier where, of course, regard must be had to the mandatory provisions of transport law. The clashes between different types of mandatory law stemming from the particular rules of the different modes of transport is taken care of by employing the network liability system (Art 23. NSAB 2000). Also, NSAB 2000 provide for a particular liability in order to ensure just in time (JIT) promises. Efforts have also been made to implement such dual system of liability in the 1996 FIATA Model Rules for Freight Forwarding Services.⁴⁰ As far as the type of liability for services falling outside the scope of mandatory transport law is concerned, the well-known principle of liability for failure to exercise due diligence could serve as a common denominator strengthened by a principle placing the burden of proof on the service provider, so that liability arises if he fails to prove that any physical loss of or damage to goods or pecuniary loss inflicted on his customer because of delay or otherwise has not resulted from his failure to exercise due diligence. The matter of a monetary limitation of liability is more controversial but is still required in order to provide better certainty than is usually offered by the application of the law purporting to reduce the liability to foreseeable loss as a consequence of the breach of contract.⁴¹

7 Particular Rules for Storage of Goods?

Storage of goods may require some particular rules. First, the accumulation of goods stemming from different storage contracts would expose the service provider to a potential liability of considerable magnitude and for this reason it is customary to put a cap on the total exposure more or less in the same manner as is done to limit the exposure of ship owners under the Limitation Conventions.⁴² Second, storage is sometimes closely connected to the transport and it might therefore be appropriate to supplement the liability of the carrier with the liability of the storage service provider, particularly as losses are more frequent when the goods are at rest than when the goods are in motion together with the transportation vehicle and thus less accessible for thefts. In order to fill these gaps a mandatory regime has been offered by the 1991 UN Convention on the

³⁹ The agreement may be extended to comprise an agreement on the commentary to the conditions. *See, e.g., J. Ramberg, NSAB 2000* (cit. note 32) Preface at p. 2. *See also for an example of an agreed document the German insurance system (ADSp/SpV 2002) and the comments by J. Ramberg, The Law of Freight Forwarding* cit. note 32 pp. 30-31.

⁴⁰ *See J. Ramberg, The Law of Freight Forwarding*, op.cit. note 39 pp. 89-94, id. *The FIATA Model Rules for Freight Forwarding Services*, *Il Diritto Marittimo*, 1997 pp. 284-291 and id. *Unification of the Law of International Freight Forwarding*, *Uniform Law Review* 1998 pp. 5-13.

⁴¹ *See J. Ramberg, Breach of Contract and Recoverable Losses* [Making Commercial Law. Essays in Honour of Roy Goode, Oxford 1997 pp. 191-200].

⁴² In particular, the 1976 *International Convention on Limitation of Liability for Maritime Claims*.

Liability of Operators of Transport Terminals (the “OTT-Convention”). A requirement for the applicability of the convention is that the goods are “involved in international carriage”. The liability rules and the monetary limitation correspond to the rules of the 1980 Multimodal Transport Convention. However, particular difficulties arise in deciding the very basis for the application of the OTT-Convention, namely that the goods should be “involved in international carriage”.⁴³ Also, the liability under the OTT-Convention becomes very complicated when different modes of transport might be intended. If so, one would have to decide whether a maritime or a non-maritime carriage is intended, since the monetary limit of 8.33 SDR per kilo would apply for the liability of the storage service provider in case a non-maritime carriage is intended. The OTT-Convention has not yet come into force and, in any event, it is unlikely that it will meet worldwide success. Also, the OTT-Convention is inappropriate when the storage service provider extends his service in 3PL contracts which, as has been already indicated, may well comprise a full distribution service including receipt of orders and order confirmation with subsequent dispatch of the goods appropriately packed and perhaps also adapted to meet the order specifications. Such expanded service would be more or less disassociated from the transport as such.

8 The Need for a New Approach

Although, as has been demonstrated, the traditional focus on the different modes of transport (“unimodalism”) supplemented with the injection of particular modes into the main contract of carriage is quite insufficient to meet the demands of modern international trade, an expansion of unimodal transport to comprise other modes of transport – such as the creation of a maritime door-to-door regime – would not be helpful. The difficulties to reach international consensus on any such innovation is well demonstrated by the limited success of the 1978 Hamburg Rules and the failure of the 1980 Multimodal Transport Convention as well as the 1991 OTT-Convention. Thus, the better option seems to be to retain the conventions covering the different modes of transport in their present form, with some adaptations if necessary, and to develop an *entirely new legal regime* clearly based on the contract rather than on the means used to perform it. Such a contractual approach should, of course, follow the main principles of the 1980 Convention on Contracts for International Sale of Goods (CISG) which has met with worldwide success and must be regarded as a strong basis for the regulation of international trade. After all, it is normally the contract of sale which sets the ball rolling and triggers the ancillary contracts of carriage, insurance and payment.⁴⁴ True, the type of liability under CISG – strict liability with exemptions only for circumstances beyond control – may well be unattractive to those used to a more modest liability as would the absence of a monetary limitation of liability. But, in return, the service providers would have

⁴³ See J. Ramberg & E. Vincenzini, *La convenzione sulla responsabilità degli operatori di transport terminals nel commercio internazionale*, *Diritto dei trasporti* 1990:2.

⁴⁴ See for efforts to explain the interrelation J. Ramberg *op.cit* note 13 *passim*.

the possibility to adapt their liability using freedom of contract to the extent that it is not limited by the duty to act in good faith and in accordance with fair dealing. Undoubtedly, there will be a considerable reluctance to abstain from the traditional restrictions by specific mandatory law, as there is no certainty that the service providers will offer their customers an appropriate protection. But, indeed, it is cold comfort for sellers and buyers to enjoy some sort of protection by mandatory provisions applicable only to the stage of the transport itself, while they in any event would have to suffer from any shortcomings of the law or contract terms applicable to services surrounding the transport, such as for storage, distribution, freight forwarding services and value added services by 3PLS. Also, the customers of the service providers are themselves accustomed of using their freedom of contract to agree as they please. And, in most cases, in an appropriate fashion.

9 Summing up

Previous efforts to expand the mandatory liability applicable under the various international conventions for carriage of goods by sea, rail, road and air have been basically unsuccessful and there is no reason to believe why this should change. Minor adaptations of the respective conventions may be possible but beyond that it would be impossible to reach international consensus. Any efforts to introduce innovations in the present international conventions would probably only contribute to a further disunification of the law.

It follows from what has been said that there is no strong commercial need for significant amendments of the existing international conventions in transport law. But such need does exist with respect to contemporary commercial practice to provide important services to assist sellers and buyers in international trade in order to ensure delivery of the goods to the buyer including any added services as required but without necessarily specifying any particular mode or modes of transport to achieve this aim.⁴⁵ The main ingredients of a prospective convention could be described as follows.

It should

apply to any contract by a service provider taking goods in charge for delivery to a party as instructed but *should not apply* to a person having undertaken to perform carriage of the goods by specified mode or modes of transport or having declared that he acts as an agent only,

cover all obligations following from the contract including labelling, packing, reloging, installation, adaptation, storage, transshipment and clearance of the goods for export or import as well as collection of documents or money and any additional services,

⁴⁵ See in particular R. Asariotis et al., *Intermodal transportation and carrier liability*, publ. by the European Commission, Luxemburg June 1999 and J. Ramberg, *The Future of International Unification of Transport Law*, *Il Diritto Marittimo*, 2001 pp. 643-649.

oblige the service provider to issue a document, or an equivalent EDI-message, evidencing taking in charge of the goods and an irrevocable promise to deliver them to a party as instructed,

cover the service provider's liability for any breach of contract,

provide for the same type of liability as under CISG in order to ensure full compatibility⁴⁶ between the liability of the seller to the buyer and the liability of the service provider to either of them,

allow the parties to opt out of the convention wholly or in part.

Contracts falling under such a convention would be regarded as *sui generis*. Thus, the risk for conflicts with any mandatory regime applicable to a particular mode of transport would be avoided. Nevertheless, *actual performance* by the service provider of a transport may trigger the application of mandatory law. This should be no major problem except where the service provider avails himself of the possibility to reduce his liability below the level of the applicable mandatory law (cf. the so-called savings clause in Art. 13 of the 1992 UNCTAD/ICC Rules for Multimodal Transport Documents).

It may perhaps be difficult to induce UNCITRAL to undertake the task of elaborating a convention according to the afore-mentioned or similar principles, since the present efforts to up-date the rules relating to maritime transport may prove to be insufficient to obtain worldwide international consensus and thus inject a feeling of hopeless frustration. However, it would undoubtedly be much easier to work outside the confines of mandatory law and to focus on an area where there is a clear commercial need. The incompatibility between rules relating to sale of goods and rules relating to contracts for ancillary services for the implementation of the seller's main obligation to the buyer is disturbing and should be removed. The resounding success of CISG should encourage UNCITRAL to go ahead but if that should not occur one will have to choose the second best alternative by engaging non-governmental organizations such as ICC, preferably in co-operation with UNCITRAL, UNIDROIT or UNCTAD, in order to establish rules for voluntary adoption following the well-known methodology represented by Incoterms 2000 and UCP 500.

⁴⁶ The incompatibility is best demonstrated by an example where a person obliged to carry the goods from point to point does so by intergrating the obligation in a contract of sale on delivered terms (DAF, DES, DEQ, DDU or DDP Incoterms 2000) rather than in a separate contract of carriage. In the latter case his liability is mandatory but limited and in the former case it is strict without monetary limits but non-mandatory.