The Comprehensive Coverage of the New Convention: Performing Parties and the Multimodal Implications

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SUMMARY

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I. INTRODUCTION

"Comprehensive" is the word that accurately describes the basic character of the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("the Convention"). The Convention comprehensively regulates the major issues arising from the international carriage of goods by sea. Its scope includes not only the carrier's liability for loss of or damage to goods, but also many other important and pertinent aspects, including delivery, right of control, and the transfer of rights. This article addresses one of the comprehensive aspects of the Convention, namely its extended coverage over transport, including the different modes of transport and those persons involved in the transport service. Part II explains how the "door-to-door" application of the Convention emerged and resulted in the form of the final text. Part III examines the issue of conflict of conventions, an inevitable consequence of the "door-to-door" application. The regulation of persons other than carriers involved in carriage is discussed in Part IV, which is followed by the conclusion.

II. "DOOR-TO-DOOR" APPLICATION OF THE CONVENTION

A. A Legislative History

1. Existing Conventions

Existing conventions on the carriage of goods by sea are limited in their application to maritime transportation. The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924[1] ("the Hague Rules") or the Hague Rules amended by Visby Protocol, 1968[2] ("the Hague-Visby Rules") adopts "tackle-to-tackle" principle: the Convention's mandatory regulation covering the period when the goods are loaded onto the ship to the time they are discharged from the ship.[3] Although the United Nations Convention on the Carriage of Goods by Sea, 1978 ("the Hamburg Rules") has expanded the scope of responsibility so that the carrier is responsible for the period during which he is in charge of the goods at the port of loading and the port of discharge, they still restrict coverage from one port to another ("port-to-port").[4] None of these conventions cover any activities outside of the port area, such as incidental road carriage to the port of loading or from the port of discharge.

With the development of containerized transportation, it has become increasingly common that the carrier assume the risk of the whole transport from the

1. International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, art. 1, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155 (U.S. ratification proclaimed Nov. 6, 1937) [hereinafter Hague Rules].

2. Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, 1412 U.N.T.S. 127 [hereinafter Hague-Visby Rules].

3. Article 1(e) of Hague and Hague-Visby Rules provides "'carriage of goods' covers the period from the time when the goods.are loaded on to the time they are discharged from the ship." The coverage is called "tackle-to-tackle."

4. U.N. Convention on the Carriage of Goods by Sea, art. 1(6), (4), Mar. 31, 1978, 1695 U.N.T.S. 3 [hereinafter Hamburg Rules].

place of the exporter to the final destination.[5] "Tackle- to- tackle" or even "port- to-port" application of the transport law convention looks obsolete because such applications artificially separate the transport into the covered and non-covered period.[6] It creates gaps between the mandatory liability regimes applicable to the different stages involved in the transport of goods.[7] A single coherent liability regime that covers the whole period of transport beyond "tackle-to-tackle" or "port-to-port" was highly desired.[8]

2. The CMI Draft

It is not surprising that from the early stages of its examination of the new Convention, the International Sub-Committee of the Comité Maritime International (CMI) thought it was desirable and necessary for the new Convention to cover the whole period of transport.[9] Article 1.5 of the draft prepared and submitted to UNCITRAL by CMI in December 2001 (CMI Draft) defines the term "contract of carriage" as "a contract under which a carrier, against payment of freight, undertakes to carry goods *wholly or partly by sea from one place to another*,"[10] thereby clearly indicating the multimodal aspect of the contract covered by the Draft and abandoning the concept of "tackle-to-tackle" or "port-to-port." Article 4.1.1 provides that "the responsibility of the carrier for the goods under this instrument covers the period from the time when the carrier or a performing party has received the goods for carriage until the time when the goods are delivered to the consignee"[11] and there is no geographic restriction either on the place of receipt or on the place of delivery. Therefore, if the parties agree on the contract of carriage, for example, from the seller's factory to the buyer's warehouse, the CMI Draft applies to the whole period ("door-to-door").

3. Discussion in UNCITRAL Working Group

The initial reaction of the United Nations Commission on International Trade Law (UNCITRAL) that received the CMI draft was ambivalent.[12] A certain degree of hesitance was expressed in immediately endorsing the approach.[13] The report of

5. UNCTAD Secretariat, *Implementation of Multimodal Transport Rules* para. 7, *delivered to the United Nations Conference on Trade and Development*, U.N. Doc. UNCTAD/SDTE/TLB/2 (June 25, 2001).

6. *See id.* para. 7 (stating that containerization in the 1960s led to operators taking "responsibility for the whole transport chain under one single transport contract.").

7. *See id.* para. 9 (noting that different jurisdictions have conflicting legal schemes).

8. *Id.* para. 8.

9. U.N. Comm'n on Int'l Trade Law [UNCITRAL], *Report of the United Nations Commission on International Trade Law on its Thirty-Fourth Session (Vienna, 25 June–13 July 2001)*, para. 331, U.N. Doc. A/56/17 (July 27, 2001) [hereinafter UNCITRAL, *Thirty-Fourth Session Report*].

10. U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group III (Transport Law), *Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea*, art. 1.5, U.N. Doc. A/CN.9/WG.III/WP.21 (Jan. 8, 2002) (emphasis added) [hereinafter UNCITRAL, *Preliminary Draft Instrument*].

11. *Id.* art. 4.1.1.

12. *See generally* Michael F. Sturley, *Scope of Coverage under the UNCITRAL Draft Instrument*, 10 J. INT'L MAR. L. 138, 145–154 (2004) (detailing discussion in the UNCITRAL Working Group).

13. *Id.*

the 34th session of UNCITRAL, which decided to establish Working Group III (Transport Law) for this project, states as follows:

> As to the scope of the work, the decision was that it should include issues of liability. The Commission also decided that the considerations in the working group should initially cover port-to-port transport operations; however, the working group would be free to study the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations, and, depending on the results of those studies, recommend to the Commission an appropriate extension of the working group's mandate.[14]

At the 9th session of Working Group III, April 2002 (the first session for the deliberation of the Convention), concerns were raised by a number of delegates regarding expanded scope of application.[15] Strong support was expressed in favor of the working assumption that the scope of the draft instrument should extend "door-to-door"[16] and the 35th session of UNCITRAL, June 2002 finally endorsed the approach.[17] While objections were sometimes raised to this approach,[18] the Working Group at its 11th Session in April 2003 widely supported the Convention applying "door-to-door"[19] and the deliberations of the Working Group have always been based on this assumption in the sessions that followed.[20]

4. The Final Text

The final text of the Convention provides as follows: "'Contract of carriage' means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage"[21] and "[t]he period of responsibility of the carrier for the goods under this

14. UNCITRAL, *Thirty-Fourth Session Report*, supra note 9, para. 345.

15. *See* U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group on Transport Law, *Report of the Working Group on Transport Law on the Work of its Ninth Session* (New York, 15–26 Apr. 2002), paras. 27–29, U.N. Doc. A/CN.9/510 (May 7, 2002) (detailing arguments against the extension to door-to-door operations).

16. *Id*. para. 32.

17. *See* U.N. Comm'n on Int'l Trade Law [UNCITRAL], *Report of the U.N. Comm'n on Int'l Trade Law on Its Thirty-Fifth Session (New York, 17-28 June 2002)*, para. 224, U.N. Doc. A/57/17 (July 18, 2002).

18. *See* Gov't of Canada, *Preliminary Draft Instrument on the Carriage of Goods [By Sea] (Proposal by Canada)*, para. 4, U.N. Doc. A/CN.9/WG.III/WP.23 (Aug. 21, 2002); U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group on Trade Law, *Report of the Working Group on Transport Law on the Work of Its Tenth Session (Vienna, 16–20 Sept. 2002)*, paras. 25–26, U.N. Doc. A/CN.9/525 (Oct. 7, 2002).

19. U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group on Transport Law, *Report of the Working Group on Transport Law on the Work of Its Eleventh Session (New York, 24 March–4 Apr. 2003)*, para. 239, U.N. Doc. A/CN.9/526 (May 9, 2003). One commentator noted that it was remarkable how non-contentious the discussion on convention's scope tuned out to be at the session. Sturley, *supra* note 12, at 147.

20. *See, e.g.* U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group on Transport Law, *Report of the Working Group on Transport Law on the Work of Its Twelfth Session (Vienna, 6–17 Oct. 2002)*, para. 1, U.N. Doc. A/CN.9/544 (Dec. 16, 2003) (referring to the approval of "door-to-door") [hereinafter UNCITRAL, Working Group on Transport Law, Twelfth Session Report].

21. U.N. Comm'n on Int'l Trade Law [UNCITRAL], *Convention on Contracts for the Int'l Carriage of Goods Wholly or Partly by Sea*, G.A. Res. 63/122 art. 1(1), U.N. Doc. A/RES/63/122 (Feb. 2, 2009) [hereinafter UNCITRAL, *Contracts by Sea*].

Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered."[22]

Apart from minor changes in wording, the only substantive difference from the CMI draft is the additional requirement that a contract of carriage should include international sea carriage. While the CMI draft could apply if a contract of carriage includes sea carriage, whether international or domestic[23], Article 5 of the final Draft Convention provides that "the port of loading of a sea carriage and the port of discharge of the same sea of carriage [must be] in different States" for the Convention to apply.[24] During the discussions in the Working Group, it was suggested that the Convention should place emphasis on sea carriage to make it clear that, despite its extended scope, it is still a maritime law convention rather than a pure multimodal transport law convention (the idea was called "maritime-plus" in the Working Group)[25]. There may be several ways of doing this. One possible approach is to require that the Convention could apply only when other modes of transport are incidental to a sea carriage.[26] The problem with this approach is, as is easily imagined, it would cause a flood of litigation as to whether the land transport in a particular case was incidental. The Working Group finally decided that the requirement of internationality to the sea-leg is, if not perfect,[27] the most feasible solution to clarify the "maritime-plus" nature of the Convention.[28]

B. Carrier's Period of Responsibility under the Final Text

Article 12(1) of the Convention provides that the carrier's period of responsibility extends from the place of receipt to the place of delivery of the goods for carriage.[29] Although it is often mentioned that the Convention adopts the "door-

22. *Id.* art. 12(1).

23. UNCITRAL, *Preliminary Draft Instrument*, *supra* note 10, art. 3.1.

24. UNCITRAL, *Contracts by Sea*, *supra* note 21, art. 5(1).

25. The internationality of the sea-leg was introduced at the 12th session of the Working Group. *See* UNCITRAL, Working Group on Transport Law, Twelfth Session Report, *supra* note 20, paras. 17, 56 (establishing that the draft instrument would apply to door-to-door carriage of goods that involved a cross-border sea-leg).

26. Uniform Rules Concerning the Contract of Int'l Carriage of Passengers by Rail [CIM] (Convention Concerning Int'l Carriage by Rail [COTIF], May 9, 1980, app. B.)[hereinafter COTIF-CIM] adopts this approach for application to multimodal transport. Article 1(3) provides "[w]hen international carriage being the subject of a single contract of carriage includes carriage by sea or transfrontier carriage by inland waterway *as a supplement to carriage by rail*, these Uniform Rules shall apply if the carriage by sea or inland waterway is performed on services included in the list of services provided for in Article 24 § 1 of the Convention." .

27. Even a contract of mostly a land carriage supplemented with an incidental very short sea-leg may be covered by the Convention. It applies, for example, when the goods crossed Dover Channel by ship after a long carriage by road through many European countries. Let us take another example: a transport from Vancouver to Hawaii. While the Convention applies when the goods are carried directly from Vancouver to Hawaii, it does not when they are carried via San Francisco with a road carriage from Vancouver to San Francisco. Although these results seem a little odd, this may be a necessary evil of the Convention's formalistic approach to avoid useless litigation.

28. *See* U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group on Transport Law, *Report of the Working Group on Transport Law on the Work of Its Fifteenth Session (Vienna, 4–15 July 2005)*, paras. 32–33, U.N. Doc. A/CN.9/576 (May 13, 2005) (adopting a "more broadly encompassing solution under which the draft instrument would govern the entire transport").

29. UNCITRAL, *Contracts by Sea*, *supra* note 21, art. 12(1).

to-door" principle, it should be noted that the carrier's period of responsibility depends on the terms of the contract. Nothing in the Convention prohibits the parties from entering into a traditional "tackle-to-tackle" or "port-to-port" contract of carriage.[30] Article 12(3) explicitly allows the parties to agree on the time and location of the receipt and delivery of the goods.[31] The only restriction is the proviso in Article 12(3) that the time of receipt of the goods cannot be after the beginning of their initial loading, and the time of delivery of the goods cannot be before the completion of their final unloading.[32] It prohibits the carrier and shipper agreeing a period of responsibility shorter than "tackle-to-tackle," but nothing in Article 12 forces the carrier to accept multimodal transportation.[33] Therefore, it is perfectly possible for the parties to enter into a traditional "port-to-port" contract of carriage in which the shipper delivers the goods to the container yard of the port of loading, and the carrier unloads them at the container yard of the port of discharge, with the carrier only responsible for the carriage between the two container yards. In this example, the receipt of the goods at the container yard occurs before the goods' "initial loading" and delivery takes place after their "final unloading" under the contract of carriage. The same applies even when the goods are received by truck drivers and are brought to the carrier's container yard in the port. Although the goods look to have been "initially loaded," at least physically, when they are loaded on the truck, this does not constitute their "initial loading *under the contract of carriage*" if the carrier only assumes the ocean carriage.

Unfortunately, there is one controversial issue that remains unsolved under the final text. At the 41st Session of UNCITRAL in June 2008, a question was raised regarding the relationship between Articles 12(1) and (3).[34] Let us assume that the shipper and the carrier agreed that the shipper deliver the goods for carriage to the carrier on October 1 but the carrier received the goods on September 25.[35] One interpretation is that the time of receipt of goods under Article 12(1) is subject to Article 12(3), which allows the parties to agree on the time of receipt; and the carrier's period of responsibility begins October 1 in this case as agreed by the parties.[36] Although the carrier took possession of the goods from September 25 to October 1, it did so as a bailee, rather than as a carrier governed by the Convention. This view is based on the assumption that the period of responsibility is decided on contractual terms, which are only subject to the proviso in Article 12(3). Another interpretation is that the duration of carrier's period of responsibility is decided exclusively by Article 12(1), and since the carrier received goods on September 25, its

30. UNCITRAL, *Preliminary Draft Instrument*, *supra* note 10, art. 4.1.3 (explanatory note after Article 4.1.3 of the CMI Draft recognizing the freedom of contract for "tackle-to-tackle" or "port-to-port").

31. UNCITRAL, *Contracts by Sea*, *supra* note 21 art. 12(3).

32. *Id.*

33. *Id.*

34. U.N.Comm'n on Int'l Trade Law [UNCITRAL], Report of the U.N.Comm'n on Int'l Trade Law on Its Forty-first Session (New York, 16 June-3 July 2008), U.N. GAOR, 63d Sess., Supp. No. 17, para. 39, U.N. Doc. A/63/17 (June 16–July 3, 2008).

35. Let us assume that there is no revision of the original agreement regarding the time for receipt of the goods. If the court finds that the carrier agreed to receive the goods for carriage on September 25 under a revised contract of carriage, the story would be completely different.

36. *See* U.N. Doc. A/63/17, *supra* note 34, para. 40 (stating that there was explicit support for an interpretation that the carrier should be responsible for the goods during the period set out in the contract of carriage, which could be limited to "tackle-to-tackle").

period of responsibility begins at the same time.[37] Despite extensive efforts to clarify the relationship between Articles 12(1) and (3), the Commission could not reach a compromise to reconcile these different interpretations. Therefore, the text of Article 12 intentionally left the apparent ambiguity and different interpretations expressed in the Commission would be brought to each national court that applies this article.

C. "Free In/Free Out"

In practice, the carrier and shipper sometimes agree that the shipper load and unload the goods onto or from the vessel. Such an arrangement (called a "Free In/Free Out" (FIO) clause) is usually found in charterparty agreements.[38] Although charterparty agreements between parties are excluded from its scope of application, the Convention applies to the extent that third parties are involved.[39]

The validity of an FIO clause has been discussed under the Hague Rules and the Hague-Visby Rules, and the solutions differ from jurisdiction to jurisdiction. The question is whether the clause is a prohibited exoneration of the carrier's liability. In some jurisdictions, the courts understand that an FIO clause determines the scope of the contract of carriage (i.e., the contract of carriage begins after the loading and ends before the unloading), and the mandatory regulation of the carriage of goods by sea does not apply to activities under FIO clauses because they are outside of the scope of the contract of carriage.[40] In other jurisdictions, an FIO clause is regarded as a provision of risk and cost allocation and is valid to that extent (i.e., invalid as an exoneration clause).[41]

Under the Convention, it is impossible to regard FIO clauses as determining the scope of the period of responsibility as beginning after the loading of and ending before the unloading of the goods. Article 12(3) clearly states that the parties are not allowed to agree on the time and location of the receipt of the goods beginning after the commencement of the initial loading and ending before the completion of the final unloading.[42] Therefore, a different approach is needed under the Convention if one wishes to establish the validity of FIO clauses. This is why Article 13(2) provides

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37. *See id.* para. 41(noting that there was another interpretation of paragraph 3 that did not modify paragraph 1, but only aimed at preventing the carrier from limiting its period of responsibility to exclude the time after initial loading of the goods or prior to final unloading of the goods).

38. U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group on Transport Law, *Report of Working Group III (Transport Law) on the work of its twenty-first session (Vienna, 14–25 January 2008)*, para. 46, U.N. Doc. A/CN.9/645 (Jan. 30, 2008) [hereinafter UNCITRAL, Working Group on Transport Law, Twenty-First Session Report].

39. UNCITRAL, Contracts by Sea, supra note 21, art. 7 .

40. Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd., (1954) 2 Q.B. 402All ER 158 (Q.B.); G.H. Renton & Co., Ltd. v. Palmyra Trading Co. of Panama, (1957) A.C. 149 *See also* Jindal Iron and Steel Co., Ltd. and Others v. Islamic Solidarity Shipping Company Jordan Inc., (2005) 1 All ER 175 (H.L.) (referring to the fact that the issue is under discussion in UNCITRAL).

41. *See, e.g.*, Anne-Laurence Michel, La Portée de la Clause F.I.O./F.I.O.S/ F.I.O.S.T dans L'affrètement au Voyage, 597 Droit Maritime Français 799 (1999); Georg Schaps und Klaus H. Abraham, Das Seerecht in der Bundesrepublik Deutschland: Kommentar und Materialsammlung : Seehandelsrecht, 4., vollig neu bearb. Aufl., I.teil, 1978, §606.6; Heinz Prüßmann und Dieter Rabe, Seehandelsrecht: fünftes Buch des Handelsgesetzbuches, mit Nebenvorschriften und internationalen Ubereinkommen, 4. Aufl., 2000, §606.C.

42. UNCITRAL, *Contracts by Sea*, *supra* note 21, art. 12(3).

specifically that "the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods" can be "performed by the shipper, the documentary shipper or the consignee."[43] While it presupposes that the activities under FIO clauses fall within the scope of the carrier's period of responsibility, the provision explicitly authorizes the validity of FIO clauses.[44] In addition, Article 17 provides an explicit exoneration for the carrier from liability as a result of such activities.[45]

One might simply see the Convention's approach as an alternative way of authorizing FIO clauses, but it might be more than that. If one justifies FIO clauses as determining the scope of the contract of carriage, as English courts do,[46] it becomes unclear how far such freedom of contract goes. Can the parties agree on any activity performed by anyone, including persons employed by the carrier itself, as being outside the scope of the contract of carriage? Is there any geographic restriction for the parties to decide the period of the contract of carriage? The Convention's approach to FIO clauses is restrictive in that it allows only the activities listed in Article 13(2) ("the loading, handling, stowing or unloading of the goods") to be performed by the shipper or the consignee; moreover, it limits the freedom of contract to shorten the period of responsibility.[47] It is fair to say that the Convention not only confirms the validity of FIO clauses, but also specifically regulates the extent to which freedom of contract applies to such arrangements.

III. RELATIONSHIP WITH OTHER INTERNATIONAL INSTRUMENTS

A. The Nature of the Problem: Possible Conflict with Other Transport Regimes

The door-to-door application of the Convention to the contract of carriage and the expanded period of responsibility of the carrier could create conflicts with other liability regimes which may apply to the carriage of goods by means other than transport by sea (e.g., carriage by road).[48] If a contracting state of this Draft

43. *Id.* art. 13(2).

44. *See id.*

45. *Id.* art. 17, para. 3 ("The carrier is also relieved of all or part of its liability . . . if . . . it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay: . . . . (i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee . . . . ").

46. *See supra* text accompanying note 40 (explaining how English courts interpret the FIO clause as determining the scope of the contract of carriage).

47. UNCITRAL, *Contracts by Sea*, *supra* note 21, art. 13(2); *see also id.* art. 12(3) (voiding some contractual provisions based on the time of loading and unloading of goods).

48. There are conflicts with the existing convention on the carriage of goods by sea (e.g., the Hague and the Hague-Visby Rules or the Hamburg Rules), which is of a totally different nature. Because the purpose of the Convention is to produce a new regime that replaces these old maritime transport conventions, the solution is to denounce them rather than to make any concession to them. *See id.* art. 89(1) (providing the Contracting State's obligation for denunciation). The conflict with United Nations Convention on the Liability of Transport Terminals in International Trade, 1991 (the OTT Convention) is avoided because article 15 of the OTT Convention concedes to any international convention relating to the international carriage of goods. *See* United Nations Convention on the Liability of Terminal Operators in International Trade, art. 15, U.N. Doc. A/Conf. 152/13 (Apr. 19, 1991) (specifying that the OTT "does not modify any rights or duties which may arise under an international convention relating to the international carriage of goods which is binding on a State . . .").

Convention is also a contracting state for an international convention for carriage of goods by road, and both are applicable to the same contract of carriage, a court in that jurisdiction owes an incompatible obligation to apply different rules provided by different liability regimes. For instance, if one convention provides for a time bar of one year and the other a two year time bar and an action is brought after 15 months have passed, the court will violate one of the conventions whether it holds the carrier liable or not. The problem is especially serious when there is a potential conflict with widely accepted international conventions, such as the Convention on the Contract for the International Carriage of Goods by Road, 1956 (CMR),[49] or the Uniform Rules Concerning the Contract for International Carriage of Goods by Rail [Appendix B to the Convention Concerning International Carriage by Rail], 1990 (COTIF-CIM).[50]

Is the concern of potential conflict a real one, or is it a purely theoretical possibility?[51] The answer to this question is not completely clear because the texts of these conventions are not explicit, and their interpretation may differ among the contracting states. Let us take CMR as an example. The basic issue is whether CMR is applicable to multimodal contracts of carriage governed by this Convention to the extent they include carriage by road. Some commentators argue that a contract of carriage of goods by sea coupled with transportation by land is characterized as a multimodal transport contract, and therefore that such a contract is not a "contract for the carriage of goods by road" governed by CMR.[52] If this is the case, then there is basically no conflict between the conventions (except for limited situations examined in section E below).[53] Others consider that CMR applies to a multimodal transport contract as far as it involves carriage by road as its part[54], and that therefore there may be a potential conflict between the liability regime of this Draft Convention and CMR. It should be noted that the question is *not* which interpretation is correct. Each contracting state has its own authority to interpret these conventions, and, as far as some contracting states interpret that CMR applies to the land-leg of a multimodal contract of carriage which consists of a road and a sea carriage, it would be reasonable to conclude that concern over possible conflicts between the conventions is well founded and cannot be ignored.

B. Limited Network Principle under the Convention

The issue of conflict between different conventions has been well recognized since the CMI drafting stage. The CMI Draft seems to be based on the assumption

49. Convention on the Contract for the International Carriage of Goods by Road, May 19, 1956, 399 U.N.T.S. 189 [hereinafter CMR].

50. COTIF-CIM, *supra* note 26.

51. *See* Note by the Secretariat, U.N. Comm'n on Int'l Trade Law [UNCITRAL], General remarks on the sphere of application of the draft instrument, paras. 43–110, U.N. Doc. A/CN.9/WG.III/WP.29 (Jan. 31, 2003) (examining "the scope and period of application of each of the transport conventions").

52. *See* Francesco Berlingieri, *A New Convention on the Carriage of Goods by Sea: Port-to-Port or Door-to-Door?,* 8 Unif. L. Rev 265, 269–70 (2003) (outlining circumstances in which a "door-to-door" contract would not be governed by CMR due to its multimodal nature).

53. For additional discussion of the issue, *see id.* at 269–273 (discussing the "risk of conflict between the new Convention and other transport Conventions").

54. *See* Quantum Corp., Inc. v. Plane Trucking Ltd., (2001) 2 Lloyd's Rep. 25 (explaining when multimodal transport may be governed by CMR).

that its "limited network system" could solve the problem. The explanatory note of Article 4.2.1 (current Article 26) of the CMI Draft states:

> The great majority of contracts of carriage by sea include land carriage, whether occurring before or after the sea-leg or both. It is necessary therefore to make provision for the relationship between this draft instrument and conventions governing inland transport which may apply in some (particularly European) countries. This article deals with that problem, and provides for a network system, but one as minimal as possible.[55]

There has been considerable discussion regarding which rule is most desirable—"uniform system" or "network system"—for the liability of a carrier who assumed multimodal transportation. "Network system" divides the carriage into different modes of transport and imposes liability on the carrier based on the liability regime that would be mandatorily applicable if the parties entered into a separate contract of carriage corresponding to each transport mode.[56] For example, if the damage occurs during the carriage by road, then the rules on the carriage by road would apply as if the parties had entered into a contract of carriage by road instead of a multimodal transport contract. Both The UNCTAD/ICC Rules for Multimodal Transport Documents (ICC Publication no. 298) (UNCTAD/ICC Rules)[57] and "FIATA Multimodal Transport Bill of Lading" adopt "network system".[58] "Uniform system", in contrast, recognizes a multimodal transport contract *sui generis* and applies independent liability rules to the whole period of transport.[59] The United Nations Convention on International Multimodal Transport of Goods of 1980 (UN Multimodal Convention) rests on this system.[60]

Although these approaches look totally incompatible, each system is usually modified so that the difference is not as big as it appears. For example, any network system should be supplemented by the rule that governs the carrier's liability when it is impossible to determine where the damage occurred[61]. "Uniform system" is often modified to allow the application of the mandatory liability rule that governs the corresponding transport mode as far as the place where damage occurs is identified.[62]

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55. UNCITRAL, *Preliminary Draf t Instrument, supra note 21,* para. 49.

56. Secretariat, U.N. Conference on Trade and Dev. [UNCTAD], *Implementation of Multimodal Transport Rules*, UNCTAD/SDTE/TLB/2/Add. 1 (Oct. 9, 2001) [hereinafter UNCTAD, *Implementation*], para. 21.

57. U.N. Conference on Trade and Dev. [UNCTAD]/Int'l Criminal Ct. [I.C.C.] *Rules for Multimodal Transport Documents*, I.C.C. Publication no. 298, [hereinafter UNCTAD/ICC Rules] Rule 6.4, a*vailable at* http://r0.unctad.org/en/subsites/multimod/mt3duic1.htm.

58. U.N. Econ. Comm'n for Europe, *Standard Conditions (1997) Governing the FIATA Multimodal Transport Waybill*, Rule 9.6, *available at* www.unece.org/etrades/unedocs/e_forms/page_96_icc_fwb_secondpage.pdf.

59. U.N. Conference on Trade and Dev. [UNCTAD], *Implementation*, *supra* note 56, para. 21.

60. U.N. Conference on Trade and Dev. [UNCTAD], *Convention on International Multimodal Transport*, art. 14, U.N. Doc TD/MT/CONF/17 (May 24, 1980).

61 UNCTAD/ICC Rules, *supra* note 57, art. 6.1–6.3 applies the limitation amount of Hague-Visby Rules when the damage is not localized as far as the contract in question contains a sea-leg.

62. Art. 19 of UN Multimodal Convention ("Localised damage") provides as follows: "When the loss of or damage to the goods occurred during one particular of the multimodal transport, in respect of which an applicable international convention or mandatory national law provides a higher limit of liability than the limit that would follow from application of paragraphs 1 to 3 of article 18, then the limit of the multimodal transport operator's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law". UNCTAD, *Multimodal Convention*, *supra* note

The choice between "uniform system" and "network system," in theory, is not necessarily related to the problem of conflict of conventions. Even if the multimodal contract in question is a purely domestic one, the choice matters. Nevertheless, it is also true that the issue of conflict of conventions would be, in practice, much alleviated with the adoption of "network rules" for multimodal transport. Recognizing the necessity to respect existing international rules for other non-maritime modes of transport, the CMI Draft adopts the network system but "only as minimal[ly] as possible."[63]

Although the wording is substantially different, this basic framework is still retained in the final text of the Convention. It provides as follows:

> *Article 26. Carriage preceding or subsequent to sea carriage*
>
> When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:
>
> (a) Pursuant to the provisions of such international instrument 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 of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

60, art. 19.

63. UNCITRAL, *Preliminary Draft Instrument*, *supra* note 10 art. 4.2.1 of the CMI Draft provides as follows:

> 4.2.1 Carriage preceding or subsequent to sea carriage
>
> Where a claim or dispute arises out of loss of or damage to goods or delay occurring solely during either of the following periods:
>
> (a) from the time of receipt of the goods by the carrier or a performing party to the time of their loading on to the vessel;
>
> (b) from the time of their discharge from the vessel to the time of their delivery to the consignee;
>
> and, at the time of such loss, damage or delay, there are provisions of an international convention that
>
> (i) according to their terms apply to all or any of the carrier' s activities under the contract of carriage during that period, [irrespective whether the issuance of any particular document is needed in order to make such international convention applicable], and
>
> (ii) make specific provisions for carrier's liability, limitation of liability, or time for suit, and
>
> (iii) cannot be departed from by private contract either at all or to the detriment of the shipper, such provisions, to the extent that they are mandatory as indicated in (iii) above,
>
> prevail over the provisions of this instrument.

(b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.[64]

Let us examine how Article 26 works in the next section.

C. Operation of Article 26

Since the structure of Article 26 is fairly complicated, it may be helpful to use several examples to show how the article operates in practice.

Hypothetical Case #1

The parties entered into a contract of carriage from Tokyo to Berlin, which includes international sea carriage from Tokyo to Rotterdam and international road carriage from Rotterdam to Berlin. Let us assume further that Japan, the Netherlands, and Germany are contracting states to the Convention. The goods are damaged during the road carriage and the consignee brought an action in a German court.

Since the damage occurred during the road carriage, the requirement in the chapeau of Article 26 is met.[65] The conditions set forth in Article 26(b) and (c) are satisfied because CMR provides specific provisions on carrier's liability, limitation of liability, and time for suit, and these provisions are mandatory rules.[66] Finally, the requirement under Article 26(a) is also fulfilled because if the parties enter into "a separate and direct contract" for the carriage by road from Rotterdam to Berlin, this contract for international road carriage is within the scope of CMR.[67] Therefore, the provisions of the Convention do not supersede the regulations under CMR, and the German court can safely apply the provisions of CMR in this case.

However, this is not the end of the story. The fact that the conditions of Article 26 are satisfied does not necessarily mean that the court (in this hypothetical the German court) will apply the provisions of CMR for the liability resulting from the damage in question. Article 26 simply provides that "the provisions of this Convention do not prevail over" CMR and does not say that the court *should* apply CMR.[68] As noted earlier, there is disagreement over whether CMR applies to a contract of multimodal transport (as discussed in Section A above), and the German court may interpret CMR as not applicable in this hypothetical scenario. In this case, despite the application of Article 26, the German court will apply the provisions of the Convention rather than the provisions of CMR. Article 26 authorizes the court to apply the provisions of other international instruments when its conditions are met, but it does not force the court to apply them automatically.

64. UNCITRAL, *Contract by Sea*, *supra* note21 art. 26.

65. *Id.*

66. *Id.*; CMR, *supra* note 49, art. 41(1).

67. CMR applies to "every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country." CMR, *supra* note 49, art. 1(1).

68. UNCITRAL, *Contract by Sea*, *supra* note 21, art. 26(1).

The result might seem unusual compared with the treatment regarding "localized damages" under the "network system" approach adopted in other international instruments. For example, Article 6.4 of UNCTAD/ICC Rules for Multimodal Transport Documents (ICC publication no. 298) provides as follows:[69]

> 6.4. When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the MTO's liability for such loss or damage *shall be determined by reference to the provisions of such convention or mandatory national law*.[70]

Under UNCTAD/ICC Rules applied to the hypothetical case, the limitation amount is decided based on CMR regardless of the courts' interpretation of CMR.[71] However, Article 26 of the Convention is drafted in a clearly different manner although one might question why it adopted such an approach.

Hypothetical Case #2

The parties entered into a contract of carriage from Tokyo to Berlin which included international sea carriage from Tokyo to Rotterdam and international road carriage from Rotterdam to Berlin. Let us further assume that Japan, the Netherlands, and Germany are contracting states to the Convention. The goods were damaged during the road carriage and the consignee brought an action in a Japanese court.

The only difference from the hypothetical scenario #1 is the forum. The Japanese court is not bound by CMR (since Japan is not a contracting state to CMR) and will not apply it unless the parties choose the laws of a contracting state to CMR as the applicable law. If German or Dutch law is the applicable law in the above hypothetical, then the result is essentially the same as Case #1. The Japanese court will apply either the Convention or CMR just as the German or the Dutch court would. If the applicable law is Japanese law, there is no room for the Japanese court to apply CMR to the contract of carriage. Although the provisions of CMR might prevail over the Convention's provisions pursuant to Article 26 in this hypothetical case,[72] the court will apply this Convention, rather than CMR, to the liability for the damage to the goods in question.

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69. *See* UN Multimodal Convention *supra* note 60, art. 19 (providing essentially the same although it adopts "uniform system").

70. UNCTAD/ICC Rules, *supra* note 57 (emphasis added).

71. *See id.*, at Explanation of the Rules, Rule 6.

72. It is even uncertain whether the condition under Article 26(a) is satisfied at all. A "direct and separate" contract of carriage by road from Rotterdam to Berlin surely falls under the geographic scope of the application of CMR. However, CMR will not be applied to the contract when the action is brought in a Japanese court (assuming it has jurisdiction) and when the applicable law is Japanese law. The exact meaning of "would have applied" and "if the shipper had made a separate and direct contract with the carrier" is not sufficiently clear. Is the application of another instrument judged assuming the action was brought at the same court? Is "direct and separate" assumed to include other provisions of the contract of carriage in question, such as choice of law provisions? If the answers to these questions are in the affirmative, the condition under Article 26(a) is not met in the hypothetical #2 because Japanese law has no mandatory regulation for road carriage.

Hypothetical Case #3

The parties entered into a contract of carriage from Tokyo to Berlin that included international sea carriage from Tokyo to Rotterdam and international road carriage from Rotterdam to Berlin. Let us assume further that Japan, the Netherlands and Germany are all contracting states to the Convention. The goods were damaged somewhere during the transport but the location is not specified.

In this hypothetical, the carrier's liability for the damage of the goods is governed by the Convention and the provisions of CMR do not apply. Article 26 requires that loss or damage to the goods, or an event or circumstance causing a delay in delivery, occurs solely before the goods were loaded onto the ship, or solely after their discharge from the ship.[73] Article 26 does not apply when the location where the damage occurred is not specified ("non-localized damage"). It should also be noted that, for Article 26 to apply, the loss of or damage to the goods itself must take place outside the sea-leg, and that it is not sufficient that an event or circumstance that caused or contributed to the loss or damage occurred during such periods.[74]

D. Special Limitation for "Non-localized Damages"?

As is shown in Hypothetical Case #3, the Convention exclusively governs the carrier's liability when the claimant cannot identify where the loss of or damage to the goods occurred. The treatment of such "non-localized damages" was one of the most controversial issues in connection with the multimodal aspects of the Conventions during the discussion in the UNCITRAL Working Group III (Transport Law). A number of states, especially the contracting states to CMR or to COTIF-CIM felt that the prevalence of the Convention's provisions over those of CMR or COTIF-CIM with respect to "non-localized damages" would seriously undermine the risk allocation under CMR or COTIF-CIM given the fact that it is often impossible to specify where the loss or damage occurred for goods in a container. The fact that the limitation level of maritime transport conventions that would likely to be followed by the Convention has been substantially different from CMR or COTIF-CIM[75] aggravated their concern. It was, therefore, proposed that

73. UNCITRAL, *Contract by Sea*, *supra* note 21, art. 26.

74. Article 26 provides that "loss of or damage to goods, or an event or circumstances causing a delay in their delivery, occurs." By contrast, Article 17 (Basis of Liability) applies when "loss, damage, or delay, *or the event or circumstances that caused or contributed to it* took place" UNCITRAL, *Contract by Sea*, *supra* note 21, art. 17 (emphasis added). The Convention carefully uses different wordings.

75. It is often claimed that CMR or COTIF-CIM has much higher limitation compared with the Hague-Visby Rules or even with the Hamburg Rules. This comparison may be inaccurate or even misleading. The limitation amount based on weight under COTIF-CIM Article is 17 SDR per kilogram. COTIF-CIM, *supra* note 50, art. 40(2). Under CMR Article 23(3), it is the equivalent of 8.33 SDR per kilogram. CMR, *supra* note 49, art. 23(3); *see* COTIF-CIM, *supra* note 50. These limitations appear to be much higher than the limitations based on weight under the Hague-Visby Rules, limiting to only 2 SDR per kilogram. Hague-Visby Rules, *supra* note 2, art. IV.5(a). They also appear to be higher than the limitations under the Hamburg Rules, limiting to only 2.5 SDR per kilogram. Hamburg, *supra* note 4, art. 6(1)(a). However, both the Hague-Visby and the Hamburg Rules also adopt a separate amount of limitation per package; Hague-Visby Article IV.5(a) limits to 666.67 SDR per package, and Hamburg Article 6(1)(a) limits to 835 SDR per package. Under both regimes, the higher limitation as calculated either per weight or per package is applied in any particular case. In practice, the limitation amount per package is often higher. For example, let us assume there is a package of 50 laptop computers, the gross weight of which is 50kg. Under CMR, the limitation is 416.5 SDR (8.33*50), and under the Hague-Visby

the highest limit of liability in the international mandatory provisions applicable to the different parts of the transport should apply to non-localized damages. The proposal resulted in draft Article 62(2), which has always been in a square bracket.[76] Non-CMR or non-COTIF-CIM countries such as the United States or Japan saw the issue in the opposite way, namely that the proposed draft Article 62(2) seriously undermines the risk allocation under the Convention.[77] Since the loss or damage is often unable to be "localized" for containerized cargo, the limitation amount under the Convention would often be ignored and the limitation under other conventions would apply.[78] It was argued that while the proposal might be sensible for a pure multimodal convention that treats every mode of transport equally, it is simply natural for the Convention to apply the rule governing the maritime leg once it took "maritime-plus approach."[79]

Because the conflict is deeply rooted from each states' own interests in international carriage, it cannot be easily resolved. It was at the final session of the Working Group when the issue was decided. After a lengthy negotiation, Article

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Rules, the limitation is the per package rate of 666.67 SDR. It is fair to say that because the calculation mechanism is totally different under maritime transport conventions and under land transport conventions, it is difficult to predetermine which limitation provision is more advantageous for the cargo interest.

76. The following two variants of Article 62(2) were contained in the text prepared by the Secretariat in November 2007. Article 27, referenced in "variant A" below, was changed to become Article 26 in the final version. U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group III (Transport Law), *Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]*, art. 62(2), U.N. Doc. A/CN.9/WG.III/WP.101 (Nov. 14, 2007) (all brackets in original)[hereafter, UNCITRAL, 2007 Nov. Draft]:

> *Article 62(2)*
>
> [Variant A of paragraph 2
>
> [2. Notwithstanding paragraph 1 of this article, if (a) the carrier cannot establish whether the goods were lost or damaged [or whether the delay in delivery was caused] during the sea carriage or during the carriage preceding or subsequent to the sea carriage and (b) provisions of an international convention [or national law] would be applicable pursuant to article 27 if the loss, damage, [or delay] occurred during the carriage preceding or subsequent to the sea carriage, the carrier's liability for such loss, damage, [or delay] is limited pursuant to the limitation provisions of any international convention [or national law] that would have applied if the place where the damage occurred had been established, or pursuant to the limitation provisions of this Convention, whichever would result in the higher limitation amount.]
>
> Variant B of paragraph 2
>
> [2. Notwithstanding paragraph 1 of this article, if the carrier cannot establish whether the goods were lost or damaged [or whether the delay in delivery was caused] during the sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international [and national] mandatory provisions applicable to the different parts of the transport applies.]]

77. *See,* U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group on Transport Law*, Report of Working Group III (Transport Law) on the Work of its Nineteenth Session (New York, 16-27 April 2007)* para. 194, U.N. Doc. A/CN.9/645 (Jan. 30, 2008)("A provision such as draft paragraph 2 was said to undermine the very purpose of adopting an international convention.") [hereinafter UNCITRAL, Working Group on Transport Law, Nineteenth Session Report].

78. *Id.* para. 200.

79. The "maritime-plus" approach is discussed above in II.A.4.

62(2), regarding the carrier's limitation level under the Convention, was deleted as a part of "the compromise package".[80]

E. Other Safeguards

As noted earlier, the network rule adopted in Article 26 largely eliminates the concern over any potential conflict of conventions. Nevertheless, several specific situations exist where a state that has contracted into other international conventions faces incompatible obligations imposed under this Convention. Article 82 refers to such cases and offers appropriate safeguards, as follows:

> *Article 82. International conventions governing the carriage of goods by other modes of transport*
>
> Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:
>
> (a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;
>
> (b) Any convention governing the carriage of goods by road 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;
>
> (c) Any convention governing the carriage of goods by rail 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; or
>
> (d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.

Let us take some examples showing why such safeguards are necessary.

Hypothetical Case #4

The parties entered into a contract of carriage from New York to Tokyo via Hong Kong. The goods were carried by air from New York to Hong Kong and by ship from Hong Kong to Tokyo. The cause of damage to the goods occurred during the air carriage, and the goods are actually damaged during the sea carriage. The consignee sued the carrier in Japan.

Article 26 applies only when the damage itself occurred before the loading or after the discharge. When the cause of the damage only occurs in air carriage, Article 26 does not apply.[81] Therefore, the provisions of this Convention apply to the

80. *See* UNCITRAL, Twenty-First Session Report, *supra* note 38, paras. 197–203 (referring to the decision to delete Article 62(2)).

81. *See supra* note 74 and the accompanying text.

contract of carriage without reservation in the above hypothetical. At the same time, the Convention for the Unification of Certain Rules for International Carriage by Air, 1999 ("the Montreal Convention")[82] also applies to the above case. Because the place of destination is within the State Party, the Montreal Convention applies to the air carriage from Hong Kong to Tokyo.[83] Unlike CMR, Article 38(1) of Montreal Convention explicitly provides that it applies to multimodal transportation, which includes the air-leg.[84] While it restricts its application, stating that "in the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall . . . apply only to the carriage by air," Article 18(1) provides that the carrier is liable for "damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the *event which caused the damage* so sustained took place during the carriage by air."[85] Therefore, despite the network rule under Article 26, a contracting state to both conventions would face a conflicting obligation to apply the provisions of Montreal Convention. Article 82(a) of this Convention allows the contracting state to the Montreal Convention to apply its provisions under the above hypothetical.[86]

Hypothetical Case #5

The carrier assumed the contract of carriage from Brussels to London. The goods were carried on a truck from Brussels to Antwerp. The truck was carried by ferry with the goods loaded from Antwerp to London. Both the United Kingdom and Belgium were contracting states to the convention. The goods were damaged during the sea carriage.

The Convention applies because it is an international carriage to or from a contracting state that includes an international sea-leg.[87] Article 27 does not apply since the damage took place during the sea-leg.[88] At the same time, CMR also applies to the whole carriage (from Brussels to London) in this hypothetical. Article 2(1) of CMR provides that "where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air, and, except where the provisions of Article 14 are applicable, the goods are not unloaded from the vehicle, this Convention shall nevertheless apply to the whole of the carriage."[89] In this case, pursuant to Article 82(b), a court can apply CMR instead of this Convention, thereby avoiding the conflict of conventions.[90]

Similar minor conflicts that are unavoidable through Article 26 are conceivable in connection with COTIF-CIM or the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways ("CMNI"), 2000, and Article 82(c) and (d) similarly offer a safeguard.[91]

82. Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. 106-45, 2242 U.N.T.S 309 (2000) [hereinafter Montreal Convention].
83. Montreal Convention, supra note 82, art.1(2).
84. *Id.* art. 38(1).
85. *Id.* art. 18(1) (emphasis added).
86. UNCITRAL, *Contracts by Sea*, *supra* note 21, art. 82 (a).
87. *Id.* art. 5.
88. *Id.* art. 26.
89. CMR, *supra* note 49, art. 2(1).
90. UNCITRAL, *Contracts by Sea*, *supra* note 21, art. 82 (b).
91. UNCITRAL, *Contract by Sea*, *supra* note 21, art. 82(c), (d).

IV. THE REGULATION ON "PERFORMING PARTIES"

A. Existing Transport Law Conventions

Traditional transport law conventions are focused on the contractual relationships and liability of the contracting parties. The Hague Rules as well as the Hague-Visby Rules regulate only the liability of the carrier as a contracting party. The Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1929 ("Warsaw Convention") for air carriage[92], including the amendments by subsequent Protocols,[93] also applies only to contractual carriers. The same applies to CMR[94] and COTIF-CIM.[95]

Recent international conventions, in contrast, extend their regulation to sub-carriers with no direct contractual relationship with the shipper. The Hamburg Rules impose liability on the "actual carrier" on the same basis as a contracting carrier for sea carriage that it actually performed.[96] The same applies to the CMNI. As for air carriage, the Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier, 1961 ("Guadalajara Convention"), which supplements the Warsaw Convention, established the liability of "actual carrier,"[97] and the Montreal Convention includes a chapter titled "carriage by air performed by a person other than the contracting carrier."[98]

The Convention, consistent with these trends towards more comprehensive regulation of the persons involved in the carriage, moved even further.[99]

B. The CMI Draft

The CMI Draft introduced a new concept of the "performing party": those who perform any of the carrier's responsibilities under a contract of carriage and act, either directly or indirectly, at the carrier's request or under the carrier's supervision

92 Int'l Civil Aviation Org. (ICAO), *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, Oct. 12, 1929, 478 U.N.T.S. 371, *available at* http://www.unhcr.org/refworld/docid/48abd581d.html.

93. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 371; Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, *as amended by* the Protocol Done at the Hague on 28 September 1955, Mar. 8, 1971, 10 I.L.M. 613; Additional Protocol No. 3 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12 1929, *as amended by* the Protocol Done at the Hague on 28 September 1955 and at Guatemala City on 8 March 1971, Sept. 25, 1975, ICAO Doc. 9147; Additional Protocol No. 4 to Amend Convention for the Unification of Certain Rules Relating to International Carriage By Air, Oct. 12, 1929, *as amended by* the Protocol Done at the Hague on 28 September 1955, Sept. 25, 1975, 2145 U.N.T.S. 31.

94. CMR, *supra* note 49, art. 1(1).

95. COTIF-CIM, *supra* note 26.

96. Hamburg Rules, *supra* note 4, art. 10(1).

97. Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to Int'l Carriage by Air Performed by a Person Other than the Contracting Carrier art. 2, Sept. 18, 1961, 500 U.N.T.S. 31.

98. Montreal Convention, *supra* note 83, ch. V.

99. For the drafting history of the Convention, *see generally* Michael F. Sturley, *Issues of Transport Law: The Treatment of Performing Parties*, 2003 CMI YEARBOOK 230–44.

or control.[100] It includes those who are not a "carrier" in any sense, such as the terminal operator, stevedore, or warehouse.[101] It includes truckers or railroads that perform land carriage as a sub-carrier because the carrier's period of responsibility covers not only the sea-leg but also the land transport.[102] Compared with "actual carrier" under Hamburg Rules (i.e., an ocean carrier who actually carries the goods),[103] "performing party" covers a much broader range of parties involved in a carriage of goods.

The CMI Draft brought the performing party under the same liability regime as a contracting carrier.[104] During the discussion in the UNCITRAL Working Group, however, it was recognized that the approach taken in the CMI Draft has serious problems with existing transport Conventions.[105] The following example illustrates this point.

Hypothetical Case #6

The contract of carriage from New York to Vienna via Hamburg included an international road carriage from Hamburg to Vienna. Assume that Austria is a contracting state to the Convention. Damage to the goods occurred during the road carriage and the consignee brought an action against the trucker who undertook the road carriage from Hamburg to Vienna in an Austrian court.

Under the CMI Draft, the trucker in this example is subject to the liability regime of the Convention as a performing party. At the same time, the road carriage is governed by CMR because it is an international road carriage between contracting states agreeing to CMR. Therefore, the Austrian court is faced with incompatible obligations under both applicable conventions.

In addition to the issue of conflicting conventions, a concern was raised that the CMI Draft's approach is too far reaching in that it regulates purely domestic land transport.[106] A truck driver who carries the goods to a neighboring town might be subject to the liability regime of an international convention under the CMI Draft when the carriage consists of any part of the contract of carriage to which the Convention applies. Because of the result is beyond the ordinary expectations of a land carrier who engages exclusively in domestic land carriage, each state has its own domestic policy for regulating land carriage, and several states saw the CMI Draft's approach as an unreasonable interference in their domestic regulatory framework.[107]

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100. Article 1.17 of the CMI Draft provides as follows: "Performing party means a person other than the carrier that physically performs [or fails to perform in whole or in part] any of the carrier's responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods, to the extent that that person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage. The term 'performing party' does not include any person who is retained by a shipper or consignee, or is an employee, agent, contractor, or subcontractor of a person (other than the carrier) who is retained by a shipper or consignee." UNCITRAL, *Preliminary Draft Instrument*, *supra* note 10, art. 1.17 .

101. *Id*.

102. *Id*.

103. Hamburg Rules, *supra* note 4, art. 1(2).

104. UNCITRAL, *Preliminary Draft Instrument*, *supra* note 10, art. 6.3.1(a).

105. Sturley, *supra* note 99, at 231.

106. *Id*. at 238.

107. *Id.*

C. Current Draft: Division of Maritime and Non-maritime Performing Party

Taking these concerns seriously, several possible solutions were proposed,[108] and the final solution is as follows.[109] The final Draft Convention divides the "performing party" into two categories: "maritime performing party" and "non-maritime performing party."[110] "Maritime performing party" is defined as meaning "a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship."[111] The convention imposes liability and provides for a direct cause of action only against maritime performing parties.[112]

Of the parties involved in the carriage, the following example illustrates to whom the Convention applies.

Hypothetical Case #7

The shipper entered into a contract of carriage from Berlin to Chicago with NVOC. The goods were carried by road from Berlin to Antwerp, by ship from Antwerp to New York and by rail from New York to Chicago. Let us assume that the United States is a contracting state to the Convention, while Germany and Belgium are not. Depending upon when the goods were damaged, who could the consignee sue and on what basis?

Because the place of delivery was situated in a contracting state, the Convention applies to the contract of carriage in this hypothesis.[113] The consignee can sue the NVOC (the carrier) under the Convention regardless of where the goods are damaged.[114] If the goods were damaged during the sea carriage, the consignee can also sue the ocean carrier who carried the goods from Antwerp to New York. The ocean carrier who delivered the goods in the port of a contracting state is liable under the Convention as a maritime-performing party if the goods were damaged between Antwerp and New York.[115]

Stevedores or terminal operators who worked at the port of New York can also be liable under the Convention if the goods were damaged during their custody, but those who worked at Antwerp cannot.[116] The maritime performing party is subject to the liability regime of the Convention only when it "received the goods for carriage

108. *Id*. at 236.

109. For a solution introduced at the twelfth session, *see* UNCITRAL, Working Group on Transport Law, Twelfth Session Report, *supra* note 20, paras. 20–42.

110. Although the term "non-maritime performing party" is not used in the Convention itself, we use the term for the sake of convenience to mean a performing party that does not qualify as a maritime performing party. *See* UNCITRAL, *Contracts by Sea*, *supra* note 21, art. 1(6–7).

111. *Id*. art. 1(7).

112. It was decided at the Twelfth Session and was based on the U.S. proposal. U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working on Transport Law, *Report of Working Group III (Transport Law) on the Work of its Twelfth Session*, paras. 20–27, U.N. Doc. A/CN.9/544 (Oct. 17, 2003); *see* U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group III (Transport Law), *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea]: Proposal by the United States of America*, paras. 5–9, U.N. Doc. A/CN.9/WG.III/WP.34 (Oct. 17, 2003); *see also* Sturley, *supra* note 99, at 241–42.

113. UNCITRAL, *Contracts by Sea*, *supra* note 21, art. 5.

114. *Id*. art.12(1), 17.

115. *Id*. art. 1(7), 19(1).

116. *Id*.

in a contracting state, or delivered them in a contracting state, or performed its activities with respect to the goods in a port in a contracting state."[117] Therefore, a stevedore or a terminal operator who provides services in the port of a non-contracting state (Antwerp in the above hypothetical) is not regulated under the Convention. The Convention does not intend to interfere with activities that have no geographic connection with the contracting state.[118]

If the goods were damaged between Berlin and Antwerp, the trucker would not be liable under the Convention because it is not a maritime-performing party. The trucker would be liable to NVOC under CMR, but CMR does not provide for a direct cause of action against the sub-carrier for the benefit of the consignee with no contractual relationship. The consignee can only sue the trucker in tort.

If the goods were damaged between New York and Chicago, the liability would be governed by U.S. law. The Carmack Amendment that regulates domestic railroad transportation does not offer a direct cause of action against the sub-carrier for the benefit of the consignee, so the consignee can only sue railroad in tort.

Although the Convention provides for liability of the maritime performing party only, it still uses the term "performing party," which includes non-maritime performing parties because the concept is useful in the context of carrier's liability. Article 18 provides that the act or omission of any "performing party," whether maritime or non-maritime, is attributable to the carrier.[119]

D. Fine Tuning of the Concept

1. Is an Employee a Performing Party?

A sensitive question was raised in connection with the definition of the performing party: Is an employee of the carrier or of a performing party regarded as a performing party? The definition of a performing party could reasonably include an employee of the carrier because the employee certainly performs, or undertakes to perform a part of the carrier's obligation under a contract of carriage.[120] If an

117. *Id*. art. 19(1).

118. This restriction was introduced at the 17th session. *See* U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group on Transport Law, *Report of Working Group III (Transport Law) on the work of its Seventeenth Session*, paras.141–45, U.N. Doc. A/CN.9/594 (Apr. 13, 2006).

119. UNCITRAL, *Contracts by Sea*, *supra* note 21 art. 18.

120. At one state of the Working Group's deliberation, the text was explicit on this point. Specifically, the text prepared by the secretariat in February 2007 contained the following definition in Article 1(6):

> "Performing party" means a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, discharge or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control. *It includes employees*, agents and subcontractors of a performing party to the extent that they likewise perform or undertake to perform any of the carrier's obligations under a contract of carriage, but does not include any person that is retained by a shipper, by a documentary shipper, by the consignor, by the controlling party or by the consignee, or is an employee, agent or subcontractor of a person (other than the carrier) who is retained by a shipper, by a documentary shipper, by the consignor, by the controlling party or by the consignee.

employee of the carrier is regarded as a performing party, then the employee of any performing party is also a performing party.

The problem with this structure is that if an employee is a performing party, any individual employee, including a master or crew involved in sea carriage, can be deemed a maritime-performing party and can be sued under the Convention. This result was not intended by most delegations, even if such an action is not likely in reality.[121] However, one cannot solve the problem simply by excluding employees from the definition of a performing party.[122] If employees are not regarded as a performing party, it becomes unclear whether a maritime performing party is responsible for the acts or omissions of its employees.[123] The difficulty is that the definition of performing party has different functions at the same time: (1) to define the scope of the person who is liable under the Convention by affecting the definition of maritime-performing party,[124] (2) to define the scope of vicarious liability of the carrier or a maritime performing party,[125] and (3) to define the scope of "Himalaya protection" (i.e., the defense available to the person who, without a contractual relationship with the shipper, works for the contract of carriage).[126]

These three issues are of a totally different nature. As for the scope of vicarious liability of the carrier, there is almost unanimous consensus in the Working Group that anyone, including an employee who performs or undertakes to perform any of the carrier's obligations under the contract of carriage, should be covered to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.[127] "Himalaya protection" is based on the different consideration. If defenses available to the carrier are not allowed in an action against a person who is economically dependent on the carrier, then the ultimate financial burden of the claim is borne by the carrier, which would undermine the risk allocation that the Convention intended to establish. The logical consequence from this line of thinking is that the "Himalaya protection" should be given to those who are economically dependent on the carrier, which is exactly the reason why Article 4 bis (2) of the Hague-Visby Rules refuses to give such protection to an "independent contractor."[128] The question of whether individual employee of the carrier or a maritime performing party should be sued under the Convention is an independent policy choice, and most delegations are reluctant to create such a cause of action.

The final solution under the Convention was not to solve these problems through a complicated definition of performing party, but instead to clarify the solutions in each of the articles. On one hand, the current definition of performing party is still ambiguous as to whether or not it includes an employee of a carrier.[129]

U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group III (Transport Law), *Transport Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]*, art. 1(6), U.N. Doc. A/CN.9/WG.III/WP.81 (Feb. 13, 2007) (emphasis added).

121. UNCITRAL, Working Group on Transport Law, Ninteenth Session Report, supra note 77, para. 129, U.N. Doc. A/CN.9/621 (May 17, 2007).

122. *Id.* paras. 141–53.

123. See, UNCITRAL, 2007 Nov. Draft , *supra* note 76, at 7 n. 2.

124. UNCITRAL, Nineteenth Session Report, *supra* note 77 para. 128.

125. *Id*.

126. *Id*.

127. *Id*. paras. 141-142.

128. Protocol to Amend, *supra* note 2, art. 4 bis.

129. UNCITRAL, *Contracts by Sea*, *supra* note 21, art. 1(6)(a) ("'Performing party' means a person

On the other hand, Article 20(4) clarifies that an employee cannot be sued as a maritime-performing party under the Convention provided that "nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime-performing party."[130] Article 19 enumerates the list of the persons whose act or omission is attributable to the carrier, including employees of the carrier or a performing party.[131] Article 4(1) makes it clear that the employees of the carrier or a maritime-performing party can enjoy "Himalaya protection," but a non-maritime party falls outside this protection.[132]

2. Inland Carrier as a Maritime-Performing Party

The second sentence of Article 1(7) provides that "an inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area."[133] The purpose of this restriction is to ensure that the Convention does not interfere too much with the domestic regulation of inland transportation. Let us assume that a railroad carries goods to a terminal in a port. Most of the transportation is outside the port area, but the goods are carried into and discharged within the port area. In this case, save the above restriction, a railroad carrier is a maritime-performing party to the extent that it carries goods within a port area because it satisfies the definition of maritime-performing party in the first

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other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.") "Performing party" does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party, or by the consignee instead of by the carrier. *Id.* art. (1)(6)(b).

130. *Id*. art. 19(4).

131. *Id.* art. 18. Article 18 provides

> The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:
>
> (a) Any performing party;
>
> (b) The master or crew of the ship;
>
> (c) Employees of the carrier or a performing party; or
>
> (d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

132. *Id.* art. 4(1). Article 4(1) provides

> Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:
>
> (a) The carrier or a maritime performing party;
>
> (b) The master, crew or any other person that performs services on board the ship; or
>
> (c) Employees of the carrier or a maritime performing party.

133. *Id*. art. 1(7).

sentence of Article 1(7).[134] Since the domestic railroad industry is usually regulated domestically, it was thought unwise for the Convention to regulate even a part of its transportation. At the same time, it would be too much to exclude the railroad carrier or road carrier completely from the definition of maritime performing party[135]. A carriage by a folk lift from a container yard in a port to the ship, for instance, has been considered a typical activity of a maritime-performing party throughout the deliberation in the Working Group and it was thought necessary to regulate it under the convention.[136]

The second sentence of Article 1(7) divides inland carriers into two categories: those who perform their service exclusively within a port area[137] and those who do not.[138] Only the former are governed by the convention as a maritime-performing party.[139] Therefore, the Convention imposes a liability on the folk lift in the above example but does not on the railroad. It should be noted that the issue whether "an inland carrier performs or undertakes to perform its services exclusively within a port area" is decided on a contract by contract basis rather than company-to-company. For example, if Company A's truck carries goods between warehouses within a port area in connection with a certain contract of carriage governed by the Convention, it is a maritime-performing party, even if company A also engages in land transport outside of the port area for another contract. As far as Company A performs part of the carrier's obligation under the contract of carriage in question exclusively within a port area, A's services for other customers have nothing to do with the application of the Convention.

V. CONCLUSION

The Convention substantially expands its coverage compared to traditional transport law Conventions. It applies to the whole of the transport, including different modes of transport and to persons other than the carrier who are involved

134. *See id*. (defining a "maritime performing party" as a "performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship").

135. A proposal was made at the 19th session of the Working Group that rail carriers, even if performing services within a port, should be excluded from the definition of "maritime performing party." U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group III, *Transport Law: Preparation of a Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]: Proposal of the United States of America on the Definition of "Maritime Performing Party"*, para. 1, A/CN.9/WG.III/WP.84 (Feb. 28, 2007). A similar exemption was also proposed for a road carrier. U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group III, *Transport Law: Preparation of a Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]: Proposals by the International Road Transport Union (IRU) Concerning Articles 1 (7), 26 and 90 of the Draft Convention*, para. 1, A/CN.9/WG.III/WP.90 (Mar. 27, 2007). Although some sympathy was expressed, the Working Group was critical to such a blanket exemption. *See* UNCITRAL, Working Group on Transport Law, Nineteenth Session Report, *supra* note 77 paras. 136–37.

136. UNCITRAL, *Contracts by Sea*, *supra* note 21, para. 141.

137. The term "port" or "port area" is not defined in the Convention and the determination of what exactly constitutes a "port" is left to local authorities and the judiciary. Although a concern was raised that it would cause uncertainty, it might be a necessary evil if we deny a "blanket" exemption for rail or road carriers. The Hamburg Rules also use the term "port" without definition. For the discussion on "port," *see* UNCITRAL, Working Group on Transport Law, Nineteenth Session Report, *supra* note 77 para. 148.

138. UNCITRAL, *Contracts by Sea*, *supra* note 21, art. 4(1).

139. *Id.*

in the sea carriage. It is one of the most comprehensive legal regimes for the international carriage of goods, and is an invaluable contribution to the uniformity of transport law. At the same time, such a comprehensive approach could give rise to a number of difficult issues, especially with other international Conventions. The complexity of the Convention, one of the most popular complaints by innocent readers, is caused partly by the efforts to solve every possible issue as explicitly as possible. It would be unfair to criticize the complexity of the text, because it comes from the complexity of the issues themselves rather than a poor drafting technique. Given the value of a comprehensive regime for international carriage, I believe that this is the price we have to pay. Although the text of the Convention is detailed, the ideas behind the text are much simpler. I hope this article can be of some assistance in better understanding this Draft Convention.