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Global Unification of Transport Law: A Hopeless Task?

Jan Ramberg*

In the late 1800s and the beginning of the 1900s important steps were taken to unify transport law starting on the regional level in Europe with carriage of goods by rail with CIM (now COTIF/CIM).¹ For carriage by air the Warsaw Convention² (now Montreal Convention 1999)³ appeared in 1929 and CMR for International Carriage of Goods by Road in 1956.⁴ Maritime transport became subjected to the 1924 Bill of Lading Convention⁵ (the so-called Hague Rules) as supplemented by the 1968 Protocol⁶ (the so-called Hague/Visby Rules). Therefore, I think it is fair to suggest that at the time of the mid-1970s a global unification of transport law had been achieved although, admittedly, COTIF/CIM and CMR have to be regarded as regional unifications.

With the advent of carriage of goods in containers, the interest naturally focused on carriage from point-to-point whereby different modes of transport could be integrated in the same contract of carriage.⁷

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1. Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (COTIF/CIM), May 9, 1980, *available at* <http://www.jus.uio.no/lm/cim.rail.carriage.contract.uniform.rules.19xx/toc.html>.

2. Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention), Oct. 12, 1929, 49 Stat. 3000, *available at* <http://www.jus.uio.no/lm/air.carriage.warsaw.convention.1929/doc.html>.

3. Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention), May 28, 1999 (entered into force Nov. 4, 2003), *available at* <http://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/>.

4. Convention on the Contract for the International Carriage of Goods by Road (CMR), May 19, 1956, 399 U.N.T.S. 189, *available at* <http://www.jus.uio.no/lm/un.cmr.road.carriage.contract.convention.1956/doc.html>.

5. Convention for the Unification of Certain Rules Relating to Bills of Lading (Hague Rules), Aug. 25, 1924, 51 Stat. 233.

6. Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating Bills of Lading (Hague/Visby Rules), Feb. 23, 1968 (entered into force June 23, 1977), *available at* <http://www.jus.uio.no/lm/sea.carriage.hague.visby.rules.1968/doc.html>.

7. See RALPH DE WIT, MULTIMODAL TRANSPORT: CARRIER LIABILITY AND DOCUMENTATION (Lloyd's of London Press Ltd. 1995); J. Ramberg, *Multimodal*

Difficulties arose to create a suitable legal regime to control maritime carriage of goods since maritime law differed considerably from the law of the other modes of transport. The carrier of goods by sea enjoyed particular exemptions (such as the exemption for error in navigation and the management of the vessel and of fire)⁸ and much lower monetary limits of liability than those which applied to the other modes.⁹ Efforts to create a new régime for maritime transport were initiated and resulted in the so-called Hamburg Rules 1978.¹⁰ Somewhat later, the 1980 UN Convention on Multimodal Transport of Goods¹¹ appeared. The Hamburg Rules have entered into force but on a limited scale and the Multimodal Transport Convention has not entered into force and will presumably remain unsuccessful in its present form. With the Hamburg Rules maritime transport became more akin to transport by other modes, since the particular exemptions for error in navigation and the management of the vessel and of fire were removed.

So, in the 1980s it seemed as if the development of transport law pointed at a broader international unification within the whole field of transport law. But the Hamburg Rules failed to effectively replace the old system under the Hague and the Hague/Visby Rules and the 1980 Multimodal Transport Convention remained unsuccessful. This resulted in an on-going disunification of international maritime law. Therefore, the CMI initiated efforts to bridge the gap between the old system represented by the Hague and the Hague/Visby Rules and the new system evidenced by the Hamburg Rules. Also, measures were taken to achieve statutory support for electronic recording of information in order to replace the paper Bill of Lading which so far had to rest on agreement between the contracting parties, e.g. by using the CMI Rules for Electronic Bills of Lading. The CMI initiated a co-operation with UNCITRAL to achieve an entirely new convention. The work has been going on for quite some time and has resulted in the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea called the Rotterdam Rules as a result of an invitation to sign the convention in Rotterdam in the fall of 2009.

Transport: A New Dimension in the Law of Carriage of Goods?, in ETUDES OFFERTES À RENÉ RODIÈRE 481 (Daloz Paris 1981).

8. Hague/Visby Rules art. 4.2(a), (b).

9. See for a survey, JAN RAMBERG, INTERNATIONAL COMMERCIAL TRANSACTIONS 193 (Int'l Chamber of Commerce Publ. 3d ed., 2004).

10. United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules), March 31, 1978, 17 I.L.M. 608, available at http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_rules.html.

11. U.N. Convention on International Multimodal Transport of Goods, May 24, 1980, UN Doc. TD/MT/CONF/17, available at <http://www.jus.uio.no/lm/un.multimodal.transport.1980/doc.html>.

In the meantime, the European Commission (DG VII) initiated a study in order to assess the possibilities of finding appropriate solutions.¹² Also, the Economic Commission for Europe (Economic and Social Council), in September 1999, discussed the matter in a particular Working Party on Combined Transport.¹³ There, the need was stressed to achieve: “an international legal régime providing easily understandable, transparent, uniform and cost-effective liability provisions for all relevant transport operations, including transshipment and temporary storage, from the point of departure to the point of final destination.”¹⁴ It is hard to disagree with that objective.

Recent transport law legislation in Germany resulted in the reformed part of the *Handelsgesetzbuch* dealing with carriage, freight forwarding and warehousing in an act dated 25 June 1998.¹⁵ The effect of the legislation is basically limited to domestic transports, since Germany retains its ratification of the international conventions relating to the different modes of transport.¹⁶

The aforementioned Working Party on Combined Transport set up by the Economic Council for Europe concluded that “a new attempt had to be made to arrive at international uniform and mandatory legislation on liability in international transport based on the existing unimodal liability regime.”¹⁷ It was suggested that this should be at a global scale and not be restricted to sub-regional or regional areas.¹⁸ The new régime should be mandatory without the possibilities for the parties to opt out.¹⁹

The aforementioned amendments of the German *Handelsgesetzbuch* of 25 June 1998 contain an interesting new methodology. Here, in Section 449 on “*abweichende Vereinbarungen*,” it is permitted to depart from the mandatory rules on liability²⁰ but in principle “only by an agreement reached after detailed negotiations, whether for one or similar

12. See REGINA ASARIOTIS, H.J. BULL, MALCOLM A. CLARKE, R. HERBER, A. KIANTOU-PAMPOUKI, D. MORAN-BOVIO, JAN RAMBERG, R. DE WIT & S. ZUNARELLI, *INTERMODAL TRANSPORTATION AND CARRIER LIABILITY* (European Commission, Luxembourg: Office for Official Publications of the European Communities 1999).

13. See U.N. Econ. & Soc. Council [ECOSOC], Inland Transport Comm, Working Group on Combined Transport, Report: *Possibilities for Reconciliation and Harmonization of Civil Liability Regimes Covering Combined Transport*, U.N. Doc. RANS/WP.24/1999/2 (Nov. 12, 1999), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G99/242/42/PDF/G9924242.pdf?OpenElement> (last visited Nov. 7, 2008).

14. *Id.* ¶ 19.

15. See Rolf Herber, *The New German Transport Legislation*, 33 EUR. TRANSPORT L. 591 (1998).

16. See *id.* at 605.

17. See ECOSOC, *supra* note 13, ¶ 22.

18. See *id.* ¶ 23.

19. See *id.* ¶ 25.

20. See Herber, *supra* note 15, at 598-99.

contracts between the parties.”²¹ The methodology to disallow agreements on liability by standard form contracts rather than by “detailed negotiations” is correct, since it quite rightly recognizes the disappearance of real contractual intent in modern contracting techniques with standard form contracts and the exchange of electronic messages. Re-establishment of the traditional requirement of real contractual intent is understandable and, if such real intent could be proven, the important principle of freedom of contract is recognized even in the field of transport law. However, by necessity future contracting must rest upon standardized techniques. It is therefore questionable whether mandatory transport law could be retained in its present form even if supplemented by a possibility to depart from the mandatory law by a contractual arrangement based upon detailed negotiations between the parties.

While the UN Convention on Contracts for International Carriage Wholly or Partly by Sea²² bridges the gap between the Hague and the Hague/Visby Rules on the one hand and the Hamburg Rules on the other by removing the particular defenses available to the maritime carrier under the Hague and the Hague/Visby Rules and by increasing the monetary limits of liability to account for world inflation since the 1920s,²³ there may well be considerable difficulties to get a broad international consensus on the innovations contained in the UN Convention. One such controversial aspect concerns the expansion of the Convention to cover not only the maritime segment but also pre-carriage and on-carriage by other modes of transport²⁴ (the so-called “maritime plus”). Difficult problems arise in determining the applicability of the Convention in relation to other potentially applicable legal régimes to the same transport.²⁵ Further, the Convention as such does not actually cover transport additional to maritime transport as it merely gives the maritime carrier the option to include such additional carriage in his contract.²⁶ In practice, this may well result in considerable difficulties for the customers to determine whether or not the carrier has exercised that option. Furthermore, it is not helpful to expand a unimodal transport convention to cover other modes as well,

21. Section 449.

22. U.N. General Assembly, Commission on International Trade Law, Working Group III (Transport Law), Note from the Secretariat: *Draft Convention on the Carriage of Goods [Wholly or Partly] [By Sea]*, U.N. Doc. A/CN.9/WG.III/WP.101 (Nov. 14, 2007) [hereinafter *Convention*].

23. See *Convention*, *supra* note 22, art. 99, ¶ 6(b).

24. See Francesco Berlingieri, *A New Convention on the Carriage of Goods by Sea: Port-to Port or Door-to Door?* 8 UNIFORM L. REV. 265, 268 (2003).

25. See *id.* at 269.

26. See *Convention*, *supra* note 22, art. 1.1 (may provide for carriage by other modes in addition to the sea carriage).

since nowadays the important factor for customers is not exactly how goods have been carried and which mode of transport has been used but rather the desire to get the goods in the right condition to the right place at the right time.

The UN Convention also expands to cover anyone acting as a “maritime performing party.”²⁷ The definition of such a party would include anyone performing or undertaking 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 but with the exception that an inland carrier is only to be considered a maritime performing party to the extent that it performs or undertakes to perform its services exclusively within a port area.²⁸ The definition clearly includes stevedoring companies and cargo terminals in the seaport. This may cause some problem to multi-purpose cargo terminals in the seaports, as it would be difficult for them to determine to what extent the goods stored in the terminal are subjected to the maritime convention. Indeed, the failure of the 1991 Convention on Operators of Transport Terminals²⁹ to come into force (four states have ratified so far while five are required for the convention to enter into force)³⁰ presumably depends on the difficulties which would arise for cargo terminals being exposed to different systems of liability depending upon the contemplated modes of carriage.³¹ If that convention does come into force, the situation would be further aggravated.

Generally, the UN Convention evidences an imbalance between shippers and carriers. While the carrier enjoys the privilege of a monetary limitation of liability for a breach of *any* of its obligations,³² the shipper would incur an unlimited liability,³³ e.g. in case of incorrect information given to the carrier.³⁴ While it might be understandable that the maritime carrier would prefer to have joint and several liability comprising everyone acting as shipper and consignee, it may be

27. *See id.* arts. 4.1(a), 20.

28. *See id.* art. 1.7 (definition).

29. U.N. Convention on the Liability of Operators of Transport Terminals in International Trade, Apr. 19, 1991, available at http://www.uncitral.org/pdf/english/texts/transport/ott/X_13_e.pdf.

30. *See* UNCITRAL—Status of the 1991 U.N. Convention on the Liability of Operators of Transport Terminals in International Trade, http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/1991Convention_status.html (last visited Nov. 4, 2008).

31. *See* Enrico Vincenzini & Jan Ramberg, *La Convenzione Sulla Responsabilità Degli Operatori di Transport Terminals nel Commercio Internazionale, 1990-II DIRITTO DEI TRASPORTI* 121 (1990).

32. *See Convention, supra* note 22, art. 59.1.

33. *Compare id. with id.* art. 59.

34. *See id.* art. 28.

considered less acceptable that a party having had nothing to do with the contract of carriage should be liable under the Convention. Nevertheless, the Convention contains a definition of “documentary shipper.”³⁵ In order to qualify as such it is sufficient that the party accepts to be named as “shipper” in the transport document or electronic transport record.³⁶ This might be particularly harmful for Ex-Works and FOB-sellers who may, without knowing the consequences, accept to appear as documentary shippers in Bills of Lading. Also, the particular rules for the frequent case where no one appears to claim the goods at their destination³⁷ tend to erode the value of the Bill of Lading as a negotiable instrument controlling disposition of the goods in the sense of Art. 58 of the UN Convention on Contracts for the International Sale of Goods (CISG).³⁸ The situation becomes even worse when—at the last moment in the deliberations in the UNCITRAL Commission—the carrier becomes entitled to issue a negotiable bill of lading without a promise only to deliver the goods against one original or its electronic equivalent (Art. 47.2).

During the deliberations in the UNCITRAL Commission in June 2008, the African and Arab States, as well as Australia and Canada, took a firm stance against what they considered an improper imbalance between the interests of shippers and carriers.³⁹ Also, the problems caused by the expansion of the Convention to deal with non-maritime transport (the “maritime plus”) caused some States (Germany, Finland, and Sweden) to suggest a possibility to make reservations with respect to the applicability of the Convention to more than the maritime segment.⁴⁰ This was rejected by the majority and instead a compromise was reached to the effect that, whenever the maritime carrier extends the contract to cover non-maritime transport, existing conventions regulating such transport would supersede.⁴¹

While the regulation of maritime transport primarily relates to contracts and the particular role of Bills of Lading, air and land transport has developed with performing carriers in mind. It may well be that performing carriers should at least to some extent be controlled by

35. *See id.* art. 1.9.

36. *See id.*

37. *See Convention, supra* note 22, arts. 47-49.

38. U.N. Convention on Contracts for the International Sale of Goods (CISG), Apr. 11, 1980, 19 I.L.M. 668, available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf>.

39. In particular due to the exception for volume contracts in Article 1.2 (definition) and Article 80 (freedom of contract) and the long list of exemptions in Article 17.3.

40. Such reservation is, however, unnecessary as the option system would permit regional and global systems to co-exist.

41. *See Berlingieri, supra* note 24, at 269.

mandatory law but the position of contracting carriers is different. Contracting carriers offer a contract of carriage but entrust performance to somebody else and should—as other contracting parties in business-to-business transactions—be permitted to enjoy freedom of contract. Otherwise, we are facing a number of incomprehensible inconsistencies. Why is it that mandatory transport law covers loss of or damage to the goods—and in some cases also delay in delivery⁴²—but not other important parts of the contract, such as non-performance, misdelivery, freight and added services? Why should a CISG-seller selling DDP Incoterms 2000 be permitted to exempt himself totally from liability for events occurring during the transport,⁴³ while he cannot do so if he were to conclude two contracts, one contract of sale Ex-Works with additional transport contract(s)?

In my view, the only way forward lays in shifting the perspective back to performance and away from contract. Protection of customers could be maintained and further enhanced by pinning mandatory liability on the performing carriers and permitting direct actions against the carriers even when contracts of carriage have been entered into with other parties.⁴⁴ The present unimodal transport conventions could be maintained basically in their present form but supplemented by Protocols, where necessary, to exempt non-performing parties from the scope of applicability of the conventions. Such a move would facilitate the on-going efforts by the EU Commission to develop appropriate rules applicable to transport integrators and logistics service providers disassociated from the strait-jackets of mandatory transport law.⁴⁵

42. See *Convention*, *supra* note 22, art. 4; *cf. id.* art. 21.

43. See CISG, *supra* note 38, art. 79.

44. See JAN RAMBERG, *THE LAW OF TRANSPORT OPERATORS IN INTERNATIONAL TRADE* (Norstedts Juridik 2005).

45. See *id.* at 184-87.

