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# The Rotterdam Rules in a European multimodal context

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In this article, the Rotterdam Rules' solution of a 'mandatory modified network liability system' will be analysed in light of the European Commission's attempt to establish a European regional instrument on multimodal carrier liability. Whether or not the Rotterdam Rules provide a sufficiently effective alternative to the European Commission's objective to see increased use of multimodal transport by providing transport users with a predictable liability system is debatable; it is arguable that despite the incompleteness of the Rotterdam Rules on multimodal carrier liability, the European Commission should not try to navigate around them but rather accept the modified network liability system as a sufficient alternative.

## I The Rotterdam Rules – a maritime plus convention<sup>1</sup>

### I.1 One step forward

Multimodal transport, normally defined as a contract of carriage involving more than one mode of transport,<sup>2</sup> has been on the international regulatory agenda for many years. To date there has been no success in achieving uniformity of law in its international regulation.<sup>3</sup> When the new maritime Convention on International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules)<sup>4</sup> breaks with unimodal tradition and includes '... carriage by other modes of transport in addition to the sea carriage',<sup>5</sup> it embodies a big step forward. However, it is clear that the main area of the Convention is still maritime carriage. The multimodal part is only an 'addition', a fact that has given the Rotterdam Rules the position of a 'maritime plus' convention. Nevertheless, if the Rotterdam Rules enter into force the global transport industry will be provided with a legal instrument harmonising the rules on carrier liability in 'wet' multimodal transport, or multimodal transport with a sea leg.

The parties to the Rotterdam Rules could be both the European Member States as well as the European Union (EU) as such (see Rotterdam Rules Articles 88, 93). Up to October 2010

<sup>1</sup> I would like to thank my colleague Professor Erik Røsæg for his valuable comments on a previous draft of this article.

<sup>2</sup> Multimodal carriage is normally defined as carriage consisting of at least two modes of transport, but only one contract. See Ralph de Wit *Multimodal Transport Carrier Liability and Documentation* (Lloyds of London Press 1995) p 1.

<sup>3</sup> On past attempts to regulate multimodal transport see M Hoeks *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer The Netherlands 2010) at 19–22.

<sup>4</sup> United Nations Convention on International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules) (formally adopted by UN General Assembly December 2008, annexed to General Assembly Resolution 63/122).

<sup>5</sup> Rotterdam Rules art 1.1.

only the following Member States have signed the Convention: Denmark, Greece, France, Luxembourg, the Netherlands, Poland and Spain. We might see a split in the traditional Nordic transport law cooperation: Denmark and Norway have signed; Finland, Sweden and Iceland have not. From an international point of view it is interesting that the United States has signed but China has not.<sup>6</sup> So far, however, no state has ratified the Convention. If a sufficient number of states do ratify (under Article 94 of the Convention 20 ratifications are required) and the Rotterdam Rules become applicable in any of these countries, there will certainly be an impact on the EU.

Currently the European Commission is working towards a form of transport that is:

... sustainable, energy-efficient and respectful of the environment. [The] ... aim is to disconnect mobility from its adverse effects. This means, above all, promoting co-modality, i.e. optimally combining various modes of transport within the same transport chain, which is the solution for the future in the case of freight.<sup>7</sup>

A regional legal instrument is considered to be a prerequisite for this, incorporating a transparent and predictable liability regime. The lack of legal clarity has been considered a 'transaction cost' or barrier, keeping the consignor from choosing the multimodal transport alternative which is seen as more environmentally friendly than, for example, road transport.<sup>8</sup>

## 1.2 Questions to be addressed

One question is whether or not the modified network liability system of the Rotterdam Rules provides a sufficiently effective alternative to the European Commission's objective to see increased use of multimodal transport by providing transport users with a predictable liability system.

Under a network liability system predictability is linked to the question of how complicated it is for service users to predict liability in case of lost, damaged or delayed goods. This again is linked to the question of what liability system to apply. In the Rotterdam Rules this question is dealt with mainly in Articles 26 and 82. Article 26 governs the applicability of the Rotterdam Rules on carriage preceding or subsequent to sea carriage and Article 82 governs the status of international conventions governing the carriage of goods by other modes of transport. While the latter regulates the relationship between existing conventions at a time when the Rotterdam Rules enter into force, Article 26 also takes into account the possibility of a new convention, or international instrument, covering the same area.<sup>9</sup>

The challenge in multimodal carriage has been to decide which convention is to be used in which situations. There is, by definition, more than one mode of transport involved in a multimodal carriage and thus several possible legal regimes may apply. The problem has usually been solved by establishing under which means of transport the damage, loss or incident causing delay occurred and then applying the appropriate unimodal legal regime. This approach is based on an understanding of the multimodal contract as a 'mixed contract' which is subject to an accumulation of regulations. With regard to the applicable convention the contract is considered as the sum total of unimodal contracts. This implies the use of different unimodal conventions in solving legal disputes arising under a multimodal contract

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<sup>6</sup> Twenty-two states have now signed. However, the Rotterdam Rules will only come into force one year after the Convention has been ratified by 20 contracting states, which still appears some time away.

<sup>7</sup> The European Commission, [http://ec.europa.eu/transport/sustainable/index\\_en.htm](http://ec.europa.eu/transport/sustainable/index_en.htm).

<sup>8</sup> Discussed below at 2.1.

<sup>9</sup> Such a legal regime exists in the Andean Community. See N Martínez Devia *The Multimodal Transport System in the Andean Community: An Analysis from a Legal Perspective* (LL.M Business Corporate and Maritime Law Erasmus University of Rotterdam 2008), available at [http://www.immta.org/uploads/The\\_multimodal\\_transport\\_system\\_in\\_the\\_Andean\\_Community.pdf](http://www.immta.org/uploads/The_multimodal_transport_system_in_the_Andean_Community.pdf).

of carriage. Where carrier liability is concerned this is known as the 'network liability solution'.<sup>10</sup>

However, the network liability solution does not provide a solution when the damage, loss or event causing delay cannot be located or when the location is not exact because the damage, loss or delay has occurred gradually during the carriage. Also, when arrival of the cargo is delayed it may well be difficult to locate exactly where in the transport chain the delay occurred. These problems are familiar, particularly in container transport where the problem of legal unpredictability is particularly acute. A network liability system with a fall-back solution for damage, loss or delay that is not located might, however, solve this problem. Such a system has been defined as the 'modified network liability system' and is the solution adopted in the Rotterdam Rules. A modified network liability system will apply if there is no other (unimodal) liability system applicable or if the damage is not localised.<sup>11</sup>

Efforts so far to draft a European regional liability regime on multimodal transport have been based on an understanding of the multimodal contract as *sui generis*, a contract with its own characteristics, different from unimodal contracts of transport. This point of view was taken by the legal experts assisting the European Commission in drafting the 2005 proposal for an EU regional multimodal regime.<sup>12</sup> The proposal's provisions were accordingly based on an effective and predictable 'uniform system', meaning one liability under a multimodal contract, regardless of where in the transport chain the damage, loss or delay occurred. This approach was possible because at the time of the proposal there was no international regulation on multimodal transport. Nevertheless, the expert group recognised that a European regime on multimodal transport might conflict with existing unimodal conventions, such as the Convention on the Contract for the International Carriage of Goods by Road (CMR),<sup>13</sup> although it is stated in the proposal: 'The intention behind the Regime, however, is that in all such cases it is the Regime and not CMR that should prevail'.<sup>14</sup>

The Rotterdam Rules are going to change this picture. If they enter into force there will be an operable international multimodal regime, a fact that must be taken into consideration when discussing a regional multimodal legal regime for the EU. The *sui generis* approach will not solve the problem of a 'collision of conventions' if the EU decides on a regional solution for international European multimodal transport. On the contrary, there will be two competing international legal regimes.

In this article the European debate on a regional solution to the problem of liability in international (European) multimodal transport will be presented in section 2. In section 3 the modified network solution of the Rotterdam Rules will be outlined, although the content of the liability system of the Rotterdam Rules or any of the other applicable liability systems will not be addressed. The question of whether or not the modified network liability system of the Rotterdam Rules might serve as an alternative for the EU will be discussed in section 4. It will be argued that, despite the incompleteness of the Rotterdam Rules on multimodal carrier liability, the European Commission should not try to navigate around them but rather accept the modified network liability system as a sufficient alternative. This would also avoid the question of EU competency and the conflict between Member States' obligations both to an international convention and to the Community.

<sup>10</sup> De Wit (n 2) pp 138–42 uses the term 'pure' network liability.

<sup>11</sup> Ibid 142. Other authors use this terminology; see eg T Nikaki 'Conflicting Laws in "Wet" Multimodal Carriage of Goods: The UNCITRAL Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]' (2006) 37 Journal of Maritime Law & Commerce 521–44 at p 528.

<sup>12</sup> Integrated Services in the Intermodal Chain (ISIC) Final Report Task B: Intermodal Liability and Documentation (Southampton 28 October 2005) (ISIC 2005) p 13.

<sup>13</sup> Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva 19 May 1956).

<sup>14</sup> ISIC 2005 (n 12) p 13. There is more on the applicability of different unimodal conventions below at section 3.2.

## 2 The European multimodal context

### 2.1 A European transport policy on sustainable transport

One might ask why the European Commission has stepped into the area of international transport law and is discussing the question of a possible regional legal regime for multimodal transport. The answer lies in the development of a Common European Transport Policy (CTP), which started more than 15 years ago with a White Paper on the construction of a common framework for sustainable mobility.<sup>15</sup> The challenge for the Community's transport system is defined as 'how to provide, in the most efficient manner, the services that are necessary for the continued success of the single market and the mobility of the individual traveller, while continuing to reduce the inefficiencies and imbalances of the system and safeguarding against the harmful effects that increased transport activity generates'.<sup>16</sup> An efficient and sustainable transport system is, in other words, seen as an essential prerequisite for the Inner Market and the EU's competitiveness.

The White Paper was followed in 1997 by a Communication from the European Commission on Intermodality and Intermodal Freight Transport in the EU.<sup>17</sup> This was based on the recognition of the fact that the transport sector had proved incapable of appropriate self-regulation. From 1970 to 1997, European freight transport had increased by about 70 per cent.<sup>18</sup> In the same period, road transport had increased its market share from nearly 50 per cent to 72 per cent.<sup>19</sup> Consequently, the transport systems had become a source of environmental and social costs. A 'business as usual' approach was thus not considered feasible and the 'concept of intermodality' was presented as a solution to the problems: 'The objective is to develop a framework for an optimal integration of different modes so as to enable an efficient and cost-effective use of the transport system through seamless, customer-oriented door-to-door services whilst favouring competition between transport operators'.<sup>20</sup>

### 2.2 The identified need for a European liability regime

#### 2.2.1 *Unpredictable liability rules are a hindrance for increased multimodal transport*

The reason why the transport industry itself was incapable of reforming the transport system was, according to economists, that any change of mode in the current modally-oriented transport system involves a change of system, rather than a mere technical transshipment. This change of system creates, according to the Commission, 'friction costs'<sup>21</sup> that prevent the formation of a competitive intermodal transport chain. In other words, in order to strengthen the intermodal transport chain, the friction costs would have to be identified and reduced.<sup>22</sup> In its Communication, the Commission identified friction costs at three levels and suggested a range of actions to reduce them.

The first level of friction costs was linked to infrastructure, the second to the points of transport between modes, and the third to the existing mode-based information transmission

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<sup>15</sup> White Paper 'The Future Development of the Common Transport Policy – A Global Approach to the Construction of a Community Framework for Sustainable Mobility' COM(92) 494 final, Bulletin of the European Communities Supplement 3/93.

<sup>16</sup> *ibid* para 92.

<sup>17</sup> COM(97) 243 final.

<sup>18</sup> *ibid* para 2. Due to the financial crisis the European transport industry is facing a decline. This is temporary, however, and does not affect the structure of the industry.

<sup>19</sup> *ibid* para 3.

<sup>20</sup> *ibid* para 16.

<sup>21</sup> Friction costs are defined as a measurement of the inefficiency of a transport operation. They are expressed in the form of higher prices, longer journeys, more delays, less punctuality, lower availability of quality services, limitations on the types of goods available, higher risk of damage to cargo and more complex administrative procedures (*ibid* para 26).

<sup>22</sup> *ibid* 27.

system and other administrative bottlenecks. At this level, legal friction costs were also identified. Each mode of international transport in Europe is regulated by different liability conventions. In addition, special liability regimes exist for national transports in several Member States. The problem of determining where in the transport chain the ultimate responsibility lies for cargo damage, loss or events causing delay was clearly a friction cost in the terminology of the Commission. The uncertainty in relation to the issue of carrier liability during multimodal transports was, in other words, considered to form an obstacle to an efficient European transport chain.

### 2.2.2 *The solution: a regional voluntary multimodal liability regime*

The Commission for this reason discussed the idea of introducing a *voluntary* multimodal liability regime applicable within the EU.<sup>23</sup> The conditions for liability for damaged or lost (and probably also delayed) goods should be transparent. They should not be mode-specific and should not distinguish between national and international transport. The carrier's liability should also cover any 'value added logistics activity ... for example warehousing or product customisation at the nodal point'.<sup>24</sup> This spelt out the Commission's desire for a legal solution in which the concept one transport – one document – one liability would be realised; in other words, the basic ingredients of a uniform liability system.

### 2.2.3 *The 2005 proposal: uniform multimodal liability rules*

Different groups of independent legal experts have been engaged in the process of finding a solution. The first published its work in 1999.<sup>25</sup> Without drawing any conclusions on the content of such a regime, it is clear that the group considered that a regional legal instrument would have advantages, particularly in resolving the question of the carrier's liability during a multimodal transport.

The second group of experts<sup>26</sup> started its work within a project on 'Integrated Services in the Multimodal Chain' (ISIC). In 2005 a draft set of uniform liability rules for multimodal EU transport was presented (the 2005 proposal).<sup>27</sup> The expert group drafting the 2005 proposal had a clear remit; they were to propose a set of uniform multimodal liability rules which 'concentrate the transit risk on one party and which provide for strict ... liability of the contracting carrier ... for all types of losses (damage, loss, delay) irrespective of the modal stage where a loss occurs and of the causes of such a loss'.<sup>28</sup>

The proposed basis of liability was accordingly 'strict' in the sense that the multimodal carrier, or 'transport integrator', could not prove innocence but would be excused if the loss, damage or delay was caused by circumstances beyond its control. The proposed limitation of liability was 17 SDR per kilogram of gross weight, which at the time was the same as the highest monetary limit found in unimodal regimes.<sup>29</sup> This quite 'tough' liability system was softened by the fact that the proposal did not attempt to provide a mandatory new regional legal instrument; on the contrary, parties could choose to 'opt out' and make other agreements.

<sup>23</sup> In addition to the legal questions, the concept of introducing an intermodal real-time electronic information and transaction system is discussed as a part of action group C (ibid paras 71–8).

<sup>24</sup> ibid para 81.

<sup>25</sup> 'Multimodal Transportation and Carrier Liability' (Study co-funded by the European Commission Director General for Transport DGVII June 1999).

<sup>26</sup> Prof M A Clarke (St John's College – Cambridge), Prof R Herber (University of Hamburg), Dr F Lorenzon (Institute of Maritime Law – Southampton) and Prof J Ramberg (University of Stockholm).

<sup>27</sup> ISIC 2005 (n 12).

<sup>28</sup> ibid p 6.

<sup>29</sup> This applies in international air and rail carriage. See Convention for the Unification of Certain Rules for International Carriage by Air (Montreal 28 May 1999) (the Montreal Convention) art 23 and Convention Concerning the Contract for International Carriage by Rail (COTIF) – Annex B Uniform Rules Concerning the Contract of International Carriage of Goods by Rail 1999 (CIM) (COTIF-CIM) art 30.

The 2005 proposal sought to provide the cargo interests with a simple and predictable method of indemnification irrespective of issues such as the transport integrator's rights of recourse against sub-contractors. This aspect was accordingly left out of the proposal.

A 'contract of transport' was suggested, whereby a transport integrator undertakes to 'perform or procure'<sup>30</sup> the transport of goods from a place in another country, whether or not through a third country, involving at least two different modes of transport, and to deliver the goods to the consignee. In the comments attached to the provision, the expert group clearly stated that the European regime should not be applicable to a contract of carriage of goods '... to the extent that such a contract is within the scope of unimodal regimes ...'.<sup>31</sup> This 'step back' formulation seems more realistic than the presumption of a predominant EU regime based on a *sui generis* approach.<sup>32</sup>

## 2.3 A modified plan after discussions with stakeholders

### 2.3.1 The European freight action plan

The 2005 proposal has been discussed extensively by the Commission and the stakeholders. On the basis of these discussions, a specific action plan for freight transport in Europe, the Freight Transport Logistic Action Plan,<sup>33</sup> was launched by the Commission in 2007. Several actions to improve efficiency and sustainability in Europe were presented, including working towards a multimodal regulatory structure for liability.<sup>34</sup> The ambition of the Commission had clearly diminished during 10 years of discussions with the stakeholders. According to the 2007 action plan, the Commission would address two different liability systems for multimodal transport:

- 1) A European standard liability clause for all transport operations. This could be a fall-back clause, meaning that if nothing else is agreed between parties, this clause would automatically apply. This is in line with the proposal of the 2005 expert group and would be in line with the need for predictability and efficiency spelled out by the Commission.
- 2) A European liability rule to cover those parts of the logistics chain that currently fall outside existing mode-based liability regimes.

The latter is far cry from the original idea of a uniform legal instrument. A liability rule designed to fill in gaps between existing liability regimes would, however, be very close to the solution reached in the Rotterdam Rules. According to the 2007 action plan, such a proposal might have been effected in 2010.<sup>35</sup> A difficulty for the European Commission all along has been to satisfy the stakeholders as well as achieve its own ideal of a rapid expansion of the multimodal transport chain. It thus ordered a third group of legal experts to address the question.

### 2.3.2 The 2009 expert report

The latest report was published on the Commission website in June 2009<sup>36</sup> and is titled 'study on the details and added value of establishing a (optional) single transport (electronic) document

<sup>30</sup> By adding the word 'procure' the expert group extended the responsibility of the carrier from the traditional tasks of a carrier to also organising and taking part in the preparation of the carriage. This raises several legal problems regarding freight forwarders and other groups involved in preparing for the actual carriage; these questions will not be addressed here.

<sup>31</sup> ISIC 2005 (n 12) p 16.

<sup>32</sup> The expert group made it clear that the proposed regime was intended to be *sui generis*, but even without this reservation 'collisions of conventions' were regarded unlikely and if they should arise, the EU regime should prevail (ibid pp 12–13).

<sup>33</sup> COM(2007) 607 final.

<sup>34</sup> ibid 2.3.3.

<sup>35</sup> ibid. By November 2010 no proposal has been brought forward by the Commission.

<sup>36</sup> [http://ec.europa.eu/transport/strategies/studies/strategies\\_en.htm](http://ec.europa.eu/transport/strategies/studies/strategies_en.htm).

for all carriage of goods, irrespective of mode, as well as a standard liability clause (voluntary liability regime), with regard to their ability to facilitate multimodal freight transport'.<sup>37</sup> The expert group undertook a survey on the need for a uniform liability system to boost multimodal transport in the EU and on the basis of this made recommendations to the European Commission.<sup>38</sup> The result of the survey was that the stakeholders agree on the need for a uniform system but cannot accept any increase in liability.<sup>39</sup> Also, most stakeholders believe that any attempt at regulating multimodal transport should take place at a global level. A European regime would add a new layer of complexity to the already complex cargo liability regimes.<sup>40</sup>

Nevertheless, if the European Commission insists on a regulatory instrument on a European level, this should, according to the third expert group, focus on carrier liability and be connected to a prior debate on the policy matters behind the proposal. The expert group therefore suggests 'mandatory uniform rules for all matters other than liability limits'. The liability limits should be based on an opt-out system, under which the parties are allowed to tie their contract to any of the existing unimodal liability limits. In the absence of an express contractual agreement the rules of the 'longest mode' apply and in cases of disagreements as to which is the longest mode, the 17 SDR/kg limit will apply.<sup>41</sup> This could be characterised as a 'modified uniform liability system'.

It is questionable whether this last proposal will satisfy the European Commission or whether the EU will be better off with the Rotterdam Rules, which are in line with the alternatives presented in the 2007 Freight Logistic Action Plan. The Rotterdam Rules offer a modified network liability system (Article 26) combined with a wide step back clause regarding extended applicability of existing unimodal regimes in multimodal transport (Article 82). They also offer a global solution as required by the European stakeholders in the 2009 survey. However, it is not a truly multimodal legal regime.

Whilst the position of the European Commission, as the EU's executive body is still open, other institutions within the EU system are discussing the question of whether or not the multimodal liability system under the Rotterdam Rules can be a solution for the European quest for a predictable liability system. The European Parliament has gone some way in encouraging the Member States to sign up to the Rotterdam Rules as can be seen in a resolution on strategic goals and recommendations for the EU's maritime transport policy until 2018. The Council of the European Union has still not reached an official conclusion, but is discussing the matter.

In an informal meeting in Antwerp, 15–16 September 2010, the Council of Ministers of Transport of the European Union, when discussing full integration of waterborne transport into the EU transport and logistics chains, concluded that seamless co-modal logistics also require co-modal arrangements for liability issues and that 'the Rotterdam Rules seem to have great potential'. The question on how the Rotterdam Rules could serve this purpose, however, required, according to the Ministers, further examination.<sup>42</sup>

<sup>37</sup> The study was carried out for the Directorate-General for Energy and Transport in the European Commission and expresses the opinion of Gomez-Acebo & Pombo, Abogados SCP.

<sup>38</sup> The stakeholders comprised 27 EU Member States, the Secretariats of the existing and draft international conventions, the Secretariats of present contractual arrangements, different port authorities, airports, ship-owners, carriers, providers of logistic services, academics etc. 183 questionnaires were sent out, to which 58 responses were received and 29 interviews were held (ibid p 5).

<sup>39</sup> This was also the conclusion of the UNCTAD report 'Multimodal Transport: The Feasibility of an International Legal Instrument' UNCTAD/SDTE/TLB/2003/1.

<sup>40</sup> The 2009 expert report (n 36) p 8.

<sup>41</sup> ibid pp 13–14.

<sup>42</sup> Note to the Presidency to the Council of Ministers of Transport, Brussels, 22 September 2010, TRANS245/MAR87-13971/10, at 5. <http://register.consilium.europa.eu/pdf/en/10/st13/st13971.en10.pdf>.

### 3 The modified network liability system of the Rotterdam Rules

#### 3.1 Introduction

The basic objective of the Rotterdam Rules is to regulate international carriage of goods by sea and 'multimodal carriage when the carriage has a sea leg'. If adopted the state parties must make the Rotterdam Rules applicable to contracts of carriage which '... shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage' (Article 1(1)). Furthermore, this only concerns carriage that is international and linked to a contracting state (Article 5). Because of the maritime plus scope of the convention not only the port of delivery and discharge but also the place of receipt and delivery are accepted as linking factors. Both the carriage end to end as well as the sea part of it must be international.

The Rotterdam Rules go further than the current maritime conventions on carriage of goods<sup>43</sup> in that they present a harmonised instrument regulating almost the entire contractual relationship between the parties to a contract of carriage.<sup>44</sup> They not only regulate the obligations of the carrier (chapter 4), but also the obligations of the shipper to the carrier (chapter 7). This article relates, however, only to the liability system of the Rotterdam Rules applicable on multimodal contracts and the question of whether or not it provides a sufficient alternative for the European Commission.

The modified network liability system applicable to multimodal contracts of carriage is based on an interaction between the different unimodal liability systems on carriage by road,<sup>45</sup> rail,<sup>46</sup> air<sup>47</sup> and inland waterway<sup>48</sup> and the liability system of the Rotterdam Rules.<sup>49</sup> Generally speaking, the carrier's liability will vary according to where in the multimodal chain the damage, loss or event causing delay occurred. The main principle is that the mode-specific liability system will apply also under a multimodal contract of carriage. However, due to the fact that the period of responsibility of the carrier under the Rotterdam Rules is extended to include the place of receipt to the place of delivery,<sup>50</sup> both the Rotterdam Rules and different unimodal liability regimes may be applicable simultaneously and lead to conflicts of conventions. Also, the unimodal conventions have an extended scope of application and are applicable to what might be seen as traditional maritime carriage.

In order to avoid conflicts with the unimodal conventions, the Rotterdam Rules liability system includes wide step back clauses laid down in Articles 26 and 82. Article 26 regulates the situation where the liability regime of the Rotterdam Rules has extended its scope of application to multimodal carriage outside the vessel. Article 82, on the other hand, regulates situations

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<sup>43</sup> International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels 1924 (the Hague Rules), Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels 1968 (the Hague-Visby Rules) and United Nations Convention on the Carriage of Goods by Sea, Hamburg 1978 (the Hamburg Rules).

<sup>44</sup> For more on the extended purpose of the Rotterdam Rules see P Mankowski 'The Rotterdam Rules – Scope of Application and Freedom of Contract' (2010) 2:1/2 European Journal of Commercial Contract Law 9–21 p 12.

<sup>45</sup> CMR (n 13).

<sup>46</sup> COTIF-CIM (n 29).

<sup>47</sup> Both the Warsaw Convention of 1929 with amendments and the Montreal Convention of 1999, which is meant to consolidate and replace the Warsaw Convention, are operating alongside each other. All EU members have, however, acceded to the Montreal Convention by Regulation (EC) No 889/2002 and Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by the Council (13 May 2002). In this article reference will be made only to the Montreal Convention.

<sup>48</sup> Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (CMNI) (Budapest 22 June 2001).

<sup>49</sup> On the liability system of the Rotterdam Rules, see A Diamond 'The Rotterdam Rules' (2009) 4 Lloyd's Maritime and Commercial Law Quarterly 445–536 at 461–91. See also S Yuzhou, H Hai Li 'The New Structure of the Basis of Liability for the Carrier', [www.rotterdamrules2009.com/cms/index.php?page=text-speakers-rotterdam-rules-2009](http://www.rotterdamrules2009.com/cms/index.php?page=text-speakers-rotterdam-rules-2009).

<sup>50</sup> Rotterdam Rules art 12.

where the unimodal regimes have extended their scope of application to what might be characterised as traditional maritime carriage, such as when the cargo is on board a ship or if the sea leg is supplementary to the land transport. In the area of aviation, the legal regime has expanded to a great extent and the step back clause in Article 82 is correspondingly wide.

## 3.2 Article 26 – Carriage preceding or subsequent to sea carriage

### 3.2.1 Introduction

Article 26 is the key provision for understanding the limited network liability system of the Rotterdam Rules. The provision distinguishes between damage, loss or circumstances causing delay that occurred 'solely before ... loading ... or solely after ... discharge from the ship' and other situations connected to the cargo being onboard the vessel, or when the damages, losses or events causing delay cannot be localised or are progressive. In the latter situations the liability system laid down in the Rotterdam Rules chapter 5 is applicable. In the first situation, the Rotterdam Rules step back for other international applicable legal regimes as specified in Article 26 provided this international instrument contains mandatory liability provisions.

### 3.2.2 Solely outside the vessel

The difference between the liability system of the Rotterdam Rules and other liability systems starts from the event causing damage, loss or delay in delivery of the goods. According to paragraph 1 of Article 26 the Rotterdam Rules do not prevail over those provisions of another international instrument regulating this question if the event occurred '... during the carrier's period of responsibility but solely before ... loading onto the ship or solely after ... discharge from the ship'.

The word 'solely' suggests that the event should not be subject to any concurring or contributory event after loading or before discharge and the burden of proof lies with the claimant, normally the shipper or receiver. If the damage, loss or delay started during the land leg of a multimodal carriage governed by the Rotterdam Rules, but continued during the sea leg (or vice versa) then the Convention will prevail over, for example, the CMR. A typical case could be the refrigeration system starting to malfunction during the land leg of the transport and worsening during the sea voyage.

If it cannot be identified where the damage, loss or event causing delay occurred, it cannot be said that the event took place solely outside the vessel and the Rotterdam Rules will apply as a default system. This is certainly a very important rule as a high percentage of container cargo damage is concealed.<sup>51</sup> A harmonised fall back solution for undisclosed events causing loss, damage or delay will definitely be one of the most important achievements of the Rotterdam Rules if they enter into force. The problem that exists when the damage, loss or delay cannot be localised is at present partly solved, as regards liability limitation, through different optional general conditions, such as the FIATA FBL 1992 and MULTIDOC 95, both based on the UNCTAD/ICC Rules for Multimodal Transport Documents 1992.<sup>52</sup>

### 3.2.3 The mixed contract approach

The Rotterdam Rules presuppose that there might be conflicts between the new convention and existing unimodal conventions. As mentioned above, this might be seen as an acceptance of multimodal contracts as mixed contracts to which the unimodal legal regime of the particular mode where the damage, loss or delay is located will be applicable. The Rotterdam Rules, as a result, step back for conventions that:

<sup>51</sup> C Hancock 'Multimodal Transport and the New UN Convention on the Carriage of Goods' (2008) 14 JIML 484–95 at p 490.

<sup>52</sup> The text of the Rules can be found in ICC publication No 481.

... 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 circumstances causing delay in their delivery occurred.<sup>53</sup>

Such 'hypothetical contracts' are sufficient for the Rotterdam Rules to step back. It is not necessary to prove the unimodal legal regime applicable if there is no separate contract as they presuppose such applicability.<sup>54</sup> For example, if road carriage is part of a multimodal transport with a sea leg and the Rotterdam Rules are applicable, the system is that the CMR liability system will govern damages located to the road leg, provided that the preconditions of Article 26 are otherwise fulfilled.

The same approach was taken by the English Court of Appeal in the *Quantum Corporation Inc v Plane Trucking* decision<sup>55</sup> and by the Danish Maritime and Commercial Court in a ruling from 2008.<sup>56</sup> The courts approached the question on applicability from a mixed contract point of view and applied the appropriate unimodal regime, regardless of the contracts being multimodal.<sup>57</sup>

However, a more formal approach has been taken by the Bundesgerichtshof (BGH) (German Supreme Court) in Germany in a decision of 17 July 2008.<sup>58</sup> The question for the court was whether or not the CMR is applicable to multimodal contracts in situations other than the 'piggyback' situation regulated in Article 2. The court stated that the wording of CMR Article 1(1) does not exclude multimodal contracts.<sup>59</sup> However, because of a legal opinion given by the German Government (the Bundesregierung), stating that the CMR is only applicable when the transport is undertaken solely by road, the BGH ruled that CMR cannot be used on multimodal transport.<sup>60</sup> This approach has been followed up by the German legislator when passing the national provisions on multimodal transport in BGH paragraphs 452ff.<sup>61</sup> According to the German view, no collision of conventions will take place. Despite the approach of the German court, the rulings from the other European courts indicate the necessity of including a provision such as Article 26 in a network liability system. Under both Danish and English law there may be conflicts between unimodal liability systems and the multimodal liability system of the Rotterdam Rules.

<sup>53</sup> Rotterdam Rules art 26(a).

<sup>54</sup> See also K Haak 'Carriage Preceding or Subsequent to Sea Carriage under the Rotterdam Rules' (2010) 2:1/2 European Journal of Commercial Contract Law 63–71 pp 64 and 70.

<sup>55</sup> [2002] 1 WLR 2678; [2003] 1 All ER 873; [2002] EWCA Civ 350. The court ruled that CMR was applicable to the road leg of a multimodal transport operation under a single contract, performed from Singapore to Paris by air and by road from Paris to Dublin. The road leg was a roll-on/roll-off (ro-ro) carriage from Paris across the English Channel to Manchester (United Kingdom) which would have continued across the Irish Sea to Dublin (Ireland), if not for the intervention of thieves. The first question was on the interpretation of CMR art 1. As this attaches to contracts, it could be argued that it is the nature of the contract which must be examined. In this case there was a single contract of carriage pursuant to which the goods were to be carried from Singapore to Dublin. One could argue that because this was predominantly a contract for carriage by air the CMR did not apply – not even to the stage from Paris to Dublin. This reasoning was rejected by the Court of Appeal: to characterise the contract overall would open up unwanted metaphysical arguments about the nature of a multimodal contract. According to CMR art 1, together with art 17, the liability regime applies from the time that goods are taken over. The second question was therefore when the goods were considered taken over, in Singapore or in Paris. The Court of Appeal concluded that the 'place of taking over and delivery of the goods under Article 1(1) are to be read as referring to the start and end of the contractually provided or permitted road leg', in this case Paris. Under CMR, 'take over' in the sense of arts 1 and 17 can occur without any physical takeover by the carrier in question.

<sup>56</sup> U 2008.1638H. The court ruled that the CMR was applicable to goods damaged under the road leg in Germany during a carriage from Billund (Denmark) to Narita (Japan) via Frankfurt (Germany). An airway bill was issued by the air sub-carrier for a carriage from Billund to Narita, accordingly the carriage should be regarded as carriage by air, and thus governed by the Montreal Convention. However, the court ruled that as the contractual carrier had used its option to substitute part of the carriage by another mode of transport, this per se triggered the applicability of the CMR (which in this case was not used as the claim was superseded).

<sup>57</sup> Other examples from the Netherlands on the same line are given by Haak (n 54) p 69.

<sup>58</sup> Published in *Transportrecht* (2008) 365–368.

<sup>59</sup> *ibid* 21.

<sup>60</sup> *ibid* 23.

<sup>61</sup> *ibid* 24.

However, Article 26 does not solve all the problems. If the loss, damage or event causing delay occurred at different stages of the transport, is non-localised or progressive ‘... then two international instruments may both apply with potentially conflicting result.’<sup>62</sup> Neither Article 26 nor Article 82 regulates all the possible conflict situations that might occur.

### 3.3 Article 82 – Collision with unimodal conventions in multimodal transport

#### 3.3.1 Scope of Article 82

Article 82 deals with the relationship between the Rotterdam Rules and other international conventions regulating carriage by air, road, rail or inland waterway, as far as the relevant conventions are in force at the time the Rotterdam Rules enter into force. At first glance it seems that Article 82 is a general conflict provision and that nothing in the Rotterdam Rules affects the application of any unimodal convention regarding the liability of the carrier for loss of or damage to the goods. However, this is not the case. The general step back rule is only applicable to conflicts with the international conventions on carriage of goods by air such as the Montreal Convention<sup>63</sup> (see Article 82(a)). In all other cases the step back clause is restricted to certain situations mentioned in Article 82(b)–(d).

#### 3.3.2 Carriage by air

According to Article 82(a), the Rotterdam Rules step back from any conflict with any convention governing the carriage of goods by air ‘... to the extent [it] ... according to its provisions applies to any part of the contract of carriage’. The Montreal Convention is a unimodal convention with a wide scope of application. According to Article 1, it applies to all international carriage of cargo by aircraft for reward. What this means more precisely is regulated in chapter III Liability for the Carrier and Extent of Compensation for Damage where Article 18(1) states that the carrier is liable for damage to cargo and delay of cargo when the event which caused the damage or delay took place ‘during the carriage by air’. According to Article 18(3) this means the period during which the cargo is ‘in the charge of the carrier’. Regarding combined or multimodal carriage, Article 38(1) states that ‘... the Convention shall, subject to paragraph 4 of Article 18, apply only to the carriage of air’.

From Article 18(4) we can deduce that inside the airport carriage of air includes carriage by land, sea or inland waterway. A combination of carriage by sea and air inside an airport is perhaps not very practical. However, carriage outside the airport might also be included if ‘... such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment ...’ or in the case when the carrier, without the consent of the consignor, substitutes the air carriage by other modes of transport.

The Montreal Convention is accordingly applicable to other modes of transport either within the airport area or, for example, as part of a door-to-door agreement, or when the carrier, by himself, substitutes the mode of transport. In other words, the Montreal Convention might be applicable in situations when the air carriage includes a sea leg, a situation when the Rotterdam Rules might also apply. If such a situation occurs the Rotterdam Rules state that they will not affect the application of ‘any convention governing the carriage of goods by air’ (Article 82(a)).

Article 82(a) was drafted ‘... in order to ensure that there is no conflict between the [draft] convention and the Montreal Convention’<sup>64</sup> and is by nature a ‘general conflict provision’. This is different from the other provisions in Article 82 which all are ‘specific conflict

<sup>62</sup> Diamond (n 49) p 456.

<sup>63</sup> Both the Warsaw Convention of 1929 with amendments and the Montreal Convention of 1999, which is meant to consolidate and replace the Warsaw Convention are operating alongside each other. See n 47.

<sup>64</sup> F Berlingieri ‘Multimodal Aspects of the Rotterdam Rules 2009’ at p 15, available at <http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20F.%20Berlingieri%2013%20OKT29.pdf>.

provisions' designed to cover particular situations when other unimodal conventions may apply to the carriage by sea performed by a vessel. In a conflict between the Rotterdam Rules and the Montreal Convention the result is quite predictable: the Montreal Convention will prevail.

### 3.3.3 Road carriage

Regarding road carriage, however, the situation is far from predictable. The conflict between the Rotterdam Rules and the CMR is regulated by Article 82(b) which limits the situation to one where the goods '... remain loaded on a road cargo vehicle carried on board a ship'.<sup>65</sup> The same wording is used in CMR Article 2, which states that the Convention is applicable to lost, damaged or delayed goods 'carried over part of the journey by sea ... [when] ... the goods are not unloaded from the vehicle',<sup>66</sup> in other words, the same 'piggyback' situation as mentioned in the Rotterdam Rules. In this situation Article 82 provides that the CMR will prevail as far as it is applicable. So far the system seems quite predictable.

The problems arise when trying to figure out the liability system of CMR Article 2(2).<sup>67</sup> The CMR also operates with a network liability system in a multimodal context. According to Article 2(1) the crucial question in deciding which liability system to use is the source of the damage, loss or delay. If the damage, loss or delay is caused by '... some event which could only [have] occurred in the course of and by reason of the carriage by that other means of transport [than the road based transport] ...' then the liability system of the relevant convention for this means of transport is applicable. This means that in some cases of piggyback transport the Rotterdam Rules chapter 5 will apply, despite the fact that the CMR prevails.

During sea carriage, a typical situation would be that the road vehicle and its cargo has fallen overboard and is lost (roll on/fall off). In such a situation the CMR is normally not applicable and the Rotterdam Rules will apply. If, on the other hand, the cargo remains unloaded and the damage is due to problems with the containers (eg temperature), the CMR will be applicable despite the fact of the damage taking place at sea and according to Article 82(b) of the Rotterdam Rules.

The provisions on conflict of conventions in the Rotterdam Rules and the CMR are complicated, and might for that reason be characterised as unpredictable. According to the Rotterdam Rules Article 26 the CMR will be applicable to events causing delay, damage or loss when the event has taken place solely outside the vessel and during the road leg of the transport. If the damage, loss or event causing delay is connected to the sea leg or is non-localised then the Rotterdam Rules apply. However, in the case of piggyback transport the Rotterdam Rules will step back if the CMR is applicable. The question of when the CMR liability is applicable in these situations is not easy, however, because of the difficult preconditions laid down in CMR Article 2. From an EU perspective this solution is far from ideal.

### 3.3.4 Carriage by rail

There are also problems regarding conflict of conventions regulating carriage by rail. According to Article 82(c) the Rotterdam Rules step back from conflict with the convention regulating international carriage by rail, the COTIF-CIM,<sup>68</sup> as far as it applies to 'the carriage of

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<sup>65</sup> The sea carriage in such a situation might be performed by a roll-on/roll-off (ro-ro) vessel designed to carry wheeled cargo that is driven on and off the ship on its own wheels or by lo-lo (lift on-lift off) vessels which use a crane to load and unload cargo to and from the vessel. CMR will typically only apply to the ro-ro situation.

<sup>66</sup> This is, however, not valid if the means of transport has changed according to the instructions of the sender as regulated in CMR art 14.

<sup>67</sup> CMR art 2 is one of the most complicated provisions in transport law. A good overview of the different possible conflict situations that might arise is given by de Wit (n 2) at pp 102–7.

<sup>68</sup> Note 29.

goods by sea as a supplement to the carriage of rail'. This is the same expression as used in CIM Article 1 paragraph 4 as a precondition for applying CIM on a sea leg of a multimodal contract including a rail and a sea leg. Deciding on what is supplementary might be controversial and in some situations lead to unpredictability regarding the applicable legal regime.

One way to distinguish the supplementary criteria is by distance. A sea leg can be a supplement to a rail carriage when the distance transported by sea is short and only ancillary to the rail transport, such as in a carriage by rail between Paris and London. On the other hand, if the sea carriage is clearly the longer one, it is difficult to consider it supplementary to the rail carriage. An overseas carriage from New York to Paris, where only the last part is undertaken by train from a European port, cannot be characterised as supplementary. If the sea leg is the more important part of the carriage the CIM is, according to Article 1 paragraph 4, not applicable. Another way of distinguishing the sea leg as supplementary is to consider the carrier's position. Is it mainly a performance of rail carriage or are we dealing with a maritime carrier? The position of the carrier might influence the evaluation.

However, even if the sea leg of the multimodal carriage is found to be supplementary to the rail leg, this is not sufficient for the CIM to apply. If the rail carriage is the main mode of the contract of carriage, the CIM is applicable to the sea leg only if the sea carriage '... is performed on services included in the list of services provided for in Article 24 paragraph 1 of the Convention'. According to COTIF Article 24 there are two lists, the CIV lists and the CIM list.<sup>69</sup>

To complicate matters even further, if the CIM is applicable it is not clear what liability system should be used; the CIM applies a kind of network system. Even though the CIM basis of liability, according to Article 23, is strict liability with some exemptions, a different fault-based liability system is available for the sea carrier in respect of sea-rail traffic (Article 38). It is, however, necessary that the state parties to the CIM opt in to this possibility.<sup>70</sup>

### 3.3.5 Carriage by inland waterway

Article 82(d), the last of the 'conflict of convention' provisions of the Rotterdam Rules, is a provision on potential conflict with any convention applicable to inland waterways which applies to carriage of goods without trans-shipment both by inland waterways and sea. The relevant convention here is the CMNI, in force from 1 April 2005. Parties to this convention are mainly from the EU.<sup>71</sup> According to Article 2(2) the CMNI is applicable if the purpose of the contract is the carriage of goods, without trans-shipment, both on inland waterway and in waters to which maritime regulations apply, unless 'a maritime bill of lading has been issued in accordance with the marine law applicable' (Article 2(2)(a)) or 'the distance to be travelled in waters to which maritime regulations apply is the greater' (Article 2(2)(b)).

<sup>69</sup> Article 24 Lists of lines or services para 1. The maritime and inland waterway services referred to in Article 1 of the CIV Uniform Rules and of the CIM Uniform Rules, on which carriage is performed in addition to carriage by rail subject to a single contract of carriage, shall be included in two lists: a) the CIV list of maritime and inland waterway services, b) the CIM list of maritime and inland waterway services. See <http://www.otif.org/en/publications/lists-of-lines-or-services-cim/cim-list-of-maritime-and-inland-waterway-services.html>.

<sup>70</sup> By requesting a suitable note to be included in the list of services to which the CIM apply, art 38 provides liability based on neglect with a reversed burden of proof for the sea carrier from the time the goods were loaded on board the ship to the time they were unloaded from the ship (art 38(2)). Such a note is requested for lines between Sweden and Denmark as well as Sweden and Finland for example. See [http://www.otif.org/fileadmin/user\\_upload/otif\\_verlinkte\\_files/07\\_veroeff/07\\_liste\\_CIM/CIM\\_Sude\\_3.8.2006\\_1.1.2008.pdf](http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff/07_liste_CIM/CIM_Sude_3.8.2006_1.1.2008.pdf).

<sup>71</sup> Note 48. The CMNI was agreed at a diplomatic conference organised jointly by the Central Commission for the Navigation for the Rhine, the DANUBE Commission and the United Nations Economic Commission for Europe (UNECE). It is therefore characterised as a Pan-European Legal Instrument in the field of Inland Water Transport. It is signed by 12 European nations, including Germany, France and the Netherlands, and by Russia, altogether 13 nations. See: [http://www.unece.org/trans/main/sc3/sc3\\_cmni\\_legalinst.html](http://www.unece.org/trans/main/sc3/sc3_cmni_legalinst.html).

In other words, if the goods are carried without trans-shipment and a marine bill of lading has been issued, the CMNI is not applicable. The interesting question here is what does a marine bill of lading mean? According to Hoeks no exact definition has been given to a marine bill of lading. However, as the bills of lading commonly used in sea carriage and those used in inland waterway have the same structure, any transport document used to verify a contract of carriage at sea should be characterised as a marine bill of lading.<sup>72</sup> If the transport document issued is a multimodal document the solution is not self-evident. A multimodal transport document might not be a purely marine one; it might include land-based transport. However, it might be advocated that this document should also be included. If a transport document is issued under the Rotterdam Rules then the Rotterdam Rules will prevail, and no conflict of conventions will arise.<sup>73</sup> From the point of view of efficiency and predictability, a broad definition of a marine bill of lading seems sensible.

#### 4 Summary and Conclusions

The question raised in this article is whether or not the modified network liability system of the Rotterdam Rules provides a sufficient alternative to the European Commission's plan for increased use of multimodal transport by providing the transport users with a predictable liability system needed to reduce transactions costs by changing mode of transport.

Based on a study on the modified network system, and recognising all the questions regarding the content of Article 26 and the complicated network of scope of application in the unimodal conventions which has to be measured against the collision rules in Article 87, it is easy to criticise the Rotterdam Rules for their multimodal attempts.<sup>74</sup> The answer to the above question must therefore be 'No'. The system is not easy and predictable. On the contrary, many legal obstacles need to be overcome and the network-based interaction with the unimodal conventions is not without loopholes.

However, the modified network liability system laid down in the Rotterdam Rules is based on the network liability system in operation at present: if the damage, loss or event causing delay can be localised to a specific mode of transport, the liability system of this mode will apply. The problem of unlocalised damage, loss or event causing delay is at present not governed by any international binding legal regime, but by different general conditions, such as the FIATA FBL 1992 and MULTIDOC 95.<sup>75</sup> These general conditions only harmonise the limitation rules. In other words, the existing European multimodal liability system is a network liability system with an opt-in solution for unlocalised loss, damage or event causing delay. By providing a fall back solution, as achieved by Article 26, the Rotterdam Rules have improved the legal clarity of the network system.<sup>76</sup>

The modified network liability system of the Rotterdam Rules therefore represents a step forward in the international regulation of multimodal carrier liability. Keeping the history of international harmonisation of multimodal transport in mind, this is more than a small achievement. If the Rotterdam Rules enter into force, the convention will become the first international mandatory regime on multimodal transport. Among the ratifying states non-regulated liability gaps will not exist. A downside is, however, that the Rotterdam Rules do not include multimodal transport without a sea leg, nor do they regulate on all legal issues in multimodal transport. Nevertheless, as Haak points out, they represent the 'next-best

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<sup>72</sup> Hoeks (n 3) at pp 290–91.

<sup>73</sup> Berlingieri (n 64) at p 21.

<sup>74</sup> See for example W Tetley 'A Summary of General Criticisms of the UNCITRAL Convention (The Rotterdam Rules)' (20 December 2008), available at [http://www.mcgill.ca/files/maritimelaw/Summary\\_of\\_Criticism\\_of UNCITRAL\\_No\\_1.pdf](http://www.mcgill.ca/files/maritimelaw/Summary_of_Criticism_of UNCITRAL_No_1.pdf).

<sup>75</sup> Both based on the UNCTAD/ICC Rules for Multimodal Transport Documents 1992 (n 52).

<sup>76</sup> Hoeks (n 3) at pp 348–9 points out, however, that this also has negative consequences as the low liability limit of the Rotterdam Rules will not stimulate the carriers to reveal where the loss or damage occurred.

solution for international multimodal cases' simply because they will increase the level of uniformity in international multimodal transport.<sup>77</sup>

The question of whether or not this will satisfy the EU remains to be answered. As mentioned, one of the main obstacles in the process towards a European multimodal transport chain has been the friction costs resulting from the uncertain legal position of the multimodal carrier, especially in relation to the question of carrier liability. This issue has been discussed internationally for decades. It is no secret that the main problem has been the industry's response to proposed new legal instruments. Even though there is apparently a demand for a clear and predictable legal solution no one wants their own liability to be increased beyond the existing system. The early EU proposals advocate a strict uniform liability system which would probably best fulfil this demand. However, recent studies show that it is almost impossible to reach consensus on such a proposal.<sup>78</sup> This was also recognised by the European Commission as it opened discussions on a modified network system in the 2007 Freight Transport Logistic Action Plan.<sup>79</sup> If the Rotterdam Rules enter into force on a global level this will be a strong argument for the EU to link its regional solution to the global convention and settle for a modified network system. At present the Member States are examining this option.

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<sup>77</sup> Haak (n 54) at p 71.

<sup>78</sup> The matter is, however, still discussed within different governmental bodies, such as the UNECE Working Party on Intermodal Transport and Logistics (WP.24). The Working Party brings together experts from UNECE, governments, the European Commission and non-governmental organisations, as well as industry and academia. At the meeting held in Geneva on 4–5 October 2010, a Pan-European liability regime for intermodal land transport was on the agenda. See <http://www.unece.org/trans/wp24/welcome.html?expandable=99>.

<sup>79</sup> Note 33.