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## Bringing Multimodal Transport Law into the New Century: Is the Uniform Liability System the Way Forward

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# BRINGING MULTIMODAL TRANSPORT LAW INTO THE NEW CENTURY: IS THE UNIFORM LIABILITY SYSTEM THE WAY FORWARD?

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I. INTRODUCTION

THE SIGNIFICANT GROWTH in the international carriage of containerized goods by two or more different modes of transport (multimodal transport)<sup>1</sup> has brought into sharp focus the practical importance of implementing international rules that regulate this particular type of transport operation. The quest for a uniform set of international rules governing multimodal transport has been protracted, dating back to the 1960s, yet has to date garnered modest success.<sup>2</sup> The first international legal instrument to reach fruition was the United Nations (U.N.) Convention on International Multimodal Transport of Goods of May 24, 1980.<sup>3</sup> However, the Convention has not yet entered into force and it is very unlikely that it ever will.<sup>4</sup> Approximately thirty years later, the international community produced another international instrument that attempted to regulate international multimodal transport contracts—but this time only to a limited extent.<sup>5</sup> These rules are the United Nations Convention on Contracts for the International Carriage of

<sup>1</sup> See United Nations Convention on International Multimodal Transport of Goods, art. 1 §§ 1–3, May 24, 1980, 19 I.L.M. 938 [hereinafter U.N. Multimodal Transport Convention] (not yet entered into force) (defining “international multimodal transport,” “multimodal transport contract,” and “multimodal transport operator”); *United Nations Convention on International Multimodal Transport of Goods*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XI-E-1&chapter=11&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-E-1&chapter=11&lang=en) (last visited Aug. 24, 2012) [hereinafter U.N. TREATY COLLECTION] (documenting the status of the U.N. Multimodal Transport Convention).

<sup>2</sup> See William Driscoll & Paul B. Larsen, *The Convention on International Multimodal Transport of Goods*, 57 TUL. L. REV. 193 (1982) (providing a synopsis of the attempts to achieve uniformity).

<sup>3</sup> See U.N. TREATY COLLECTION, *supra* note 1.

<sup>4</sup> U.N. Multimodal Transport Convention, *supra* note 1 (showing that the convention has attracted only eleven out of the thirty required ratifications or other modes of adoption for entry into force). For the reasons of failure of the convention to attract sufficient support, see Multimodal Transport: The Feasibility of an International Legal Instrument: Report by the UNCTAD Secretariat, U.N. Conference on Trade and Development [UNCTAD] Secretariat, ¶¶ 22–26, U.N. Doc. UNCTAD/SDTE/TLB/2003/1 (Jan. 13, 2003) [hereinafter Multimodal Transport: The Feasibility of an International Legal Instrument].

<sup>5</sup> See G.A. Res. 63/122, U.N. Doc. A/RES/63/122 (Feb. 2, 2009) [hereinafter Rotterdam Rules].

Goods Wholly or Partly by Sea (Rotterdam Rules), adopted by the U.N. Assembly in December 2008.<sup>6</sup> The Rotterdam Rules do not, however, qualify as a fully-fledged multimodal transport regime. They are designed to apply only to a limited range of multimodal transport operations, such as contracts for the carriage of goods by combination of sea and any other transport mode, as defined in Article 1.1 (referred to as “wet multimodal transport”).<sup>7</sup> The fate of the Rotterdam Rules is also uncertain, as they still require eighteen ratifications to enter into force.<sup>8</sup>

The failure of the U.N. Multimodal Transport Convention to attract sufficient support and the doubtful future of the Rotterdam Rules leave open the issue of the applicable liability rules in cases of cargo loss, damage, or delay in delivery occurring in the course of multimodal transport operations. What has, however, complicated matters is that the gap left by the absence of internationally-accepted rules on transnational multimodal transport has been filled over the years by a rather complex and fragmented legal framework.<sup>9</sup> The rules applicable to the liability of a multimodal transport operator (MTO) are embodied in a mosaic of international conventions on unimodal transport (which also extend to other modes of transport),<sup>10</sup> regional and subregional agreements on multimodal carriage of goods,<sup>11</sup> and national laws governing multimodal transport, as well as different

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* art. 1 § 1.

<sup>8</sup> *Id.* art. 94 § 1 (stating the requirement of twenty ratifications or other modes of adoption for entry into force); *Status: 2008—United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea—the “Rotterdam Rules”*, U.N. COMMISSION ON INTERNATIONAL TRADE LAW, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/transport\\_goods/rotterdam\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html) (last visited Aug. 24, 2012) (documenting the status of the Rotterdam Rules in that only two states, Spain and Togo, have ratified them so far).

<sup>9</sup> See discussion *infra* Part III.

<sup>10</sup> See *id.*

<sup>11</sup> See, e.g., Asociacion Latinoamericana de Integracion [Latin American Integration Association] [ALADI] Agreement on International Multimodal Transport, Nov. 8, 1996, <http://www.aladi.org> (last visited Aug. 24, 2012) [hereinafter ALADI Agreement]; Association of Southeastern Nations Framework Agreement on Multimodal Transport, Nov. 17, 2005, <http://aseansec.org/17877.htm> (last visited Aug. 24, 2012) [hereinafter ASEAN Framework Agreement]. See also Implementation of Multimodal Transport Rules: Report Prepared by the UNCTAD Secretariat, UNCTAD Secretariat, ¶¶ 47–122, U.N. Doc. UNCTAD/SDTE/TLB/2 (June 25, 2001) [hereinafter Implementation of Multimodal Transport Rules] (for reference to other regional and subregional agreements).

aspects of the transport operations.<sup>1213</sup> Moreover, MTO liability is often governed by standard contract terms, such as the ICC/UNCTAD Rules,<sup>14</sup> which have been incorporated in widely used multimodal transport documents like the MULTIDOC 95 and the FIATA FBL 1992.<sup>15</sup> Variety is not, however, the only complicating factor that renders the current legal framework far from ideal. It is also the type of the liability scheme the multimodal transport rules adopt—namely the network<sup>16</sup> or modified network liability scheme<sup>17</sup>—that creates unpredictability and legal uncertainty by, inter alia, turning the identification of the applicable liability regime and/or the limitation of liability rules into

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<sup>12</sup> See, e.g., Transportrechtsreformgesetz [TRG] [German Transport Law Reform Act], June 22, 1998, BUNDESGESETZBLATT [BGB] at 25, art. 1, §§ 452–452(d), amending June 22, 1998, BGB at 1, art. 3, § 4100-1 (Ger.) [hereinafter German Transport Law Reform Act]; Burgerlijk Wetboek [BW], art. 8, §§ 40–43 (Neth.); Lei No. 9.61 de 19 de Fevereiro de 1998, D.O.U., Fevereiro 1998 (Braz.); see also Rolf Herber, *The German Legislation on Multimodal Transport: Why Did It Come True and Has It Worked Out Well?*, in FUTURE LOGISTICS AND TRANSPORT LAW 23 (Johan Schellin ed., 2008).

<sup>13</sup> See, e.g., Harter Act, 27 Stat. 445–46 (1893), reprinted in 46 U.S.C. § 30701–07 (2006) (previously codified at 46 U.S.C. app. §§ 190–96) [hereinafter Harter Act]; German Transport Law Reform Act, *supra* note 12, § 475 (liability of warehouse keepers).

<sup>14</sup> UNCTAD, UNCTAD/ICC Rules for Multimodal Transport Documents, I.C.C. Pub. 298 (Jan. 7, 1992) [hereinafter UNCTAD/ICC Rules] (following to a certain extent the U.N. Multimodal Transport Convention). Other standard terms include the General Conditions of the Union Internationale des Sociétés de Transport Combiné Rail-Route [International Union of Combined Rail and Road Transport Companies] (UIRR), July 1, 1999; NSAB 2000: General Conditions of Nordiskt Speditör Förbund [Nordic Association of Freight Forwarders], June 1, 1998. See also DAVID A. GLASS, FREIGHT FORWARDING AND MULTIMODAL TRANSPORT CONTRACTS ¶ 3C.6 (2004) (providing a comprehensive discussion of the UNCTAD/ICC Rules) and NSAB 2000: THE GENERAL CONDITIONS OF THE NORDIC ASSOCIATION OF FREIGHT FORWARDERS: COMMENTARY BY JAN RAMBERG (2001) (for an analysis of NSAB 2000).

<sup>15</sup> MULTIDOC 95, The Baltic and International Maritime Council (BIMCO); FIATA [International Federation of Freight Forwarders Associations] Multimodal Transport Bill of Lading 1992 [hereinafter FIATA FBL 1992].

<sup>16</sup> See, e.g., Convention on the Contract for the International Carriage of Goods by Road, art. 2 § 1, May 19, 1956, 399 U.N.T.S. 189, as amended by Protocol to the Convention for the International Carriage of Goods by Road, July 7, 1978, 1208 U.N.T.S. 427 [hereinafter CMR]; see also JAN RAMBERG, THE LAW OF TRANSPORT OPERATORS IN INTERNATIONAL TRADE 176–79 (Norstedts Juridik ed., 2005).

<sup>17</sup> See, e.g., German Transport Law Reform Act, *supra* note 12, § 452(a); UNCTAD/ICC Rules, *supra* note 14, art. 6 § 4; ALADI Agreement, *supra* note 11, art. 15; see RALPH DE WIT, MULTIMODAL TRANSPORT ¶¶ 2.145–2.169 (1995) (for a detailed discussion of the different liability systems).

a fact-specific inquiry for each case,<sup>18</sup> leading to the application of the various liability schemes prescribed in the unimodal transport conventions.<sup>19</sup> To further complicate matters, what rules apply depends not only on the localization of cargo loss, but also on local jurisprudence, especially regarding the particular tribunal's application of unimodal transport rules to multimodal transport operations, as well as its jurisprudence on their scope of application.<sup>20</sup> To that, one should also add the unforeseeability and uncertainty associated with the terms of existing multimodal transport regimes per se, specifically relating to their diverse rules on the default limits of liability and other core matters like documentation or time bars.<sup>21</sup> It thus comes as no surprise that the existing multimodal transport regime has been openly criticised by government representatives and industry stakeholders as unsatisfactory and uneconomic, and even as impeding the promotion of international trade.<sup>22</sup>

As had been expected, this longstanding legal conundrum has finally attracted the international community's regulatory attention. The harmonization of international multimodal transport rules has occupied the agenda of several multilateral organizations, leading to proposals for a new (international or regional) regime on multimodal transport. For instance, in 1998, the Inland Transport Committee of the United Nations' Economic Commission for Europe (UNECE) commissioned a group of experts to propose an international legal instrument on multimodal transport.<sup>23</sup> The expert group called for a fresh

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<sup>18</sup> See, e.g., *Finagra v. O.T. Africa Line*, [1998] 2 Lloyd's Rep. 622 (Q.B.) 626 (Eng.).

<sup>19</sup> See The UNCITRAL Draft Instrument on the Carriage of Goods by Sea, and the Other Transport Conventions, Comparative Tables—Note by the Secretariat U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group III on Transport Law, 11th Sess., March 24–Apr. 4, 2003, U.N. Doc. A/CN.9/WG.III/WP.27 (Dec. 30, 2002) [hereinafter UNCITRAL Comparative Tables of the Transport Convention].

<sup>20</sup> See further discussion *infra* Part III.

<sup>21</sup> See Implementation of Multimodal Transport Rules—Comparative Table—Report Prepared by the UNCTAD Secretariat, U.N. Doc. UNCTAD/SDTE/TLB/2/Add.1 (Oct. 9, 2001) [hereinafter Implementation of Multimodal Transport Rules Comparative Table].

<sup>22</sup> See, e.g., Multimodal Transport: The Feasibility of an International Legal Instrument, *supra* note 4, ¶¶ 14, 21, 90.

<sup>23</sup> See Report of the Working Party on Combined Transport on its 30th Session, U.N. Econ. & Soc. Council [ECOSOC], Econ. Comm'n for Eur. [UNECE], Inland Transport Comm., Working Party on Combined Transport, ¶¶ 37–44, 30th Sess., Sept. 7–8, 1998, U.N. Doc. TRANS/WP.24/81 (Oct. 28, 1998) [hereinafter UNECE Report (Oct. 28, 1998)].

attempt to produce mandatory international legislation on multimodal transport liability based on existing unimodal liability regimes.<sup>24</sup> It therefore recommended adopting a modified network system of liability, including default rules for unlocalized damages similar to the Convention on the Contract for the International Carriage of Goods by Road (CMR).<sup>25</sup> In addition, the European Commission has been working on the regulation of multimodal transport carrier liability in the European Union since the 1990s as the advance of intermodal freight transport forms part of the wider project on the development of a Common European Transport Policy (CTP).<sup>26</sup> This project has generated so far three proposals, which are diametrically opposed to the UNECE's proposal, as they each support adopting different versions of the uniform liability system.<sup>27</sup>

This article aims to contribute to the ongoing debate over the possibility of implementing a uniform international multimodal transport regime. It first focuses on the need for harmonizing current international multimodal transport regimes and explores ways to maximize the prospects of new regime's global

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<sup>24</sup> *Id.* ¶ 14; see Possibilities for Reconciliation and Harmonization of Civil Liability Regimes Governing Combined Transport, U.N. Econ. & Soc. Council [ECOSOC], Econ. Comm'n for Eur. (UNECE), Inland Transport Comm., Working Party on Combined Transport, ¶¶ 22, 29, U.N. Doc. TRANS/WP.24/1999/2 (Nov. 12, 1999) [hereinafter UNECE Report (Nov. 12, 1999)].

<sup>25</sup> Possibilities for Reconciliation and Harmonization of Civil Liability Regimes Governing Combined Transport, U.N. Econ. & Soc. Council [ECOSOC], Econ. Comm'n for Eur. [UNECE], Inland Transport Comm., Working Party on Combined Transport, 31st Sess., Apr. 12–13, 1999, U.N. Doc. TRANS/WP.24/1999/2 (Jan. 19, 1999) [hereinafter UNECE Report (Jan. 19, 1999)].

<sup>26</sup> See also EUR. CMTY. COMM'N, WHITE PAPER ON THE FUTURE DEVELOPMENT OF THE COMMON TRANSPORT POLICY: A GLOBAL APPROACH TO THE CONSTRUCTION OF A COMMUNITY FRAMEWORK FOR SUSTAINABLE MOBILITY (1993).

<sup>27</sup> R. ASARIOTIS ET AL., INTERMODAL TRANSPORT AND CARRIER LIABILITY (Eur. Comm'n ed., 1999); M.A. CLARKE ET AL., INTEGRATED SERVICES IN THE INTERMODAL CHAIN (ISIC)—FINAL REPORT TASK B: INTERMODAL LIABILITY AND DOCUMENTATION (2005) [hereinafter CLARKE, ISIC FINAL REPORT (2005)]; Final Report: Study on the Details and Added Value of Establishing a (Optional) Single Transport (Electronic) Document 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 and Enhance the Framework Offered by Multimodal Waybills and or Multimodal Manifests, at 95, TREN/CC/01-2005/LOT1/LEGAL ASSISTANCE ACTIVITIES [hereinafter European Commission 2009 Report on Multimodal Transport]. See Ellen Efestøl-Wilhelmsson, *EU Intermodal Transport and Carrier Liability – Content and Context*, 2007 SCANDINAVIAN INST. MAR. LAW Y.B. (Univ. of Oslo) 133, 135–38 (discussing the European initiatives); Ellen Efestøl-Wilhelmsson, *The Rotterdam Rules in a European Multimodal Context*, 16 J. INT'L MAR. L. 274, 275–80 (2010).

acceptance. To that end, it seeks to identify common denominators in current proposals supporting new rules with a view to delineating the objectives of the new international multimodal transport regime. While mapping these aims, this article emphasizes the importance of overcoming current deficiencies in existing multimodal transport rules and concludes that a new regime will have decidedly better prospects than the U.N. Multimodal Transport Convention if, in addition to securing the transport industry's support, it promotes predictability, legal certainty, and cost-effective administration of multimodal transport operations. It next explores the extent to which the uniform liability scheme, which has not so far been tested in practice, could attain its proposed aims. The article therefore tests the uniform liability scheme against the objectives elaborated above and concludes that it certainly meets the first objective, predictability of the applicable liability rules, because the foreseeability of laws is inherent in the uniform liability system. Whether the uniform liability scheme meets the other two objectives, legal certainty and cost-effectiveness, is less certain, as this depends on the particular rules to be included and whether they would be sufficient to promote them.

## II. THE HARMONIZATION OF INTERNATIONAL MULTIMODAL TRANSPORT LIABILITY RULES: MAPPING OBJECTIVES OF THE NEW INTERNATIONAL REGIME ON MULTIMODAL TRANSPORT

The development of smooth, economic, and efficient multimodal transport services, which will also further international trade, may be promoted not only by modernizing infrastructure and equipment for moving goods, but also by implementing uniform rules on international multimodal transport. So far, this has not been achieved because, as discussed above, transnational multimodal transport operations are regulated by complex and fragmented legal rules that lead to increased litigation and insurance costs.<sup>28</sup> The need to harmonize existing international multimodal transport laws has thus become imperative as it is believed that the current rules—and, more importantly,

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<sup>28</sup> See, e.g., UNECE Report (Jan. 19, 1999), *supra* note 25, ¶ 11; Multimodal Transport: The Feasibility of an International Legal Instrument, *supra* note 4, ¶¶ 14, 21.



their deficiencies—stand as an impediment to the development of freight intermodalism worldwide.<sup>29</sup>

It appears that the idea of harmonizing disparate international multimodal transport regimes has now matured, thereby enhancing the prospects for success of any project on multimodal transport law. This much is evident from a questionnaire conducted by UNCTAD beginning in 2002 that revealed that reform of the current rules on international multimodal transport would have the clear support of the international transport community.<sup>30</sup> Undoubtedly, such declared support is a good starting point, but it will not suffice. The success (or otherwise) of an international multimodal transport instrument depends heavily on negotiation outcomes and, in particular, on whether the new regime's final text will receive the same degree of widespread acceptance by the international transport community. In fact, this will be one of the drafter's major challenges, especially in light of the U.N. Multimodal Transport Convention's failure to achieve uniformity.<sup>31</sup> If, therefore, the endorsement and application of a uniform law is to be attractive to potential parties, the law must ensure that it will accommodate the transport industry's needs. This will certainly require new rules to overcome the deficiencies of the current rules, which have been openly criticized by governments and the transport industry.<sup>32</sup> To that end, careful consideration should be given to the objectives of the current international multimodal transport rules because these will not only form the basis for drafting a

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<sup>29</sup> See, e.g., UNECE Report (Nov. 12, 1999), *supra* note 24, ¶ 11. But see Reconciliation and Harmonization of Civil Liability Regimes in Intermodal Transport, U.N. Econ. & Soc. Council [ECOSOC], Econ. Comm'n for Eur. [UNECE], Inland Transport Comm., Joint ECMT/UNECE Working Party/Group on Intermodal Transport and Logistics, 46th Sess., Apr. 3–4, 2006 (Sept. 7, 2006) [hereinafter UNECE Report (Sept. 7, 2006)] (regarding the opposition to the harmonization of the international multimodal transport rules expressed by FIATA and CLECAT (Comité de Liaison Européen des Commissionnaires et Auxiliaires de Transport du Marché Commun)).

<sup>30</sup> See Multimodal Transport: The Feasibility of an International Legal Instrument, *supra* note 4, ¶ 39 ("virtually all respondents (98%) indicated that they would support any concerted efforts towards the development of a new international instrument").

<sup>31</sup> U.N. TREATY COLLECTION, *supra* note 1. See also *supra* note 4 (for the reasons the U.N. Multimodal Transport Convention failed to attract sufficient ratifications to enter into force).

<sup>32</sup> See Multimodal Transport: The Feasibility of an International Legal Instrument, *supra* note 4, ¶¶ 14, 21, 90.

new instrument, they will also delineate the means of addressing existing problems in the legal framework.

Judging by the proposals put forward so far,<sup>33</sup> it should not be difficult to reach a consensus regarding the objectives that a new international multimodal transport conventions should ideally meet in establishing a new set of rules. In particular, first of all, it transpires from all four proposals that the new rules must be both predictable and certain.<sup>34</sup> Undoubtedly, one of the benefits of a new regime that promotes predictability is the reduction of legal risk and the subsequent increase in value of carriage transactions.<sup>35</sup> That is, predictability allows parties to the multimodal contract of carriage to form clear legal commitments with predictable consequences.<sup>36</sup> But even then, one should not lose sight of the fact that foreseeability and legal certainty will only be achieved if the new rules provide for their interrelationship with existing unimodal transport international conventions.<sup>37</sup> If not, there may be a risk of overlapping rules which could result in conflicting decisions among jurisdictions.<sup>38</sup> In addition, to be successful the new regime should also promote cost-effective administration of multimodal transport operations.<sup>39</sup> This requires drafting rules that will reduce or, if possible, eliminate the friction costs relating to litigation and insurance premiums the transport industry is currently incurring.<sup>40</sup>

Surprisingly, unlike the U.N. Multimodal Transport Convention and the Rotterdam Rules, no proposal refers to the promotion of equality in international trade, and in particular to the

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<sup>33</sup> See *supra* notes 24, 25, 29.

<sup>34</sup> UNECE Report (Nov. 12, 1999), *supra* note 24, ¶ 19; ASARIOTIS ET AL., *supra* note 27, at 10, 24; CLARKE ET AL., *supra* note 27, at 9, 19; European Commission 2009 Report on Multimodal Transport, *supra* note 27, at 187. It is also worthy to note that the promotion of the predictability and legal certainty are also two of the objectives of the Rotterdam Rules. See Rotterdam Rules (Preamble), *supra* note 5.

<sup>35</sup> See generally Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 746 (1999) (defining "legal risk" as the concept of unpredictable rules applying to a business relationship).

<sup>36</sup> *Id.*

<sup>37</sup> See discussion *infra* Part III.

<sup>38</sup> See, e.g., ASARIOTIS ET AL., *supra* note 27, at 24, 30; see also Rotterdam Rules, *supra* note 5, arts. 26, 82 (the pertinent conflicts provision).

<sup>39</sup> UNECE Report (Nov. 12, 1999), *supra* note 25, ¶ 19; ASARIOTIS ET AL., *supra* note 27, at 10, 24.

<sup>40</sup> See, e.g., Multimodal Transport: The Feasibility of an International Legal Instrument, *supra* note 4, ¶¶ 14, 21 (questionnaire responses).

maintenance of a fair balance of interests between developed and developing countries, a factor that is deemed essential for the promotion of international trade.<sup>41</sup> One may assume that equality can be achieved, at least to an extent, if international multimodal transport rules are predictable, certain, and cost effective. This assumption is based on the idea that implementing predictable and certain rules will reduce transaction costs and thus promote equitable access to, and participation in, international markets for developing countries, which are presently disadvantaged due to the high friction costs associated with international multimodal transport.<sup>42</sup> Setting forth predictable and certain rules will therefore contribute to the equal development of trade, but this is certainly not the only means of attaining equality. It may also be argued that the promotion of equity in international trade may be achieved by provisions that strike a fair balance between the interests of MTOs and shippers.<sup>43</sup> This is, however, just one side of the coin. One may counter-argue that express references to equality in preambles of international trade conventions like the U.N. Multimodal Transport Convention and the Rotterdam Rules exist solely for political correctness. So, if it is included in the new multimodal transport instrument, equality may serve that same perfunctory purpose, and it may therefore not really matter whether equality is an express objective.

Moreover, the new convention must be successful in securing the transport industry's blessing<sup>44</sup> to render acceptance by a significant number of trading nations (including the most important ones) a realistic prospect. If not, the international community will have expended significant energy in producing yet another convention never to be implemented, just like the

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<sup>41</sup> See U.N. Multimodal Transport Convention (Preamble), *supra* note 1, at 938; Rotterdam Rules, *supra* note 5.

<sup>42</sup> Possibilities for Reconciliation and Harmonization of Civil Liability Regimes Governing Combined Transport, U.N. Econ. & Soc. Council [ECOSOC], Econ. Comm'n for Eur. [UNECE], Inland Transport Comm., Working Party on Combined Transport, 34th Sess., Sept. 4–6, 2000, ¶ 14, U.N. Doc. TRANS/WP.24/2000/3 (Jul. 3, 2000) [hereinafter UNECE Report (July 3, 2000)] (Report of two expert group meetings ("hearings") on civil liability regimes for multimodal transport); Multimodal Transport: The Feasibility of an International Legal Instrument, *supra* note 4, ¶ 14.

<sup>43</sup> See Theodora Nikaki & Baris Soyer, *A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive, and Efficient, or Just Another One for the Shelves?* 30 BERKELEY J. INT. L. 302, 329 (2012) (writing in the context of the Rotterdam Rules).

<sup>44</sup> ASARIOTIS ET AL., *supra* note 27, at 10, 24.

UN Multimodal Transport Convention.<sup>45</sup> Or even worse, if the new convention gains only the minimum required ratifications for entry into force, there is the risk of further fragmentation of international multimodal transport laws, which will obviously complicate matters even more. Gaining widespread acceptance is indeed the most difficult task, as it requires consultation not only with government delegates, but also with representatives of all transport modes and other interests involved in multimodal transport operations.<sup>46</sup> It also requires that these groups will at least reach a compromise on the core provisions of a new convention, not excepting the rules governing liability and limitation of liability. This will be challenging given the divergent bases and limits of liability rules provided for in existing unimodal transport conventions.<sup>47</sup> It is also inevitable that representatives of each mode of transport will insist upon adopting the liability systems already applicable to their particular mode, as they are familiar with them and they have established their entire operations on the basis of these rules (i.e., transport documents, etc.). As expected, even before the initiation of negotiations, some stakeholders have expressed their preference for extending the international regime currently applicable to their mode of transport to all or some types of multimodal transport.<sup>48</sup>

So far, so good. Drafting adequate objectives alone, however, will be futile if they are not also combined with rules that meet these objectives and thus deal with—at least most of the—difficulties of current multimodal transport regimes. This leads to the issue of whether and to what extent the uniform liability scheme, on which this article focuses, may successfully attain the aims set above in order to become the basis for the new interna-

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<sup>45</sup> See U.N. Multimodal Transport Convention, *supra* note 1; Rotterdam Rules, *supra* note 5.

<sup>46</sup> Such as MTOs, freight forwarders, insurance companies, and cargo interests. Consultation with sea, road, and rail carriers; freight forwarders; and insurance companies, alongside shippers, took place, for instance, in the course of the negotiation of the Rotterdam Rules. See further, the *travaux préparatoires* to those rules, available at [http://www.uncitral.org/uncitral/en/commission/working\\_groups/3Transport.html#9thsession](http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html#9thsession).

<sup>47</sup> See UNCITRAL Comparative Tables of the Transport Conventions, *supra* note 19; see also Malcolm A. Clarke, *A Way with Words: Some Obstacles to Uniform Transport Law*, 3 UNIF. L. REV. 351 (1998) (discussing the differences between the liability rules on the international unimodal transport conventions).

<sup>48</sup> See, e.g., Multimodal Transport: The Feasibility of an International Legal Instrument, *supra* note 4, ¶¶ 34–35; European Commission 2009 Report on Multimodal Transport, *supra* note 27, at 179.

tional multimodal transport regime. This issue will be further considered in Part III.

### III. OBJECTIVES OF THE NEW INTERNATIONAL MULTIMODAL TRANSPORT REGIME

#### A. PREDICTABILITY OF MULTIMODAL TRANSPORT LAWS AND LEGAL CERTAINTY

##### 1. *Predictability of Multimodal Transport Laws and the Uniform Liability System*

Restoring the long-lost predictability and legal certainty of the current multimodal transport framework will unquestionably be one of the main objectives of a new international multimodal transport instrument. In fact, achieving this aim is not only an end in itself, but is also a means of achieving the other two objectives. A predictable and legally certain regime may reduce friction costs and may therefore promote international trade. In turn, a cost-effective regime will have enhanced prospects of acceptance by the transport industry and ratification by a greater number of trading nations.

Starting with predictability of the applicable laws to multimodal transport operations, there is no doubt that adoption of a uniform liability system, which provides for the same liability rules throughout a multimodal transport operation, would promote this objective. The reason is that parties to a multimodal contract of carriage would know the "rules of the game" from the outset—e.g., the independent rules applicable to cargo loss, irrespective of transport leg—and could therefore enter clear legal commitments with foreseeable consequences.<sup>49</sup> In addition, being seamless and transparent, a uniform liability system would avoid factual inquiries related to localization of cargo loss and would avoid some legal risks stemming from the identification of the applicable liability and/or limitation of liability rules, which are inherent in both modified and network liability systems. Adopting a uniform liability system would thus eliminate unnecessary litigation, associated with the pertinent factual and legal inquiries, thus avoiding costs stemming from claims han-

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<sup>49</sup> See, e.g., ASARIOTIS ET AL., *supra* note 27, at 30; CLARKE ET AL., ISIC FINAL REPORT, *supra* note 27, at 9. See generally Stephan, *supra* note 35, at 746–48.

dling and litigation, and thereby leading to a proportionate decrease in (at least) cargo insurance premiums.<sup>50</sup>

2. *Legal Certainty and Multimodal Transport Laws: Is the Uniform Liability Scheme the Panacea for Legal Ambiguity?*

Implementing predictable rules on multimodal transport alone will not be sufficient for developing sustainable and effective multimodal transportation services. As discussed above, to be successful a uniform liability system must also promote legal certainty, meaning that the rules embodied in the system must be as clear and certain as is possible. If not, they will inevitably create unnecessary interpretive legal proceedings. Therefore, to achieve legal certainty, the drafters of a uniform liability scheme must engage in the strenuous task of addressing the uncertainty associated with the current legal framework and the uniform liability system per se, with a view toward adopting solutions that can eliminate or reduce to the greatest possibly extent the pertinent ambiguities.

When evaluating the causes of legal ambiguity associated with current international multimodal transport rules, one could easily conclude that one of the most difficult and controversial issues brought before national courts is the direct applicability of unimodal transport treaties to multimodal transport operations involving "mode-to mode" carriage.<sup>51</sup> In fact, all of the controversial cases have focused on applying the CMR<sup>52</sup> and very few

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<sup>50</sup> See *infra* Part III (discussion regarding the interrelationship between litigation costs and the calculation of the premium).

<sup>51</sup> Compare *Princes Buitoni v. Hapag-Lloyd Aktiengesellschaft* [1991] 2 Lloyd's Rep. 383 (Eng.) (focusing on the issue of the application of the CMR to the road leg of a multimodal transport operation, where the CMR applied as a matter of contract), with CMR, *supra* note 16, art. 2 § 1.

<sup>52</sup> This is just one of the issues that has arisen over the applicability of the international conventions to international unimodal transport. Another issue that has also led to diverging opinions is whether an international transport convention would apply to a multimodal transport operation if the overall multimodal operation is international but not the particular transport leg. Compare *Rechtbank [R.R.]* [ordinary court of first instance] Rotterdam 24 januari 1992, S&S 1993, 89 m.nt. (Neth.) (ruling in favor of the applicability of the CMR to the road domestic leg (Cairo-Alexandria) of an international road-sea-road transport operation (Cairo (Egypt)-Geleen (The Netherlands))), with *Oberlandesgericht [OLG]* [Higher Regional Court of Dusseldorf] June 16, 2004 (I-18U 237/03) (Ger.) (reaching the opposite conclusion). See also Roland Loewe, *Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR)*, (1976) EUR. TRANSP. L. 311, 327; Anthony Diamond, *Legal Aspects of the Convention*, in PAPERS OF A ONE DAY SEMINAR C1, C2 (Southampton Univ., Sept. 12, 1980) (both supporting the second option).

have dealt with the Hague regimes—the Hague Rules and the Hague-Visby Rules.<sup>53</sup> What may be inferred from most cases, however, is that most legal uncertainty comes from the definition of the contract of carriage provided in the CMR and the Hague regimes, because that definition largely assumes that unimodal transport sits ill with transport by several means. It is also worth mentioning that the Hamburg Rules, as well as the Warsaw and Montreal Conventions, have taken a different approach on this matter by having a separate provision clarifying that their rules apply to unimodal legs that form part of a multimodal journey.<sup>54</sup> Although it seems that this approach has significantly reduced disputes because there are very few reported cases dealing with this issue<sup>55</sup>—which have so far ruled for the applicability of the Warsaw/Montreal Conventions to multimodal legs of multimodal journeys—one should not underestimate the possibility of diverging decisions on the matter. It has been argued, for instance, that a contract of carriage by air with an option to carry by other modes does not meet the preconditions of Article 38 of the Montreal Convention.<sup>56</sup> Supporters of this view justify it on the basis that such a contract qualifies as a multimodal carriage contract rather than a “contract of carriage

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<sup>53</sup> International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 223, 120 L.N.T.S. 155 [hereinafter Hague Rules]; 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. 121 (amending the Hague Rules); Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Dec. 21, 1979, 1412 U.N.T.S. 146 (amending the Hague Rules) [hereinafter Hague-Visby Rules].

<sup>54</sup> United Nations Convention on the Carriage of Goods by Sea art. 1 § 6, Mar. 31, 1978, 1695 U.N.T.S. 3 [hereinafter Hamburg Rules]; Convention for the Unification of Certain Rules for International Carriage by Air art. 38, May 28, 1999, 2242 U.N.T.S. 309 [hereinafter Montreal Convention]; Convention for the Unification of Certain Rules Relating to International Carriage by Air art. 31 § 1, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

<sup>55</sup> *Commercial Union Ins. Co. v. Alitalia Airlines*, 347 F.3d 448, 458 (2d Cir. 2003) (citing with approval GEORGETTE MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT: THE WARSAW SYSTEM IN MUNICIPAL COURTS 249–56 (1977)); *Højesteret [H.D.]* [Supreme Court of Denmark] 23 april 2008 (Nos. 120/2005 and 138/2005), U.2008.1638H (*The Salmon Roe*) (*obiter*) (Den.).

<sup>56</sup> Vibe Ulfbeck, *The Air/Road Combination in Recent European Case Law*, 33 TRANSPR 370, 372 (2010). See also David C. Jackson, *Conflict of Conventions*, in PAPERS OF A ONE DAY SEMINAR G1, G5 (Southampton Univ., Sept. 12, 1980) (counter-argument regarding the application of the Warsaw Convention to the unimodal legs of multimodal transport).

of goods by air," which is required for applying the Montreal convention to the air leg of a multimodal transport operation.<sup>57</sup>

Regarding the CMR, judicial opinions vary significantly, with the courts of England and Wales taking a "pro-CMR" approach based on a broad definition of the "contract of carriage by road."<sup>58</sup> Hence, according to English courts, the CMR would apply to the road leg of a multimodal transport operation where the contract of carriage permits for the carriage of goods by road and the goods are actually carried by road, even if they are not exclusively or predominantly carried by road.<sup>59</sup> At the other end of the spectrum one will find the German and Dutch courts.<sup>60</sup> It was, however, as late as 2008 that the German Federal Supreme Court (BGH) changed its long-standing position and ruled for the first time against applying the CMR to multimodal transport. The BGH based its judgment on a very literal interpretation of the phrase "contract of carriage by road," taking the view that the contract for the carriage of goods by road means carriage solely by road.<sup>61</sup> The court reinforced its position by construing Article 2 as defining the scope of multimodal transport to which the CMR applies and concluded that the CMR applies only to multimodal transport operations falling

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<sup>57</sup> Ulfbeck, *supra* note 55; Jackson, *supra* note 55. *Contra* H.D. 23 april 2008 (Nos. 120/2005 and 138/2005), U.2008.1638H (The Salmon Roe) (*obiter*) (Den.).

<sup>58</sup> *Quantum Corp. v. Plane Trucking, Ltd.* [2002] 2 Lloyd's Rep. 25 (C.A.) 30–31 (Eng.). The ruling in *Quantum* has been supported by leading academics, such as Professor Malcolm Clarke. See, e.g., INTERNATIONAL CARRIAGE OF GOODS BY ROAD: CMR ¶¶ 13, 18 (Malcolm A. Clarke ed., 5th ed. 2009); Malcolm A. Clarke, *Carrier's Liability in Cross-Border Air Cargo Substitute Transportation*, 28 TRANSPR 182, 184 (2005). *But see* Ingo Koller, *Quantum Corporation Inc. v. Plane Trucking Limited und die Anwendbarkeit der CMR auf die Beförderung mit Verschiedenartigen Transportmitteln*, 26 TRANSPR 45 (2003).

<sup>59</sup> *Quantum*, [2002] 2 Lloyd's Rep. at 30.

<sup>60</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Jul. 17, 2003 (I ZR 181/05), (2009) EUR. TRANSP. L. [ETL] 196 (Ger.); Hof den Haag [HDH] [ordinary court of appeal] 22 juni 2010, S&S 2010, 104 m.nt. Z.V.D. (Godafoss) (Neth.), *rev'g* RR Rotterdam 11 april 2007, S&S 2009, 55 m.nt. (Godafoss) (Neth.). It should be noted, however, that the BGH distinguished the case at issue from the previous German cases. The court held that its ruling was not in contradiction with the previous German cases, as in none of the previous cases had the court addressed the issue of the direct applicability of the CMR to multimodal contracts of carriage because in all of them, German law applied to the carriage contract. (2009) EUR. TRANSP. L. at 202; *see also* Peter Laurijssen, *Quantum Corporation Inc. v. Plane Trucking Ltd. Revisited by German Supreme Court: Consideration on the German Federal High Court's Decision of 17 July 2008*, (2009) EUR. TRANSP. L. 143, 145 (criticizing the BGH on that point).

<sup>61</sup> (2009) EUR. TRANSP. L. at 200–01.



into the scope of Article 2.<sup>62</sup> Lastly, the court reasoned that it transpires from the Protocol of Signature that the drafters of the CMR did not intend to extend its scope to multimodal transport operations because it is stated in the protocol that they also intended to prepare a separate instrument on international multimodal transport.<sup>63</sup> The BGH's reasoning was followed by the Dutch Court of Appeals in 2010, and then by the Supreme Court of The Netherlands, in the case of *Godafoss*.<sup>64</sup>

Also, somewhere between the English and German courts, the Belgian Cour de Cassation decided that the CMR does apply to a contract of carriage—but only if the contractual agreement expressly provides for carriage by road, or, where the contract leaves the means of transport open, if it can be inferred from the circumstances that the parties intended goods to be carried by road.<sup>65</sup> It can, however, be deduced from the facts of the case that the actual carriage of goods by road by itself does not suffice because the parties' intent to carry goods by road is what triggers the CMR.<sup>66</sup> Thus, unlike the courts in England and Wales,<sup>67</sup> the Belgian courts may not hold the CMR applicable to combined transport contracts for unspecified transport performed partly by road (mode to mode) if the surrounding circumstances do not indicate that the parties had envisaged road carriage. This approach may, however, lead to evidentiary inquiries regarding the intent of the parties, especially in cases

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<sup>62</sup> *Id.* at 201.

<sup>63</sup> *Id.*

<sup>64</sup> HDH, 22 juni 2010, S&S 2010, 104 m.nt. J.M.R. (*Godafoss*) (Neth.), *rev'g* RR Rotterdam 11 april 2007, S&S 2009, 55 m.nt. Z.V.D. (*Godafoss*) (Neth.), *upheld by* Hoge Raad der Nederlanden [HR] [Supreme court of the Netherlands] 1 juni 2012, NJ 2012, 516 m.mt. K.F.H. (*Godafoss*) (Neth.). This was expected given that the pre-2008 position of the German courts had formed the basis for the decisions of other European courts, including those of England and Wales. *See, e.g.*, BGH June 24, 1987 (I ZR 127/85), 10 TRANSPR 447 (1987) (Ger.); *Quantum* [2002] Lloyd's Rep. at 36–37.

<sup>65</sup> Cour de Cassation [Cass.] [supreme court for judicial matters] Nov. 8, 2004, (2006) EUR. TRANSP. L. 228 (Belg.) (*TNT Express Belgium v. Mitsui Sumitomo Insurance Company Europe Ltd.*); *see also* Cour d'appel [CA] [regional court of appeal] Anvers, Jan. 30, 2012 (Fr.) (stating that if the contract of carriage leaves the means open, the contract will be qualified as one of carriage by road for the purposes of the CMR only if the parties had in fact agreed to carry the goods by road).

<sup>66</sup> *See id.*

<sup>67</sup> *Quantum* [2002] 2 Lloyd's Rep. at 30–31 (holding that the CMR applies to contracts that leave open the means of transport, “either *entirely* or as between a number of possibilities at least one of them being carriage by road”) (emphasis added).

where there is evidence that the cargo interests were engaged in discussions over the cost implications and advantages of different modes of transport.<sup>68</sup>

The applicability of the CMR to separate road legs of multimodal journeys has also been upheld or rejected by other national courts on grounds not associated with the interpretation of “contract of carriage of goods by road.” For example, a U.S. court of appeals adopted a pro-CMR stance by applying the network liability system.<sup>69</sup> Also, in two cases in which carriage by road options were included in air waybills, both the French Tribunal de Commerce and the Danish Supreme Court took a different view than *Quantum*<sup>70</sup> and looked at the overall characterization of the contract (i.e., that the contract was an air waybill).<sup>71</sup> Therefore, both courts applied the relevant air convention to the entire transport operation, notwithstanding the actual performance of the land segment by road.<sup>72</sup>

Although these cases center on the direct applicability of the CMR to multimodal transport operations, possibly because road haulage is the most popular “connecting” mode of transport, one should not underestimate the possibility that disputes may arise over applying the Convention Concerning International Carriage of Goods by Rail and the Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (collec-

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<sup>68</sup> See Institutional & Technological Changes in Transport/Logistics Field, UNCTAD Secretariat, ¶ 7, U.N. Doc. UNCTAD/SDTE/TIB/3 (Mar. 4, 1999) (reporting that shippers “today are less interested in specifying the mode of transport than in the past. Rather, they are going to ask the service provider to help analyse the service-cost trade-offs of the different modes and provide the combination that is most cost-effective as part of an overall distribution pattern.”).

<sup>69</sup> *Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549, 558–59 (2d Cir. 2000), *vacating* *Hartford Fire Ins. Co. v. M/V “OOCL BRAVERY,”* 79 F. Supp. 2d 316 (S.D.N.Y. 1999).

<sup>70</sup> *Quantum* [2002] 2 Lloyd’s L. Rep. at 40 (rejecting the overall characterization of the contract argument as it “would open up a prospect of metaphysical arguments about the essence of a multimodal contract.”). It is also noteworthy that the overall characterization of the contract (*Gesamtbetrachtung*) approach has also been rejected by both the German and the Australian courts. See BGH June 24, 1987 (I ZR 127/85), 10 TRANSPR 447 (1987) (Ger.); *Siemens Ltd. v. Schenker Int’l (Australia) Pty Ltd.* [2002] NSWCA 172 (Austl.), *aff’d by* [2004] HCA 11 (Austl.).

<sup>71</sup> Tribunal de Commerce [Trib. de Comm.] [Commercial court] de Bobigny, 24 Novembre 1995, Bulletin des transports et de la logistique 1996, 38 (Fr.), *available at* [http://www.idit.asso.fr/\\_private/moteur\\_cmr/jurisprudence/fiche.php?num=0](http://www.idit.asso.fr/_private/moteur_cmr/jurisprudence/fiche.php?num=0); H.D. 23 april 2008 (Nos. 120/2005 & 138/2005), U.2008.1638H (The Salmon Roe) (Den.).

<sup>72</sup> *Id.* See criticism of the Danish case in Ulfbeck, *supra* note 55, at 375.

tively, COTIF-CIM 1999)<sup>73</sup> or the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI)<sup>74</sup> to segments of multimodal operations performed by rail or inland waterways, respectively. This is because the material scope of both conventions, as defined in their respective definitions of the “contract for the carriage of goods,”<sup>75</sup> is very similar to that of the CMR, which, as discussed above, has been the crux of extensive litigation. To this, one should add the COTIF-CIM 1999’s and the CMNI’s provisions on special cases of multimodal transport<sup>76</sup> that national courts may interpret as restricting their application to particular combined transport operations, just as with Article 2, Section 1, of the CMR.<sup>77</sup> It is thus possible that the same division of opinion will be repeated regarding the applicability of COTIF-CIM 1999 and the CMNI because courts tend to extend their *ratio decidendi* by analogy to similar situations. What is unfortunate, however, is that the risk of such disputes could have been easily avoided when the international transport conventions were drafted and modified. The CMNI was adopted by the Diplomatic Conference in 2000,<sup>78</sup> while both the CMR and the COTIF-CIM were modified by protocols in 2008 and 1999 respectively,<sup>79</sup> long after the first dis-

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<sup>73</sup> Convention Concerning International Carriage of Goods by Rail (COTIF), app. B, International Rail Transport Committee (CIT); Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM), May 9, 1980 (as amended June 3, 1999) [collectively, hereinafter COTIF-CIM 1999].

<sup>74</sup> Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, Apr. 1, 2005, International Rail Transport Committee (CIT) [hereinafter CMNI].

<sup>75</sup> CMNI, *supra* note 73, art. 1 § 1; COTIF-CIM 1999, *supra* note 72, art. 1 § 1.

<sup>76</sup> CMNI, *supra* note 73, art. 2 § 2; COTIF-CIM 1999, *supra* note 72, arts. 1 § 4, 38.

<sup>77</sup> BGH July 7, 2008 (I ZR 181/05), (2009) EUR. TRANSP. L. 196 (Ger.); HDH 22 juni 2010, S&S 2010, 104 m.nt. (Godafoss) (Neth.).

<sup>78</sup> CMNI was adopted by the Diplomatic Conference Organized Jointly by the Central Commission for the Navigation of the Rhine, the Danube Commission and UN/ECE, held in Budapest from September 25 to October 3, 2000. CMNI, *supra* note 73.

<sup>79</sup> Additional Protocol to the Convention on the Contract for the International Carriage of Goods by Road (CMR) concerning the Electronic Consignment Note, Geneva, February 20, 2008 (entered into force June 5, 2011); Protocol of 3 June 1999 for the Modification of the Convention concerning International Carriage by Rail (COTIF), May 9, 1980 (1999 Protocol) (entered into force July 1, 2006).

putes arose over the application of CMR to the road legs of combined transport.<sup>80</sup>

It is also surprising that, despite the great volume of cargo transported by sea, there are very few reported cases on the direct applicability of the Hague regimes to sea legs of multimodal transport operations. Even so, national courts have nevertheless split over the matter, causing further uncertainty. On one hand, Australian and Dutch courts have issued judgments applying the Hague or Hague-Visby Rules to sea carriage that formed part of a multimodal transport operation.<sup>81</sup> It was, however, only the Australian court that took the issue further and clarified that the “multimodal bill of lading,” which purports to cover both sea and land transport, is a bill of lading within the meaning of the Hague and Hague-Visby Rules.<sup>82</sup> On the other hand, without much elaboration, Italian and English courts have held that the Hague-Visby Rules do not apply to contracts of carriage contained or evidenced in multimodal transport documents.<sup>83</sup> Academics have, though, shed more light on the matter, centering their debate on whether a multimodal bill of lading is “a bill of lading or a similar document of title, in so far as such document relates to the carriage of goods by sea.”<sup>84</sup> It is the prevailing view among academics in the United Kingdom that a multimodal transport document meets the requirements of Article 1(b) and, therefore, the Hague and Hague-Visby rules apply to the sea segment of a multimodal journey.<sup>85</sup> In reaching this conclusion, they have interpreted the reference to “carriage of goods by sea” in Article 1(b) as a clarification that the rules apply only to the sea legs of multimodal transport operation covered by com-

<sup>80</sup> The issue of the applicability of the CMR was brought before the German courts as early as the 1980s. *See, e.g.*, BGH June 24, 1987 (I ZR 127/85), 10 TRANSPR 447 (1987) (Ger.); BGH May 17, 1989 (I ZR 2111/87) (Ger.); *Quantum Corp. v. Plane Trucking* [2002] 2 Lloyd's Rep. 25 (Q.B.) 35–37 (Eng.).

<sup>81</sup> *Comalco Aluminium Ltd. v. Mogal Freight Servs Pty. Ltd.* (1993) 113 ALR 677, 700 (Austl.) (obiter); *followed by Parlux SpA v M & U Imps. Pty. Ltd.* 2008 VSCA 161, [39] (Austl.); RR Rotterdam 17 september 2003, S&S 2007, 63 m.nt. (Neth.); RR Rotterdam 19 juli 2006, S&S 2007, 84 m.nt. (Neth.).

<sup>82</sup> *Comalco*, [1993] 113 ALR 700 (Austl.); *Parlux*, [2008] VSCA 161 (Austl.).

<sup>83</sup> Tribunale [Trib.] [ordinary court of first instance] of Turin 5 giugno 2002, *il Diritto Marittimo* 2003, 1042 (It.); *Bhatia Shipping & Agencies Pvt. Ltd. v. Alcobex Metals Ltd.* [2005] 2 Lloyd's Rep. 336 (Q.B.) 342 (Eng.).

<sup>84</sup> Hague Rules, *supra* note 52, art. 1(b).

<sup>85</sup> SIR GUENTER TREITEL & FRANCIS REYNOLDS, *CARVER ON BILLS OF LADING* ¶ 8-071 (3d ed. 2011); SIR BERNARD EDER, *SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING* § 20-033 (22d ed. 2011). *But see* SIMON BAUGHEN, *SHIPPING LAW* 166–67 (5th ed. 2012).

bined transport documents, rather than as a prohibition on applying the rules to combined transport.<sup>86</sup> In addition, as it is settled law in England and Wales that the rules also apply to "received for shipment" bills of lading,<sup>87</sup> U.K. academics do not envisage any obstacle in considering a multimodal transport document, which will usually show receipt of the goods at an inland point, as a bill of lading for the purposes of the rules.<sup>88</sup> In fact, applying the Hague regimes to the sea segments of multimodal transport operations is a pragmatic approach that will go a long way in facilitating trade. The Hague regimes apply to the majority of shipments worldwide and the opposite conclusion would have created great uncertainty. A contrary view is, however, supported by German authors.<sup>89</sup>

It is worth mentioning that applying the Hague Rules to multimodal transport has also generated significant debate in the United States, though in a totally different context. There, disputes arose over applying the Carriage of Goods by Sea Act (COGSA 1936)<sup>90</sup> to the road or rail legs of combined sea-land transport operations and centered on identifying the applicable liability regime to damages resulting from the inland segment.<sup>91</sup> More simply, the debates were about whether COGSA 1936 or the Carmack Amendment would usually apply to inland transport.<sup>92</sup> The U.S. Supreme Court put an end to a long-standing circuit split in 2010 by deciding that COGSA 1936, rather than the Carmack Amendment, governs the rail leg of an overseas

<sup>86</sup> TREITEL & REYNOLDS, *supra* note 85; EDER, *supra* note 85.

<sup>87</sup> *Hugh Mack v. Burns & Laird Lines* [1944] 77 Lloyd's Rep. 377 (C.A.N.I.) 383 (Eng.).

<sup>88</sup> TREITEL & REYNOLDS, *supra* note 85, § 20-033.

<sup>89</sup> Stephan Erbe & Philipp Schlienger, *Der Multimodal-Vertrag im Schweizerischen Recht*, 28 TRANSPR 421, 424 (2005); Klaus Ramming, *Probleme der Rechtsanwendung im Neuen Recht der Multimodalen Beförderung*, 22 TRANSPR 325, 330 (1999).

<sup>90</sup> Carriage of Goods by Sea Act, Pub. L. No. 74-521, 49 Stat. 1207 (1936), reprinted in note following 46 U.S.C. § 30701 (2006) (previously codified at 46 U.S.C. app. §§ 1300-15 (2000) [hereinafter COGSA].

<sup>91</sup> 49 U.S.C. § 11706 (2006) (rail carriage); 49 U.S.C. § 14706 (2006) (motor carriage); *see, e.g., Sampo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, 456 F.3d 54, 56-57, 63, 69 (2006) *abrogated by* *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 243, 2440, 2442 (2010) (holding that the Carmack Amendment did not apply to the rail segment of a shipment originating overseas covered by a through bill of lading). *Contra* *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700, 702 (4th Cir. 1993); *Am. Road Serv. Co. v. Consol. Rail Corp.*, 348 F.3d 565, 568-69 (6th Cir. 2003); *Capitol Converting Equip., Inc. v. LEP Transp., Inc.*, 965 F.2d 391, 394-95 (7th Cir. 1992); *Altadis USA, Inc. ex rel. Fireman's Fund Ins. Co. v. Sea Star Line, LLC*, 458 F.3d 1288, 1291, 1294 (11th Cir. 2006).

<sup>92</sup> *Id.*

import shipment under a single through bill of lading.<sup>93</sup> The Court nonetheless left open whether the Carmack Amendment applies to rail carriage in the United States under an outbound ocean through bill of lading.<sup>94</sup>

Unfortunately, this is not the end of the matter. The segmentation of liability for multimodal transport leads to further complexities and legal uncertainty, this time stemming from the identification of the applicable liability regime to operations that lie on the borderline between two transport regimes, i.e., the loading and unloading processes from and to a different mode of transport.<sup>95</sup> It is uncontested that this difficulty arises mainly because the majority of transport conventions were prepared in the era of unimodalism, and so they have no particular concern for their interrelationship with other transport regimes (aside from the multimodal transport cases they specifically mention).<sup>96</sup> This is in fact reflected in how most unimodal transport conventions define the period of responsibility of the carrier. With the exception of the Hague regimes that associate the carrier's period of responsibility with the acts of loading and discharge of the cargo,<sup>97</sup> this period is measured in the rest of the transport conventions by the time in which carrier is in charge of the cargo for the purposes of the particular convention,<sup>98</sup> a

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<sup>93</sup> *Kawasaki Kisen Kaisha Ltd.*, 130 S. Ct. at 2446; see also Robert Force, *The Regal-Beloit Decision: What, if Anything, Would Happen to the Legal Regime for Multimodal Transport in the United States if It Adopted the Rotterdam Rules*, 36 TUL. MAR. L.J. 685, 689, 693 (2012).

<sup>94</sup> *Kawasaki Kisen Kaisha Ltd.*, 130 S. Ct. at 2444. This issue was addressed recently by one of the lower federal courts (Southern District of New York), where it was decided that the Carmack Amendment governed the inland leg of a multimodal shipment originating within the United States and traveling on to Australia on a through bill of lading. *Am. Home Assurance Co. v. Panalpina, Inc.*, No. 07 CV 10947(BSJ) 2011 WL 666388, at \*1 (S.D.N.Y. Feb. 16, 2011).

<sup>95</sup> Also, thirty-two out of fifty-eight participants to the study prepared by Gomez-Acebo & Pombo, Abogados SCP for the Directorate-General for Energy and Transport in the European Commission gave a negative answer to the question of whether they consider the costs of transferring between modes presently reasonable and encouraging multimodal transport, mainly because of the lack of legal certainty that leads into extra costs. See European Commission 2009 Report on Multimodal Transport, *supra* note 27, at 113–14.

<sup>96</sup> CMNI, *supra* note 73, art. 2 § 2; CMR, *supra* note 16, art. 2 § 1; COTIF-CIM 1999, *supra* note 72, arts. 1 § 4, 38; Montreal Convention, *supra* note 53, art. 18 § 4; Warsaw Convention, *supra* note 53, art. 18 § 3.

<sup>97</sup> Hague and Hague-Visby Rules, *supra* note 52, art. I(e).

<sup>98</sup> CMR, *supra* note 16, art. 17 § 1, COTIF-CIM 1999, *supra* note 72, art. 23 § 1; Warsaw Convention, *supra* note 53, art. 18 § 2. The Montreal Convention follows the same approach in Article 18 § 3 but this is justified as it is based on the

concept that has generated legal and factual inquiries, in particular in the context of multimodal transport.<sup>99</sup> Accordingly, drawing a dividing line between international transport conventions has been proved to be a thorny task, as it is not always easy to ascertain where one unimodal transport regime ends and the next one begins.<sup>100</sup>

This was, for instance, the dilemma of the German courts when they demarcated the maritime and road regimes in a case of cargo damage sustained during transshipment from a sea vessel to a truck. It was clear that the main source of uncertainty was the extensive application of the maritime regime beyond discharge because under German law, which was applied, sea carriage ends upon delivery rather than when the goods are unloaded from the vessel.<sup>101</sup> In addressing this issue, the BGH took the view that the ocean carriage ends not at the time of unloading of the cargo from the vessel but only at the moment at which the cargo is placed on the truck.<sup>102</sup> Reversing a previous decision of the OLG Hamburg,<sup>103</sup> the BGH thus held that, unless special circumstances arise, the handling of cargo in port is not a separate leg of land transport governed by the applicable land regime, and this is true even where special installations are used and the cargo handling occurs under a particular contract.<sup>104</sup> The BGH's ruling has, however, been criticized as too favorable for the carrier. This is because the decision allows the MTO to take advantage of clauses in a multimodal transport bill of lading that may exonerate the MTO from liability for cargo loss

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respective provision of the Warsaw Convention. Montreal Convention, *supra* note 53, art. 18 § 3.

<sup>99</sup> See HR 24 maart 1995, S&S 1995, 72 m.nt. (Iris) (Neth.) (regarding the division between sea and road carriage (under Dutch law, the sea carrier is responsible for the goods for the entire period the goods are in its charge)), BGH Oct. 27, 1978 (I ZR 114/76), NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 493, 1979 (Ger.); Norton McNaughton, Inc. v. Polar Air Cargo, 702 N.Y.S.2d 759, 760–62 (N.Y. Sup. Ct. 1999) (regarding the dividing line between air and road).

<sup>100</sup> See, e.g., Jagenberg, Inc. v. Ga. Ports Auth., 882 F. Supp. 1065, 1077 (S.D. Ga. 1995).

<sup>101</sup> HANDELSGESETZBUCH [HGB] [COMMERCIAL CODE], § 606 (Ger.); BGH Nov. 3, 2005 (I ZR 325/02), (2006) EUR. TRANSP. L. 339 (Ger.).

<sup>102</sup> BGH Nov. 3, 2005 (I ZR 325/02) (2006) EUR. TRANSP. L. 339, 29 TRANSPR 41 (2006) (Ger.); BGH Oct. 18, 2007 (I ZR 138/04) (2008) EUR. TRANSP. L. 478, *rev'g* OLG Hamburg Aug. 19, 2004 (6 U 178/03), 27 TRANSPR 402 (2004) (Ger.).

<sup>103</sup> OLG Hamburg Aug. 19, 2004, 27 TRANSPR 402 (2004) (Ger.).

<sup>104</sup> For instance, in the OLG Hamburg case, the cargo, which was stowed in a mafi-trailer, was trucked for 300 meters out of the vessel into a warehouse to be loaded on a truck for further road transportation. *Id.*

that may occur in the course of the operation of transshipment, which, under German law, are valid only if the transshipment (land carriage) is subject to maritime law.<sup>105</sup>

A different view on the matter is likely to be taken by the U.S. courts in that they may hold the Harter Act, and not COGSA 1936, applicable to cases involving transshipment from vessels to trucks. Such an assumption is based on previous rulings of U.S. courts that have concluded that the liability of carriers under the Harter Act runs from the moment the goods are discharged from the vessel until their "proper delivery," which, in cases of transfer to a truck for further inland transportation, means delivery to the inland carrier.<sup>106</sup> However, what distinguishes the U.S. cases from the BGH decision is the limited scope of application of the sea regime (COGSA 1936) to "tackle-to-tackle" operations and the enactment of a separate regime (the Harter Act) for the pre-loading and post-discharge stage. In any case, it is evident that the U.S. position is not especially favorable to the MTO, which is only entitled to rely on the limited range of defenses prescribed in the Harter Act,<sup>107</sup> rather than the full list of exceptions provided in COGSA 1936. The MTO will also be in exactly the same position even if COGSA is set to apply to the handling operations pursuant to a "period of responsibility" clause, due to the predominance of the Harter Act over the COGSA provision with respect to the pre-loading and post-discharge periods.<sup>108</sup>

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<sup>105</sup> See also Herber, *supra* note 12, at 34–35.

<sup>106</sup> Great Am. Ins. Co. of N.Y. v. A/P Moller-Maersk A/S, 482 F. Supp. 2d 357, 360 (S.D.N.Y. 2007) (following Mannesman Demag Corp. v. M/V CONCERT EXPRESS, 225 F.3d 587, 594, (5th Cir. 2000)). It is worth noting that in both cases the issue was whether the Harter Act applies to the inland segment of the cargo's carriage under a through bill of lading, rather than whether it applies to cargo damaged during transshipment. *Id.* It is, however, the definition of "proper delivery" that may be of importance and may be applied by analogy to the cases of transshipment. The same definition was also adopted in *Jagenberg, Inc. v. Georgia Ports Authority*, whereby the cargo was damaged while being retrieved from the storage area in the port of discharge and before it was loaded onto a truck for transportation to its final destination. 882 F. Supp. 1065, 1077–78 (S.D. Ga. 1995); see also *Watkins v. M/V LONDON SENATOR*, 112 F. Supp. 2d 511, 519 (E.D. Va. 2000) (holding the carrier was liable under the Harter Act for damages incurred during transportation of cargo from vessel to storage shed at pier).

<sup>107</sup> See Harter Act, *supra* note 13, § 30706.

<sup>108</sup> See COGSA, *supra* note 90, § 12; *Uncle Ben's Int'l Div. of Uncle Ben's, Inc. v. Hapag-Lloyd Aktiengesellschaft*, 855 F.2d 215, 217 (5th Cir. 1988). For instance, the fire and the quarantine exceptions provided in COGSA have been held inapplicable to pre-loading and post-discharge cases to which COGSA applied under a period of responsibility clause. *R. L. Pritchard & Co. v. Steamship*



Also, in the light of the stance taken in *Quantum*<sup>109</sup> and, in particular, the adoption of the network liability principle, one may assume that the English courts are also likely to adopt a different approach than that adopted by German courts should a transshipment case fall before them. What would make a great difference would be adopting not only a network approach, but also a clear delimitation of the Hague-Visby Rules to “tackle-to-tackle” sea carriage. This would simplify matters as the rules would not apply beyond discharge from the vessel unless there was a contractual extension to that effect. Thus, the regime applicable to transshipment cargo losses would be either the Hague-Visby Rules, the national law applicable to the domestic road leg and ancillary services,<sup>110</sup> or the CMR, if the road leg crosses borders. Then, under a network liability scheme, identifying the applicable rules would depend on the location of the cargo loss, that is, whether it occurred during discharge from the vessel and subsequent loading on the truck, or while awaiting transshipment while in control of the sea or road carrier or a third party. And, even if a sea carrier attempted to apply the Hague regimes to inland parts of transportation through a period of responsibility clause, this clause would not affect application of the CMR to the international road carriage. Such a clause would be held ineffective as a stipulation that purports to derogate from the provisions of Article 41, Section 1 of the CMR.<sup>111</sup> Thus, the court would decide that the road carrier’s period of responsibility under the CMR commences when the road carrier takes charge of the goods for the purpose of international road carriage, not when the goods are placed on the lorry.<sup>112</sup>

The legal uncertainty does not end here. Identifying the rules applicable to occurrences during the period of packing or storage of goods has also proved to be an intricate issue. Indeed, once again it becomes a question of interpreting the scope of international transport conventions and, at times, of contract terms, with a view to ascertaining whether the respective opera-

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Hellenic Laurel, 342 F. Supp. 388, 391 (S.D.N.Y. 1972) (fire defense); Sunpride (Cape) (Pty.) Ltd. v. Mediterranean Shipping Co. S.A., No. 01 Civ. 3493 (CSH), 2003 WL 22682268, at \*28–34 (S.D.N.Y. Nov. 12, 2003) (quarantine exemption).

<sup>109</sup> See *Quantum Corp. Inc. v. Plane Trucking* [2002] 2 Lloyd’s Rep. 25 (Eng.).

<sup>110</sup> The domestic road carrier is liable in contract (i.e., Road Haulage Association Ltd.’s Conditions of Carriage) or in tort.

<sup>111</sup> See CMR, *supra* note 16, art. 41 § 1.

<sup>112</sup> See *id.* art. 17 § 1.

tions are ancillary to a particular transport leg. If so, the terms are absorbed by the pertinent international unimodal transport convention or domestic transport rules. Again, this is a circumstantial issue, but the deciding factor is whether the preconditions for applying the pertinent international transport convention are met, that is whether the carrier is in charge of the cargo for the purposes of a particular treaty.

For example, in a case arising out of cargo transportation covered by a through or combined transport bill, English courts have ruled in favor of applying the Hague-Visby Rules to the intermediate storage period (between two periods of sea carriage) of a container at port.<sup>113</sup> This was, however, only because the Hague-Visby Rules applied throughout the transport operation.<sup>114</sup> That is because, in the particular case, once the rules came into operation, they continued in force until the end of the sea carriage.<sup>115</sup> Otherwise, the storage would have fallen outside the scope of the rules because it would not have been deemed related to the "carriage of goods by sea."<sup>116</sup> It is also likely that German courts will adopt the same approach for intermediate storage if German law governs the multimodal carriage contract, because the carrier's period of responsibility for sea carriage in Germany runs from receipt of cargo for carriage to its delivery.<sup>117</sup>

Also, regarding storage that precedes or follows a single sea leg, German courts have already decided that storing goods in a port or nearby for a short period is ancillary to sea carriage and therefore governed by sea transport rules.<sup>118</sup> The end result is again favorable for the MTO, which, as noted above, will be entitled to rely on the generous exemption clauses available under German maritime law. This will not, however, be the same under U.S. law, where storing goods in a port while in the

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<sup>113</sup> *Mayhew Foods v. Overseas Containers Ltd.* [1984] 1 Lloyd's Rep. 317 (Q.B.) 317–20 (U.K.); see also GLASS, *supra* note 14, ¶ 3B.8.

<sup>114</sup> *Mayhew Foods* 1 Lloyd's Rep. at 320.

<sup>115</sup> *Id.*

<sup>116</sup> *Compare id., with Captain v. Far E. S.S. Co.* [1979] 1 Lloyd's Rep. 595 (B.C.S.C.) 601–02 (Can.) (holding that the Hague Rules did not apply to the part of the contract under which the goods were on the dock at Singapore since that part of the contract did not relate to the "carriage of goods by water."). The difference between the two cases was that, in *Far Eastern*, there were two separate bills of lading for two sea legs, as opposed to one combined bill covering the entire transport operation as in *Mayhew*. See *id.*

<sup>117</sup> HGB § 606 (Ger.).

<sup>118</sup> OLG Hamburg Feb. 28, 2008 (6 U 241/06), 31 TRANSPR 125 (2008) (Ger.).

charge of a sea carrier is subject to the Harter Act, which applies to the pre-loading and the post-discharge periods in both foreign and domestic trade (but only while the carrier is in custody of the cargo).<sup>119</sup> Once again, unlike its position under German law, the MTO will be entitled to avail itself only of the defenses provided in the Harter Act, which are limited in comparison to those provided in COGSA 1936.<sup>120</sup> Nor will the MTO be in a better position even if the COGSA 1936 applies to warehousing goods in port under a "period of responsibility" clause. This is because, as explained above, any provision of COGSA 1936 that is incompatible with the Harter Act will yield to the Harter Act, thus depriving the MTO of defenses that are only available to it under COGSA 1936.<sup>121</sup>

It may be also the case that some courts will conclude that the CMR applies to packing and warehousing goods prior to the road leg of a multimodal transport operation if the packing or warehousing are considered ancillary to the road carriage, i.e. if the parties to the contract so agreed,<sup>122</sup> or even absent such an express agreement, if can be inferred from the circumstances.<sup>123</sup> In the same vein, storing cargo immediately before or after an air leg may also be considered part of air carriage if the carrier has taken, or is still in charge of, the cargo, an issue that may have to be decided on a case-by-case basis.<sup>124</sup> Although extending the CMR and the Warsaw and Montreal conventions to storage may be more straightforward in cases where the air or road segment is the first leg of a multimodal transport operation—it will be easier to prove that the carrier took over the goods for the purposes of the applicable road or air conven-

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<sup>119</sup> COGSA, *supra* note 90, § 12; Harter Act, *supra* note 13, § 30702. See *Uncle Ben's Int'l Div. of Uncle Ben's, Inc. v. Hapag-Lloyd Aktiengesellschaft*, 855 F.2d 215, 216–17 (5th Cir. 1988); *Levatino Co. v. Am. President Lines, Ltd.*, 233 F. Supp. 697, 701 (S.D.N.Y. 1964).

<sup>120</sup> See Harter Act, *supra* note 13, § 30706.

<sup>121</sup> See *supra* note 108 and accompanying text.

<sup>122</sup> See, e.g., RR Rotterdam 22 October 1993, S&S 1997, 53 (Neth.); CLARKE, INTERNATIONAL CARRIAGE OF GOODS BY ROAD: CMR, *supra* note 58, ¶ 28 (supporting the same view in the context of unimodal transport). But see ANDREW MESSENT & DAVID A. GLASS, HILL & MESSENT CMR: CONTRACT FOR THE INTERNATIONAL CARRIAGE OF GOODS BY ROAD ¶ 6.8 (2000).

<sup>123</sup> See, e.g., BGH Jan. 12, 2012 (I ZR 214/10), (2012) EUR. TRANSP. L. (Ger.) (regarding carriage of goods solely by road).

<sup>124</sup> Warsaw Convention, *supra* note 53, art. 18 § 2.; Montreal Convention, *supra* note 53, art. 18 § 3; see, e.g., Cour de Cassation [Cass.] [supreme court for judicial matters] Com., 28 May 1996, Bull. civ. IV, No. 94-1055, (1997) EUR. TRANSP. L. 129 (Fr.).

tion<sup>125</sup>—the situation is further complicated where the road or air transport is the intermediate or final leg. A good illustration of such a scenario can be found in a decision by the Supreme Court of Austria in which goods were damaged while stored between the modes of transport (road and rail).<sup>126</sup> There, the court ruled against applying either of the regimes governing those respective modes, which preceded and followed storage, that is the rules that applied to the rail leg and the CMR, because it found that the storage fell outside the scope of both regimes. The court held that the goods were no longer under the control of the railways and the transportation by road had not yet begun.<sup>127</sup> Thus, even if courts adopt a pro-CMR interpretation of the term “take over,” by reading Article 1(1) as referring to the start of the contractually provided or permitted road leg,<sup>128</sup> there will still be complex factual inquiries concerning whether the road carrier did in fact take over the goods for purposes of the CMR. If not, then the intermediate storage period will be subject to national laws, thereby leading to fluctuating rights and obligations in different jurisdictions.<sup>129</sup>

What all of the above examples confirm is that the confusion and uncertainty pertaining to the existing legal framework on multimodal transport is not simply caused by the number of legal and factual inquiries that arise out of applying unimodal transport conventions, but also by the proliferation of divergent legal approaches. What further exacerbates the situation is that the conflicting decisions of different national courts<sup>130</sup> encourage forum shopping. For example, the issue of applying international transport conventions to separate legs of multimodal transport operations is not only theoretical, but it also has considerable financial implications. Liability limits, or the opportunity for cargo interests to break those limits, may differ significantly depending on the rules a court will apply to a mul-

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<sup>125</sup> CMR, *supra* note 16, art. 17 § 1; see *Quantum Corp. v. Plane Trucking Ltd.* [2002] 2 Lloyd's Rep. 25 (Q.B.) 39 (U.K.).

<sup>126</sup> Oberster Gerichtshof [OGH] [supreme court] July 13, 1994, (7 Ob 586/93), 18 TRANSPR 21 (1995) (Austria).

<sup>127</sup> *Id.* at 22.

<sup>128</sup> See CMR, *supra* note 16, ar. 1 § 1; see also *Quantum* [2002] Lloyd's Rep. at 33 (interpreting “take over” in the multimodal transport context).

<sup>129</sup> For other issues that may cause legal uncertainty, see ASARIOTIS ET AL., *supra* note 27, at 18–19; UNECE Report (July 3, 2000), *supra* note 41, ¶¶ 26–32. See also *supra* note 52.

<sup>130</sup> See, e.g., the discussion *infra* on the division over the applicability of the CMR.

timodal contract of carriage. Thus, it is likely that affected parties will be incentivized to bring cases before national courts more favorable to their interests. A prime example of the impact that identifying the applicable regime may have is the English Court of Appeal case *Quantum*.<sup>131</sup> It was only because the court held the CMR applicable to the road leg of an air-road transportation that the cargo interests were given the chance to rely on Article 29 of the CMR in an attempt to break CMR liability limits on grounds of wilful misconduct or equivalent default on the part of the carrier—Air France.<sup>132</sup> Hypothetically speaking, if the same case were brought before the German courts, for instance, a decision more favorable to Air France could be expected. The CMR would not apply and limitations on liability would be governed by Article 11.7 of the general conditions of carriage by air for cargo, which limits liability to 17 Special Drawing Rights (SDRs) per kilogram and has no provision for evading these monetary limits.<sup>133</sup>

The question then becomes whether a uniform liability scheme alone, providing for the application of independent rules throughout a multimodal journey, will avoid the legal ambiguity generated by the potential application of unimodal transport conventions to multimodal transport operations, and thus provide a greater degree of legal certainty to prevent unnecessary litigation and forum shopping. The answer would have been in the affirmative if consensus existed that a multimodal transport contract is a *sui generis* (aliud) contract (a contract with its own characteristics different from unimodal contracts of transport) governed only by particular multimodal transport rules and not pertinent unimodal transport treaties.<sup>134</sup> There is no doubt that in such a case, the uniform liability scheme would avoid legal uncertainty stemming from the application of unimodal transport conventions, which is inherent in existing multimodal transport rules. This is unfortunately not the case. What muddies the waters is that the direct applicability

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<sup>131</sup> [2002] 2 Lloyd's Rep. 25 (Eng.).

<sup>132</sup> *Id.* at 41. The issue of the proving "wilful misconduct" was remitted to the Commercial Court to be dealt with there. *Id.*

<sup>133</sup> See BGH July 17, 2008 (I ZR 181/05), (2009) EUR. TRANSP. L. 196 (Ger.); see also *Quantum Corp. v. Plane Trucking Ltd.* [2001] C.L.C. 1192 (Q.B.) 1207 (Eng.) (holding that the CMR did not apply to the road leg where the damage occurred).

<sup>134</sup> See, e.g., ASARIOTIS ET AL., *supra* note 27, at 25; CLARKE, ISIC FINAL REPORT (2005), *supra* note 27, at 13; Jackson, *supra* note 57, at G5 (discussing the counterargument to the application of the Warsaw Convention to multimodal contracts).

of unimodal transport conventions to separate legs of a multimodal journey has been advocated, as have the multimodal transport operations clearly prescribed in their rules,<sup>135</sup> which support this view even if the multimodal carriage contract is classified as a *sui generis* (*aliud*) contract<sup>136</sup> (as opposed to a chain of contracts, which makes application of individual transport conventions straightforward<sup>137</sup>). Thus, it is likely that, in at least some jurisdictions, parties to multimodal contracts of carriage would be exposed to the same legal risks as if a network or a modified network liability scheme applied to their contracts, even though a uniform regime would apply to the multimodal transport operation. In fact, the issue of applying unimodal transport conventions would become even more complex, as the terms of unimodal transport treaties would overlap with the uniform rules of the international multimodal regime.<sup>138</sup> As the risk of such conflicts cannot be ignored,<sup>139</sup> steps would need to be

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<sup>135</sup> CMNI, *supra* note 43, art. 2 § 1; COTIF-CIM 1999, *supra* note 73, art. 1 §§ 4, 38; Montreal Convention, *supra* note 54, arts. 38, 18 § 4; Hamburg Rules, *supra* note 54, art. 1 (6); CMR, *supra* note 16, art. 2§ 2; Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd., 230 F.3d 549 (2d Cir. 2000); *see also Quantum* [2002] 2 Lloyd's Rep. 25 (Eng.); RR Rotterdam 17 september 2003, S&S 2007, 63 m.nt. (Neth.); RR Rotterdam 19 juli 2006, S&S 2007, 84 m.nt. (Neth.).

<sup>136</sup> *See* Rolf Herber, *Zur Berücksichtigung des Teilstreckenrecht bei Multimodalem Transportvertrag* in Festschrift für Henning Piper 877, 886 (W. Erdmann, W. Gloy & R. Herber eds. 1996); *see also* Jackson, *supra* note 55, at G1-2, G5 (addressing the UN Multimodal Transport Convention); MARIAN HOEKS, MULTIMODAL TRANSPORT LAW: THE LAW APPLICABLE TO THE MULTIMODAL CONTACT FOR THE CARRIAGE OF GOODS §§ 2.3.2.1.3, 2.3.2.2 (2010).

<sup>137</sup> *See, e.g., Quantum* [2002] 2 Lloyd's Rep. at 25 (Eng.); *Hartford Fire Ins.*, 230 F.3d at 549; *see also* David A. Glass, *Meddling in the Multimodal Muddle?—A Network of Conflict in the UNCITRAL Draft Convention on the Carriage of Goods [Wholly or Partly][by Sea]*, LLOYD'S MAR. & COM. L.Q. 307, 313–15 (2006); Jan Ramberg, *Deviation from the Legal Regime of CMR in INTERNATIONAL CARRIAGE OF GOODS BY ROAD (CMR)* 19, 22 (Jan Theunis ed. 1987).

<sup>138</sup> The issue of the clashes between the multimodal and unimodal conventions is more pressing in Europe, where the majority of international conventions on unimodal transport apply (i.e., CMR, COTIF-CIM 1999, and CMNI, in addition to international regimes on air transport that apply worldwide). It should be also noted that a regional convention on international road transport (1989 Inter-American Convention on International Carriage of Goods by Road) was negotiated within the Organization of American States (OAS) but has not, however, entered into force so there is no issue of overlap with respect to that convention, at least at the moment. *See* Paul B. Larsen, *1989 Inter-American Convention on International Carriage of Goods by Road*, 39 AM. J. COMP. L. 121 (1991).

<sup>139</sup> The same issue was also raised in the course of negotiations of the UN Multimodal Transport Convention (mainly by the United Kingdom) and the Rotterdam Rules. *See, e.g., UNCITRAL, Working Group III (Transport Law) Rep. on*

taken to resolve potential collision of conventions.<sup>140</sup> If solved, it could address to a certain extent the remaining issues related to applying unimodal transport treaties. Much would depend, though, on political bargaining, which is expected to play a significant role in reaching an acceptable solution.<sup>141</sup>

3. *Resolving the Conflicts Between the International Multimodal Transport Rules and the Existing Unimodal Transport Treaties: What is the Way Forward?*

In theory, the clashes between an international multimodal transport regime and existing unimodal transport conventions could be resolved either by drafting explicit conflict-of-laws provisions or by recourse to Article 30 of the Vienna Convention on the Law of the Treaties (Vienna Convention),<sup>142</sup> which applies as a residual rule between member states to the convention.<sup>143</sup> It is doubtful, however, whether resort to the Vienna Convention would provide an adequate solution, at least in the case of overlap between international multimodal and unimodal transport conventions. First of all, the Vienna Convention applies only to parties that have ratified or otherwise accepted its rules. Therefore, it would present an adequate solution to possible conflicts only if all parties to the new multimodal convention are also

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the Work of its 11th Sess., Mar. 24–Apr. 4, 2003, ¶¶ 254–60, U.N. Doc. A/CN.9/526 (May 9, 2003).

<sup>140</sup> In a strict sense, a conflict of conventions occurs when a party to two treaties cannot simultaneously honor its obligations under both. Applying a broader definition, such a conflict occurs when a state is party to two or more treaties and either the mere existence of, or the actual performance under, one treaty will frustrate the purpose of another treaty. See generally Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 GEO WASH. INT'L L. REV. 573, 575 (2005); Wilfred C. Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT'L L. 401, 426 (1953); Felipe Paolillo, *Article 30—Convention de 1969 in LES CONVENTIONS DE VIENNE SUR LE DROIT DES TRAITÉS* 1247, 1265–66 (Oliver Corten & Pierre Klein eds. 2006). Conflicts between the multimodal and unimodal conventions would therefore arise only in the areas of the conventions that overlap, i.e., liability, limits of liability, time limits, etc.

<sup>141</sup> See generally Borgen, *supra* note 140, at 576, 605.

<sup>142</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

<sup>143</sup> See SIR IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 97 (2d ed. 1984); MARK E. VILLIGER, *COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* 403 (2009); Alexander Orakhelashvili, *Article 30—Application of Successive Treaties Relating to the Same Subject Matter*, in 1 *THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY* 764, 774–75 (Oliver Corten & Pierre Klein eds. 2011).

parties to the Vienna Convention.<sup>144</sup> But even if this ever materializes, it is debatable whether Article 30 of the convention would prescribe a systematic and efficient solution to the conflicts at issue. The first hurdle is the non-retroactivity of the Vienna Convention established in Article 4, which provides that its provisions do not apply to treaties concluded by state parties prior to the convention's entry into force for that particular state,<sup>145</sup> save insofar as they are declaratory of customary international law.<sup>146</sup> It is not, however, settled whether Article 30 reflects established customary law. The majority of leading scholars,<sup>147</sup> as well as the International Law Commission's (ILC) Report on Fragmentation of International Law,<sup>148</sup> tend to agree that at least some of the rules set out in Article 30—the *lex posterior*<sup>149</sup> and *pacta tertiis*<sup>150</sup>—are an expression of existing norms of customary law. The opposite view has, however, also been echoed.<sup>151</sup> Thus, if Article 30 were to be classified as a progressive development of the law of the treaties, then Article 30 would not cover all the pertinent treaty conflicts. For example, the non-retroactivity

<sup>144</sup> So far, the VCLT has 111 parties, not including the United States or European countries like France. *Vienna Convention on the Law of Treaties in MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL*, available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXIII/XXIII-1.en.pdf> (last visited Sept. 8, 2012) [hereinafter MULTILATERAL TREATIES].

<sup>145</sup> Vienna Convention, *supra* note 142, art. 4. For twenty-five states, the Vienna Convention entered into force on Jan. 27, 1980, but for the rest of the eighty-six it did later, even as late as Apr. 1, 2010. MULTILATERAL TREATIES, *supra* note 144.

<sup>146</sup> International customary law is created by a constant and uniform usage practiced by the states in question, combined with their *opinio juris*. *Asylum (Colom. / Peru)*, Judgment, 1950, I.C.J. Reports 266, 276 (Nov. 20).

<sup>147</sup> ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 228 (2d ed. 2007); VILIGER, *supra* note 143, at 410; Jan B. Mus, *Conflicts Between Treaties in International Law*, NETHER. INT'L L. REV., XLV 208, 211–12 (1998); Orakhelashvili, *supra* note 143; Manfred Zuleeg, *Vertragskonkurrenz im Völkerrecht, Teil I: Verträge Zwischen Souveränen Staaten*, 20 GERMAN Y.B. INT'L L. 246, 257 (1977).

<sup>148</sup> Int'l Law Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Rep. of the Study Group of the International Law Commission on the Fragmentation of International Law, ¶¶ 225, 228, 243, 252; UN Doc. A/CN.4/L.682 (April 13, 2006) (finalized by Martti Koskenniemi) [hereinafter Koskenniemi Report on Fragmentation of International Law]. It should be noted that this report is often cited as authority for a position, the ILC being the leading jurists who can help to codify international law. See MARGARET A. YOUNG, TRADING FISH, SAVING FISH: THE INTERACTION BETWEEN REGIMES IN INTERNATIONAL LAW 298–99 (2011).

<sup>149</sup> *Lex Posterior derogate lege prior*.

<sup>150</sup> *Pacta tertiis nec nocent nec prosunt*.

<sup>151</sup> See NELE MATZ, WEGE ZUR KOORDINIERUNG VÖLKERRECHTLICHER VERTRÄGE 316 (2005).



rule, as embodied in Article 4, would have precluded the application of Article 30 at least regarding states that adopted the Vienna Convention at the same time as the new multimodal transport convention, but had also concluded other international transport conventions before that date.<sup>152</sup> But even if the above obstacles could be overcome, it is still doubtful whether such conflicts fall into the ambit of Article 30 of the Vienna Convention because its scope is limited to conflicts between treaties "relating to the same subject matter." Thus, a lot would depend on the interpretation of the "same subject matter," which is deemed to be satisfied if the fulfillment of the obligation under one treaty affects the fulfillment of the obligation of another.<sup>153</sup> If the phrase were construed strictly, excluding international conventions with different foci but overlapping issue areas,<sup>154</sup> then unimodal and multimodal transport conventions, which touch on the same issues but do not really seek to supplant each other, would probably fall outside the scope of Article 30. On the other hand, if the view were taken that characterizations ("multimodal transport," "air carriage," etc.) have no normative value per se,<sup>155</sup> then the precondition of the "same subject matter" may be met, as concurrent application of multimodal and relevant unimodal transport conventions to the same facts would probably lead to incompatible results,<sup>156</sup> as in application of different liability rules, for example. In addition, one might argue that Article 30 of the Vienna Convention is not designed to avoid conflicts between private law conventions because it is intended to regulate "the rights and obligations of state parties

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<sup>152</sup> Unimodal transport treaties that the state has expressed its consent to be bound. See generally Frederic Dopagne, *Article 4: Non-Retroactivity of the Present Convention in 1 THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY*, *supra* note 143, at 81-82; Paul V. MacDade, *The Effect of Article 4 of the Vienna Convention on the Law of Treaties 1969*, 35 INT'L & COMP. L.Q. 499, 508-10 (1986).

<sup>153</sup> SINCLAIR, *supra* note 143, at 98; E.W. Vierdag, *The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions*, 59 BRIT. Y.B. INT'L L. 75, 100 (1988); Koskenniemi Report on Fragmentation of International Law, *supra* note 148, ¶ 254.

<sup>154</sup> See generally Borgen, *supra* note 140, at 603-04, 612.

<sup>155</sup> Koskenniemi Report on Fragmentation of International Law, *supra* note 148, ¶ 21.

<sup>156</sup> See Vierdag, *supra* note 154, at 100, cited with approval in Koskenniemi Report on Fragmentation of International Law, *supra* note 148, ¶¶ 22-23. It is also worthy to note that the issue of the sameness of the subject matter has been raised by neither Diamond nor Jackson in their respective papers on the U.N. Multimodal Transport Convention. See Diamond, *supra* note 52, at C10; Jackson, *supra* note 56, at G6.

to successive treaties.”<sup>157</sup> Therefore, as a state party would discharge its obligations under the pertinent transport convention by meaningfully implementing the convention into its domestic law, it could be argued that by the time a dispute between an MTO and cargo interests falls before a court, the state’s interest in applying the convention would be “tenuous or nominal.”<sup>158</sup>

Thus, the best solution by far for avoiding treaty conflicts would be treaty clauses that clearly and precisely spell out the new international multimodal transport convention’s synergies with unimodal transport treaties.<sup>159</sup> The drafting of such clauses would be a delicate exercise and particular attention should be given to the danger of conflicts arising not only from the applicability of transport treaties to single legs of multimodal transport operations, but also to operations that entail the combination of different transport modes, which are exceptionally regulated in the existing unimodal transport conventions.<sup>160</sup> That leaves drafters with the strenuous task of identifying the optimal solution to all possible conflicts, if indeed there is any. If one were, however, to evaluate the options open to drafters, one could easily conclude that there are not many, as a great number of solutions that might have been available in other conflicts would not be available here for various reasons.

First, the denunciation of unimodal transport conventions, which is usually successful in resolving conflicts with conventions with overlapping subject matters,<sup>161</sup> would not be a recommended conflict-solution technique here simply because it

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<sup>157</sup> Vienna Convention, *supra* note 142, art. 30 § 1; *see also* Diamond, *supra* note 52, at C10–11 (regarding the UN Multimodal Transport Convention).

<sup>158</sup> *See* Diamond, *supra* note 51, at C11 (raising the same argument regarding the applicability of the Vienna Convention to the UN Multimodal Transport Convention). *See also id.* at C11–12.

<sup>159</sup> This is generally considered to be the best option. *See generally* AUST, *supra* note 147, at 218; Borgen, *supra* note 140, at 584, 636.

<sup>160</sup> *See* CMNI, *supra* note 74, art. 2 § 2; COTIF-CIM 1999, *supra* note 73, arts. 1 § 4, 38; CMR, *supra* note 16, art. 2 § 1. Whether the respective provisions of the Warsaw and the Montreal Conventions would also conflict with the new multimodal transport instrument would depend on the scope of application of the multimodal convention and in particular, whether or not the operation of pick-up and delivery of goods carried out in the performance of a unimodal transport contract, would qualify as international multimodal transport. In the case of the U.N. Multimodal Transport Convention, it was not. *See* U.N. Multimodal Transport Convention, *supra* note 1, art. 1 § 1; *see also* Warsaw Convention, *supra* note 54, art. 18 § 3; Montreal Convention, *supra* note 54, art. 18 § 4.

<sup>161</sup> *See, e.g.*, Rotterdam Rules, *supra* note 5, art. 89 (regarding the denunciation of the existing maritime conventions).

would solve one problem by creating many more. More specifically, if the new multimodal convention were to provide that each state that ratifies or otherwise adopts its rules must denounce all unimodal transport conventions to which it is a party (from the time of the entry into force of the multimodal transport convention with respect to that state), then there would be no scope for conflicts. It would be the international multimodal transport convention alone claiming applicability to the entire multimodal transport operation. Denouncing the existing carriage conventions would eradicate conflicts, but it would nevertheless create a gap regarding the applicable regime to single-mode carriage operations, leading to further disharmony, only on the unimodal transport front this time (at least with regard to the states that would unilaterally terminate their participation in those treaties).

It is, therefore, worth exploring whether incompatibility between the new multimodal and existing unimodal transport conventions may be addressed through other procedures, such as reviewing all of the international unimodal transport conventions.<sup>162</sup> A revision to that effect would entail modifying both the definition of “contract of carriage” in existing carriage conventions and the respective provisions that expressly stipulate the application of these conventions to unimodal legs of multimodal transport to clarify that they apply only to carriage performed exclusively by the particular mode concerned<sup>163</sup>—save for cases in which such conventions expressly extend their applicability to other modes of transport, which exist in order to accommodate specific cases of carriage performed under two transport modes<sup>164</sup> and should therefore not be disturbed. Undoubtedly, a limitation of their scope of application would avoid treaty conflicts, but it would only be effective if also combined with a clause governing the interrelationship between the new multimodal transport convention and provisions of transport conventions that apply to carriage by other transport means. In

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<sup>162</sup> CMNI, *supra* note 74, art. 36; COTIF-CIM 1999, *supra* note 73, arts. 33–35; CMR, *supra* note 16, art. 49; Warsaw Convention, *supra* note 54, art. 41.

<sup>163</sup> This clarification would address the point made in *Quantum Corp. Inc. v. Plane Trucking* that the CMR Convention does not require that the freight carriage by road is part of a journey exclusively performed by road. [2002] 2 Lloyd's Rep. 25 (C.A.) 40 (Eng.).

<sup>164</sup> CMNI, *supra* note 74, art. 2 § 2; COTIF-CIM 1999, *supra* note 73, arts. 1 § 4, 38; Montreal Convention, *supra* note 54, art. 18 § 4; CMR, *supra* note 16, art. 2 § 1; Warsaw Convention, *supra* note 54, art. 18 § 3.

such a case, no clash would be conceivable because transport conventions by different transport modes would not claim applicability to individual legs of multimodal transport operations. This would, however, be too good to be true, as it is unlikely that revising current transport conventions to that effect could happen. Most existing transport conventions are either fairly new<sup>165</sup> or have been revised quite recently.<sup>166</sup> Nonetheless, none of them has clarified their applicability to multimodal transport operations, even though this matter had already been brought before the courts when these conventions were drafted or modified.<sup>167</sup>

In a similar vein, modifying unimodal transport conventions to limit their scope, though only between parties to the unimodal transport convention that would adopt the international multimodal transport instrument, is not an option that could be exercised—again at least in this case of conflicts. Though such a modification *inter se* would have avoided conflicts for the same reasons explained in the case of review of the conventions, unfortunately, it could not operate here. The operation of the principle of modificatory *inter se* agreements, which reflects a rule of customary law also embodied in Article 41 of the Vienna Convention,<sup>168</sup> is caught in this case by Article 1, Section 5 of the CMR, which expressly prohibits its parties from varying any of its provisions by special agreements between two or more of them, except to make it inapplicable to their frontier traffic or to authorize use in transport operations confined to their territory of consignment notes representing title to goods. And, this is not the only case in which the CMR creates obstacles to solutions for the conflicts at issue. It is also the two-way mandatory system established in Article 41 of the CMR—alongside Article 25 of the CMNI—that removes from the equation the possibility of resolving conflicts through establishing liability for multimodal transport in excess of minimum liability and

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<sup>165</sup> See CMNI, *supra* note 74 (adopted by the Diplomatic Conference Organized Jointly by the Central Commission for the Navigation of the Rhine, the Danube Commission and UN/ECE, held in Budapest from Sept. 25–Oct. 3, 2000); *see also* Montreal Convention, *supra* note 54 (adopted by a diplomatic meeting of International Civil Aviation Organization member States on May 28, 1999).

<sup>166</sup> See *supra* note 7.

<sup>167</sup> See *supra* note 79.

<sup>168</sup> See, e.g., VILLIGER, *supra* note 143, at 538; Anne Rigaux & Denys Simon, *Article 41: Agreement to Modify Treaties Between Certain of the Parties Only* in 2 THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 986, 994 (Corten & Pierre Klein eds. 2011). *Contra* SINCLAIR, *supra* note 143, at 14.

monetary limits provided for in unimodal transport conventions.<sup>169</sup> This is because unlike transport conventions that only prohibit decreasing carrier liability and would therefore be compatible with this solution,<sup>170</sup> both the CMNI and the CMR add to derogation not only any decreases in a carrier's liability, but also increases.<sup>171</sup> Unless both the CMR and the CMNI are amended to avoid the above difficulties, none of the above solutions are available. This would nonetheless be very unlikely as there seems to be little to no appetite from the transport industry to change a legal instrument that works rather well in practice.<sup>172</sup>

This leaves us with the alternative of incorporating conflicts provisions in the new multimodal transport instrument that would expressly deal with synergies between the international multimodal transport treaty and the international unimodal transport conventions, including a separate clause on its interrelationship with their provisions that extend application to other modes of transport. Drafting such provisions would not be an easy task, as the previous experience of the UN Multimodal Transport Convention has shown.<sup>173</sup> Thoughtful drafting requires careful consideration of both types of conflicts and close attention to the particularities of each one. Starting with the latter, one could argue that the collision of conventions in that

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<sup>169</sup> This alternative was proposed in the case of the European instrument on multimodal transport. See ASARIOTIS, *supra* note 27, at 28, 30; see also Malcolm A. Clarke, *The Transport Goods in Europe: Patterns and Problems of Uniform Law*, LLOYD'S MAR. & COM. L.Q. 36, 68 (1999) (European regulation); Clarke, *Carrier's Liability in Cross-Border Air Cargo Substitute Transportation*, *supra* note 58, at 185 (advancing the same arguments regarding the UNCITRAL Draft Convention on the Carriage of Goods [wholly or partly] [by Sea] (now Rotterdam Rules)).

<sup>170</sup> COTIF-CIM, 1999, *supra* note 73, art. 5; Montreal Convention, *supra* note 54, art. 47; Hamburg Rules, *supra* note 54, art. 23 § 1-2; Hague and Hague Visby Rules, *supra* note 53, art. III, r. 8.

<sup>171</sup> CMNI, *supra* note 74, arts. 20 § 4, 25; CMR, *supra* note 16, art. 41 § 1. CMNI, however, allows increase only with respect to liability limits where the nature and higher value of goods or articles of transport have been expressly specified in the transport document and the carrier has not refuted those specifications, or where the parties have expressly agreed to higher maximum limits of liability. CMNI, *supra* note 74, arts. 20 § 4, 25. It also allows for the inclusion of some additional defences related to inland waterways carriage. *Id.* art. 21 § 2.

<sup>172</sup> See Malcolm A. Clarke, *The Line in Law between Land and Sea*, J. BUS. L. 522, 524 (2003) (regarding the CMR); Rolf Herber, *CMR: UNIDROIT Should Not Let This Child Go!*, 3 UNIF. L. REV. 475, 478 (1998).

<sup>173</sup> U.N. Multimodal Transport Convention, *supra* note 1, arts. 30 § 4, 38; Diamond, *supra* note 52, at C13-14; Jackson, *supra* note 56, at G8-9; DE WIT, *supra* note 17, ¶¶ 2.221-2.236, 2.245-2.249.

case can be avoided if priority is given to provisions of unimodal conventions that extend to other modes of transport on the basis of the *lex specialis*.<sup>174</sup> This solution is based on the premise that provisions of unimodal transport conventions that apply to other transport modes are special types of multimodal transport and should therefore prevail over general provisions of a new international multimodal convention.<sup>175</sup> This seems to be a sensible approach as it preserves the applicability of provisions to special types of transport, reflecting long-established practices. Such a priority clause must then be coupled with rules that would provide for the interrelationship of the multimodal transport convention with the remaining provisions of existing international transport conventions. What, however, makes elaborating such conflict rules complicated is the *pacta tertiis* principle, which makes indispensable the adoption of a tiered approach based on whether a multimodal transport operation is performed between two state parties to it.<sup>176</sup> If it is, there is no obstacle in making a new multimodal transport instrument mandatorily applicable to the carriage contract, leaving no scope for applying a unimodal transport convention and in turn for conflicts.<sup>177</sup> If, however, the multimodal transport is between states, one of which is a party to the new multimodal convention and both of which are bound by another unimodal convention, this solution would not work because an international treaty

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<sup>174</sup> See generally Koskenniemi Report on Fragmentation of International Law, *supra* note 148, ¶ 116–18 (on the requirement of speciality in regard to “subject-matter”).

<sup>175</sup> The prevailing view is that transport under these rules is a special type of multimodal transport. See, e.g., CLARKE, INTERNATIONAL CARRIAGE OF GOODS BY ROAD: CMR, *supra* note 58, ¶ 15; GLASS, *supra* note 14, ¶ 3.97; HILL & MESSENT, *supra* note 122, ¶ 2.1; HOEKS, *supra* note 136, at 2.3.3.3; Ramberg, *supra* note 137, at 22. But see K.F. HAAK, THE LIABILITY OF THE CARRIER UNDER THE CMR 92–93 (1986); Loewe, *supra* note 52, at 330–31. See also HUIBERT DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 976 (1954), art. 18.3, ¶ 76 (with respect to Warsaw Convention); Günter Kirchhof, *Der Luftfrachtvertrag als Multimodaler Vertrag im Rahmen des Montrealer Übereinkommen*, 30 TRANSPR 133, 134 (2007) (not a special type of multimodal transport); CHRISTOPHER SHAWCROSS & K.M. BEAUMONT, AIR LAW ¶ 345 (2012) (multimodal transport).

<sup>176</sup> This solution resembles to the approach adopted in the Vienna Convention. Vienna Convention, *supra* note 142, art. 30 § 4. See also UN Multimodal Transport Convention, *supra* note 1, art. 38; Diamond, *supra* note 52, at C13 (for the interpretation of “a case relating to international multimodal transport subject to this Convention which takes place”).

<sup>177</sup> See a similar approach in the UN Multimodal Transport Convention, *supra* note 1, art. 3 (adopting a similar solution analogous to that of the Vienna Convention, art. 30 § 4(a)).

cannot impose obligations on third states without consent (*pacta tertiis non nocent*). Therefore, in such a case, the collision of conventions would be avoided by giving priority to provisions of the otherwise applicable unimodal transport convention.

Though including conflicts provisions appears to be a viable solution, it is not free of difficulties. Its success and, to a certain extent, the success of the new multimodal transport convention, would depend on whether pro-CMR states will accept a conflicts clause that implicitly denounces applying the CMR to road legs of multimodal transport operations, at least where the multimodal contract is performed between two member states to the new multimodal convention. Of course, this is a matter of negotiation and political compromise and the outcome would not be predictable. In addition, it is a solution that leaves uncertainty regarding the applicability of unimodal transport conventions to a multimodal journey, the applicable regime to borderline cases and ancillary services. But, obviously, these cases would be limited. Applying unimodal transport conventions would be allowed only if multimodal transport is between states, only one of which being party to the new multimodal convention. This is only because a contrary solution would have violated the *pacta tertiis non nocent rule*.

Moreover, matters would be further complicated if the Rotterdam Rules, which extend their application to "wet multimodal" transport, ever enter into force. As transport under the Rotterdam Rules would be classified as a special type of multimodal transport, it is safe to assume that possible conflicts between the new multimodal transport regime and the Rotterdam Rules would be resolved through application of *lex specialis*. One should, however, go beyond the legal framework and consider the practical ramifications of such a solution that gives priority to the Rotterdam Rules. It is not only the increasing volume of containerized goods carried by the combination of sea and other modes,<sup>178</sup> but also the extensive scope of the Rotterdam Rules, which apply even if a minor sea leg is contemplated in the contract of carriage,<sup>179</sup> that will have a negative impact on the range and number of operations to which the new multimodal transport convention would apply. It is thus likely that in such a

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<sup>178</sup> See, e.g., *Multimodal Transport: The Feasibility of an International Legal Instrument*, *supra* note 4, ¶ 6; UNCITRAL Working Group on Transport Law Rep. on the Work of its 9th Sess. (April 15–26, 2002), ¶ 26, U.N. Doc. A/CN.9/510 (May 7, 2002).

<sup>179</sup> Rotterdam Rules, *supra* note 5, art. 1.1.

case, the scope of the multimodal transport instrument would be reduced significantly.

#### 4. *Legal Certainty—Other Issues*

In addition to the legal ambiguity associated with the application of unimodal transport conventions, the segmentation of liability for multimodal transport leads to further legal uncertainty stemming from conflicting decisions of the national courts on core issues related to the carrier's liability as prescribed in different unimodal transport rules. The courts have, for instance, been divided over the interpretation of Article 17 of the CMR and, in particular, over the type of liability provided in the CMR rules (strict or fault-based),<sup>180</sup> the scope of the "unavoidable circumstances" defense,<sup>181</sup> or the burden of proof established by the CMR rules.<sup>182</sup> The courts have also been divided over the scope of "willful misconduct" under both the CMR and the Warsaw Convention.<sup>183</sup> Thus, even after localizing cargo loss, damage or delay in delivery, and identifying the applicable regime, the parties to the multimodal contract of carriage may still be in an uncertain legal position because their situation ultimately depends on the jurisprudence of the court before which their case is brought.

There is no doubt that applying uniform rules throughout a multimodal journey would evade the uncertainties resulting from the application of different unimodal transport conventions to the multimodal transport operation. Whether the uniform liability scheme could be successful in establishing clear and certain rules, however, also depends on its terminology. Put

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<sup>180</sup> Compare H.D. 24 June 1997 ND 1997, 167, (1998) EUR. TRANSP. L. 52 (Denmark-strict liability), with *Høyesterett* [Supreme Court of Norway] ND 1998.226 (fault-based liability). See also HUGO TIBERG & JOHAN SCHELIN, ON MARITIME & TRANSPORT LAW 150–51 (2012). In England, the road carrier's liability is seen as strict contractual liability which is qualified by the defenses provided in the Rules. See CLARKE, INTERNATIONAL CARRIAGE OF GOODS BY ROAD: CMR, *supra* note 58, ¶ 54a; HILL & MESSENT, *supra* note 122, ¶¶ 6.2–6.6.

<sup>181</sup> See Clarke, *A Way with Words: Some Obstacles to Uniform Transport Law*, *supra* note 47, at 359–60 (citing cases that refer to the divergent construction of the "unavoidable circumstances" (CMR, art. 17.2) by the national courts).

<sup>182</sup> See, e.g., Robert Wijffels, *Legal Interpretations of CMR: the Continental Viewpoint* (1976) EUR. TRANSP. L. 208.

<sup>183</sup> For the different interpretation of the "willful misconduct" in both the CMR and the air conventions, see Clarke, *The Transport Goods in Europe: Patterns and Problems of Uniform Law*, *supra* note 169, at 58–59; INTERNATIONAL CARRIAGE OF GOODS BY ROAD: CMR, *supra* note 58, ¶¶ 101–103d. MALCOLM A. CLARKE, CONTRACTS OF CARRIAGE BY AIR 144–51 (2d ed. 2010).



simply, the chances of avoiding ambiguities would be increased if the text eschews using controversial terms from existing international transport rules that have resulted in litigation.<sup>184</sup> But even so, it is likely that the new liability scheme would not be free from legal uncertainty. There are no guarantees that it would achieve an unfettered harmonization of laws in the sense that the new convention would never accomplish unification of the international multimodal transport laws.<sup>185</sup> The reason is that, because no single institution would oversee implementing and interpreting the new instrument,<sup>186</sup> there is a strong chance that there would be differences in its implementation into national laws<sup>187</sup> and the interpretation of its provisions by different national courts.<sup>188</sup>

In sum, neither of the liability systems—the modified network or the uniform—is perfect, as each has its own drawbacks. Nonetheless, between the two “evils”, it is the uniform liability scheme that enhances predictability of multimodal transport laws by providing a seamless regime and promotes legal certainty, if though combined with appropriate conflict-of-conventions provisions. But even then as the above analysis showed, such a combination still leaves room for ambiguity, though rather limited. Moreover, there is no doubt that the success of a uniform liability system cannot be guaranteed, as it depends not only on the successful drafting of provisions that would address the uncertainties of existing unimodal transport conventions, but also on extrinsic factors, such as political bargains and compromises that must be reached regarding the applicability of unimodal transport conventions to multimodal transport operations.

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<sup>184</sup> See Clarke, *The Transport Goods in Europe: Patterns and Problems of Uniform Law*, *supra* note 169, at 55–65 (discussing the diverse interpretations of core terms of unimodal transport conventions and listing several examples).

<sup>185</sup> See generally David L. Leebron, *Claims for Harmonisation, A Theoretical Framework*, 27 CAN. BUS. L. J. 64, 72 (1996).

<sup>186</sup> For instance, the European Union (EU) can ensure the consistent implementation of aims set out in EU treaties by issuing regulations that have binding effects on the member states. The EU can also secure the uniform interpretation of EU law by the member states through the “preliminary ruling procedure,” namely if a national court is in doubt about the interpretation or validity of an EU law, it may—and sometimes must—ask the Court of Justice of the European Union for advice.

<sup>187</sup> See, e.g., COGSA, *supra* note 90 (the implementation of the Hague Rules in the United States).

<sup>188</sup> See Clarke, *The Transport Goods in Europe: Patterns and Problems of Uniform Law*, *supra* note 169, at 55–65 (discussing perils of the sea, willful misconduct, etc.).

B. IS THE UNIFORM LIABILITY SCHEME COST-EFFECTIVE OR AT LEAST MORE COST-EFFECTIVE?

The development of efficient transportation services and, in turn, the promotion of international trade is inexorably tied to the implementation of international transport rules, which aim at reducing overall costs of transport operations. This objective is achieved if, *inter alia*, transport laws eliminate or at least minimize friction costs burdening participants in transport operations, leading to a decrease in the price of products sold worldwide. Hence, if one were to assess the cost-effectiveness of multimodal transport laws, and in particular of the uniform liability system, the question to be asked is whether or not—and also to what extent—the adoption of this type of liability system would contribute to the reduction of unnecessary administrative and other costs in order to promote the cost-effectiveness of a new international multimodal transport regime.

The starting point is that a uniform liability system would be seamless, transparent, and to some extent certain. It therefore offers the prospect of reducing the mounting costs of pursuing cargo claims under the current legal framework and, in particular, those costs associated with the complexities of the modally-oriented multimodal liability regime, e.g. the factual inquiries over the localization of cargo loss and, as discussed above, at least some of the pertinent legal inquiries.<sup>189</sup> But then, this is a very simplistic approach. One must also look at the bigger picture and explore the impact of adopting a uniform liability scheme on overall transportation costs and, specifically, on cargo insurance premiums and freight rates.

With regard to cargo insurance, one would expect that the predictability and legal certainty of a uniform scheme would provide assurances to shippers about their prospects of recovery against the MTO and thus lead to decreasing double or overlap insurance friction costs.<sup>190</sup> Having said this, it does not mean that cargo insurance would not be needed. Statistics show that shippers tend to insure their cargo, especially if it will travel internationally, by including terms like “transit” (warehouse-to-warehouse)<sup>191</sup> or “ex factory” clauses in their marine cargo poli-

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<sup>189</sup> See the discussion on legal certainty, *supra* Part III.

<sup>190</sup> See ASARIOTIS ET AL., *supra* note 27, at 20; see also David M. Sassoon, *Liability for International Carriage of Goods by Sea, Land and Air: Some Comparisons*, 3 J. MAR. L. & COM. 759, 771 (1971–1972) (with regard to the current position).

<sup>191</sup> Institute Cargo Clauses (A) & (B) (1982) and (2009), Clause 8.1.

cies.<sup>192</sup> It cannot, however, be pre-estimated at this juncture whether the amount of cargo insured would increase or decrease. The decision to insure or not would depend heavily on not only on distance, but also on the terms of a new multimodal transport convention and, in particular on the extent of the list of the excepted perils and monetary limits (in relation to the value of the carried goods).<sup>193</sup>

In addition, when it comes to the computation of the cargo insurance premium, which is based, *inter alia*, on the sum of claims paid by the insurer and on administrative costs of policy and claims handling, one could estimate that adopting a uniform liability scheme would result in a decrease in the level of premiums. This is because it is believed that shippers ultimately pay higher sums simply because cargo claims handling involves unnecessary legal and factual inquiries stemming from inadequacies of the (modified) network liability scheme. It is not possible, though, to calculate the exact, proportionate amount of decrease because available statistics either refer to general figures like overall administrative costs related to cargo insurance<sup>194</sup> or overall friction costs related to uncertainties of the existing legal framework incurred by all stakeholders.<sup>195</sup>

This is not, however, the only factor that may have an impact on calculating cargo insurance premiums. For example, litigation may arise over interpreting novel terms in the uniform rules, thereby leading to additional legal expenses to be incurred by the insurers. One should not automatically assume, however, that cargo insurance premiums would increase based only on this hypothesis. What should also be taken into account

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<sup>192</sup> See, e.g., *Wünsche Handelsgesellschaft Int'l mbH v. Tai Ping Ins. Co. Ltd.* [1998] C.L.C. 851 (C.A.) (Eng.).

<sup>193</sup> THE ECONOMIC IMPACT OF CARRIER LIABILITY ON INTERMODAL FREIGHT TRANSPORT REPORT, ¶ 3.5 (2001), available at [http://ec.europa.eu/transport/library/final\\_report.pdf](http://ec.europa.eu/transport/library/final_report.pdf) (where it was reported that one of the major reasons for insuring goods was the low liability limits prescribed in the Hague regimes).

<sup>194</sup> It is estimated that the shippers' administrative costs, which are mostly associated with cargo claims handling amount to approximately fifteen percent of the cargo insurance premium paid. Things are worse for shippers without cargo insurance as the same expenses amount to twenty-five percent of the cargo premium they would have paid. *Id.* ¶ 4.3.

<sup>195</sup> The Economic Impact of Carrier Liability on Intermodal Freight Transport Report suggests that the overall administrative costs of claim handling under the current framework amount to no more than twenty percent of the pertinent administrative costs. Specifically, in terms of multimodal transport in the EU, they amount to 50 million euros per annum (based on a maximum total friction cost of 600 million euros per year). *Id.* at ¶ 5.4.2 (but the report dates back to 2001).

is eliminating litigation costs related to construing provisions of unimodal transport rules (unless the same terms are also adopted in the new rules), which burden cargo insurers under existing rules.<sup>196</sup> Again, it would not be possible to pre-estimate whether and to what extent there would be an increase or decrease because there is no readily available data on the pertinent litigation expenses.

Furthermore, it is believed that there is a correlation between the type of liability adopted in the transport rules and the number of cargo claims brought forward. Hence, it is likely that an increased level of care would reduce losses and damage to goods,<sup>197</sup> and would in turn lead to a decrease in sums of claims paid and a proportionate reduction of cargo insurance premiums. The only caveat is that the terms of a uniform liability scheme should impose on the MTO liability for cargo loss, damage, or delay in delivery that “will be sufficient to provide him with a commercial inducement to undertake precautions, the cost of which would be economically justified by the reduction of the risk of loss or damage to the goods.”<sup>198</sup> Obviously, a different model would be economically unproductive and would defeat the purpose of establishing a cost-effective regime in the first place. Although the level of liability is deemed to have a significant impact with regard to unimodal transport, it may be argued that its significance can be reduced in multimodal transport operations. This argument holds true only if the prescribed level of care would be considered relevant solely to the conduct and liability of the actual carrier, and thus only applicable to transport legs operated by the MTO itself. Thus, it would be immaterial if the MTO is a freight forwarder or a “non-vessel-own-

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<sup>196</sup> See *supra* notes 180–183.

<sup>197</sup> JOHAN SCHELIN, *CMR LIABILITY IN A LAW AND ECONOMICS PERSPECTIVE*, 183, available at <http://www.scandinavianlaw.se/pdf/46-8.pdf>; see also ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 336–37 (6th ed. 2012); RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 226–31 (8th ed. 2011); see also *id.* at 229 (stating that strict liability will increase the number of claims in cases where damages are unavoidable in an economic sense, which is not usually the case in carriage). See also generally Trine Lise Wilhelmsen, *Transport Liability Regimes and Economic Efficiency in LAW AND ECONOMICS: ESSAYS IN HONOUR OF ERLING EIDE* 257 (Erik Røsæg et al. eds. 2010).

<sup>198</sup> See Lord Diplock, *Conventions and Morals-Limitation Clauses in International Maritime Conventions*, 1 J. MAR. L. & COM 525, 525–27 (1970) (cited with approval in *Mitsui & Co. v. Am. Exp. Lines, Inc.*, 636 F.2d 807, 815 (2d Cir. 1981)); Michael F. Sturley, *Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments About Hague, Visby and Hamburg in a Vacuum of Empirical Evidence*, 24 J. MAR. L. & COM. 119, 129 (1993); see generally POSNER, *supra* note 197, at 214–15.

ing ocean carrier" (NVOOC)—which is usually the case—because under those circumstances the relevant level of care would be that which is prescribed in the unimodal transport conventions applicable to individual transport legs. It could be argued, however, that the level of care provided in the multimodal transport rules would also have an impact on the MTO's choice of subcontractors. The higher the liability under the multimodal rules, the more diligent the MTO will be in choosing its subcontractors, leading to a possible decrease in the number of claims.

In addition, one should also take into account the effect of the type of the liability rules on the costs of legal adjudication of cargo claims, which also plays a significant role in determining the administrative cost of cargo handling and, in effect, cargo insurance premiums. It is, for instance, well-established that litigation costs are lower in strict liability cases compared to disputes involving negligence.<sup>199</sup> A reason for this is that cases involving strict liability are easier to settle without going to court.<sup>200</sup> Moreover, even if a case is brought before a court, an action engaging strict liability is evidentiarily less sophisticated and thus less costly because there is no need to address the issue of negligence.<sup>201</sup> Of course, this would not be as simple for multimodal cargo because the new multimodal transport regime would most probably also provide for instances in which the carrier would be exculpated from liability.<sup>202</sup> The costs of administering the liability rules, and hence cargo premiums, would then depend on the extent and complexity of the excepted perils in a new multimodal transport regime. Compared to the network and modified network liability schemes, however, the uniform liability system would provide more certainty and simplicity regarding the basis for calculating administrative costs of cargo handling. It would be based on only one liability system—either strict or fault-based, possibly with excepted perils—and would

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<sup>199</sup> See POSNER, *supra* note 197, at 229.

<sup>200</sup> *Id.*; see also CLARKE, ISIC FINAL REPORT (2005), *supra* note 27, at 11.

<sup>201</sup> See POSNER, *supra* note 197, at 229.

<sup>202</sup> For example, "circumstances which the MTO could not avoid and the consequences of which he was unable to prevent." This was included in the draft regime proposed in the ISIC. CLARKE, ISIC FINAL REPORT (2005), *supra* note 27, art. 8.4.

not depend on the type of liability adopted in a unimodal treaty applicable to the particular transport leg.<sup>203</sup>

What would also play a role in calculating the final amount of cargo insurance premiums is the proportion of claims paid to a shipper by its cargo insurer, which is subrogated from the carrier's liability insurance. It is not, however, possible to pre-assess the cargo insurer's prospects of recovery from the carrier or its insurer under the new international multimodal transport instrument because the amount recoverable under subrogation against the carrier's insurer would be restricted by the MTO's defenses and monetary limits of the new multimodal transport instrument. But even if limitation amounts were available, it would not be possible to extrapolate their impact on cargo insurance premiums because there is no statistical data available regarding subrogation rates from carrier insurance to cargo insurance, simply because insurance companies tend to be secretive on this matter.<sup>204</sup>

There is no doubt that all of the above factors would have an effect on calculating cargo insurance premiums, which can be assessed further only if and when the multimodal transport rules are drafted. One should not, however, base one's assumptions regarding potential increases or decreases of cargo premiums solely on the impact of the above mentioned parameters. By doing so, one runs the risk of underestimating the significance of extrinsic factors, such as market demand, which plays a major role in calculating insurance premiums.<sup>205</sup> What that means in practical terms is that market demand usually determines the cost of premiums in the first place, and it is only at the next stage of calculations that the remaining factors, e.g., type of liability, subrogation claims, etc., come into the equation regarding computation of a final premium, e.g., lead to an increase or decrease.<sup>206</sup>

Evaluating next the effect of a uniform liability scheme on freight charges involves, *inter alia*, assessing the impact of a new liability scheme on liability insurance premiums. The starting point is that implementing a uniform liability regime would not

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<sup>203</sup> Under the existing legal conventions, the liability of the carrier ranges from fault-based (Hague regimes) to strict liability with exceptions (CMR and COTIF-CIM 1999).

<sup>204</sup> THE ECONOMIC IMPACT OF CARRIER LIABILITY ON INTERMODAL FREIGHT TRANSPORT REPORT, *supra* note 193, ¶ 4.6.

<sup>205</sup> PETER ZWEIFEL & RONALD EISEN, INSURANCE ECONOMICS 6.2 (2012).

<sup>206</sup> *Id.*

change the current position regarding the MTO's prospects of obtaining insurance coverage for liability throughout all modes of multimodal journey because the unpredictability and legal uncertainty generated by the current legal framework do not generally seem to be obstacles for the MTO in obtaining such insurance coverage.<sup>207</sup> For instance, a great number of multimodal transport operations are insured by the TT Club, a mutual insurance company that specializes in insurance of liabilities and equipment for multimodal operators.<sup>208</sup> The TT Club offers tailor-made liability insurance policies to combined transport operators, which generally extend to cover their legal liabilities whether arising under contract, national law, or international convention.<sup>209</sup> Where the uniform liability scheme may have an impact, though, is on calculating liability insurance premiums, as it has been reported that uncertainty over the applicable legal rules leads to increases in liability insurance premiums for multimodal transport operations to and from developing countries and regions without clear legislation on multimodal transport.<sup>210</sup>

Although adopting a uniform liability scheme would affect calculating liability insurance premiums, it is not, however, possible to pre-estimate the exact percentage of the increase or decrease in premiums that would be associated with implementation of a new liability scheme. Several factors could contribute to this result. For example, much would depend on the particulars of a new international multimodal transport instrument, such as the type of liability and terminology used in the new rules, and the impact they may have on the number of claims and litigation expenses.<sup>211</sup> Moreover, there is no statistical data available on the amount of cargo claims or causes of the cargo loss that would allow for accurate assumptions regarding the impact of a new regime. Perhaps insurers find it uneconomical to collect such data or, even if they do, they are reluctant to

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<sup>207</sup> See, e.g., European Commission 2009 Report on Multimodal Transport, *supra* note 27, at 115–16 (whereby thirty-four out of fifty-eight stakeholders responded positively to the relevant question); see also UNECE Report (July 3, 2000), *supra* note 42, ¶ 14.

<sup>208</sup> See TT CLUB: MUTUAL INSURANCE LTD., <http://www.ttclub.com/> (last visited Nov. 21, 2012).

<sup>209</sup> See *id.*

<sup>210</sup> UNECE Report (July 3, 2000), *supra* note 42.

<sup>211</sup> The risk theory of insurance revolves around the description and forecasting of liabilities resulting from the underwriting of risks. See also ZWEIFEL & EISEN, *supra* note 205, ¶ 6.1.

publish it. Furthermore, the multimodal transport liability insurance model is based on the assessment of a wide range of elements, the body of multimodal transport laws being simply one of them.<sup>212</sup> Bearing all this in mind, however, it would be helpful to address the instances in which the uniform liability system could make a difference and in turn lead to an increase or decrease in insurance premiums.<sup>213</sup>

It is, for example, expected that there would be instances where the enactment of a uniform system may burden the MTO with friction costs, leading to a potential increase in freight rates. Such cases would relate to an MTO's right of recovery against subcontractors, which may in some cases be jeopardized by the application of the uniform liability scheme. Put simply, as it is not practically possible to dovetail the multimodal transport regime with the various unimodal transport liability rules, there would be cases in which the MTO would not be able to seek redress against its subcontractors, either fully or in part. Much would depend of course on the independent liability rules applying to the multimodal transport operation, but there may be cases in which an MTO could not re-claim against its subcontractor because the latter would be entitled to rely on an excepted peril only provided for in unimodal transport rules that apply to the MTO-subcontractor relationship. One could assume that this would occur, for instance, if a subcontractor sea carrier relied on the navigational error or the seaworthiness defense as prescribed in the Hague regimes<sup>214</sup> because one would expect that a new multimodal transport regime would not include such anachronistic rules. An MTO could possibly find itself in a similar situation regarding monetary limits. Obviously, it is not possible to foresee the financial implications for MTOs without knowing the exact liability limits of a new multimodal transport convention or other relevant details, like whether spe-

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<sup>212</sup> See also Ratko Zelenika, Tomaz Lotric, & Ervin Bušan, *Multimodal Transport Operator Liability Insurance Model*, 23 *TRAFFIC & TRANSP.* 25, 28–29 (2011) (referring to factors such as multimodal infrastructure and superstructure, multimodal transport technologies, business policies of the MTO, MTO service quality, etc.).

<sup>213</sup> It is worth noting that, unlike shippers, carriers would not be relieved of legal and other administrative costs related to localization of cargo loss, as such expenses would still remain relevant but only in connection to an MTO's recourse action against its subcontractors because they relate to identification of the subcontractor to be sued and the applicable regime. Such costs would thus still be reflected in freight rates and nothing will change in that respect.

<sup>214</sup> Hague and Hague-Visby Rules, *supra* note 53, arts. IV., r.2(a), III, r.1 (nautical fault and seaworthiness).



cial monetary limits would apply to multimodal journeys involving a sea leg, as is the case with the U.N. Multimodal Transport Convention.<sup>215</sup> Also, there could be instances where the MTO will lose the right to sue its subcontractor because the claim would be time-barred.<sup>216</sup> The end result in all of these instances is that the MTO would either bear the costs of such losses itself or buy extra insurance. Nevertheless, in both cases the freight charges would be raised, shifting the ultimate cost of the “mismatch” between the multimodal transport regime and the unimodal transport treaties to consumers.

Therefore, it has been proposed that the above difficulties could be avoided if the same liability rules—the uniform multimodal transport rules—applied to both multimodal transport and sub-contracted unimodal carriage, e.g., through express incorporation of new multimodal transport rules in pertinent sub-contracts.<sup>217</sup> This solution initially seems plausible, as applying the same liability rules both horizontally and vertically would solve issues arising from the “mismatch” of the multimodal and the unimodal rules. It is not, however, viable for a number of reasons. The first obstacle would be the CMR, which, under Article 41, Section 1, prohibits any derogation from its provisions.<sup>218</sup> To this, one should add the possibility of adverse lobbying by the transport industry and, in particular, the shipping industry, which in the past has opposed increases in a sea carrier’s liability.<sup>219</sup> Last but not least, depending on the monetary limit rules in new multimodal transport rules, this solution may prove economically unproductive because freight rates related to a subcontractor’s liability that exceed ordinary monetary limits would be excessive. This assumption is based on the premise that it is more economical for cargo interests to cover excess liability with their cargo insurers than for carriers to insure against excess lia-

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<sup>215</sup> U.N. Multimodal Transport Convention, *supra* note 1, arts. 18 § 1, 18 § 3.

<sup>216</sup> See Hague and Hague-Visby Rules, *supra* note 53, art. III, r.6; see also CMR, *supra* note 16, art. 32, CMNI, *supra* note 73, art. 24; COTIF-CIM 1999, *supra* note 73, art. 48 (providing for only a one-year time bar, with the exception of wilful misconduct—in the cases of the SMR and COMF-CIM 1999, where this period is two years). Other transport conventions establish a longer period, such as two years. See Montreal Convention, *supra* note 54, art. 35; Hamburg Rules, *supra* note 54, art. 20; Warsaw Convention, *supra* note 54, art. 29.

<sup>217</sup> ASARIOTIS ET AL., *supra* note 27, at 30.

<sup>218</sup> See also *id.* at 28 n.49, 30 n.53 (proposing solutions to overcome this hurdle based on European law (restraint of trade)).

<sup>219</sup> The shipping industry has objected both the Hamburg Rules and the Multimodal Transport Convention that increased the sea carrier’s liability.

bility.<sup>220</sup> This is actually why the option to declare higher value is practically never exercised.<sup>221</sup> Thus, in cases where subcontractors agree to accept the higher liability prescribed in multimodal transport rules, it is inevitable that freight charges applying to the multimodal transport contract would be significantly increased to reflect enhanced freight rates charged to multimodal transports operator by subcontractors.

The analysis above showed that the cost-effectiveness of a uniform liability scheme depends on whether possible increases in freight rates—mainly due to the possible loss of the MTO's right of recovery against subcontractors—would outweigh potential decreases in cargo insurance premiums attributed to reducing litigation costs. It is not, however, possible to predict outcomes at this stage for the reasons discussed above. What can, however, be deduced is that one of the factors that would play an instrumental role is the scope of a uniform liability scheme's liability rules, as they would determine its interrelationship with the diverse liability rules on unimodal transport claiming applicability to separate legs of the multimodal transport operation and, in turn, the MTO's prospects of recovery against its subcontractors. It is inevitable, though, that there would still be cases in which an MTO will not be able to recover from a subcontractor, as discussed above. But their impact cannot be estimated—not only because the particulars of a uniform liability are not set, but also because there is no available data on the percentage of losses attributable to particular causes, such as error in navigation. Thus, unless both unimodal and multimodal regimes are aligned, which is unlikely to happen, such friction costs would continue to exist, increasing the overall cost of products distributed throughout the world.

#### IV. CONCLUSIONS

The quest for harmonizing international multimodal transport laws comes from the realization that the proliferation of diverse rules adversely affects the efficiency of multimodal transport and the promotion of international trade. The long-awaited harmonization has not yet been achieved, however, despite the efforts of several international organizations. Although support has been expressed for reform of the current legal

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<sup>220</sup> Lord Diplock, *supra* note 198, at 529–30 (cited with approval in *Smythgreyhound v. M/V Eurygenes*, 666 F.2d 746, 752 (2d Cir. 1981)).

<sup>221</sup> Lord Diplock, *supra* note 198, at 529.

framework on international multimodal transport laws, it has been established earlier in this article that any effort to that end would be futile if it failed to address the shortcomings of the current rules. In other words, a new international legal framework on multimodal transport will have genuine prospects of gaining widespread acceptance only if it provides for rules that are predictable, certain, cost-effective, and acceptable to the international transport community. It has been doubted, though, as explained in this article, whether the network and modified network systems of liability, as implemented in the current multimodal transport rules, meet those objectives because they create factual inquiries over identifying locus of cargo loss and other related legal issues, which in turn increase friction costs incurred by all stakeholders.

But then is a uniform liability scheme the way forward? This may be plausible but much depends on the content of uniform liability rules. In particular, the above analysis demonstrates that although the predictability of liability rules should be intrinsic to a uniform liability scheme, legal certainty will be only achieved if successful conflict-of-conventions clauses are incorporated in rules to avoid clashes with existing or future unimodal transport conventions. But even then, as the earlier discussion has shown, the objective of legal certainty will not be attained to the fullest extent because conflict clauses still leave room for applying the unimodal transport conventions, leading to legal ambiguities related to their application to multimodal transport operations. The analysis then further demonstrated that an increase in transaction costs—mainly those associated with freight rates—could also be a major hindrance to the acceptance of a uniform liability scheme by the transport industry. It is not, however, possible to estimate whether and to what extent there will ultimately be an increase for a variety of reasons explained earlier in this article, such as the absence of empirical data and information on particulars of the new rules, as well as the impact of a wide range of factors on computing premiums. But what the above analysis clearly shows is that the possibility of increasing liability insurance premiums relates to MTO's risk of losing its right of redress against subcontractors where its liabilities are not on back-to-back terms. Hence, much would depend on the liability provisions embodied in the multimodal transport convention and the extent to which they converge with or diverge from pertinent rules of the unimodal transport conventions, i.e. in terms of exoneration from liability and monetary

limits. Ultimately, a cost-benefit analysis would determine whether a uniform liability scheme in a new multimodal transport convention is cost-effective—or sufficiently cost effective to satisfy the transport industry's needs and therefore gain wide acceptance.

So, what lies ahead? The international community has not yet embarked on drafting on an international regime on multimodal transport rules, despite the support expressed by the transport industry and governments some time ago. A valid explanation may be that projects on multimodal transport were stalled while the Rotterdam Rules were being negotiated,<sup>222</sup> and a wait-and-see position was subsequently adopted for implementing a new convention. It will be interesting to see how the EU might proceed on that front, given that it has already prepared three proposals for a regional regime on multimodal transport.<sup>223</sup> It appears, however, that within the EU the general support is for an international regime, while those who support harmonization at the European level only view a European instrument as a stepping stone toward the ideal of global uniformity.<sup>224</sup> What has also muddled the waters is that the European Parliament has already urged its member states to adopt the Rotterdam Rules, a limited multimodal transport regime, without delay.<sup>225</sup> The situation thus remains uncertain and one cannot predict the EU's direction or any other multilateral body for that matter. In any case, implementing a uniform liability scheme in EU would represent a good test of its efficacy prior to its adoption at the international level, given that the issue of conflicts of conventions is far more pressing in Europe, where most of the unimodal transport conventions claim applicability.<sup>226</sup>

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<sup>222</sup> For instance, the UNECE's project on the civil liability regime for multimodal transport was suspended while the Rotterdam Rules were prepared. *See, e.g.*, U.N. Econ. & Soc. Council [ECOSOC], Inland Transport Comm., Report of the Inland Transport Committee on the work of its sixty-seventh session (Feb. 15–17, 2005), ¶ 24, ECE/TRANS/162 (Mar. 8, 2005).

<sup>223</sup> *See supra* note 27.

<sup>224</sup> European Commission 2009 Report on Multimodal Transport, *supra* note 27, at 158.

<sup>225</sup> *See* the Resolution of 5 May 2010 on Strategic Goals and Recommendations for the E.U.'s Maritime Transport Policy Until 2018, Eur. Parl. Doc. A7-0114/2010.

<sup>226</sup> *See supra* note 138.

