NexTrust Deliverable 6.5 - Report on the effect of the absence of an international convention on multimodal transport

Deliverable 6.5

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Contributors	Michiel Spanjaart, KKL, nextrust@kneppelhout.nl
Checked by	TX Logistik, Pastu Consult, Giventis, GS-1 Germany, VU Amsterdam, Vlerick Brussels
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1. Introduction D6.5

Presently, there is no international convention to govern multimodal contracts of carriage. The United Nations Convention on International Multimodal Transport of Goods was signed in Geneva in 1980 (MMTL 1980), but the convention never entered into force. Only 11 countries have ratified the convention to date. A minimum of 30 ratifications, however, was required for its entry into force.[1]

This Deliverable discusses the effect of the absence of an international convention on multimodal transport. The report has been written from a legal perspective; it does not deal with any environmental and/or (macro) economic effects. It is safe to assume, though, in view of the already existing EU policy, that an increase of multimodal transport at the expense of consecutive unimodal contracts of carriage (by road) is both cost efficient and eco-friendly.[2]

1.1 NexTrust project overview

The NexTrust project has been granted funding from the EU Horizon 2020 Research and Innovation Programme under Grant Agreement 635874. In broad outline, the NexTrust Project specifically aims to increase efficiency and sustainability in the logistics chain by developing trusted collaborative networks that enable horizontal and vertical collaboration across shippers and industry sectors with all their respective supply chains, including last mile (e-commerce), in the European logistics market. These networks will fully integrate shippers, logistics service providers ("LSP's" or "LSP") and intermodal operators as equal partners. To reach a high level of sustainability, these networks will not only bundle freight volumes, but shift them off the road to intermodal rail and waterways. These networks will significantly reduce greenhouse gas emissions and traffic congestion, while simultaneously improving asset utilization and logistics cost efficiencies, thus creating a more sustainable, competitive arena for European logistics that will be an inspirational example for the market. The NexTrust Project original plan is to cover 23 pilot cases in five different categories. The action engages major shippers as partners owning freight volumes of well over 1,000,000 annual truck movements across Europe, plus SME shippers and LSP's with a track record in ICT innovation. Characteristic of the NexTrust project is the focus on market driven research and innovation. NexTrust intends to create 'stickiness' for collaboration in the marketplace, validated through large-scale pilot cases carried out in real market conditions. The underlying foundation of the NexTrust consortium is the belief that horizontal and vertical collaboration should not be viewed only in the context of a theoretical or technological exercise, but when applied and validated pragmatically, can lead to a new level of business maturity and innovation strategy.

The pilot cases cover the entire scope of the call and cover a broad cross section of entire supply chain (from raw material to end consumers) for multiple industries. The creation and validation of trusted collaborative networks will be market oriented and implemented at an accelerated rate for high impact. We expect our pilot cases to reduce deliveries by 20%-40% and with modal shift to reduce

[1] Article 36 (1) MMTL 1980 reads: 'This Convention shall enter into force 12 months after the Governments of 30 States have either signed it not subject to ratification, acceptance or approval or have deposited instruments of ratification, acceptance or approval or accession with the depositary.'

[2] see for instance Amendment of the Combined Transport Directive: 'The EU transport policy has set a goal to reduce these effects by supporting a shift from long distance road transport to combinations of other modes of transport (multimodal transport). Furthermore, shift from long distance road transport to multimodal transport helps to create more local jobs improving the quality of jobs in transport sector. The aim is to shift 30% of road freight over 300 km to multimodal transport by 2030, and more than 50% by 2050.' https://ec.europa.eu/transport/themes/urban/consultations/2017-CTD_en

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GHG emissions by 40%-70%. Load factors will increase by 50%-60% given our emphasis on back-load/modal shift initiatives. NexTrust will achieve a high impact with improved asset utilization and logistics cost efficiency, creating a sustainable, competitive arena for European logistics that will be an inspirational example for the market.

1.2 Purpose and Scope of Deliverable 6.5 - the effect of the absence of an international convention on multimodal transport

A major problem in logistics in the EU is that far too much carriage is performed unimodally by road, and not by environmentally friendlier modalities. Multimodal transport is the smart solution to face this problem. From a legal viewpoint a shortcoming is that there is no international regime on multimodal carriage, and the existing uncertainties with regard to the applicable (conventional) regime and the contractual provisions on the carrier's liability may very well cause shippers and carriers to be somewhat reluctant to explore this path. In this Deliverable 6.5 the problem will be analyzed further and a practical solution will be put forward.

Against this background, the first objective of Deliverable D6.5 is to outline the playing field. What is multimodal transport (as opposed to unimodal transport), which of the existing international (unimodal) conventions regulate multimodal situations, and which rules apply to the contract of carriage in the absence of such an international convention? The answer to this last question obviously depends on the facts and circumstances of the case, but also on the law that applies to the multimodal contract of carriage and the court seized. The second objective is therefore to illustrate that, in the absence of an international convention on multimodal transport, similar cases can currently have different outcomes within the EU. The third objective is then rather ambitious, i.e. to introduce a new international legal framework to regulate contracts of carriage, irrespective of whether these are multimodal or unimodal contracts.

2. Report on the effect of the absence of an international convention on multimodal transport

2.1 Multimodal contracts of carriage

A multimodal contract of carriage is a contract whereby the carrier agrees with the shipper to carry certain goods from the place of receipt using more than one different means of transportation and to deliver them to the consignee at the place of their destination.

This is a rather wide definition of a multimodal contract of carriage, for instance in line with the definition of combined transport ('gecombineerd vervoer') in article 8:40 of the Dutch Civil Code (DCC). A similar definition is found in the German Commercial Code (GCC), although the German legislator has imposed an additional requirement as § 452 GCC demands that '*at least two of these contracts would have been subject to different legal rules'*.[3]

[3] A contract of carriage, partly by rail and partly by road, is therefore not a multimodal contract of carriage in this definition as both legs are subject to the regime of § 407 GCC and further.

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Departing from this more or less generally accepted approach of multimodal contracts of carriage, however, the European Commission has adopted the following definition of 'combined transport' in its Amendment of the Combined Transport Directive:[4]

The Combined transport of goods is where the major part of the journey is carried out by train, ships or barges and is served by a short road leg in the beginning and/or end of the journey. In combined transport the goods are loaded into intermodal loading units (e.g. containers) in the beginning of the journey and these loading units are moved from one type of transport to another without reloading the goods themselves (transhipped). Combined transport is thus both a type of intermodal and multimodal transport.

• *Multimodal transport is transport where the goods or passengers are transported by more than one mode of transport, for example a transport operation involving road and rail transport.*

• *Intermodal transport is multimodal transport of goods in single loading units which is transhipped from one mode of transport to another (such as transport of a container first by road and then by a barge on inland waterway).*

• *Combined transport is a type of intermodal transport where the road leg is limited to a short distance and the major part of the route is carried out by rail, inland waterways or maritime transport.*

This is unfortunate, of course, as different definitions (leading to different interpretations) ultimately only add to the confusion.[5] For the remainder of this deliverable, it will therefore be assumed that there is no material difference between multimodal, intermodal and combined transport and that they are just different names for one and the same concept (as defined above).[6]

A means of transportation includes ships, trucks, trains, barges, airplanes or any other means by which the goods can be carried.[7] Warehouses, terminals or tanks are obviously not means of transportation, and the storage of the goods prior to, in the course of or following the actual carriage does not convert a unimodal contract of carriage into a multimodal contract of carriage.

A multimodal contract of carriage needs to involve two or more of these different means of transportation. A contract of carriage by road, whereby the goods are transhipped into a different truck halfway, and then carried to the final destination for their delivery to the consignee, is therefore still a unimodal contract of carriage of goods by road as the two different trucks are still one and the same means of transportation.

The carriage by a certain means of transportation must be able to stand on its own feet. This implies that the carriage of the goods with a specific means of transportation must constitute a separate leg within a multimodal contract of carriage. A contract for the carriage of goods by sea, whereby the

[4] https://ec.europa.eu/transport/themes/urban/consultations/2017-CTD_en
[5] This was also one of the outcomes of the public consultation (see under the heading Problems Identified): 'The definition of combined transport is complex and somewhat ambiguous creating problems with the implementation. Furthermore, the definition is limited in scope.'
[6] De Wit 1995, 4; Clarke 2010, 192: 'Combined carriage (also called multimodal or intermodal carriage).'
[7] A means of transportation is not exactly the same as a 'modality' or a 'mode of transport', see for instance. article 2 (j) IMTGA: '"mode of transport" means carriage of goods by road, air, rail, inland waterways, or sea.' Strictly speaking, a ship is then a means of transportation that could be used for the carriage of goods by two modalities or modes of transport, but confusion in this respect is unlikely to occur. In fact, in the case of carriage of goods under the CMNI, the reference to a means instead of a mode is probably more accurate as the international carriage of goods with a single ship, mainly on inland waterways, but also in waters to which maritime regulations apply, is a unimodal contract of carriage.

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goods are discharged from the sea-going vessel into small barges for their delivery to the terminal,[8] is therefore still a unimodal contract of carriage. Indeed, two different means of transportation are necessary to complete the voyage, but the barge service within the port area is ancillary to the contract of carriage by sea. The barge service facilitates the carriage of goods by sea, and as such it is absorbed by the unimodal contract of carriage by sea.[9]

Conversely, a contract for the carriage of goods, whereby the goods are first carried on board of a sea-going vessel, and then discharged into barges for their further transportation by river to an inland terminal, is a multimodal contract of carriage. Once again, two different means of transportation are necessary to complete the voyage, but this time the carriage by inland waterways stands on its own feet. It is not an ancillary service, it is not absorbed by the contract of carriage by sea and it constitutes a separate leg within the multimodal contract of carriage.

The discharge of the goods from one means of transportation and their subsequent reloading into the next are obviously transport related operations, but they do not qualify as individual transport legs. All the same, the transhipment of the goods will occasionally require their transportation in the process. In principle, the transportation of the goods at the terminal in the course of their transhipment will not qualify as an individual leg within a multimodal contract of carriage,[10] but the qualification ultimately depends on the underlying reason for the transportation.

If the goods are carried (for a few hundred metres within a confined area) in order to facilitate their transhipment, then clearly the transportation will not constitute a separate leg within a multimodal contract of carriage. This may be different though, if the goods are transhipped in order to be carried onwards, for instance into a truck (instead of a tugmaster or Mafi-trailer) and to a destination beyond the terminal premises, or when there are other 'special circumstances' to support its qualification as a separate leg within a multimodal contract of carriage.[11]

It is easy enough to recognize a multimodal contract of carriage if the contract prescribes that the goods must first be carried by train to the airport, then by air for the second leg, and finally by road for delivery to the consignee. In practice, however, the contracting parties often fail to specify the means of transportation in their contract. The qualification of the contract of carriage as either unimodal or multimodal then depends on the circumstances of the case at hand.

The value and the size of the goods will often give a first indication. A contract for the carriage of a box of jewellery from Dublin (Ireland) to Madrid (Spain) may remain silent on the means of transportation, and yet it is surely an unimodal contract of carriage by air. The box of jewellery is light and very valuable, and its carriage by air, albeit certainly more expensive than by any other means of transportation, is the safest, quickest and in fact only viable option in the given circumstances.

[8] The bigger sea-going vessels are sometimes simply too big to reach the terminal, for instance because they too long for the quay or because the port area is not deep enough.
[9] HR 28 November 1997, S&S 1998/33 (General Vargas).
[10] BGH 3 November 2005, TranspR 2006, 35; Koller 2008, 333. See also Hof 's Gravenhage 17 October 1995, S&S 1996/54 (Salar) and BGH 18 October 2007, TranspR 2007, 472. In this latter case the court of appeal held that 'the transportation of the goods after their discharge from the ship within the port area to the truck with which the on-carriage had to be performed, contrary to the opinion of the court of appeal, cannot be seen as an individual (land) leg. (..) The circumstances of the case - transportation of the goods on a Mafi-trailer within the port area over a distance of 300 metres - do not suggest a different assessment.'
[11] BGH 3 November 2005, TranspR 2006, 35: 'The question whether the transhipment within the sea terminal qualifies as a separate leg (…) must in any case be answered with no when – as in this case – there are no special circumstances in this respect.' Koller 2008, 333 says at 339 that transhipment will only constitue a separate leg in 'Extremfällen', i.e. exceptional circumstances.

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The exact same contract of carriage between Dublin and Madrid, however, would surely be multimodal if the box of jewellery were exchanged for a large industrial crane. The crane is too big and too heavy to be carried by air, and since Madrid lies in the middle of Spain and the Atlantic needs to be crossed in order to reach Spain, multimodal transportation is the only available option. [12]

Whereas some contracts of carriage remain silent on the means of transportation, others explicitly give the carrier the freedom to choose the (one or more) means of transportation. These optional contracts of carriage are common practice in the case of parcel delivery services, provided by companies such as DHL, UPS, TNT and FedEx. The DHL Express standard terms and conditions for instance contain the following provision:[13]

"Shipment" means all documents or parcels that travel under one waybill and which may be carried by any means DHL chooses, including air, road or any other carrier.

The carrier will obviously want to select to most cost efficient routing, and this may vary per package. Under normal circumstances, for instance, the easiest, cheapest and fastest way to carry a package from Vienna (Austria) to Luxemburg is probably by road. All the same, if the package can easily be consolidated with another shipment bound for the airport of Liege (Belgium), it may very well be more cost efficient, albeit perhaps not faster, to carry the package by air to Liege, and then by either truck or van to Luxemburg.

An optional contract of carriage can therefore not immediately be qualified as either unimodal or multimodal. Instead, the qualification remains open until the actual transportation of the goods. The contract of carriage only loses its optional character once the carrier has selected the means of transportation.[14] If the carrier decides to carry the goods by just one means of transportation, the contract of carriage is unimodal. If the goods are carried by more than one means of transportation, however, it is a multimodal contract of carriage.[15]

2.2 Multimodal situations covered by unimodal conventions

Unimodal contracts of carriage are often governed by international conventions. The 5 most important conventions are the Hague-Visby Rules (HVR) on carriage by sea under a bill of lading,[16] the Montreal Convention (MC) on the carriage of goods by air,[17] the (amended) CIM 1999 on carriage by rail,[18] the CMR on carriage by road,[19] and the CMNI on inland navigation.[20]

[12] Verheyen gives an example whereby goods are carried from the US to a destination in Europe, neither at a port or an airport and also refers to OLG Karlsruhe 18 May 2011, 18 U 23/10 (otherwise unpublished). Verheyen 2013, 365.
[13] This provision comes from the terms & conditions of DHL Express, given in fact under the heading: 'Important notice'.
[14] See for instance in the UK, Germany and the Netherlands respectively Datec v. UPS [2007] 2 Lloyd's Rep. 114; BGH 29 June 2006, TranspR 2006, 466; Hof 's Gravenhage, 28 November 2007, S&S 2008/28 (DHL v. Landis).
[15] This approach of optional contracts of carriage as described above is followed in the UK, Germany and the Netherlands, but not in Belgium, see Verheyen 2012 and Hof van Cassatie 8 November 2004, TNT v. Mitsui [2006] ETL 228.
[16] The Brussels Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924 as amended by the Visby Protocol of 23 February 1968.
[17] The Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal on 28 May 1999.
[18] The amended uniform rules Concernant le transport International ferroviaire des Marchandises, signed in Vilnius on 3 June 1999. The convention is sometimes also referred to as Cotif-CIM as the amendments over the years to the initial Convention of Bern (1890) were brought together under the auspices of the Organisation intergouvernementale pour les Transport Internationaux Ferroviaire (OTIF) in Cotif 1980. The CIM forms appendix B to this convention, hence the reference to Cotif-CIM.
[19] The Convention relative au contrat de transport international de Marchandises par Route, signed in Genève on 19 May 1956.

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The conventions are basically unimodal, but their provisions will sometimes apply to certain multimodal situations. The HVR are silent on multimodal transportation and the CMNI is in fact strictly unimodal,[21] but the CIM 1999, the MC and the CMR all contain rules for specific multimodal situations.

2.2.1 Supplemental carriage, article 1 §§ 3 and 4 CIM 1999

The CIM 1999 regulates contracts for the international carriage of goods by rail. Such contracts will usually be unimodal, i.e. for the carriage by rail from one station to another, but the convention also governs certain multimodal contracts of carriage. In accordance with article 1 §§ 3 and 4 CIM 1999, the convention also applies to multimodal contracts of carriage whereby the carriage by land, sea or inland waterways is supplemental to the carriage by rail, irrespective where the loss, damage or delay occurred.[22]

Whereas article 1 § 4 CIM 1999 covers supplemental cross border carriage by sea and inland waterways, article 1 § 3 CIM 1999 only relates to supplemental domestic carriage by road and inland waterways. Article 1 § 3 CIM 1999 reads:

When international carriage being the subject of a single contract includes carriage by road or inland waterway in internal traffic of a Member State as a supplement to transfrontier carriage by rail, these Uniform Rules shall apply.

The obvious question with regard to this provision is: when does the carriage by road or inland waterways qualify '*as a supplement'* to the carriage by rail? Is supplemental carriage in the sense of article 1 § 3 CIM 1999 just an ancillary delivery service in the course of a contract of carriage by rail, or does it also encompass domestic legs by road or inland waterways in the course of a multimodal contract of carriage that happens to include an international rail leg?

The question was brought before the German Supreme Court in 2013.[23] A manufacturer of consumer electronics had instructed its regular carrier under an existing umbrella contract to carry a container with merchandise from Istanbul (Turkey) to Nürnberg (Germany). The container was carried by rail between Istanbul and Nürnberg, but prior thereto it was carried by road from the factory to the Istanbul station, and again afterwards it was carried by road from the Nürnberg station to the consignee. The contract of carriage was therefore multimodal, yet predominantly performed by rail.

Upon arrival of the container at its final destination a part of the cargo proved to be missing. The manufacturer's insurers initiated proceedings against the carrier, and by the time the case had reached the Supreme Court the key issue was the applicable law. The contract of carriage was subject to German law in accordance with the choice of law in the umbrella contract, but it would be

[20] The Convention relative au contrat de transport de Marchandises en Navigation Intérieure, signed in Budapest (Hungary) on 22 June 2001.
[21] Ramming 2009, 98; Bugden et al. 2013, 404; Czerwenka 2001. The outcome in Mayhew Foods v Overseas Containers would therefore have been different if the goods had travelled by inland waterways. Article 2 (2) CMNI specifically restricts the scope of application to contracts of carriage of goods 'without transhipment'. This implies that the contract of carriage can only be performed with one single vessel; so not two vessels, let alone one vessel and another means of transportation. Assuming that transhipment requires two different ships or a ship and another means of transportation, however, the CMNI could theoretically still cover the handling or movement of the goods in the period between their discharge in an intermediate port and their (re)loading on board on the same ship for the passage to their final destination.
[22] Ramming 2011, Rn 150.
[23] BGH 9 October 2013 – I ZR 115/12. The case has also been discussed by Freise 2013.

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governed by the CIM 1999 if the two road legs were supplemental to the international carriage of the goods by rail. The German Supreme Court adopted an extensive interpretation of '*a supplement'* in the sense of article 1 § 3 CIM 1999:

Hereby is meant that the principal subject matter of the uniform contract of carriage must be the carriage by rail. The road leg must therefore be short in relation to the rail leg. (…) As such multimodal contracts of carriage could also be subject to the provisions of the CIM when the main part of the carriage is by rail and the carriage is governed by one single contract of carriage.

OTIF, the intergovernmental organisation for international carriage by rail, welcomed this decision,[24] saying that '*the highest court in Germany interpreted the legal text exactly in accordance with the legislator's aim and hence rejected a restrictive interpretation (…).*'[25]

Mutatis mutandis the same applies to supplemental, non-domestic carriage by sea or inland waterways, provided that these cross border services are duly listed. Article 1 § 4 CIM 1999 stipulates:

When international carriage being the subject of a single contract of carriage includes carriage by sea or transfrontier carriage by inland waterway as a supplement to carriage by rail, these Uniform Rules shall apply if the carriage by sea or inland waterway is performed on services included in the list of services provided for in Article 24 § 1 of the Convention.

Article 24 Cotif then ensures that these services are included in *'the CIM list of maritime and inland waterway services*'.[26] This list contains a number of major ferry connections,[27] for instance the services between Marseille (France) and Algiers (Algeria), Trelleborg (Sweden) and Rostock (Germany) and Liverpool (UK) and Dublin (Ireland).[28]

2.2.2 Ancillary services, second sentence of article 18 (4) MC

The first sentence of article 18 (4) MC basically confines the geographical scope of the convention to an airport-to-airport range: '*The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport.'* The second sentence of article 18 (4) MC, however, extends the scope of the convention to certain ancillary services performed outside the airport, provided that the cause of loss remains unknown.

[24] Bulletin of International Carriage by Rail No. 4/2013, p. 20-21
[25] OTIF also quoted the Explanatory Re-port on Article 1 CIM saying: 'The term 'as a supplement" is intended to express the idea that the principal subject matter of the contract of carriage is trans-frontier carriage by rail.'
[26] Article 24 Cotif reads: 'The maritime and inland waterway services referred to in Article 1 of the CIV Uniform Rules and of the CIM Uniform Rules, on which carriage is performed in addition to carriage by rail subject to a single contract of carriage, shall be included in two lists: (a) the CIV list of maritime and inland waterway services, (b) the CIM list of maritime and inland waterway services.'
[27] See www.otif.org for an overview of the listed services.
[28] Obviously, the supplemental carriage by sea exposes the cargo to additional risks, and therewith exposes the carrier to additional liabilities. Article 38 CIM 1999 therefore allows Member States to make a reservation, i.e. that the carrier may rely on the following four (maritime) exemptions from liability (borrowed form the HVR) in addition to the exemptions listed in article 23 CIM 1999: 'a) fire, if the carrier proves that it was not caused by his act or default, or that of the master, a mariner, the pilot or the carrier's servants; b) saving or attempting to save life or property at sea; c) loading of goods on the deck of the ship, if they are so loaded with the consent of the consignor given on the consignment note and are not in wagons; d) perils, dangers and accidents of the sea or other navigable waters.'

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The obligations of the air carrier under the contract of carriage will in practice often run beyond the boundaries of the airport, *'the area of land devoted to carriage by air'*.[29] The carrier has for instance agreed to collect the goods at the consignor's production plant, or to carry them by truck from the airport to their final destination, or from one airport to another in the course of the voyage.

Under such circumstances, and in spite of the provision in the first sentence of article 18 (4) MC, the convention may still play a role, namely when this carriage '*takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment'* of the goods. These services need to be ancillary to the carriage of goods by air; they are not supposed to replace the carriage of goods by air.[30]

If these loading, delivery or transhipment services are performed in the course of a contract for the carriage of goods by air, and if the goods are damaged somewhere during the voyage, but this damage cannot be localized afterwards, then the second sentence of article 18 (4) MC comes in:[31]

If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. (…)

The second sentence of article 18 (4) MC provides for a presumption that is '*subject to proof to the contrary.*'[32] This means that the convention does not apply to any loss or damage that actually occurred during these ancillary services. In the absence of mandatory conventional rules, the carrier's liability for these ancillary services is then governed by (mandatory) domestic legislation and/or the provisions of the contract of carriage.

The specific reference to '*the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment'* in the second sentence of article 18 (4) MC suggests a certain proximity to the airport. On the other hand, the wording of the provision does not require these ancillary services to take place in the immediate vicinity of the airport.[33] This raises a demarcation question: when are these services still ancillary to the unimodal contract of carriage by air, and when are they individual legs of a multimodal contract of carriage that happens to include an air leg?

The contract of carriage is obviously the primary source in search of an answer, but not all contracts of carriage specify the mode or modes of transportation,[34] and the intention of the parties may sometimes then be difficult to (re)construct. In that case it is submitted that the relevant question is whether the delivery or transhipment can be detached from the air carriage.

If the delivery or transhipment service can stand on its own feet, it qualifies as a separate leg within a multimodal contract of carriage. The convention then only governs the carriage by air in accordance with article 38 (1) MC as '*loading, delivery and transhipment as meant in Article 18 can certainly be no more than that; it can be no more than accessory carriage. The rationale behind the provision is to*

[29] M. Clarke Contracts of carriage by air (Informa London 2010) 117.
[30] Giemulla/Schmidt 2006, under no. 88/89; OLG Hamburg 11 January 1996, TranspR 1997, 267.
[31] The provision refers to 'loading' and 'delivery', a surprising choice as one would expect either 'loading' and 'discharging' or 'receipt' and 'delivery'.
[32] This implies that the party alleging that the event took place in the course of the ancillary loading, delivery or transhipment services also bears the burden to prove that, see for instance BGH 10 May 2012, TranspR 2012, 466.
[33] The proximity is obvious enough where it concerns loading operations in the course of carriage by air, but the delivery of the goods at the final destination or the transhipment of the goods between two airports could theoretically cover a serious distance. The distance between Charles de Gaulle Airport and Orly Airport (the international airport to the north of Paris (France) and the domestic airport to the south of Paris) is for instance approximately 45 kilometres.
[34] The contract may simply be silent on the matter, but parties may also have agreed on an optional contract of carriage.

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extend the scope of the Montreal regime to situations of unlocalized loss, but only in case the air carriage is supplemented by carriage by another mode that does not have an identity of its own.'[35]

If, however, the delivery or transhipment service forms an integral part of the carriage of the goods by air, it is absorbed by the unimodal contract of carriage by air and the presumption of article 18 (4) MC applies to unlocalized losses in the course of that contract.[36]

2.2.3 Another means of transportation than agreed, third sentence of article 18 (4) MC

Whereas the second sentence of article 18 (4) MC regulates the agreed (ancillary) transportation of goods other than by air, the third sentence of article 18 (4) MC deals with the carriage of the goods by any other means of transportation although the parties agreed on carriage by air.

The working of the third sentence of article 18 (4) MC can perhaps best be explained with an example. Air France has agreed to carry a shipment of electronics by air from Singapore to Paris. The regular (and direct) Air France flight to Paris is already fully booked, but the Singapore Airlines flight to Munich that same day is not. Air France could then decide to (have Singapore Airlines) carry the shipment of electronics to Munich by air, tranship the goods into a truck, and subsequently carry them by road to Paris. Article 18 (4) MC, third sentence, then ensures that this international road leg is governed by the convention:

If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

The idea behind the rule is obvious enough: the cargo interested parties should not suffer from the carrier's one-sided decision to use a different means of transportation than agreed.

In practice, however, most (air) carriers will want to leave their options open. They will therefore negotiate the freedom to use any other means of transportation in their contracts of carriage. KLM for instance stipulates in its general conditions that the *'Carrier is authorized to carry the consignment without notice wholly or partly by any other means of surface transportation or to arrange such Carriage'.*[37] The result is then that the substitution for another means of transportation ultimately takes place with the consent of the consignor.[38]

[35] Hoeks 2009, 200.
[36] M. Clarke Contracts of Carriage by Air (Informa London 2010) 116.
[37] The carrier could then at the same time protect his liability position for these surface legs. Article 38 (2) MC allows this as long as the air leg remains subject to the provisions of the MC: 'Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.'
[38] Article 6.3.2 of General Conditions of Carriage KLM Cargo (July 2010), https://afklcargo.com/WW/common.

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2.2.4 Ro/ro and piggyback transport, article 2 (1) CMR

The infamous article 2 (1) CMR covers mode-on-mode transport in the course of a contract for the carriage of goods by road.[39] The optimistic approach is that the article is difficult to read; the more realistic approach is that it is a lawyers' paradise and a nightmare for uniformity.[40]

Article 2 (1) CMR consists of three sentences, and it can probably best be discussed sentence by sentence. The first sentence of article 2 (1) CMR ensures that the convention applies to the entire voyage as long as the goods remain on the same set of wheels:

Where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air, and, except where the provisions of article 14 are applicable, the goods are not unloaded from the vehicle, this Convention shall nevertheless apply to the whole of the carriage.

The obvious example relates to roll on/roll off (ro/ro) ferry transportation, very common in the course of carriage between the UK and the Netherlands/France/Belgium or between the different Scandinavian countries. The truck (or just the trailer) carrying the goods boards the ship in Denmark, and drives off again in Sweden (still carrying the goods) to resume the carriage by road.

Another example is piggy back transportation over the Alps. This time the truck boards the train in Germany or Switzerland, crosses the Alps by rail road, and continues its voyage by road in Italy. The entire contract of carriage is then governed by the CMR, even though it was partially performed by another means of transportation.

The first sentence of article 2 (1) CMR is straightforward enough; it is the second sentence that causes the problems. In spite of the (uniformity) rule in the first sentence, the second sentence then steers away from the provisions of the CMR,[41] and instead offers an alternative set of rules when certain conditions are met:

Provided that to the extent it is proved that any loss, damage or delay in delivery of the goods which occurs during the carriage by the other means of transport was not caused by act or omission of the carrier by road, but by some event which could only have occurred in the course of and by reason of the carriage by that other means of transport, the liability of the carrier by road shall be determined not by this Convention but in the manner in which the liability of the carrier by the other means of transport would have been determined if a contract for the carriage of the goods alone had been made by the sender with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport.

The second sentence of article 2 (1) CMR lists three cumulative conditions. First, the damage must have occurred during the ro/ro or piggyback transportation. Second, the damage was not caused by the road carrier. And third, the damage could only have occurred during the ro/ro or piggyback transportation.

[39] Article 2 (2) CMR ensures that the same rules apply when the road carrier and mode-on-mode carrier are one and the same entity.
[40] Wijffels 1989, 336; Theunis 1987, 256; Bombeeck et al. 1990, saying at 158 that article 2 CMR is the 'paria of transport law'.
[41] The idea is that the road carrier so avoids a potential recourse gap, for instance when he is liable for 8.33 SDR/Kg under the CMR, yet he can only recover 2 SDR/Kg from the sea carrier. Herber 1988, 646; OLG Hamburg 15 September 1983, VersR 1984, 534.

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Once the three conditions have been met the carrier's liability is governed by '*the conditions prescribed by law for the carriage of goods by that means of transport'* when the sender would have concluded the contract directly with the sea/rail carrier. The second part of the second sentence thus provides for a hypothetical regime, prescribed by law for the carriage of goods by sea or train.

This hypothetical regime causes a problem as no one really knows what the sender of the goods and the ro/ro or piggyback carrier would have agreed upon. Courts over Europe have been struggling with this problem over the years, and their solutions are far from in line. Some courts have adopted a subjective approach,[42] some have adopted an objective approach, [43] and some just follow the provision to the letter.[44]

In the absence of any prescribed conditions, the default rule in the third sentence of article 2 (1) CMR is that '*the liability of the carrier by road shall be determined by this convention*.'

3. The domestic legal frameworks

If a multimodal contract of carriage (or multimodal situation) is not governed by an international convention, the law applicable to a multimodal contract of carriage is identified in accordance with Regulation (EC) No 593/2008 on the law applicable to contractual obligations ("Rome I").

3.1 The conflict of laws

Article 3 (1) Rome I codifies the main principle: freedom of choice. When the parties have made a choice of law in their contract, the chosen law governs that contract:

A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

In practice, most commercial contracts will contain a choice of law, and the contract of carriage will therefore usually be governed by the chosen law. Failing such a choice of law, however, article 5 (1) Rome I explicitly regulates the law applicable to contracts of carriage:[45]

To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.

In the absence of a choice of law, the law applicable to a contract of carriage must be determined in three steps. The first two steps follow from article 5 (1) Rome I. The law of the residence of the carrier governs the contract of carriage, but only if that law coincides with the law of the place or receipt,

[42] Thermo v. Ferrymasters [1981] 1 Lloyd's Rep. 200.
[43] HR 29 June 1990, NJ 1992, 106, S&S 1990/110 (Gabriëla Wehr), ans so has the German Supreme Court in the UND Adrayatik, BGH, 15 December 2011 - Az. I ZR 12/11.
[44] Cour de Cassation 5 July 1988, ETL 1990, 227 (Anna-Oden).
[45] This is another significant difference between the common law and Rome I. Whereas the common law relies on the open norm of the closest and most real connection, article 5 Rome I instead gives very specific guidance.

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delivery or the residence of the consignor.[46] If not, the law applicable to the contract of carriage is the law of the contractual place of delivery.

The third step follows from article 5 (3) Rome I: *Where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, is manifestly more closely connected with a country other than that indicated in paragraphs 1or 2, the law of that other country shall apply*.[47]

The reference to '*all the circumstances'* and '*manifestly*' in this provision implies that the outcome on the basis of article 5 (1) Rome I will not easily be set aside. The Court of Appeal in 's-Hertogenbosch (the Netherlands) held very recently that '*mere geographical circumstances*', such as the residence of the carrier and the place where the payment had to be made, were in any case not sufficient to depart from the main rule of article 5 (1) Rome I.[48]

The system of article 5 Rome I is limited to 'real' contracts of carriage. This follows from the decision in ICF v. Balkenende.[49] ICF had agreed to make train wagons available for the transportation of goods in a regular shuttle service between Amsterdam (the Netherlands) and Frankfurt (Germany). ICF was not the actual carrier of the goods though; this was the Deutsche Bahn. The European Court of Justice adopted a narrow interpretation of a contract of carriage; article 5 Rome I only applies *'when the main purpose of the contract is not merely to make available a means of transport, but the actual carriage of goods.'*

The law that applies to the (entire) multimodal contract of carriage is not necessarily the law that applies to the individual legs of that multimodal contract of carriage. An individual leg within a multimodal contract of carriage may be governed by a unimodal convention, for instance because that leg falls within its scope of application, or because that convention gives specific or implied rules to that extent. In that case, the leg is mandatorily governed by the provisions of that convention.

3.2 The direct application of conventions to the individual legs

The question whether the CMR directly applies to road legs within multimodal contracts of carriage is one of the major bottlenecks in multimodal transport law as it has produced two completely different answers.

In Quantum Corp. v. Plane Trucking a shipment of hard disc drives was carried by Air France from Singapore to Dublin (Ireland). The first leg was by air between Singapore and Paris (France); the second leg was by road between Paris and Dublin.[50] Air France had flown the shipment to Paris, but it had subcontracted the second leg to Plane Trucking, an English road haulier. The shipment was stolen in the course of this second leg, and the driver was in on the theft.

Air France had issued an air waybill for the entire transport. This air waybill referred to French law and jurisdiction. The air waybill furthermore provided for a limitation of liability of 17 SDR/Kg. Since the

[46] Since Rome I deals with contractual relationships, the reference to the 'consignor' is likely to be a reference to the contractual counterpart of the carrier (the shipper, see paragraph 4.1).
[47] Article 5 (2) Rome I relates to carriage of passengers.
[48] Hof 's-Hertogenbosch 21 juni 2016, S&S 2016/114.
[49] ICF v. Balkenende [2010] 2 Lloyd's Rep. 400; see also 23 October 2014, S&S 2015/50 (El-Diablo).
[50] The contract was evidenced by Air France's air waybill and allowed for the carriage by another means of transportation than an airplane. The discussion on the application of the CMR in light of article 18 (4) MC (vertragswidriges Transport) did not surface.

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hard disc drives were quite valuable, but not very heavy, the maximum liability under the air waybill amounted to GBP 116,057.56, only a fraction of the actual damage of approximately US$ 1,500,000.

Quantum argued that the road leg between Paris and Dublin fell within the scope of application of the CMR. It initiated proceedings against Air France and Plane Trucking in England on the basis of article 31 (1) (a) CMR. Although Air France did not challenge the competence of the English court,[51] it did challenge the application of the CMR. In the absence of a mandatory regime, Air France argued that it could rely on the limitation of liability in its air waybill. Conversely, Quantum argued that article 41 CMR rendered the limitation of liability null and void. Since the driver had participated in the theft, Air France would instead be fully liable in accordance with articles 3 and 29 CMR.

Tomlinson J agreed with Air France and rejected the application of the CMR. He qualified the contract as '*a contract predominantly for carriage by air'.* The CMR did not apply to the road leg as '*the nature of the contract (…) must be examined, not the nature of the carriage which happens at the time of the loss to be being undertaken*'. He concluded that Air France's liability under the contract was limited to 17 SDR per kilo.[52]

The Court of Appeal agreed with Quantum.[53] Mance LJ accepted the direct application of the CMR to an international road leg within a multimodal contract of carriage as *'the concept of a contract for the carriage of goods by road embraces a contract providing for or permitting the carriage of goods by road on one leg, when such carriage actually takes place under such contract.* Paris was the place of receipt, Dublin was the place of delivery, and the Court of Appeal held that the scope of application of the CMR extended to an international road leg within a multimodal contract of carriage.[54]

Although the wording of article 1 (1) CMR does not immediately suggest the application of the convention to multimodal transportation, and it is not very likely that such a wide interpretation had been intended or foreseen by the drafters of the convention either,[55] the decision received a lot of support. The CMR was meant to unify the law, and this objective should not be restricted by a narrow interpretation of the wording of the scope of application. For this reason, the judgement in Quantum Corp. v. Plane Trucking was for instance welcomed by Haak,[56] Clarke,[57] and Hoeks:[58]

[51] This is remarkable as article 31 CMR did not establish English jurisdiction between Quantum and Air France, irrespective of the question whether the forum choice in the air waybill was exclusive or just one of the options under article 31 CMR. Claringbould 2012.
[52] Quantum Corp. v. Plane Trucking [2001] 2 Lloyd's Rep. 133.
[53] Quantum Corp. v. Plane Trucking [2002] 2 Lloyd's Rep. 24
[54] Referring to case law from (amongst others) courts in Germany and the Netherlands, namely BGH 24 June 1987, TranspR 1987, 447, BGH 17 May 1989, TranspR 1990, 19 and Rechtbank Rotterdam, 28 October 1999, S&S 2000, 35 (Resolution Bay). In the resolution Bay the goods were first carried by sea from Port Chalmers (New Zealand) to Rotterdam (the Netherlands), and then damaged in the course of the road leg between Rotterdam and Antwerp (Belgium). Although the combined transport bill of lading referred to English law and jurisdiction, the cargo interested parties initiated proceedings in Rotterdam. They argued that the road leg between Rotterdam and Antwerp met the requirements of article 1 CMR, and that the court of Rotterdam therefore had jurisdiction in accordance with article 31 (1) (b) CMR. The court of Rotterdam agreed and accepted jurisdiction: 'Since under the combined transport of goods P & O has opted to arrange part of the transport, i.e. from Rotterdam to Antwerp, by truck/by road whereas the contract, as contained in the CT document allows it to do so, the place where P & O (…) took delivery for transport by road, i.e. Rotterdam, counts as the place of receipt stated in the contract for the purpose of article 1 (1) CMR.'
[55] On the contrary, the CMR gives very specific rules on multimodal contracts of carriage in article 2 CMR. The application of the CMR beyond ro/ro and piggyback transportation would not seem to make sense in the absence of a specific provision to that extent, especially since article 2 CMR prescribes that the convention then 'nevertheless' applies. Moreover, the Protocol of Signature under the convention provides that the contracting states 'undertake to negotiate conventions governing contracts for furniture removals and combined transport.' This suggests that multimodal contracts of carriage were not (intended to be) covered under the convention at the time of its signing. All these arguments later surfaced in BGH 17 July 2008, TranspR 2008, 365 and HR 1 June 2012, NJ 2012, 516, S&S 2012/95 (Godafoss).
[56] Haak was in fact one of the (three) judges in the Rotterdam court deciding on the Resolution Bay.

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All things considered the objective of the CMR to uniformly regulate the international carriage of goods by road is best served by applying its rules to such carriage even if the contract is multimodal.[59],[60]

All the same, the Dutch Supreme Court chose a different approach in the Godafoss.[61] Eimskip agreed in November 2003 to carry a shipment of fish from Reykjavik (Iceland) to Naples (Italy). It issued a multimodal waybill for the entire voyage. This multimodal waybill explicitly referred to Icelandic law and jurisdiction. Eimskip carried the goods by sea on board of the Godafoss for the first leg between Reykjavik and Rotterdam. The shipment of fish was then discharged in Rotterdam to be carried by truck to Naples, but it was stolen in the course of this road leg.

The leading case in the Netherlands at that time was the Court of Rotterdam judgment in the Resolution Bay,[62] a decision that had furthermore just been embraced by the Court of Appeal in Quantum Corp. v. Plane Trucking.[63] Once the cargo insurers had reimbursed their assured for the loss of the fish, they therefore confidently ignored the jurisdiction clause in the waybill and initiated proceedings in Rotterdam. In line with the judgements in the Resolution Bay and Quantum Corp. v. Plane Trucking, the Rotterdam court indeed assumed jurisdiction on the basis of articles 31 and 41 CMR,[64] and awarded the claim.

Eimskip appealed, and the timing was crucial. Shortly after the judgment in first instance, but well before the judgement in appeal, the German Supreme Court rendered its landmark decision of 17 July 2008.[65] The shipper and the carrier had agreed on the carriage of a shipment of copiers from Tokyo (Japan) to Monchengladbach (Germany) under a multimodal waybill. This waybill referred to Japanese law and jurisdiction. The copiers were first carried by sea from Tokyo to Rotterdam, and then by road from Rotterdam to Monchengladbach. They arrived at their destination in a damaged condition, and the cargo interested parties initiated proceedings in Germany.

The carrier relied on the jurisdiction clause in the waybill. In fact, he challenged the competence of the German courts up to the Supreme Court.[66] The German Supreme Court had several objections against the application of the CMR.[67] It held that the wording of article 1 (1) CMR did not cover multimodal transportation, that the exception of article 2 CMR only applied to ro/ro and piggyback transportation, that the Protocol of Signature suggested that the convention failed to apply to

[57] Clarke 2003.
[58] Haak & Hoeks 2005; Hoeks 2009, 176.
[59] The authority of Quantum Corp. v. Plane Trucking was later affirmed by the House of Lords in Datec v. UPS [2007] 2 Lloyd's Rep. 114. The carrier (UPS) had negotiated the freedom to decide on the routing and means of transportation. Exercising that freedom, the goods were carried by truck from Datec's warehouse to Luton Airport (UK), flown to Cologne (Germany), and then again carried by truck to Amsterdam (the Netherlands). Lord Mance held that it was 'common ground that CMR would apply as between UPS and the respondents to the international road carriage which UPS was entitled, and chose, to undertake.
[60] This outcome was hardly a surprise (although the decision was unanimous) as Lord Mance had also written the leading judgement in Quantum Corp. v. Plane Trucking [2002] 2 Lloyd's Rep. 24.
[61] HR 1 June 2012, NJ 2012, 516, S&S 2012/95 (Godafoss).
[62] Rechtbank Rotterdam, 28 October 1999, S&S 2000, 35 (Resolution Bay).
[63] Quantum Corp. v. Plane Trucking [2002] 2 Lloyd's Rep. 24.
[64] The first instance decision in the Godafoss is in fact a copy of the decision in the Resolution Bay, Rechtbank Rotterdam 11 April 2007, S&S 2009/55 (Godafoss).
[65] BGH 17 July 2008, TranspR 2008, 365.
[66] The court of appeal, OLG Düsseldorf 28 September 2005-I-18U 162/02, had held that the competence of the German courts followed from article 31 CMR.
[67] The Supreme Court decision in fact mentions a total of six arguments. Only arguments one, two, three and five are discussed here; the remaining two relate to German (case) law.

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multimodal transportation, and that the objective of the CMR was just to provide uniform rules for unimodal contracts of carriage by road.[68]

Whereas the Rotterdam court only had the benefit of the judgements in the Resolution Bay and Quantum Corp. v. Plane Trucking, the Court of Appeal in The Hague could now also draw arguments from the 2008 German Supreme Court decision,[69] and indeed it did. The court followed the German approach, and in the process also introduced a new argument. The court stressed the potential difficulties for the identification of the competent court in the case of ongoing or unlocalized losses:[70]

These rules link the jurisdiction to the place where the goods are taken over respectively the place designated for delivery, but in the case of multimodal transport these places do not always correspond with the beginning or final destination of the road leg. Especially when damage occurs during several legs, or when it cannot be localized, undesirable issues regarding the jurisdiction may surface, which would not benefit legal certainty. This is an argument to allow an exclusive choice of forum for multimodal contracts.

The arguments pro and con the direct application of the CMR are not always helpful, let alone decisive, to determine whether the CIM 1999, HVR, MC and CMNI apply directly to rail, sea, air respectively inland navigation legs within multimodal contracts of carriage.

Still, it is safe to say that the discussion on the direct application of the CIM 1999 to rail legs within multimodal contracts of carriage has been prejudiced by the developments under the CMR. There is hardly any light between the scope of application of the two conventions. Whereas the CMR applies to '*every contract for the carriage of goods by road in vehicles for reward,'* the CIM 1999 applies to '*every contract of carriage of goods by rail for reward.'* Besides, both conventions link the jurisdiction to *'the place where the goods were taken over by the carrier or the place designated for delivery is situated.'*

The exact same arguments for and against the direct application of the CMR will therefore steer the discussion on the reach of the CIM 1999. The UK courts will apply the convention to rail legs within multimodal contracts of carriage.[71] The German and Dutch will apply the law applicable to the multimodal contract of carriage.[72]

Obviously, the discussion on the application of the HVR to sea legs within multimodal contracts of carriage only surfaces when the contract of carriage is covered by '*a bill of lading or any similar document of title*'. Once a (multimodal) bill of lading has been issued, however, the HVR will probably govern a sea leg within a multimodal contract of carriage.

This follows, for instance, from the wording of article I (b) HVR. Whereas article 1 (1) CMR refers to '*every contract for the carriage of goods by road (…)*', article I (b) HVR in fact refers to '*contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates*

[68] The Supreme Court also discussed the decision in Quantum, and specifically the reference of the Court of Appeal in that case to the BGH judgement of 24 June 1987, 'a case that was subject to German law', and therefore not subject to the direct application of the CMR. BGH 17 July 2008, TranspR 2008, 365.
[69] Although De Meij and Spiegel/De Vos had also already defended this position before 2008. See De Meij 2003; Spiegel et al. 2005.
[70] Hof 's Gravenhage 22 June 2010, S&S 2010/104 (Godafoss),
[71] Quantum Corp. v. Plane Trucking [2001] Lloyd's Rep. 133; Datec v. UPS [2007] 2 Lloyd's Rep. 114.
[72] BGH 17 July 2008, TranspR 2008, 365; HR 1 June 2012, NJ 2012, 516, S&S 2012/95 (Godafoss). If the applicable law is either German or Dutch law, the rail leg may then very well be governed by the CIM 1999 after all, but then via the application of the domestic network system.

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to the carriage of goods by sea (…).' The decisive difference comes from the words '*in so far as*'. These words imply that the HVR also govern sea legs in the performance of a wider contract, provided of course that this contract is covered by a (multimodal) bill of lading or similar document of title.

This textual argument is closely related to the second argument, i.e. that the drafters of the Hague Rules explicitly contemplated the effect of the rules on sea legs under through bills of lading.[73] When the delegates first met in The Hague, the proposed wording of article I (b) still referred to '*a bill of lading or any similar document of title relating to the carriage of goods by sea'*. Delegate Paine, representing the Banker's Association, made the following remarks on the scope of the rules and suggested a wider definition:[74]

We have to remember that there are such things as through bills of lading, and we want these Rules to govern that part of through bills of lading which relates to contracts of carriage by sea. I suggest, therefore, the insertion after the word "relating" of the words "wholly or in part", so as to cover the question of through bills of lading. (…) I think we are all in agreement (I think it is only a question of drafting) that where a banker, or anybody else, is dealing with a through bill of lading, he does get the benefit of these rules in so far as that bill of lading relates to carriage of goods by sea.

The last argument relates to the Court of Appeal (and Supreme Court) decision in the Godafoss.[75] Apart from the interpretation of the scope of the convention, the application of the CMR on road legs within multimodal contracts of carriage could be problematic in the case of an ongoing or unlocalized loss. This is indeed an argument against the application of the CMR, but it does not play any role in the application of the HVR as the rules do not give any provisions on jurisdiction.

All in all, the arguments against the application of the CMR on road legs within multimodal contracts of carriage do not affect the application of the HVR on sea legs within multimodal contracts of carriage.[76] The wording of article I (b) HVR is wider than the wording of article 1 (1) CMR, its application to sea legs was furthermore explicitly discussed in the drafting process and complicating jurisdictional issues do not arise.

There can be little doubt that the MC applies to air legs within multimodal contracts of carriage. First of all, the wording of article 1 (1) MC is again wider than the wording of article 1 (1) CMR. Whereas article 1 (1) CMR refers to '*every contract for the carriage of goods by road',* article 1 (1) MC refers to '*all international carriage (…) performed by aircraft*'. A specific contract for the carriage of goods by air is therefore not required by article 1 (1) MC.

More importantly, however, the drafters have explicitly addressed multimodal contracts of carriage including an air leg in the convention. Once the contract has been identified as a multimodal contract of carriage, as opposed to a unimodal contract of carriage with ancillary services,[77] article 38 (1) MC provides that the convention only governs the air leg within this multimodal contract of carriage:

[73] Through bills of lading are not the same as multimodal bills of lading. The difference between the two documents has been discussed in chapter 3.3, but does not affect the relevance of Delegate Paine's remark. In fact, see Glass 2012, saying at 248 that 'the development of combined transport documentation took the form of adaptation of through transport documents.'
[74] Berlingieri 1997, 90/91.
[75] Hof 's Gravenhage 22 June 2010, S&S 2010/104; HR 1 June 2012, NJ 2012, 516, S&S 2012/95 (Godafoss).
[76] Hoeks 2009, 319.
[77] Consequently, the presumption of the second sentence of article 18 (4) MC is limited to unimodal contracts of carriage by air; it cannot apply to multimodal contracts of carriage that include an air leg

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In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of Article 18, apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.

Admittedly, article 38 (1) MC has been worded somewhat restrictively ('*only*'), but with regard to the question at hand, it is quite clear that the provisions of the convention apply to an air leg within a multimodal contract of carriage.[78]

The CMNI is still a very young convention. There have not been that many cases on carriage of goods by inland waterways yet, and certainly not on inland navigation legs within multimodal contracts of carriage. Since the convention fails to give specific guidance in this respect,[79] the question whether the CMNI applies to these individual legs is theoretically still open.

Again, however, the answer may have been prejudiced by the discussion on the scope of application of the CMR. Whereas the CMR applies to '*every contract for the carriage of goods by road in vehicles for reward,'* the CMNI applies '*if the purpose of the contract of carriage is the carriage of goods (…) on inland waterways*'. Although the UK is not a contracting state to the convention, it seems likely that the English courts would be tempted to apply Quantum v. Plane Trucking to an inland navigation leg within a multimodal contract of carriage.[80]

In fact, an extra argument in favour of its direct application is that the convention does not give any jurisdiction rules. Consequently, the jurisdiction problem does not surface under the CMNI. Another argument in favour may be derived from article 16 (2) CMNI.[81] This provision prescribes that the carrier's liability beyond the tackle-to-tackle period, including thus any prior or subsequent carriage by other means of transportation, '*shall be governed by the law of the State applicable to the contract of carriage*.'[82]

In spite of all these arguments, however, it appears that the material scope of the convention provides a decisive argument against its direct application to inland navigation legs within multimodal contracts of carriage. Article 2 (2) CMNI stipulates that the convention applies '*if the purpose of the contract of carriage is the carriage of goods, without transhipment, both on inland waterways and in waters to which maritime regulations apply*.'

The key lies in the words '*without transhipment'*. Since the transfer from one means of transportation to the next more or less necessarily requires the transhipment of the goods,[83] this restriction implies that the convention only governs unimodal contracts of carriage by inland waterways, on occasion extended to waterways on which maritime regulations apply.[84]

[78] Koning 2007, 125; Verheyen 2016; Spiegel et al. 2005, 71.
[79] See Hoeks 2009, observing at 238 that 'its designers must have known of the ambiguity concerning the interpretation of the scope of application rules of the CMR, yet they failed to take appropriate measures to prevent the CMNI from following the same path.'
[80] Clarke 2005; Hoeks 2009, 237.
[81] Hoeks 2009, 238.
[82] Other than article 38 (1) MC though, article 16 (2) CMNI does not explicitly target multimodal transport, it just restricts the application of the convention to the tackle-to-tackle period.
[83] Transhipment is not always required though, see for instance ro/ro or piggyback transport. In theory, the CMNI could therefore apply to the carriage of a shipment of gravel in a push barge, first pushed by an inland navigation vessel, and later relieved by a sea-going vessel.
[84] Ramming 2009, 98.

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3.3 The application of a domestic network system

When the individual legs of a multimodal contract of carriage are not directly governed by one of the unimodal conventions, they are governed by the law applicable to the multimodal contract of carriage.[85] Obviously, there are as many domestic systems as there are EU member states. Some countries will not have any specific provisions on contracts of carriage in place at all,[86] others will just have one set of provisions to govern contracts of carriage in general, but Germany and the Netherlands, for instance, have incorporated a mandatory network system in their legislation.[87]

This network system, also known as the chameleon system,[88] ensures that the regime changes color with each change in the means of transportation, see for instance article 8:41 DCC prescribing that '*each leg of the carriage shall be governed by the legal rules applicable to that leg.*'[89]

The network system does not settle the conflict of laws.[90] In fact, the domestic network system that governs the multimodal contract of carriage was found as a result of the prior application of conflict rules,[91] and further renvoi is not allowed.[92] The reference to the '*legal rules applicable to that leg*' is therefore not a reference to the law of a certain country, but instead a reference to the rules that govern contracts of carriage by a certain means of transportation.[93]

The network system can perhaps best be explained with an example of a multimodal contract of carriage, for instance for the carriage of a shipment of tea from Sri Lanka to Poland. The tea is first carried by truck from the interior to the port of Colombo (Sri Lanka), then by sea to Hamburg (Germany) and then by road again to Warsaw (Poland). The multimodal contract of carriage in this example contains a choice for Dutch law and jurisdiction of the court of Rotterdam.

Once the application of Dutch law has been established on the basis of the rules of private international law, the network system of article 8:41 DCC then ensures that the road leg within Sri Lanka is governed by Dutch domestic law on carriage of goods by road. It is perhaps tempting to apply local domestic law to the carriage by road within Sri Lanka, but incorrect. The network system

[85] Hartenstein 2005; Hoeks 2009, 356; Van Beelen 1996, 97/98.
[86] The contract of carriage is then governed by the provisions on contractual obligations in general.
[87] See the Unctad report UNCTAD/SDTE/TLB/2/Add. 1 of 9 October 2001.
[88] De Wit 1995, 138.
[89] Mutatis mutandis the same applies when the domestic legislation of a country prescribes different rules for different means of transportation, and the network system is applied to multimodal contracts of carriage by its courts. See for the UK for instance Datec v. UPS [2007] 2 Lloyd's Rep. 114 and Quantum Corp. v. Plane Trucking [2002] 2 Lloyd's Rep. 24, discussed under paragraph 8.1. See for the US Wood 2000, 249. See for Belgium for instance Rechtbank van Koophandel Antwerpen 25 June 1976, ETL 1976, 691; Rechtbank van Koophandel Antwerpen 18 January 2005, ETL 2006, 543 and Hof van Beroep Antwerpen 25 October 2004, ETL 2006, 79 where the Court of Appeal held 'that, when, as in this case, not all legs are maritime, for those legs that have been performed by another means of transportation, the regime will apply that applies to that specific means of transportation.'
[90] Van Beelen 1996, 90; Hartenstein 2005; Spiegel et al. 2005, 74.
[91] This necessarily implies that domestic network systems will not take effect if the multimodal contract of carriage contains a valid floating choice of law whereby the applicable law changes with each new leg. The chosen law then governs that leg and the domestic network system does not come into play.
[92] Spiegel et al. 2005, 74; see also the discussion of the basic principles in paragraph 7.1.
[93] The wording of § 452a GCC is slightly different and refers to 'the legal provisions which would apply', instead of 'the legal rules applicable' as in article 8:41 DCC. This has caused several German authors to read this provision as a conflict rule, see for instance Koller 2000; Rabe 2000, and very recently Merkt 2016, 1651. This cannot be right, though, as the conflict of laws has already been settled by the applicable conflict rules at an earlier stage. When German law applies as a result thereof, § 452a GCC cannot reopen this discussion once again as it could lead to renvoi.

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does not identify the applicable law; the law that applies to the multimodal contract of carriage has already been identified. The network system only identifies the applicable legal rules.[94]

The regime that applies to the sea leg depends on the transport documentation. The domestic network system cannot override the direct application of mandatory conventions. If the sea leg is therefore covered by a bill of lading or any similar document of title, or if the entire multimodal contract of carriage is evidenced by a multimodal bill of lading,[95] it is mandatorily governed by the HVR.[96] If the sea leg is not covered by any transport document,[97] the HVR do not apply directly.[98] Since Dutch law applies to the multimodal contract of carriage, the sea leg is in that case governed by Dutch domestic law on carriage of goods by sea pursuant to article 8:41 DCC.[99]

Finally, the road leg from Germany to Poland is governed by the CMR. The convention does not apply directly though;[100] the convention only applies to the road leg because article 8:41 DCC prescribes its application.[101] The CMR forms part of Dutch law, it gives the '*legal rules applicable'* to an international contract of carriage of goods by road and its provisions mandatorily regulate the multimodal carrier's liability during the road leg.

The different unimodal conventions discussed earlier are in principle meant to be uniform and exclusive.[102] The application of a convention via a domestic network system, however, affects its uniform and exclusive character.

If the CMR, for example, applies to a contract for the carriage of goods by road because the requirements of articles 1 and 17 CMR have been met, the convention applies in full force. Article 13 CMR deals with the right of suit, article 31 CMR regulates the jurisdiction and article 32 CMR sets the limitation period, and all these rules apply mandatorily pursuant to article 41 CMR. If, however, the CMR applies to the road leg within a multimodal contract of carriage because a domestic network system prescribes its application, this is no longer possible as the application of the convention cannot change the course of events with retroactive effect.

The example of the multimodal contract of carriage from Sri Lanka to Poland may again be helpful to explain this. The contract refers to jurisdiction of the court of Rotterdam. Once the Rotterdam court has assumed jurisdiction on the basis of the forum choice in a multimodal contract of carriage, it applies its own conflict rules to determine the law applicable to the contract. Dutch law then governs the contract in accordance with article 3 Rome I, and the application of the network system of article

[94] Obviously, the contract of sub carriage between the multimodal carrier and his Sri Lankan sub carrier for the road leg may be subject to Sri Lankan law. This then also implies that any recourse proceedings between the multimodal carrier and the sub carrier may be subject to a different law than the law that applies between the multimodal carrier and the shipper/consignee. See the discussion of the recourse gap in paragraph 4.1.
[95] See the previous paragraph for the discussion on the application of the HVR to sea legs within multimodal contracts of carriage covered by 'a bill of lading or any similar document of title'.
[96] Articles I (b), III (8) and X HVR.
[97] Dutch law has a peculiar tendency to apply uniform rules whenever the opportunity arises. See in this respect the Supreme Court decision in HR 29 June 1990, NJ 1992, 106, S&S 1990/110 (Gabriëla Wehr), but also article 8:46 DCC: 'For the part of the transport, that will take place as carriage by sea or inland waterways in accordance with the contract between the parties, the multimodal transport document is deemed to be a bill of lading.'
[98] Or if the sea leg is subject to a charter party, see articles I (b) and V HVR.
[99] The contract would then be subject to more or less the same rules (as the HVR have been incorporated with a few alterations in the DCC), but Dutch domestic law on carriage of goods by sea is supplementary in the absence of a bill of lading or any similar document of title (article 8:382 DCC).
[100] Hof 's Gravenhage 22 June 2010, S&S 2010, 104; HR 1 June 2012, NJ 2012, 516, S&S 2012/95 (Godafoss).
[101] The CMR could have applied directly if the circumstances were only slightly different. If the port of Hamburg in the example were substituted for the port of Southampton (UK), the English courts would have assumed jurisdiction on the basis of article 31 (1) (b) CMR, see Datec v. UPS [2007] 2 Lloyd's Rep. 114 and Quantum Corp. v. Plane Trucking [2002] 2 Lloyd's Rep. 24.
[102] Sidhu v. British Airways [1997] 2 Lloyd's Rep. 76, and see chapter 5.

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41 and further leads to CMR. Clearly, the provisions of articles 31 and 33 CMR are then no longer relevant as the jurisdiction of the Rotterdam court has already been established.

In fact, it is submitted that the provisions in the CMR on the right of suit, successive carriage and even the limitation period are also ineffective.[103] The application of the convention cannot affect the law applicable to the multimodal contract of carriage, the law in fact that led to its application to the road leg in the first place. The application of the CMR via a domestic network system therefore really just means the mandatory application of those provisions of the CMR relating to the carrier's liability.

The network system has an obvious blind spot. Which legal rules govern the carrier's liability if it cannot be determined during which leg the damage occurred? If the leg where the damage occurred cannot be identified, one obvious possibility is to apply the provisions on contracts of carriage in general. This is for instance the fall back solution of § 452a GCC. The network system applies to localized losses only, and if the leg where the losses occurred cannot be established (or if the losses occurred in the course of several legs), the carrier's liability is governed by the general provisions of § 407-450 GCC.[104]

Article 8:43 (1) DCC provides another possibility, and this is surely the most adventurous of the options. The fact that damage cannot be localized fully remains for the account of the carrier, and the cargo interested parties may invoke the highest limitation available.[105]

3.4 The application of contractual (network) provisions

If a multimodal contract of carriage is not governed by conventional or domestic mandatory law, and if the individual legs of that multimodal contract of carriage are not subject to conventional or domestic mandatory law either,[106] the contracting parties are free to regulate their relation in the multimodal contract of carriage. This freedom of contract is rather relative though. Multimodal contracts of carriage are seldom negotiated line for line; instead they are often evidenced by standard documents issued by the carrier, such as the Multidoc 1995.[107]

The Multimodal Transport Bill of Lading (Multidoc 1995) was drafted and issued by Baltic and International Maritime Council (Bimco), and its network system is subject to the UNCTAD/ICC Rules

[103] This also follows from articles 8:42, 43 and 1722 DCC. This last provision regulates the limitation period (of in principle one year) in multimodal contracts of carriage under Dutch law. This limitation cannot be suspended in accordance with article 32 CMR, not even when the CMR were to govern the road leg. In fact, article 8:1722 DCC explicitly stipulates that the period starts running on 'the day of delivery under the multimodal contract of carriage.' § 452b GCC gives a similar provision for the notice period: '§ 438 applies irrespective of whether the place of damage is unknown, is known or becomes known later. The form and time limit prescribed for the notice of damage shall be deemed to have been observed as well if the corresponding provisions which would have been applicable to a con-tract of carriage covering the last leg of the carriage have been complied with.' The result is arguably the same in the absence of such explicit provisions though.

[104] § 407 (1) GCC codifies the receptum nautarum: 'By virtue of the contract of carriage the carrier is obliged to carry the goods to their destination and there to deliver them to the consignee.' § 431 GCC limits the liability of the carrier to 8.33 SDR for each kilogram of gross weight. The paradox is that the legal certainty actually increases in the case of unlocalized losses, Verheyen 2013, 373.

[105] The same rule applies under Belgian law, see for instance Rechtbank van Koophandel Antwerpen 13 May 2010, ETL 2011, 223: 'When the carrier in a case of multimodal transportation is liable for damage, and, as in this case, it has not been established where the event leading thereto occurred (…) the liability of carrier must be determined in accordance with the regime that leads to the highest amount of compensation.'

[106] This mandatory law can be a convention (paragraphs 8.1.and 8.2) or a domestic network system (paragraph 8.3).

[107] The Multimodal Transport Waybill (Multiwaybill 1995, also drafted and issued by Bimco) is the non-negotiable sister of the Multidoc 1995. Its article 12 is almost identical to article 12 of the Multidoc 1995.

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for Multimodal Transport Documents.[108] Article 10 makes the carrier responsible for the goods from the time of receipt to the time of their delivery. Article 12 then regulates the limitation of liability under the (different legs of the) multimodal contract of carriage.[109] Article 12 (a) reads:

Unless the nature and value of the Goods have been declared by the Consignor before the Goods have been taken in charge by the MTO and inserted in the MT Bill of Lading, the MTO shall in no event be or become liable for any loss of or damage to the Goods in an amount exceeding: (i) when the Carriage of Goods by Sea Act of the United States of America, 1936 (US COGSA) applies USD 500 per package or customary freight unit; or (ii) when any other law applies, the equivalent of 666.67 SDR per package or unit or two SDR per kilogramme of gross weight of the Goods lost or damaged, whichever is the higher.

Article 12 (a) does not select the US COGSA 1936, but only confirms that the carrier's liability is subject to its USD 500 per package limitation if the US COGSA 1936 applies. When any other law applies, the carrier's liability is limited to the HVR/CMNI limitation of 666.67 SDR per collo or 2 SDR per kilo.[110]

These 'wet' limits of liability do not apply, however, if the multimodal contract of carriage lacks a sea or inland waterways leg. In that case article 12 (c) prescribes that '*the liability of the MTO shall be limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the Goods lost or damaged.'* This corresponds with the CMR limitation of liability, but the limit is significantly lower than the CIM 1999/MC limitation of liability. The potential conflict is addressed in article 12 (d):[111]

In any case, when the loss of or damage to the Goods occurred during one particular stage of the Multimodal Transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the MTO's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.

Article 12 (d) is really the only true network provision in the Multidoc 1995. It works on the basis of chain of fictive unimodal contracts of carriage and regulates the limits of liability. The limitation of liability that would have applied to each fictive unimodal contract of carriage applies to each individual leg within the multimodal contract of carriage. Article 12 (d) does not incorporate the different unimodal conventions; it only incorporates their respective limits.

The carrier's liability under a multimodal contract of carriage from Busan (South Korea) to Ljubljana (Slovenia) would then be subject to different limitations for the different legs. The sea leg from Busan to Piraeus (Greece) would be subject to the 666.67 SDR/collo or 2 SDR/Kg limitation.[112] The road leg from Piraeus to Ljubljana would then be subject to a 8.33 SDR/Kg limit.

[108] ICC Publication No. 481; J. Richardson *Combined Transport Documents* (LLP Hong Kong 2000) 202/203. The ICC 1992 are a compromise between the earlier ICC 1975 and the MTC 1980, see Kindred/Brooks 1997, 35 and onwards.
[109] See P.M. Bugden/S. Lamont-Black Goods in transit (Sweet & Maxwell London 2013) at 455 in this respect: 'BIMCO Multidoc 95 is not a traditional document and like the Multimodal Convention, the basis of liability in uniform but the limits of liability vary.'
[110] Article 12 (b) stipulates: 'Where a container, pallet or similar article of transport is loaded with more than one package or unit, the packages or other shipping units enumerated in the MT Bill of Lading as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, such article of transport shall be considered the package or unit.'
[111] This will not always be a problem though. The contractual solution of article 12 (d) is redundant when the individual legs of the multimodal contract of carriage are directly governed by a convention, see paragraphs 8.1. and 8.2.
[112] The Multidoc 1995 is a bill of lading in the sense of article I (b) HVR and the sea leg is therefore subject to the HVR limitation. Article 12 (a) (ii) ensures that the sea leg under a charter party or waybill is subject to the exact same limitation. In

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The reference to '*In any case'* ensures that article 12 (d) prevails over the other provisions of article 12.[113] If the sea leg from Busan to Piraeus were substituted for an air leg from Seoul (South Korea) to Athens (Greece), the multimodal contract of carriage would lack a sea or inland waterways leg. The air leg would then not be subject to the 8.33 SDR/Kg limit though, but it would instead be subject to the 19 SDR/Kg limit of the MC as article 12 (d) supersedes article 12 (c).[114]

Article 12 (e) limits the carrier's liability for consequential and immaterial losses to the amount of the freight,[115] article 12 (f) ensures that the limited liability cannot exceed the total loss,[116] and article 12 (g) stipulates:

The MTO is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in Delivery resulted from a personal act or omission of the MTO done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

This criterion is in line with articles 36 CIM 1999, IV (e) HVR and 21 (1) CMNI, but it is stricter than article 29 CMR (since it requires a personal act), and more lenient again than article 22 (3) MC (since it can be broken). Still, there is no conflict between these different provisions. If an international air leg is directly governed by the MC, article 22 (3) MC applies mandatorily and the provision of article 12 (g) is null and void.[117] Mutatis mutandis the same applies if the CMR applies directly to an international road leg.[118] If the CMR does not apply directly though,[119] its 8.33 SDR/Kg limitation of liability is only incorporated as a contractual rule on the basis of article 12 (d), and the contracting parties are free to agree on stricter requirements than those of the CMR in the absence of mandatory law.

The Multidoc 1995 does not explicitly regulate unlocalized losses. The limitation of liability for unlocalized losses is therefore governed by the provisions of article 12 (a) and (c). If the multimodal contract of carriage includes a sea leg, the limitation of liability for unlocalized losses is basically subject to a 666.67 SDR/collo or 2 SDR/Kg limitation.[120] If the multimodal contract of carriage does not include a sea leg, the carrier's liability for unlocalized losses is limited to 8.33 SDR/Kg.

4. A uniform convention on (multimodal) contracts of carriage

Whereas the CIM 1999, the MC and the CMNI are relatively young and up to date conventions.[121] It is safe to say, however, that he Hague-Visby Rules (HVR) on carriage by sea under a bill of lading,[122] and the CMR on carriage by road have meanwhile surpassed their shelf lives.[123]

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fact, since article 12 (a) (i) only refers to the COGSA 1936, the provision also ensures that a bill of lading contract under the Hague Rules is subject to the (higher) HVR limitation.

[113] See the Explanatory Notes to the Multidoc 1995.

[114] The 19 SDR limit arguably applies anyhow on the basis of article 38 MC, but the right of way of article 12 (d) also ensures that international rail legs are subject to a 17 SDR/Kg limit.

[115] Article 12 (e) reads: 'If the MTO is liable in respect of loss following from delay in Delivery, or consequential loss or damage other than loss of or damage to the Goods, the liability of the MTO shall be limited to an amount not exceeding the equivalent of the freight under the Multimodal Transport Contract for the Multimodal Transport.'

[116] The aggregate liability of the MTO shall not exceed the limits of liability for total loss of the Goods.

[117] Article 38 jo 49 MC.

[118] Datec v. UPS [2007] 2 Lloyd's Rep. 114; Quantum Corp. v. Plane Trucking [2002] 2 Lloyd's Rep. 24, and then in combination with article 41 CMR.

[119] BGH 17 July 2008, TranspR 2008, 365; HR 1 June 2012, NJ 2012, 516, S&S 2012/95 (Godafoss).

[120] Unless the US COGSA 1936 applies, then the carrier's liability is limited to USD 500 per package.

[121] The Convention relative au contrat de transport de Marchandises en Navigation Intérieure, signed in Budapest (Hungary) 0n 22 June 2001.

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The CMR was signed in Geneva in 1956 and the provisions of the convention have not been amended ever since.[124] The general (academic) consensus is that several provisions and the limitation of liability should be revised as soon as possible.[125] Article 1 CMR (scope of application) is currently interpreted in two different ways,[126] article 2 CMR (mode-on-mode transport) is almost incomprehensible, the combination of articles 29 and 31 CMR (wilful misconduct and jurisdiction) triggers forum shopping, and article 34 and further CMR (successive carriage) regulates a relic from the past. Nevertheless, none of the contracting states has felt the need to take the initiative to amend, update or even re-evaluate the convention.

The Hague Rules were signed in 1924 and (only) amended with the Visby protocol in 1968.[127] Consequently, the limitations of liability have not been revised for half a century now. Besides, the bill of lading has seen some serious competition over the last 50 years. The bill of lading has already given way to the (non-negotiable) sea waybill in some trades,[128] and its traditional paper form will undoubtedly be substituted for an electronic equivalent in due course. Finally, whereas the rise of the container has boosted multimodal transportation, the HVR just regulate carriage by sea,[129] and then only within the tackle-to-tackle period.[130]

Clearly, the drafters of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea was signed in Rotterdam in 2009 – The Rotterdam Rules (RR) have recognized these factors,[131] and they have also addressed them in the convention.[132] The rules do not require a bill of lading or any similar document of title for their application. Furthermore, the rules prescribe a limited network system to regulate multimodal contracts of carriage (as long as a sea leg is involved) in article 26 RR.

Still, the requirement of a sea leg implies that the rules will not apply to other multimodal contracts of carriage.[133] Contracts of carriage such as in Quantum Corp. v. Plane Trucking (air/road),[134] Datec v.

[122] The Brussels Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924 as amended by the Visby Protocol of 23 February 1968.
[123] The Convention relative au contrat de transport international de Marchandises par Route, signed in Genève on 19 May 1956.
[124] The convention was amended twice, though, with the SDR protocol (Geneva, 5 July 1978) and the Electronic Consignment Note protocol (Geneva, 20 February 2008).
[125] The shortcomings of the convention were extensively discussed at seminars in Rouen and Rotterdam in 2016, (ironically) marking its 60th anniversary.
[126] The interpretation problem relates to the question of whether the CMR directly applies to an international road leg within a multimodal contract of carriage. Affirmative: Quantum Corp. v. Plane Trucking [2002] 2 Lloyd's Rep. 24 and Datec v. UPS [2007] 2 Lloyd's Rep. 114. Negative: BGH 17 July 2008, TranspR 2008, 365 and HR 1 June 2012, NJ 2012, 516, S&S 2012/95 (Godafoss).
[127] The SDR protocol of 1980 changed the 'currency', though.
[128] For instance in short sea carriage (to avoid complications with the presentation rule).
[129] The HVR, but this really applies to all five conventions, were simply never designed to cover multimodal contracts of carriage.
[130] Article I (e) HVR.
[131] See the Preamble for instance: 'Concerned that the current legal regime governing the international carriage of goods by sea lacks uniformity and fails to adequately take into account modern transport practices, including containerization, door-to-door transport contracts and the use of electronic transport documents, (…).'
[132] See respectively articles 59, 1 (17/20) and 5 (1) RR.
[133] Article 1 (1) RR reads: '"Contract of carriage" means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.'
[134] Quantum Corp. v. Plane Trucking [2002] 2 Lloyd's Rep. 24.

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UPS (road/air/road),[135] and in fact most multimodal parcel delivery services will not be regulated by the rules.

Furthermore, the RR contain so many provisions on the contract of carriage (wholly or partially by sea) that the rules may have overshot their objective. Apart from the number of provisions (96), and the danger of overregulation, some of these provisions are also very complex and at times difficult to read.

Finally, a rather practical problem is that the rules have managed to secure just three ratifications since the signing ceremony in Rotterdam in 2009. Only Togo, Congo, Spain and recently Cameroon have ratified the convention at this point, but the major shipping countries, such as Australia, Canada, China, Germany, India, Japan, Singapore, the UK and the US, are not showing much enthusiasm to follow suit.

Given these issues and uncertainties, it makes sense to have a contingency plan in place, an alternative to step in if necessary. In fact, this alternative, the Carriage of Goods Convention (GCG), should ideally remedy the shortcomings of the CMR and the HVR in the process.

The starting point of the CGC is the contract of carriage in general. Whereas the existing conventions (and the RR for that matter) all depart from a unimodal contract of carriage, the CGC does not discriminate between unimodal and multimodal contracts of carriage. The convention gives uniform rules for all contracts of carriage within its formal scope of application.[136]

The establishment of mandatory rules is not an objective in itself. Any convention should obviously be mandatory to have any effect in the first place,[137] but the CGC gives way to the agreement of the parties whenever this is possible. The convention therefore only aims to cover the necessities, and for the rest it intends to interfere as little as possible. This means, for instance, that the CGC will not regulate jurisdiction. In the commercial practice, the contracting parties will often agree on a competent court to settle their disputes,[138] and they are perfectly free to do so.[139] The parties can also agree on arbitration; the CGC does not intend to restrict party autonomy in this respect either.[140]

The convention should be consumer friendly. The convention needs to be easily accessible for merchants, carriers, bankers, insurers and claims handlers, not just for trained and specialized legal practitioners.[141] This means, for instance, that the convention ignores the concept of successive carriage. Instead, the CGC treats contracts of successive carriage, just like contracts of sub-carriage for that matter, as contracts of carriage.[142] It also means that the CGC will not provide any rules on

[135] Datec v. UPS [2007] 2 Lloyd's Rep. 114.
[136] This implies that the convention does not need a network system.
[137] A lesson learned from the Liverpool Conference in 1882.
[138] In the absence of a (valid) jurisdiction clause, the provisions of Brussels I or the applicable domestic (private international) law will identify the competent court, and will also deal with enforcement issues.
[139] A forum choice may be null and void, though, if it effectively bypasses the application of the CGC. See in this respect the Morviken [1983] 1 Lloyd's Rep. 1.
[140] The New York Convention of 1958, and alternatively the applicable domestic law, then provides rules on the validity of the arbitration agreement, and the enforcement of arbitral awards.
[141] See in this respect Lord Mansfield in Hamilton v. Mendes (1761) 97 E.R. 787 at 795: 'The daily negotiations and property of merchants ought not to depend upon subtleties and niceties; but upon rules, easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case.' This is a foreseeable problem of the RR; there are too many rules in general, and too many complex rules in particular.
[142] The elimination of successive carriage at the same time solves the problem under the CMR that its regime is in practice sometimes applied too widely, for instance to a simple chain of sub-carriers. See Ulster-Swift v. Taunton [1977] 1 Lloyd's Rep. 346, Coggins v. LKW [1998] 1 Lloyd's Rep. 255; Cour de Cassation 11 December 1990, BTL 1990, 223; Cour d'Appel Paris 4 June 2008, BTL 2008, 433. Cour d'Appel Paris 10 October 2012, 11/06530 and HR 11 September 2015, NJ 2016, 219 (ann. K.F. Haak), S&S 2016/1 and Spanjaart 2016, 1-12.

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(the operation of) documents of title.[143] The convention covers contracts of carriage, and as such contracts of carriage under a bill of lading or similar document of title,[144] but the ambit of the CGC remains limited to the bill of lading contract and the document of title function is left untouched.[145]

The convention is a living instrument. This is quite impossible of course, but it means that its provisions are not carved in stone. The idea is to avoid a status quo as currently with the CMR. Instead of allowing for a revision of the convention (every so many years), [146] the CGC requires the contracting states to reconvene in order to amend or revise the convention at regular intervals.

With these basic principles in mind, a rather concise convention of merely 10 articles remains.[147]

4.1 Definitions

1.1 A 'contract of carriage' includes every contract for the carriage of goods between a 'carrier' and a 'shipper'.

1.2 The 'consignee', the person to whom the goods must be delivered under the contract of carriage, includes the lawful holder of a bill of lading who takes or demands delivery of the goods.

1.3 A 'transport document' includes (electronic versions of) a bill of lading, a waybill, a booking note, a consignment note and any other suitable document that evidences the specifications and apparent order and condition of the goods upon their receipt by the carrier.

1.4 'Goods' include wares, merchandise and articles of every kind, except funeral consignments and live animals.

1.5 The 'right of disposal' includes the right to give and vary the instructions to the carrier with regard to the goods and the transport document during the voyage against the payment of the costs reasonably incurred as a result thereof.

Article 1.1 CGC defines the contract of carriage,[148] but there will probably be little discussion as to its meaning.[149] The definition covers 'every' contract of carriage,[150] irrespective of the (number of) means of transportation. This ensures that the convention regulates both unimodal and multimodal contracts of carriage.

International parcel delivery services also qualify as contracts of carriage.[151] These services may, other than 'regular' commercial contracts of carriage, sometimes involve consumers. With the 20 SDR/Kg limitation, however, and the possibility to agree on a higher amount, the consumer does not

[143] To give an example: the presentation rule is observed worldwide for order and bearer bills of lading, and in most jurisdictions also for straight bills of lading. Clearly, a universal approach would be preferable, but this is not something that the CGC will impose.
[144] See article I (b) HVR.
[145] Although the CGC does regulate the right of disposal in bill of lading contracts.
[146] See for instance article 36 CMNI. This is not solution chosen in the CGC, but the objective is the same.
[147] The convention was earlier published by M. Spanjaart on 31 August 2017 as an NUS Working Paper.
[148] The definitions of article 1 are not really definitions, see the use of the word 'include' instead of 'is'.
[149] The definition does not require freight or another reward, and the (redundant) reference to gratuitous carriage in article 1 MC has also been left out. There really is no such thing as gratuitous carriage of goods in the commercial reality.
[150] The reference to 'every' also ensures the inclusion of volume contracts, umbrella contracts, and in fact all contracts 'the main purpose of which is the carriage of goods'. See ICF v. Balkenende [2010] 2 Lloyd's Rep. 400.
[151] See Hof van Cassatie 8 November 2004, TNT v. Mitsui [2006] ETL 228.

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seem to need further protection than already provided for by the CGC, Brussels I, European directives and national law.

Forwarding contracts do not qualify as contracts of carriage,[152] and neither do contracts whereby means of transportation are merely made available.[153]

The definition of the contract of carriage at the same time defines the carrier and the shipper, and underlines that they are contractual figures. They are the two parties concluding the contract of carriage.[154]

This implies that the carrier is contractually bound to the proper performance of the contract, and (unless of course sub carriage has been excluded in the contract) that he does not actually have to carry the goods himself.[155] The carrier can instruct a sub carrier, who may in turn again instruct another sub carrier and so on.[156] A contract of sub carriage is a contract of carriage as any other. In the relation between a carrier and a sub carrier, the carrier then assumes the role of the shipper, and the sub carrier assumes the role of the carrier.

The shipper is a contractual figure as well. His contractual relation with the carrier is decisive, not any reference on the transport document.[157] The CGC does not cover the position of the party that actually hands the goods to the carrier.[158] That party may of course at the same time be the shipper (or the shipper mentioned on the transport document), but he will in practice often be a stevedore, a warehouse keeper or a freight forwarder acting upon instructions of the shipper.[159] This stevedore, warehouse keeper or freight forwarder is not a party to the contract of carriage.

The consignee is the intended receiver of the goods. The consignee box of a straight bill of lading, waybill or consignment note will mention the name of the consignee, but the mere mention of his name does not give him any rights under the contract of carriage yet.[160]

The identity of the consignee under a (negotiable) bill of lading contract often remains open throughout the voyage. The ultimate consignee only comes forward upon the arrival of the goods at their destination, and he identifies himself through the presentation of an original bill of lading. The consignee under a bill of lading contract is the lawful bill of lading holder who either takes or demands delivery of the goods.

The definition of a transport document is very wide. It includes the commonly (and currently) used documents, but it is open to all sorts of suitable (electronic) documents. The transport document may evidence the contract of carriage, but it does not have to evidence the contract of carriage. The transport document must, however, evidence the specifications (number, quantity, weight and the

[152] The criteria to distinguish between carriage and forwarding are discussed in Aqualon v. Vallana [1994] 1 Lloyd's Rep. 669. See in this respect also Bugden et al. 2013, 374/377.
[153] ICF v. Balkenende [2010] 2 Lloyd's Rep. 400.
[154] See also article I (a) HVR. The carrier 'enters into a contract of carriage with a shipper'.
[155] In fact, he does not even need to have any means of transportation at his disposal. This is relevant for the position of a NVO(C)C, a non-vessel operating (common) carrier. The NVO(C)C has no ships yet presents himself as a carrier (and issues bills of lading in the process). The NVO(C)C therefore also assumes the liabilities of a carrier.
[156] Chains of 3, 4 or even 5 carriers in the international carriage by road, and an exploitation chain with an owner, a bare boat charterer, a time charterer and a voyage charterer in the international carriage by sea are in fact not uncommon.
[157] The Dithmarschen, OLG Hamburg 11 September 1986, TranspR 1987, 67; affirmed in BGH 25 April 1988, TranspR 1988, 288. See article 6.2 CGC, however, for the right of disposal.
[158] He may rely on the provisions of the convention, though, see article 9 CGC.
[159] In a purely maritime context, this party would be the 'consignor', but the CIM 1999 and the MC (rather unfortunately) use that term to indicate the shipper.
[160] See article 6.4 CGC.

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relevant marks, in fact the information listed under article III (3) (a) and (b) HVR) as well as the apparent order and condition of the goods.[161]

The description of 'goods' combines article I (c) HVR and article 1 (4) (b) CMR. There is really no good reason to exclude furniture from the definition (article 1 (4) (c) CMR), and if the goods in question are actually postal documents carried under the terms of an international postal convention (article 1 (4) (a) CMR), article 2.2 CGC ensures that the convention gives way.

The right of disposal is the right under the contract of carriage to re-direct the goods, to have the carrier issue new documents or to give (now) instructions in the course of the voyage.[162] The exercise of the right of disposal may lead to additional costs,[163] for instance when the shipper directs the carrier to a different destination. In that case, he shall have to reimburse the carrier for the reasonable costs incurred.[164]

4.2 Scope of application

2.1 This convention applies to contracts of carriage whereby the place of receipt and the place of delivery are situated in two different countries of which at least one is a contracting state.

2.2 This convention does not apply to a contract of carriage or an individual leg within that contract of carriage that is governed by an already existing convention.

2.3 This convention does not apply to the carriage of goods by sea regulated by a charter party.

2.4 This convention does not apply to the carriage of goods by sea on deck if so agreed between the carrier and the shipper.

2.5 Within its scope of application, this convention provides for mandatory rules: a clause, stipulation or provision in any way affecting the rights, obligations and liabilities under the convention is null and void.

Article 2.1 CGC, in combination with article 1.1 CGC, gives the convention's scope of application. The wording resembles the wording of article 1 CMR and article 2 CMNI.[165] The contractual places of receipt and delivery are decisive for the application of the convention.[166] The provision deliberately does not address the return tickets option of article 1 (2) MC as this in practice only applies to passenger transportation, and the convention merely deals with the carriage of goods.

Article 2.2 CGC is a negative scope rule. The provision ensures the unaffected operation of all the existing (unimodal) conventions, such as the CIM 1999, Hague Rules, HVR, HHR, CMR, MC, CMNI and in due course perhaps the RR without reservation. The CGC is therefore not aggressive at all; it

[161] See article 5 CGC.
[162] The right of disposal is something different than the right of stoppage in transit, the right of the unpaid seller to either stop or redirect the goods underway to their bankrupt buyer. Bridge 2010, 908.
[163] The convention does not deal with the question of whether the carrier can ask for security or whether he can exercise a lien on the cargo afterwards.
[164] The reference to 'reasonable' will obviously trigger discussions, but this can hardly be avoided as the quantum will always depend on the circumstances of the case at hand. What is reasonable and what is not, is therefore primarily for the parties themselves, and if necessary for the court to establish.
[165] Article 1 § 1 CIM 1999 requires two different member States, though.
[166] If the contract allows for several places of delivery, the actual one is decisive, see article 2 CMNI.

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gives way to all existing conventions that touch upon the same issues. Obviously, this limits its immediate reach, but that is a deliberate choice with two major advantages. First, it lifts any barriers for countries to accede to the CGC,[167] and second it gives the CGC the chance to gradually prove its added value.

Voyage charters, and probably most time charters, will qualify as contracts of carriage in the sense of this convention, but article 2.3 CGC explicitly excludes them from the scope of application when they 'regulate' the carriage of the goods by sea.[168] In line with well-established case law on this point, a bill of lading (or any other transport document for that matter) issued by the carrier to the shipper/charterer merely operates as a receipt between the two contracting parties.[169] The charter party then regulates the carriage of the goods by sea, and the relation between the charterer and the owner is not governed by the CGC. This only applies between the initial contracting parties, though, and article 5.3 CGC steps in when a third party consignee becomes involved.[170]

Article 2.4 then excludes the carriage of goods by sea on deck from the scope of application.[171] The requirement of article I (c) HVR to 'state' the deck cargo has been left out, but in light of article 5.3 CGC a prudent carrier will obviously still ensure that the arrangement is reflected in the transport document.[172]

The final provision of article 2 CGC is found in every existing (unimodal) convention on the carriage of goods. The convention takes mandatory effect. The provision specifically refers to 'liability' and not 'the carrier's liability' to ensure that it works both ways.

4.3 Liability under the contract of carriage

3.1 The carrier is liable for the loss of, damage to or delay in the delivery of the goods in the course of the contract of carriage, irrespective whether the goods were in his own care or in the care of his agents, servants or subcontractors.

3.2 The carrier and the shipper are free to agree that any storage, handling, loading, stowage and discharge of the goods at the place of receipt and at the place of delivery are performed without any expense and liability for the carrier.

3.3 The shipper shall inform the carrier about the nature, specifications and other relevant characteristics of the goods, and he is liable for loss or damage suffered by the carrier because of any shortcomings or inadequacies in the information provided.

[167] Obviously, the CGC has the ambition to cover all contracts of carriage in due course, but it will not require any of the current conventions to make way. Article 89 RR for instance requires the party states to abandon the HR/HVR/HHR. That may very well prove to be a serious hurdle in practice as it could discourage countries to ratify the convention.
[168] The exception only relates to the carriage of goods by sea. The reason is that the relation between the charterer and the owner has always been subject to the provisions of the charter party, and not to mandatory law, see e.g. F. Berlingieri (ed.) *The Travaux Préparatoires of the Hague Rules and the Hague-Visby Rules* (CMI Antwerp 1997) 639 and further.
[169] Rodocanachi v. Milburn (1886) 18 QBD 67; President of India v. Metcalfe Shipping [1969] 2 Lloyd's Rep. 476 (Dunelmia).
[170] The system is in line with the rule of article I (b) HVR.
[171] The exclusion only relates to sea carriage; it does not cover the use of 'open unsheeted vehicles' in the sense of article 17 (4) (a) CMR. This exemption under the CMR really only applies to minor losses in the course of the voyage (see article 18 (3) CMR), and it is furthermore just a presumption (so open to counter evidence). See also article 4 CGC.
[172] Girvin 2011, 269.

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Arguably, the convention's main rule follows from article 3.1 CGC. The contract of carriage requires the carrier to deliver the goods, on time, in the same (sound) condition as in which they were received for transportation. The carrier is liable throughout the entire period between receipt and delivery,[173] and he cannot excuse himself for any actions of his agents, servants and subcontractors used in the performance of the contract. The reference to agents, servants and subcontractors is deliberately wide in order to include 'all persons of whose services he makes use for the performance' in the sense of article 3 CMR.

Article 3.2 CGC combines article II HVR, article VII HVR and article 13 (2) RR, the codification of Renton v. Palmyra and the Jordan II.[174] The CGC covers the entire period between receipt and delivery, but the convention does allow parties to define the scope of their contract. The parties are therefore free to agree on 'before and after' clauses and FIOS clauses in their contract, and this irrespective of the means of transportation. This freedom only relates to such operations at the place of receipt and the place of delivery. Interim storage, handling, loading, stowage and discharge operations because of transhipment in the course of the voyage may perhaps be allowed under the (through or multimodal) contract of carriage, but the carrier's liability for these operations remains all the same subject to the mandatory provisions of the CGC.[175]

The convention imposes liabilities on the carrier, but also on the shipper. Ultimately, the shipper is the party with (access to) accurate information on the nature, specifications and other relevant characteristics of the goods. Article 3.3 CGC does not distinguish between 'dangerous' goods and other goods. The shipper's obligation to provide adequate information therefore applies to all goods. Given the wording of the provision, the shipper cannot raise the absence of adequate information as a valid defence. On the other hand, the obligation is not a warranty. The shipper's liability under article 3.3 CGC only relates to loss or damage as a result of any shortcomings or inadequacies in the information provided.

4.4 Exemptions

4.1 The carrier is not liable for loss, damage or delay resulting from an act of the shipper or his agents, servants and subcontractors, an inherent defect, quality or vice of the goods, (attempted) rescue or salvage operations or a cause that could neither be prevented nor avoided.

4.2 The carrier cannot rely on the exemptions listed in article 4.1 for loss, damage or delay attributable to defects in the means of transportation, including defects in any container supplied by the carrier.

The 'catalogue of exemptions' in article 4.1 CGC is not a combination of all the exemptions under the different unimodal conventions, but instead just a rather short list. The first two exemptions will hardly raise any questions; they correspond with article IV (2) (i) and (m) HVR, but also with article 18 (2) (a)

[173] Barclays Bank v. Commissioners of Customs and Excise [1963] 1 Lloyd's Rep. 81: 'The contract for the carriage of goods by sea (…) is a combined contract of bailment and transportation under which the shipowner undertakes to accept possession of the goods from the shipper, to carry them to their contractual destination and there to surrender possession of them to the person who, under the terms of the contract, is entitled to obtain possession of them from the shipowners.'
[174] Renton v. Palmyra (1957) AC 149; The Jordan II [2005] 1 Lloyd's Rep. 57.
[175] Mayhew Foods v. Overseas Containers [1984] 1 Lloyd's Rep. 317.

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and (b) MC and article 17 (4) (b),(c) and (d) CMR.[176] The explicit mention of (attempted) rescue or salvage operations is necessary because such operations can of course simply be avoided, but should never be avoided.[177]

The problem with the other events listed in article IV (2) HVR is that it is not always easy to see why they would exempt the carrier. As a contract of carriage requires the carrier to achieve a certain result - the delivery of the goods to the consignee in the same sound condition – he should only be able to escape liability in exceptional circumstances.

An error in navigation, for instance, is always avoidable, and the consequences thereof should therefore remain for the account of the carrier.[178] The occurrence of a 'fire' alone should not per definition exempt the carrier from liability. This depends on the question of whether the cause of the fire could be prevented or avoided. The perils of the sea or an act of God will often be unavoidable, but surely not if the master obtains a storm warning in advance.[179] Mutatis mutandis the same then applies for the remaining exceptions.[180]

Since these are exceptions to the general rule of article 3.1 CGC, the carrier bears the onus of proof of the occurrence of one of the causes listed in article 4.1 CGC, the causal link between that cause and the loss, damage or delay and, if required, the extent to which the exempted cause contributed to the loss, damage or delay.

If the carrier succeeds, the onus of proof shifts to the shipper/consignee. Article 4.2 CGC stipulates that the carrier remains liable if (and to the extent that) the shipper/consignee proves that the loss, damage or delay is attributable to the use of a defective ship, train, truck, airplane or other means of transportation.[181] These defects also extend to containers. The carrier cannot escape liability if the loss, damage or delay is attributable to the use of leaking containers or malfunctioning reefer containers that he has supplied.[182]

4.5 The issuance of a transport document

5.1 The carrier will issue a transport document at the request of the shipper upon the receipt of the goods under the contract of carriage.

5.2 This transport document provides prima facie evidence of the specifications and the apparent order and condition of the goods, and proof to the contrary shall not be admissible against the consignee acting in good faith.

[176] An 'act of the shipper or his agents, servants and subcontractors' covers the operations mentioned in article 3.2 CGC, but obviously has a wider scope.
[177] See article IV (2) (l) HVR and article 18 (1) (g) CMNI.
[178] There already seems to be a general consensus with regard to the error in navigation, see the CMNI and the RR.
[179] As in the Bunga Seroja [1999] 1 Lloyd's Rep. 512. See for the stricter approach, however, HOLG Bremen VersR 1967, 576, BGH Versr 69, 536 (Isarstein) and HR 11 June 1993, NJ 1995, 235 (ann. E. Japikse), S&S 1993/123 (Quo Vadis).
[180] The carrier will not too often be able to prevent or avoid an act or war, an act of public enemies or local authorities or in fact any of the other events listed in articles 23 § 3 CIM 1999, IV (2) HVR, 18 (2) MC, 17 (4) CMR and 18 (1) CMNI, but again it depends on the circumstances.
[181] This is not an overriding obligation, see also the wording of article 17 (6) RR.
[182] Articles 14 and 17 (5) (a) RR also extends this obligation to 'any containers supplied by the carrier in or upon which the goods are carried.' Anticipating on the entry into force of the RR, the Dutch Supreme Court held in the NDS Provider, HR 1 February 2008, NJ 2008, 505 (ann. K.F. Haak), that the duty also relates to the carrier-provided containers.

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5.3 If the transport document contains contractual provisions, these provisions provide prima facie evidence of the contract of carriage, and proof to the contrary shall not be admissible against the consignee acting in good faith.

The issuance of a bill of lading, waybill, consignment note or other (electronic) document is common practice. It is likely that these documents will more and more often be in an electronic form, probably even in forms that are currently not yet in existence. The parties to the contract of carriage are free to choose any suitable (electronic) document they deem fit, but they are equally free not to choose any document at all (if the shipper does not require one).

The CGC prescribes the issuance of the transport document 'upon the receipt of the goods under the contract of carriage'. This moment will usually coincide with the receipt of the goods by the carrier, but that may be different if the carrier holds the goods in storage under a separate warehouse agreement pending instructions for their carriage.

Article 5 (2) CGC is based on article III (4) HVR. The transport document provides prima facie evidence of the specifications and condition of the goods between the carrier and the shipper. This implies that the initial parties to the contract of carriage may still give counterevidence against the prima facie evidence of the transport document. The consignee will often not have been privy to the discussions and negotiations between the carrier and the shipper, and he may rely on the information in the transport document when he is unaware of, and could reasonably not have been aware of any other arrangements.[183]

The key difference between article III (4) HVR and article 5 (2) CGC is that the former only covers documents of title, whereas the latter covers all transport documents including documents of title. The justification lies in the function of the transport document, namely a representation by the carrier with the objective to serve as evidence. [184] Given this specific function, it is not so much relevant whether it is a document of title or not, but only whether the consignee in good faith relied on the information in that document: [185]

It matters not, I think, that the bill of lading is not negotiable. For what difference can it make whether the steamship owner issues a document which it may reasonably expect will be acted on to his detriment by a particular man or by many men - by a man whose name it knows or by men whose names it knows not?

This principle, the protection of someone who could reasonably rely on information given by someone else, is also found in § 242 German Civil Code and article 3:36 Dutch Civil Code as well as in the doctrine of estoppel.[186] Article 5 (2) CGC codifies this principle in line with article 41 (c) RR.[187]

[183] If the consignee is in fact an initial party to the contract, if he was involved in the negotiations, if he is aware of contractual provisions that were validly incorporated, if he has varied the contract in a side agreement with the carrier and so on, he obviously does not meet the requirement of good faith.
[184] Combe v. Combe (1951) 1 ALL ER 767.
[185] The Carso (1930) 38 Lloyd's Rep. 22.
[186] See in this respect also Baatz 2009: 'It may be argued (…) that - as statements of fact - they may have given rise to an estoppel against the carrier anyway.'
[187] Article 41 (c) RR stipulates: '(c) Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any of the following contract particulars included in a non-negotiable transport document or a non-negotiable electronic transport record: (i) The contract particulars referred to in article 36, paragraph 1, when such contract particulars are furnished by the carrier; (ii) The number, type and identifying numbers of the containers, but not the identifying numbers of the container seals; and (iii) The contract particulars referred to in article 36, paragraph 2.

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The ratio behind article 5 (3) CGC is really the same, but then related to the contractual provisions in a transport document. Article 5 (3) CGC in fact extends the operation of article 5 (2) CGC to contractual provisions.[188] The mere issuance of a transport document cannot affect the agreement between the contracting parties.[189] Their relation remains governed by the contract of carriage, and the transport document is then a mere receipt.[190]

Again, however, this changes when the transport document comes into the hands of a third party consignee acting in good faith, and again it makes no difference whether the transport document is a document of title or not. The provision is similar to article 11 MC and article 9 CMR, and codifies the rule of Leduc v. Ward.[191]

4.6 The rights (and obligations) under the contract of carriage

6.1 The shipper has the right of disposal until such time that the consignee takes or demands delivery of the goods in accordance with article 6.5 or the right of disposal passes in accordance with article 6.3.

6.2 The party mentioned as the shipper on the transport document is the shipper for the purpose of article 6.1.

6.3 If the transport document is a bill of lading or similar document of title, the right of disposal passes to the transferee with each transfer of all the originals of that bill of lading or similar document of title.

6.4 The consignee may take or demand delivery of the goods upon their arrival at the place of delivery against a receipt and payment of all freight due, and from then on exercise all rights and be held to all obligations under the contract of carriage.

6.5 The consignee's acquisition of rights and obligations under the contract of carriage pursuant to article 6.4 does not affect the shipper's rights and obligations under the contract of carriage, other than the right of disposal.

Apart from the (sole) exception of article 6.3 CGC, the right of disposal rests with the shipper until the consignee takes or demands the delivery of the goods.[192] At that moment, the shipper loses the right of disposal, and the consignee acquires the right of disposal. Article 6.1 CGC so ensures that the right of disposal is exclusive; it either rests with the shipper (or transferee, see 6.3 CGC) or the consignee, but never with two parties at the same time.

The party mentioned in the shipper's box of the transport document will often indeed be the shipper, but not necessarily. If the contract of carriage is concluded pursuant to an FOB or FCA sale of the

[188] Girvin 2011, 194: 'When a bill of lading is endorsed by a charterer to a third party bona fide purchaser, the terms of the bill of lading supplant the charter party and become conclusive evidence of the contract of carriage.' See also article 8:441 (2) DCC: 'Against the holder of the bill of lading, who was not the shipper, the carrier under bill of lading is bound to and may rely on the stipulations of this bill of lading.'
[189] Pyrene v. Scindia (1954) 2 ALL ER 158, unless of course parties intend to vary their agreement by the issuance of a transport document.
[190] Rodocanachi v. Milburn (1886) 18 QBD 67; President of India v. Metcalfe Shipping [1969] 2 Lloyd's Rep. 476 (Dunelmia).
[191] Leduc v. Ward (1888) 20 Q.B.D. 475.
[192] If the carriage is subcontracted, the shipper in the first contract of carriage can exercise his right of disposal through the carrier/shipper in the contract of sub carriage.

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goods, the buyer is the contractual shipper, but the seller is commonly mentioned in the shipper's box of the transport document,[193] and the transport document is also issued to the seller.[194]

This practice makes considerable sense given the position of an FOB or FCA seller on the one hand, and the operation of a documentary sale on the other. The seller needs the transport document (proving his compliant delivery under the sale contract) as one of the documents to present to the buyer for 'cash against documents' or to ensure payment under an L/C. So long as the seller has not been paid, however, he should be able to exercise his grip on the goods even though they are already underway. The documentary shipper therefore has the right of disposal,[195] and the carrier can safely follows his instructions.

This provision does not violate the shipper's rights under the contract of carriage in any way. As the conclusion of the contract of carriage precedes the issuance of the transport document, the shipper under the contract of carriage can steer the information in the shipper's box.[196] As such, the shipper effectively controls the identity of the documentary shipper.

The convention does not deal with documents of title, but article 6.3 CGC scratches the surface.[197] In the case of a contract of carriage under a bill of lading or similar document of title, the right of disposal attaches to that document, and transfers together with the transfer of that document.[198] This means that the initial shipper loses the right of disposal with the transfer of the bill of lading or similar document of title, and that the transferee then acquires the right of disposal.[199]

The consignee may require the delivery of the goods when they arrive at their destination. This will usually be a form free transaction between a stevedore, a warehouse keeper or a freight forwarder acting on behalf of the consignee on the one hand and the carrier or his agent on the other, although the carrier will of course require a receipt, perhaps payment of the outstanding freight, and if necessary identification before releasing the goods.

When the goods travel under a bill of lading or similar document of title, however, the consignee will have to prove his entitlement to the delivery by presentation of the bill of lading.[200] The CGC deliberately avoids the regulation of the presentation rule (and in fact any document of title function of the bill of lading), and relies on the commercial practice developed over the years,[201] and undoubtedly still to develop in the future.

[193] He is the 'documentary' shipper. Article 1 (9) RR defines the documentary shipper as 'a person, other than the shipper, that accepts to be named as "shipper" in the transport document or electronic transport record.'
[194] In fact, § 513 (1) HGB, the German incorporation of article III (3) HVR, prescribes that the bill of lading is issued to the 'Ablader', i.e. the one physically handing the goods to the carrier. The objective is to protect the position of the FOB seller: 'Unless otherwise agreed in the contract for the carriage of general cargo, the carrier must issue to the Ablader, at the latter's request, an order bill of lading that – at the choice of the Ablader – is made out "To Order" of the Ablader, "To Order" of the consignee, or simply "To Order" (blank); in the last case, this shall be deemed to mean "To Order" of the Ablader. (…).'
[195] Article 6.2 CGC only relates to the right of disposal; it is not a general rule. Arguably, though, article 5.3 GCG implies that the information in the shipper's box gives prima facie evidence as to the identity of the shipper.
[196] This may sometimes require a pro-active approach in contracts of carriage by road. Some drivers simply carry a pile of blank consignment notes in their trucks, and just issue these to anyone handing them the goods for transportation, irrespective whether that is the shipper, an FCA seller or just a warehouse keeper.
[197] Article 6.3 CGC is necessary, though, as the shipper would otherwise have retained the right of disposal under the main rule of article 6.1 CGC.
[198] Ellis v. Hunt (1789) 100 ER 679.
[199] From that moment on, article 6.1 CGC mutatis mutandis applies to the position of the transferee.
[200] The HVR do not regulate these functions either for that matter.
[201] The Stettin [1889] Lloyd's Rep 14 PD 142; Voss v. APL [2002] 2 Lloyd's Rep. 707; The Rafaela S. [2005] 1 Lloyd's Rep. 347; Carewins v. Bright Fortune [2007] 3 HKLRD 396, but see also USCA 80110 (b) saying that the carrier may deliver the goods to '(1) a person entitled to their possession; (2) the consignee named in a non-negotiable bill; or (3) a person in

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The consignee may exercise all rights under the contract of carriage from the moment that he takes or demands the delivery of the goods.[202] All rights obviously include all rights of suit. The objective of this rule is to avoid the discussion on the underlying dogmatism.[203] Article 6.4 simply prescribes that the consignee may exercise all rights under the contract, and can subsequently also be held to all obligations under the contract.

The position of the shipper under the contract of carriage, apart from the right of disposal, remains unchanged. The acquisition of rights by the consignee is not at the expense of the shipper. The shipper is, and stays, a contracting party, and as such he is entitled to exercise all rights (of suit) under the contract of carriage.[204] Other than the right of disposal, the right of suit is thus not an exclusive right.[205]

An accumulative right of suit implies that the carrier may find himself confronted with two (or more) claims for the same loss or damage, in fact sometimes even issued by claimants that did not suffer the financial consequences. This is in practice hardly a problem, though.[206] The goods are generally insured during the voyage, and the (subrogated) insurers will then take the lead in any claim against the carrier. They may indeed bring proceedings against the carrier in their own name, but perhaps (also) in the name of the shipper and/or the consignee at the same time, and often even on different grounds, i.e. under the contract but at same time in tort or bailment.[207] Still, the carrier will only have to pay once. The carrier, who pays either the shipper or the consignee in good faith,[208] is discharged from further liability in future claims for the same loss or damage.[209]

4.7 Limitation of liability

7.1 When the goods are carried in either a 20' foot or a 40' foot container, the carrier's liability is limited to 5,000 SDR or 10,000 SDR respectively per container, unless a higher limit was agreed upon.

7.2 Otherwise, the carrier's liability is limited to 20 SDR per kilo gross weight, unless a higher limit was agreed upon.

7.3 The carrier's liability shall never exceed the current market value of the goods at the agreed place of delivery, and any other (consequential or indirect) losses or damages cannot be recovered from the carrier.

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possession of a negotiable bill if (A) the goods are deliverable to the order of that person; or (B) the bill has been indorsed to that person or in blank by the consignee or another indorsee.'

[202] The reference to 'takes or demands' is borrowed from S. 3.1 COGSA 1992.

[203] Civil law countries will generally accept that the consignee acquires his rights through a third party stipulation. Common law countries will abide by the privity of contract rule, and then if necessary rely on a statutory or conventional provision.

[204] The position of the shipper is not necessarily the same as the position of the consignee, see article 5.

[205] Spanjaart 2012.

[206] The MC and the CMR already allow for an accumulative right of suit, and it has hardly triggered litigation.

[207] The CGC does not bar any extra-contractual claims against the carrier, but article 9.1 CGC does ensure that all defenses under convention then remain open to the carrier.

[208] In the case of a non-contractual claim, a further requirement is that this party had a proprietary right. The Aliakmon [1986] 2 Lloyd's Rep. 1.

[209] The German Supreme Court held in BGH 6 July 1979, VersR. 1979, 1106: 'If the consignee makes a justified claim for damage to the goods, then the carrier, when he is then again sued for the damage by his contractual counterpart - the shipper - can argue that he has already fulfilled his obligation to pay the damage against one of the parties with a right of suit and that he is therewith discharged.'

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7.4 In the case of delay in the delivery of the goods, the carrier's liability is limited to the amount of the freight.

Instead of distinguishing between kilo's and collo's/packages, the CGC distinguishes between goods carried in (20' and 40 foot) containers and goods that are not carried in such containers (either as general cargo or in bulk or in smaller sized containers).[210] Admittedly, this is an arbitrary distinction, with an arbitrary limitation, but that can probably be said about any distinction in limiting the carrier's liability. Besides, the parties to the contract of carriage are always free to agree on a higher limit of liability.

The kilo limitation may seem rather high for carriage by sea, but this will in practice probably not be such an issue. Most goods are carried by sea in containers, and the sea carrier may then rely on the relatively modest container limitation. Whenever goods are not carried in containers, these will often be commodities in bulk, and as such they will often be worth a lot less than 20 SDR per kilo. The carrier's liability is then limited to the market value in accordance with article 7.3 CGC.

The current CMR limitation has not been amended since 1956. An increased limit here, albeit it with more than 100%, does not really come a moment too soon. Besides, the carriage by road will also often be in containers, allowing the road carrier to rely on the container limitation.

The 20 SDR/Kg limit is in line with the current CIM 1999 and MC limits. The 20' foot or 40' foot containers will probably not be carried by air anyhow, and here the 20 SDR limit does not change anything.

When the goods are worth less than the limitation, the carrier's liability will not exceed their market value at the time and at the agreed place of their delivery. This also implies that any costs for excise and customs charges are not recoverable.[211] The CGC does not deal with additional costs, such as survey costs and legal interests. These amounts are recoverable if they are recoverable under the lex fori, and their quantum is for the court to decide.[212] Since the CGC does not cover the reimbursement of such costs, the parties are of course also free to address this issue in their contract.

When the goods arrive with a delay, the carrier's liability (if any) is limited to the amount paid or payable for the freight.[213] Where such a delay leads to material damages to the goods, however, for instance in the case of perishable goods, the regular container/kilo limitations apply.

In the absence of an exception for intent, wilful misconduct or any domestic equivalent thereof, these limits are unbreakable. The corresponding provision in the MC has been a great success in this respect, and it has brought proceedings in air cases back to a minimum.[214]

Another success of the MC is its possibility to index the limits, usually because of inflation, but there may also be other reasons to evaluate these amounts. In fact, there may also be a future need to limit

[210] See for an alternative solution article 20 (1) CMNI.
[211] The convention so avoids the discussion that has surfaced under article 23 (4) CMR. The courts in most contracting states have refused to award excise duties on the basis of the last part of article 23 (4) CMR, i.e. that 'no further damage shall be payable.' All the same, the House of Lords held in James Buchanan v. Babco [1978] 1 Lloyd's Rep. 119 that excise duties qualify as 'carriage charges, customs duties and other charges incurred in respect of the carriage of the goods'.
[212] These will probably always be relatively small amounts, and they are therefore unlikely to trigger forum shopping.
[213] Obviously, the limitation is not a fixed amount. The cargo-interested parties will have to prove the occurrence of the delay and quantum of the financial loss as a result of the delay.
[214] This measure is particularly relevant for international road carriage. The CMR stipulates that the court seized should apply its own domestic law in order to assess whether the carrier may rely on the limitation, and this has obviously triggered a wave of forum shopping cases, see the discussion under 3.1.

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the liability for the yet to be invented 60' ft container. The contacting states have this possibility each time they meet pursuant to article 10.2 CGC.

The carriage of goods by another means of transportation than agreed, for instance because the goods are carried by road instead of by air,[215] remains a problem. The CGC aligns the limitations of liability, but does not give a separate rule for the carrier's breach of contract on this point. Carve outs in a uniform convention are probably best avoided, especially when the problem is perhaps more academic than practical as the carrier may negotiate the freedom to use more than one means of transportation in the performance of the contract.[216]

4.8 Time bar

8.1 Any claim expires when proceedings have not been initiated within one (1) year from the date of delivery, unless an extension was agreed upon.

8.2 When no delivery has taken place, the one (1) year period starts thirty (30) days after the agreed or expected delivery date.

8.3 When the claim relates to recourse or indemnity for loss, damage or delay, the expiry date is extended with ninety (90) days from the date that these proceedings were initiated against the claimant.

The HVR and CMR adopt a one-year period; the MC adopts a two year period, but then in combination with a very short protest period. The CGC stipulates a one year period, and does not impose any protest periods. The one year period applies both ways, so also to claims by the carrier against the shipper or the consignee.

The one-year period can only be interrupted by the commencement of proceedings, irrespective whether these are proceedings in a court of law or in arbitration (should the parties have agreed thereto). The period can, however, always be extended by agreement between the parties.

Since the CGC covers all modes of transport including multimodal transport, it is very likely that a claim under one contract of carriage will often trigger further claims in the chain of (sub) carriers. When proceedings have been initiated against a carrier, he may want to take recourse on his sub carrier (and so on in the chain). The strict observance of the date of delivery is then sometimes unfair, and the one-year period is therefore extended with an extra ninety days from the moment that the proceedings against the carrier are initiated.[217]

4.9 Extra-contractual claims

9.1 The provisions of this convention apply irrespective of whether a claim is brought in contract or otherwise.

[215] Article 18 (4) MC.
[216] See for instance article 6.3.2 of General Conditions of Carriage KLM Cargo (July 2010).
[217] See also article 24 (4) CMNI.

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9.2 Agents, servants and sub-contractors employed in the performance of a contract of carriage may rely on the provisions of this convention whenever a claim is brought directly against them.

This article prevents the circumvention of the convention and it probably channels liability claims in the process. The CGC applies irrespective of the basis of the claim against the carrier, shipper or consignee. The CGC also applies when a claim is brought directly against one of the agents, servants or sub-contractors of the carrier, shipper or consignee.

In practice, the carrier's bill of lading or waybill will often stipulate a Himalaya clause with a similar effect, or an extra effect through the inclusion of a circular clause. Such clauses are less common in consignment notes, though, hence the inclusion of this provision in the CGC. Since the CGC does not regulate jurisdiction, the question of whether a (conventional) Himalaya clause also allows for a jurisdiction defence remains for the court seized to decide.[218]

4.10 Final provisions

10.1 The government of (…) is the depository of this convention, and it assumes the responsibility for all the communication regarding this convention.

10.2 Every ten (10) years the depository shall convene a conference to evaluate, and if necessary, revise and amend the convention.

10.3 The revision and amendment of the convention requires a majority of two thirds of the contracting states.

10.4 The revision and amendment of the convention binds every contracting state.

10.5 This convention can be denounced at all times by any contracting state giving one (1) year notice to the depository.

Every convention needs a depository, and so does the CGC. This depository is not only responsible for the necessary communication, but also for the organization of a conference to deal with the evaluation, revision and amendment of the convention every ten years. The objective of article 10.2 CGC is to avoid that the contracting states remain passive too long.[219]

The threshold of two thirds of the contracting states for the actual revisions and amendments ensures that these are not adopted too lightly.[220] Once an amendment is in place, it binds every contracting state. If a contracting state disagrees with the amendment, or if it is uncomfortable with the convention for any other reason, it can always denounce the convention with a one-year notice period.

[218] The Mahkutai [1996] 2 Lloyd's Rep. 1; Acciai v. M/V Berane et al. (2002) AMC 528.
[219] Article 49 CMR allows every contracting state to request a conference on the revision of the convention, but no contracting state ever has.
[220] The conference can also decide on the entry into force of any amendment.

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6. Acronyms and Abbreviations

ACROYNM	EXPLANATION
BGH	Bundesgerichtshof (German Supreme Court)
CGC	Carriage of Goods Convention
CIM	Règles uniformes concernant le contrat de transport international ferroviaire des marchandises (Uniform Rules Concerning the Contract of International Carriage of Goods by Rail)
CMNI	Contrat de transport de Marchandises en Navigation Intérieure (Convention on the Carriage of Goods by Inland Waterway)
CMR	Convention Relative au Contrat de Transport International de Marchandises par Route (Convention on the Contract for the International Carriage of Goods by Road)
Cotif	Convention relative aux transports internationaux ferroviaires (Convention Concerning International Carriage by Rail)
DCC	Dutch Civil Code
EC	European Commission
GCC	German Commercial Code
GHG	Greenhouse gas
HHR	Hamburg Rules
HR	Hoge Raad
HVR	Hague-Visby Rules
ICT	Information and Communications Technology
KKL	Kneppelhout & Korthals
LSP	Logistics Service Provider
MC	Montreal Convention
MMTL	The United Nations Convention on International Multimodal Transport of Goods
NDA	Non-Disclosure Agreement
OLG	Oberlandesgericht (German Court of Appeals)
PU (Dissemination level)	Public
R (deliverable type)	Document, Report
RR	Rotterdam Rules
SDR/Kg	Special Drawing Rights/kilogram
SME	Small and medium sized enterprises
UK	United Kingdom
WP	Work Package

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