Survey of the Jurisdiction Rules in Unimodal Transport Conventions and Their Impact on International Multimodal Transport of Goods Contracts[1]

Ling Zhu[2] and Xiaojing Li[3]

Abstract

Given the fact that uniform liability rules for international multimodal transport contracts of goods are still lacking, it is important to undertake a holistic study of the rules for resolving issues that may arise relating both to jurisdiction and to dispute resolutions in a contract for the international multimodal transport of goods. This article thus carries out a general survey of jurisdiction rules in the unimodal transport conventions and discusses the possible impacts of those rules on international multimodal transport of goods contracts. It concludes that, unless the parties have clear and unequivocal agreements in their contracts, a set of jurisdiction rules for contracts for the multimodal transport of goods is both necessary and important.

1. Introduction

Jurisdiction means the authority of a court or official organisation to hear and decide a controversy or dispute. Often, the determination of civil jurisdiction is the precondition for a court in one country to accept and hear a case involving foreign elements.[4] A conflict of jurisdictions often appears in foreign-related civil disputes, which, different from domestic transactions, may be exposed to different legal systems.[5]

Since the introduction of containerisation into international shipping and trade in the 1960s, multimodal transportation has become a very important means of transporting goods from their place of origin to the place of destination. Multimodal transport may be operated both domestically and internationally; it frequently involves an international dimension, either because the parties are resident in different countries, or because performance of the contract takes place in a country other than that in which the contract was concluded. Therefore, it is likely that goods are carried through several different jurisdictions before reaching their final place of destination.

[1] The writing of this paper is financially supported by Hong Kong SAR RGC General Research Fund (project account code: B-Q57K).
[2] Associate Professor, Department of Logistics and Maritime Studies, The Hong Kong Polytechnic University.
[3] Research Assistant, Department of Logistics and Maritime Studies, The Hong Kong Polytechnic University.
[4] Marian Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law International, 2010) 92.
[5] Giesela Rühl, 'The Problem of International Transactions: Conflict of Laws Revisited' (2010) 6(1) *Journal of Private International Law* 59, 63.

General conditions of carriage sometimes contain jurisdiction clauses whereby claimants are restricted to bringing action against the carrier only by following the contractual agreement. For instance, one multimodal transport (MT) bill of lading provides:

> "Clause 5: law and jurisdiction
>
> Disputes under this MT Bill of Lading shall be determined by the courts and in accordance with the law at the place where the [Multimodal Transport Operator]MTO has his principal place of business."[6]

This clause appears to oblige the parties to sue in a particular court.[7] However, any term in a contract may have multiple different interpretations in different jurisdictions.[8] In addition, such a jurisdiction clause may not always be supported by courts of law, especially if the court considers that the clause is being used to circumvent its national mandatory law. It also happens that the contract does not contain any jurisdiction clause. In that case, parties may agree on the jurisdiction after the dispute arises; or, alternatively, the parties may be given the right to choose the court according to domestic law or conventions.

Since situations vary, a set of jurisdiction rules has become necessary for the multimodal transportation of goods. Otherwise, questions would arise as to where to institute court proceedings in a potential dispute. However, the present legal and regulatory framework regulating international multimodal transport consists of a mix of international conventions designed to regulate unimodal carriage, along with diversified regional, sub-regional and national laws, as well as the standard contract terms created by the industry. A lack of uniform rules for regulating the multimodal transport of goods can result in a varied application of liability rules, which then affects the parties' consideration of forum shopping. In contrast, the rules regulating unimodal transport such as sea carriage and air carriage have largely been unified and harmonised. As a matter of fact, most unimodal conventions on the carriage of goods have jurisdictional provisions to control forum shopping, and object to certain choices of court agreements that may influence the right of the weaker party to get justice. These unimodal transport conventions regulate the jurisdiction by designating several forums from which plaintiffs can choose. In addition, some of them even contain specific provisions for a debatable "expanded jurisdiction". Against such a background, this article aims to assess the jurisdiction rules in unimodal transport conventions, and to discuss the impact of them on the jurisdiction issues arising from multimodal transport of goods contracts.

2. Jurisdiction rules in the unimodal transport conventions

1) Carriage of goods by sea

[6] See 'BIMCO MULTIDOC 2016'.

[7] Edwin Peel, 'Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflict of Laws' [1998] *Lloyd's Maritime and Commercial Law Quarterly* 182.

[8] Antony J. Woodhouse, 'The Importance of Jurisdiction and Choice of Law Clauses: A European Perspective' [2007] *Tort Trial & Insurance Practice Law Journal* 1027, 1041.

There are currently three sets of rules applicable to sea carriage: The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, and Protocol of Signature 1924 ('the Hague Rules'), The Hague Rules as amended by the Brussels Protocol 1968 ('the Hague-Visby Rules'), and The United Nations Convention on the Carriage of Goods by Sea 1978 ('the Hamburg Rules').

The Hague Rules were adopted by many States, including practically all maritime countries. The procedures in the Hague Rules allow contracting countries to give effect to the rules by incorporating them within their domestic legal systems in an appropriate form.[9] The rules were revised by the Visby Rules contained in a Protocol signed in 1968. There is no provision on jurisdiction in the Hague Rules or Hague-Visby Rules—the matter was deemed to be left to the national laws of the contracting States. This is because the countries that gave effect to the Hague Rules would not agree to a clause in the rules that permits a carrier to escape the mandatory minimum liability by shopping for the jurisdiction of another country.[10] Since the application of the Hague Rules and Hague-Visby Rules is almost uniform, the lack of jurisdiction rules are rarely considered to be a drawback.

At the planning stage of the Hamburg Rules, the idea that the convention should include jurisdictional clauses was initiated for protecting shippers from onerous forum provisions in bills of lading.[11] The idea of including jurisdictional rules led to four different proposals. The first proposal was to cancel all jurisdictional regulations and leave the problem to national laws. The second proposal called for inclusion of a jurisdictional regulation that declares any foreign jurisdictional rules void. In stark contrast to the second proposal, the third proposal was to contain a clause that gives express recognition to foreign jurisdictional rules. The fourth proposal was to provide specific alternative jurisdictions.[12] Finally, Article 21 of the Hamburg Rules provides that the plaintiff is entitled to choose among a long list of competent forums.[13]

By following Article 21, it is not difficult to ascertain the following: Firstly, it is clear that the plaintiff can institute a claim in the place of residence of the defendant only when there is no principal place of business, or when it is difficult to identify the principal place of business. Therefore, the Hamburg Rules prefer the principal place of business to the

---

[9] Alexander von Ziegler, 'Jurisdiction and Forum Selection Clauses in a Modern Law on Carriage of Goods by Sea' in Martine Davies (eds), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force* (Kluwer Law International 2005) 85, 87.

[10] Yvonne Baatz, 'Jurisdiction and Arbitration in Multimodal Transport' (2016) 36 *Tulane Maritime Law Journal* 643, 652.

[11] Gebreyesus Abegaz Yimer, 'Adjudicatory Jurisdiction in International Carriage of Goods by Sea: Would the Rotterdam Rules Settle the Controversy?' (2013) 21 *African Journal of International and Comparative Law* 467, 474.

[12] Samir Mankabody, *The Hamburg Rules on The Carriage of Goods by Sea* (British Institute of International and Comparative Law, London, A.W. Sijthoff 1978) 104.

[13] According to Article 21, the forums include: 1) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or 2) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; 3) the port of loading or the port of discharge; or 4) any additional place designated for the purpose in a contract by sea; or 5) where the ship was arrested.

habitual residence of the defendant.[14] Secondly, plaintiffs can also institute their claims at the place where the contract is made when the defendant has maintained there a place of business, and the contract was made through a branch or agency.[15] But it is important to stress that the contract must be entered into through a branch or agency established in that country, and the defendant must have a business place in that country. If the contract was formed through other means, that is, not by a branch or agency in the same country, or if the defendant does not have a business place in the country, then, based on the Hamburg Rules, a court at the place of the formation of the contract will not have jurisdiction. The exact definition and interpretation of the word "branch" and "agency" is debatable, since the Hamburg rules do not provide a solution. Therefore, when deciding whether a contract was formed though a branch or an agency, controversy may arise.[16] Thirdly, the plaintiff could bring the claim at the port of loading or the port of discharge[17] as an additional alternative forum. The convention does not require that the ports must be contractually agreed ports. Thus, if there is any discrepancy between the contractually agreed port and the port where the goods are actually loaded or discharged, the latter may prevail. In addition, if there are consecutive carriers, the port of loading seems to mean the port where the goods were first loaded, and the port of discharge means the destination or the end of the carriage by sea according to the contract.[18] Fourthly, the Hamburg Rules also recognise any additional place agreed in the contract.[19] This actually gives recognition to the autonomy of parties, making it more flexible for them to add additional jurisdictions other than those identified in Article 21; however, the parties can expand the alternative jurisdictions given in the convention itself but, subject to Article 23 of the convention, they cannot use the contract to restrict the available options.[20] The practical significance of this article is less clear, since parties commonly lack the motivation to provide an additional jurisdiction when they cannot avoid other jurisdictions provided in the convention.[21] Lastly, taking note of the special shipping environment, the convention provides an additional choice that the plaintiff can bring the claim in the forum where either the carrying ship or any other ship of the carrier was arrested.[22] However, for protection of the defendant, the claimant needs to move the claim to one of the jurisdictions listed in Article 21(1) if the defendant provides sufficient security to cover any later judgement awarded.[23] Nevertheless, it is interesting to note that the Hamburg Rules, in Article 21(5), states that after a claim has arisen any agreement between parties designating the place where the

[14] The Hamburg Rules, Article 21(1) (a).
[15] The Hamburg Rules, Article 21(1) (b).
[16] Gebreyesus Abegaz Yimer, above n 11, 475.
[17] The Hamburg Rules, Article 21(1) (c).
[18] Gebreyesus Abegaz Yimer, above n 11, 475.
[19] The Hamburg Rules, Article 21 (1)(d).
[20] Alexander von Ziegler, above n 10, 105.
[21] Gebreyesus Abegaz Yimer, above n 11, 475; also see UNCTAD, *The Economic and Commercial Implications of The Entry Into Force of The Hamburg Rules and The Multimodal Transport Convention*, 138.
[22] Alexander von Ziegler, above n 9, p.105.
[23] Reported by UNCTAD Secretary, above n 21, 139.

claimant may bring an action is effective. Thus, parties may agree upon the bringing of an action in a jurisdiction other than one of those mentioned above.[24]

By providing different choices of forum, the Hamburg Rules appear to avoid too rigorous a restriction of contractual freedom of the parties, and to ensure that the claimant has a sufficient choice of courts at his disposal. However, such a long list may at the same time lead to forum shopping, thus becoming subject to different procedural rules, taking up extra time, affecting the level of compensation, and other issues.[25]

2) Carriage of goods by air

The first international convention regulating the transport of passengers (loss of life or injuries) and goods by air was "the Convention for the Unification of Certain Rules Relating to International Carriage by Air", known as the Warsaw Convention.[26] The Warsaw Convention was widely accepted by most States internationally. Although they were adopted almost in the same period, the Warsaw Convention, unlike the Hague Rules, contains specific provisions on jurisdiction.[27] Article 28 states that jurisdiction lies with courts in the following places: 1) the carrier's ordinary residence; 2) the carrier's principal place of business; 3) the establishment of the carrier where the contract was made; or 4) the place of destination. Apart from Article 28, the Warsaw Convention also expressly indicates that any contract clause and all special agreements deviating from the mandatory rules of the convention shall be null and void. "The Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by A Person Other Than the Contracting Carrier of 1961" (Guadalajara Convention) introduced the concept of "actual carrier"; it at the same time also gave the claimant another two alternative forum options for a claim against the actual carrier, namely the ordinary residence and the principal place of business of the actual carrier.[28]

The alternative forum places designated by the Warsaw Convention (including the two additional places chosen by the Guadalajara Convention) are traditional, which follows the widely accepted jurisdiction principle that a lawsuit should be brought in a place which is close to the defendant's activities, such as its principal place of business, the domicile of the defendant, or the place where the contract was made between the parties.[29] The only choice that falls outside this similar scope is the place of destination. But this option may

[24] Under most national laws, such an agreement will be implied when both parties take part in the proceedings without claiming that the court lacked jurisdiction. See: Reported by UNCTAD Secretary, ibid, p.140.
[25] UNCTAD Secretary, Ibid, p.140.
[26] This convention was signed in 1929 in Warsaw. See some more discussion about the convention in the UNCTAD, Carriage of Goods by Air: A Guide to the International Legal Framework (2006) <http://unctad.org/en/Docs/sdtetlb20061_en.pdf >.
[27] Rolf Herber, 'Jurisdiction and Arbitration—Should the New Convention Contain Rules on These Subjects?' (2002) *Lloyds' Maritime and Commercial Law Quarterly* 405, 409.
[28] Guadalajara Convention, Article 8.
[29] Alexander von Ziegler, above n 9, 102.

be a particularly familiar place for the claimant; the place of destination also represents the place of performance from a wider jurisdiction perspective.[30]

The rules relating to jurisdiction remain unchanged in later protocols, including The Hague Protocol[31] and the Montreal Convention.[32]

3) Carriage of goods by land

Unlike the globally adopted sea carriage and air carriage conventions, the international treaties in relation to the carriage of goods by land have a regional focus. The discussion below will take the carriage of goods by road and railway carriage as examples.

a. Carriage of goods by road

The Convention on the Contract for the International Carriage of Goods by Road, which is also known as the CMR, was adopted in 1956. Although the CMR is relatively old, it has proved its effectiveness and is still frequently applied by courts in Europe and North Asia.

In respect of the choice of jurisdiction, the CMR, in its Article 31, recognises those alternative forums, including: 1) the place of the defendant's ordinary residence; 2) the principal place of business of the defendant; 3) the location of the branch or agency through which the contract of carriage was made; or 4) the place of delivery. In addition, the claimant can also bring a lawsuit at the place where the custody of the goods was transferred.[33]

b. Carriage of goods by rail

The Convention concerning International Carriage by Rail (COTIF) also has its regional focus, since its member States are mostly European nations.[34] There are a number of appendices to COTIF, including the Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV), the Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM), the Regulation concerning the International Carriage of Dangerous Goods by Rail (RID), the Uniform Rules concerning Contracts of Use of Vehicles in International Rail Traffic (CUV), the Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic (CUI), the Uniform Rules concerning the Validation of Technical Standards and the Adoption of Uniform Technical Prescriptions Applicable to Railway Material intended to be used in International Traffic (APTU), and the Uniform Rules concerning the Technical Admission of Railway Material used in International Traffic (ATMF).[35] Among them, CIM, which is

[30] Ibid, 102.

[31] The Protocol to amend the Warsaw Convention, signed at The Hague on 28 September 1955 (entered into force 1 August 1963) ('The Hague Protocol').

[32] The Convention for the Unification of Certain Rules for International Carriage by Air, opened for signature at Montreal on 28 May 1999 (enter into force 4 November 2003) ('The Montreal Convention').

[33] The CMR, article 31 (1) (b).

[34] The Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999. Some North African States and States from the Middle East have also ratified this convention.

[35] More details can be found in the website of the International Rail Transport Committee: <https://www.cit-rail.org/en/rail-transport-law/cotif/ >.

the uniform Rules Concerning the Contract of International Carriage of Goods by Rail, is listed as Appendix B to COTIF. The first version of CIM came into being in 1980.

If the claim is brought against a railway, Article 56 of CIM 1980 regulates its jurisdiction and states that: "Actions … may only be instituted in the competent court of the State having jurisdiction over the defendant railway, unless otherwise provided in agreements between States or in acts of concession." Accordingly, in principle, action may be brought only in the forums of the "states having jurisdiction over the defendant railway", i.e., the State in which the railway is established and thus domiciled.[36] However, the answer to the jurisdiction for the claim from a railway against the shipper or consignor is not specified. If the lawsuit is a recourse action from one railway against another, jurisdiction can be regulated by Article 63.[37]

3. Issues and problems

1) In general

Jurisdiction is a fundamental issue in litigations, especially in cases relating to the carriage of goods, because suits in this context must usually be brought in a very limited time so as to safeguard claimants' rights against the carrier.[38] It is common for regulations setting time bars to be drafted in a way that rights of claimants are forfeited if claims are not filed within a limited time. To avoid this happening, claimants need to be able to ascertain the applicable jurisdiction without too much risk.[39]

As for the multimodal transport of goods, most countries use the network liability system.[40] This means that the carrier's liability is dependent on the particular stage of the transportation where the loss occurred. However, non-localised loss is a problem typical in multimodal carriage. Damage to the goods is not easy to localise in container shipping because of the sealed containers, although this feature makes goods safer than before. Even though the damage can be identified, the damage may have occurred gradually.[41] Thus, if the loss cannot be ascribed to one specific transport leg, none of the unimodal transport conventions would be applied, except in a few such specific circumstances. This can severely complicate the process of determining the applicable law or any uniform

---

[36] Malcolm Clarke, David Yates, *Contracts of Carriage by Land and Air* (Informa, 2nd, 2008) 229.

[37] The full version of "Protocol of 3 June 1999 for the Modification of the Convention Concerning International Carriage by Rail of 9 May 1980, done at Vilnius (Vilnius Protocol), with its annex, the Convention concerning International Carriage by Rail (COTIF 1999), as amended" is available at <https://www.dfa.ie/media/dfa/alldfawebsitemedia/treatyseries/2016/ITS-No.-9-of-2016.pdf,> see Article 63 "Procedure for recourse".

[38] For example, Art.3 r. 6 of Hague Rules, Art.3 r. 6 of Hague-Visby Rules, Art.20 of Hamburg Rules, Art.32 of CMR, Art.47 of COTIF-CIM 1999, Art.24 of CMNI, Art.29 of Warsaw Convention, Art. 35 of Montreal Convention.

[39] Alexander von Ziegler, above n 19, 85.

[40] Under this network liability system, different national laws or applicable conventions are applied depending on the particular stage of the transportation where the loss occurred; thus, the carrier's liability may vary depending on the applicable liability regime.

[41] Ling Zhu, M Deniz Guner-Ozbek, and Hong Yan, 'Carrier's Liability in Multimodal Carriage of Goods in China and Its Comparison with US and EU', (2010) *Proceedings of International Forum on Shipping, Ports and Airports (IFSPA)* 103, 104.

conventions.[42] Matters can become even more complicated, since the consignee may change during the transaction process; the claimant may thus be an "unknown third party" who enters into the trade;[43] while the ultimate claimant must however have a predictable and clear access to the appropriate court prior to the suit.

One important reason why parties fight tooth and nail on the jurisdiction issues in international lawsuits is that the court exercising jurisdiction will determine the applicable law through the application of its conflict of law rules or the relevant regional conventions or regulations.[44] At the same time, there is also a strong incentive for a claimant to engage in forum shopping, and to choose a forum in the contract where the claimant is likely to "obtain the most successful outcome".[45] In carriage disputes, if all countries agreed to be bound by the same regulations in regard to substantive liability, it could be said that there is then no need to have jurisdiction or arbitration clauses or rules, since any court chosen would give the same result. Unfortunately, there is no uniform convention internationally regulating multimodal transportation contracts, as mentioned.[46]

2) Are there any expansive jurisdictions in the unimodal transport conventions?

As discussed, other than in The Hague or Hague-Visby Rules, other unimodal transport conventions contain jurisdiction rules. Moreover, there seems to be an obvious trend that these conventions, by recognising the existence of multimodal carriage, are inclined to extend their scopes of application, and they thus become debatable "plus" conventions.[47] That means the jurisdictional rules in those conventions will also likely apply to the extended regime. Following is a separate discussion of "maritime plus", "air plus", and "land plus" conventions.

A. "Maritime plus"`?

As mentioned, there are no provisions on jurisdiction contained in The Hague Rules or Hague-Visby Rules, leaving it to the national laws of the contracting States.[48] Since some carriers attempt to avoid a stringent jurisdiction by finding a cheaper forum where the law or the interpretation of the law leads to lower compensation[49] or gives other legal advantages,[50] debates have arisen as to whether a particular jurisdiction agreement in a carriage contract violates the minimum liability principle set forth in the Hague Rules or Hague-Visby Rules, article 3 r 8. Consequently, the demand for unification in the field of jurisdiction within the area of sea carriage has gradually been appearing.

---

[42] Marian Hoeks, above n 4, 13.
[43] Alexander von Ziegler, above n9, 86.
[44] Gebreyesus Abegaz Yimer, above n 11, 468.
[45] C.M.V. Clarkson and Jonathan Hill, *The Conflict of Laws* (Oxford 2011) 7.
[46] Yvonne Baatz, 'Jurisdiction and Arbitration' in D. Rhidian Thomas (eds), *The Carriage of Goods by Sea under the Rotterdam Rules* (Lloyd's List London, 2010) 319.
[47] Marian Hoeks, above n 4, 258.
[48] Gebreyesus Abegaz Yimer, above n 11, 474.
[49] For instance, US law provides lower per package limitation.
[50] Alexander von Ziegler, above n 9, 89.

The first attempt at including jurisdiction provisions in a maritime convention was in the Hamburg Rules, as discussed. Since the widespread use of containers has facilitated the development of door-to-door services, article 1(6) of the Hamburg Rules, in order to respond to this development trend, covers "…carriage by some other means…in so far as it relates to the carriage by sea". This means that the Hamburg Rules also cover a situation where sea carriage is merely a part of a larger contract, ie a multimodal contract; although it is clear that sea carriage must be an indispensable part.[51] In other words, jurisdiction rules in the Hamburg Rules apply to a multimodal transport contract only when sea carriage is a part of it, and the other modes of transport are related to the sea carriage.

The second and latest attempt was in the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ('the Rotterdam Rules'), which was adopted in 2009. The aim of the Rotterdam Rules is to replace the Hague Rules, the Hague-Visby Rules and the Hamburg Rules, and to achieve unification of law in the maritime carriage of goods. However, there is the unavoidable fact that multimodal transport continues to develop further. This being considered, the definition of "contract of carriage" in its finalized text indicates that the Rotterdam Rules is a "maritime plus" convention, and that they are applicable to "door-to-door" contracts involving more than one mode of carriage, ie more than just sea carriage.[52] In addition, during the period of drafting the Rotterdam Rules, the drafters had to decide as to the necessity of including jurisdictional provisions.[53] It was hotly debated—some, such as the UK, feared that the inclusion of jurisdictional provisions would affect the attractiveness of their forums.[54] Some believed that Article 21 of the Hamburg Rules could be adopted, with minor amendments,[55] in which case the convention could follow the foundation of the Hamburg Rules to protect a cargo claimant's ability to seek recovery in a reasonable court of its choice. At the same time, some countries, such as the US, sought a more balanced compromise between cargo interests and carrier interests.[56] In the end, it became clear that it was impossible to achieve consensus on any compromise solution.[57] As a result, a decision was made at the twentieth session of Working Group III that the provisions on jurisdiction and arbitration would not apply unless a State specifically chose them.[58] This is one of the most controversial decisions, since it may create more diversities, despite one

[51] The Hamburg Rules, Article 1(6), under which "contract of carriage by sea" also means "…a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea." See also Marian Hoeks, above n 4, 267.
[52] Article 1(1) of the Rotterdam Rules provide: "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."
[53] Gebreyesus Abegaz Yimer, above n 11, 477.
[54] Ibid, 478.
[55] Ibid, 477.
[56] Michael F. Sturley, 'Jurisdiction and Arbitration under the Rotterdam Rules' (2009) 14(4) *Uniform Law Review* 945, 951.
[57] Ibid, 950.
[58] Yvonne Baatz, above n 46 323, see the Rotterdam Rules, article 74: '…the jurisdictional provisions are binding only on states that declare their intention to be bound by it in accordance with Article 91'.

of the main objectives of the new convention being to seek to achieve international unification of law.[59] A very similar formula to that in the Hamburg Rules was finally adopted in the Rotterdam Rules. A list of alternative forums is provided in its Article 66; these include: 1) the domicile of the carrier; 2) the place of receipt agreed in the contract of carriage; 3) the place of delivery agreed in the contract of carriage; 4) the port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or 5) in a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under the Rotterdam Rules.[60]

The Rotterdam Rules, as discussed, apply to "door-to-door" carriage with sea carriage as its indispensable part. In the case of door-to-door carriage, the place of receipt and the place of delivery may not be the same as the port of loading and the port of discharging. It is clear that Article 66 also includes the competent courts of "place of receipt" and "place of delivery". Both places must be contractually agreed, and they are not necessarily the actual place of receipt or delivery; it may occur in practice that the parties modify the contract and amend the actual place of receipt or delivery by replacing the ones originally inserted in the contract.

B. "Air plus"?

That an international air law convention should also apply to door-to-door services was discussed far earlier than even sea carriage. It was discussed in the Warsaw Conference in 1929 when the French delegation made a proposal that opened the door for such wide cover.[61] The Warsaw Convention and a series of amendments contain similar provisions on this extended scope of application.[62]

The Montreal Convention affirms that it covers air carriage and is not extended to other modes of transportation.[63] Yet contemporary airports, especially the hubs, can be enormous, and thus there are more and more road movements within the commercial area of the airport to which the air carriage convention can apply. To prevent the regime from overextending its radius and applying to carriage by other modes that are not as intertwined with air transport (as that performed within the confines of an airport is thought to be), the

[59] Yvonne Baatz, Ibid, 323.
[60] The Rotterdam Rules, Article 66.
[61] George Leloudas, 'Multimodal Transport under the Warsaw and Montreal Convention Regimes: A Velvet Revolution?' in Baris Soyer and Andrew Tettenborn (eds), *Carriage of Goods by Sea, Land and Air: Uni-Modal and Multi-Modal Transport in the 21st Century* (Informa Law from Routledge, 2013) 77, 86.
[62] The Warsaw Convention, Article 18(3); and the Montreal Convention, Article 18(4).
[63] The Montreal Convention, Article 18(4): ""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. 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. 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."

first sentence of Article 18(4) explains that the period of carriage by air does not extend to carriage by means other than air performed outside an airport. Besides this restriction, the same Article 18(4) also sets out two exceptions to this rule, which create the possibility that under certain circumstances the period of carriage by air is extended beyond actual air carriage and beyond the boundaries of the airport.

The first exception applies "…if such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment…" Therefore, when the period in which the loss occurred cannot be identified, the whole operation is covered by the contract of carriage by air, and such carriage (by other means) that is for the purpose of loading, delivery or transhipment becomes subject to this expanded application of the air system. The word "presumed" in Art 18(4) is thought to relieve the burden on the party that has suffered damage or loss from the considerable work involved in proving that the loss was caused by an event which happened during the carriage by air and not by an event which happened before or after the carriage by air. Thus, if the loss or damage is proved to occur elsewhere, this presumption would be rebutted. Meanwhile, the usage of terms like loading, delivery and transhipment also indicates that there are certain restrictions for an effective application expansion. For instance, the road carriage that followed the air stage in *Quantum Corp Inc & Ors v Plane Trucking Ltd & Anor.* was not covered by any of these terms.[64] In that case, the road carriage commenced in Paris and ended in Dublin, which made it more significant than merely ancillary carriage. It was clear that the consignment of hard disks was stolen during the road carriage in England. It is unlikely that this was a mere ancillary carriage performed in addition to air carriage. As a result, Tomlinson J stated in the decision of the English Commercial Court that: "*It is common ground that the Warsaw Convention in whatever version is not by its own terms applicable to this loss which did not occur during the carriage by air or whilst the goods were at an aerodrome.*"[65] Therefore, only when the cause of the loss or damage remains concealed can the expanded provisions have effect, since "the Warsaw Convention in whatever version" only applies to air carriage, or air carriage which is supplemented by carriage by another mode that does not have its own identity and where the loss or damage is not localised.

Under the second exception, if the air carrier substitutes air carriage by another mode of transport without the consent of the consignor, the air convention shall apply to the whole journey. Thus it may extend the application of the air system if the carriage includes air carriage and "another mode of transport". However, it is important to note that – "without the consent of the consignor" – is an important condition for this second exception to apply. That means that if the consent of the consignor is in place, there is no argument that the air convention can also apply to "another mode of transport" as mentioned in article 18(4).

The above two exceptions will only be triggered when conditions are fulfilled. The exceptions must also be read in light of Article 18(3) of the Montreal Convention, which provides that "the carriage by air …comprises the period during which the cargo is in the charge of the carrier." The air convention has a clear definition of its scope of application,

[64] *Quantum Corp Inc & Ors v Plane Trucking Ltd & Anor.* [2002] EWCA Civ 350; [2002] C.L.C. 1002.
[65] *Quantum Corp Ltd & Ors v. Plane Trucking Ltd & Anor.* [2001] C. L. C. 1192, 1194.

and it applies in principle to air carriage only; air carriage outside the airport is not covered apart from the above mentioned specific exceptions.

C. "Land plus"?

a) Road plus

Carriage of goods by road is a mode of transport that is deeply intermeshed with multimodal transport, since it plays an important part in nearly all contracts of multimodal carriage; for instance, road carriage is always the only choice for the carriage of cargo to and from infrastructure hubs like railway stations, sea ports and aerodromes.[66]

Based upon Article 1(1), the CMR applies to international carriage by road, including the taking over and delivery of goods.[67] In addition, Article 2 appears to expand the scope of application defined in Article 1: Article 2(1) starts by affirming the application of the CMR to a whole journey if the goods are carried by other means and are not unloaded from the road vehicle. Thus, apart from regulating the international carriage of goods by road, the CMR also applies during a non-road carriage period, although this is not without conditions. However, it is made clear in the following parts of the same Article 2(1) that in the case where "…any loss, damage or delay in delivery of the goods which occurs during 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…", then the CMR would not apply in determining the liability of the carrier by road. Article 2(2) describes a situation where the road carrier is also responsible for carrying the goods by other means. In this situation, the rule in Article 2(1) will also follow as if the concerned carrier were two separate persons.

It seems to be a widely international consensus that the CMR could be applied to road transport that is performed under a contract of multimodal carriage. The gist of Article 2 is that, in cases of roll-on, roll-off carriage where a truck or trailer is put on a ship with goods either after or before a stage of road carriage in that same truck or trailer, the CMR rules shall apply not only to the road stage(s), but also to the whole process including the sea, inland waterway, rail or air stage of the journey.[68]

b) Rail plus

The COTIF Convention on international rail carriage is the oldest instrument of uniform carriage law.[69] As noted above, the consequence of the Vilnius Protocol pertaining to the carriage of goods can be found in the CIM appendix to the contemporary COTIF Convention.

The scope of application of the CIM is defined in Article 1(1) which states:

[66] Marian Hoeks, above n 4, 117.
[67] Article1 (1) of CMR.
[68] Marian Hoeks, above n 4, 143.
[69] Ibid, 211.

> "These Uniform Rules shall apply to every contract of carriage of goods by rail for reward when the place of taking over of the goods and the place designated for delivery are situated in two different Member States, irrespective of the place of business and the nationality of the parties to the contract of carriage."

Undoubtedly the CIM applies to international rail carriage. In addition, Articles 1(3) and 1(4) extends the CIM's scope of application to carriage by other modes of transport if they are involved in a contract of which the primary focus is rail carriage. Article 1(3) and 1(4) provide that:

> "3. 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.
>
> 4. 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."

Thus, the CIM may apply to a multimodal carriage contract under some specific circumstances. In addition, it can be noted that if the complementary carriage by other modes of carriage could meet the requirements in the above articles, the application of the CIM's rules would be mandatory and there would not be any need for acquiring the contracting parties' agreement.

However, this pursuit of uniformity creates a side effect, since the appropriation of other transport means by the CIM regime will cause recourse gaps. For example, if damage or loss happens during supplemental domestic road carriage that fulfils the requirements of the above Article 1(3), the multimodal carrier is liable to cargo interests based on the CIM limit of liability. A subcarrier who may actually have performed the road carriage is however not bound by the CIM but rather by the applicable national regime, which may have varied rules on limitation of liability.

3) Potential duplication/overlapping of actions?

On the one hand, the application of these international conventions that regulate carriage by sea, air, road and rail, and that may also apply to other modes of transport under certain conditions, can bring benefits in practice; on the other hand, such expanded application may cause conflicts or confusion, since there are obviously some overlaps between the unimodal conventions already in force.[70] This overlap of the application scope of unimodal transport conventions will undoubtedly lead to conflicts over jurisdiction. Some courts often attempt to find the applicable rules to claims relating to multimodal carrier liability

[70] Cécile Legros, 'Relations between the Rotterdam Rules and the Convention on the Carriage of Goods by Road' (2012) 36 *Tulane Maritime Law Review* 725, 727.

by examining the scope of application regulations of the unimodal convention or the applicable national law in order to ensure that they have jurisdiction.[71]

In practice, it is not uncommon for conflict to arise out of the application of two unimodal transport conventions. This may be explained by reading various articles in the CMR (on road carriage) and the Warsaw Convention (on air carriage). For instance, Article 18 of the Warsaw Convention provides that if such transport is to fulfil the contract of carriage by air for the purpose of loading, delivery or transit, any loss shall be presumed to have been the result of an event which took place during the carriage by air. What if the goods on the truck are not removed from the vehicle and part of the journey is carried out by air? Conflict thus may arise, as in the case of *Quantum Corp Inc & Ors v Plane Trucking Ltd & Anor.*, mentioned previously. Also, take another example, where the cargo is loaded on board a truck, and the truck together with the cargo inside it is later loaded onto a ferry. Article 1(6) of the Hamburg Rules (regulating sea carriage) states that: "Contract of carriage by sea means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea." Here, the Hamburg Rules should overrule other unimodal conventions if it is incorporated into the contract of carriage together with the CMR (on road carriage). But the CMR may also apply, since Article 2 of the CMR states: "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." Therefore, should any damage or delay happen on the sea leg, would this be counted as part of a road carriage or part of a sea carriage?

4. Conclusion

After having gone through the rules in various representative unimodal transport conventions, this article has established that:

1) There have not been any uniform rules formulated for regulating jurisdiction issues arising out of an international contract for the multimodal transport of goods;

2) The existing unimodal transport conventions contain effective rules relating to dispute and jurisdiction under their respective mode of transportation;

3) These unimodal transportation conventions also try to expand their jurisdictions to cover issues that may arise from the multimodal transport of goods, but they nevertheless have their limitations, which mainly include: a) requiring the loss or damage to be localised; and/or b) requiring that a specific mode of transport must be part of the said multimodal transportation of goods.

In addition, one cannot ignore or underestimate the differences among conventions relating to the basis of liability, limitation of liability, documents which have different legal value,

[71] Marian Hoeks, above n 4, 10.

and the time bars. When a single mode of transportation is still dominant, it may be argued that these particularities do not constitute an especially unmanageable problem; however, when attempting to combine different modes of transport and their different legal systems into one operation, the shortcomings become obvious. Under this circumstance, and where the application scope of unimodal transport has been expanded to encompass multimodal transport, the divergences of content in these unimodal conventions may gradually become obstacles for further development of the international multimodal transportation of goods. Consequently, unless the parties have a clear and unequivocal agreement in their contract, a set of jurisdiction rules for a contract for multimodal transportation is both necessary and important.