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Sea Carriage Goes Ashore: The Relationship Between Multimodal Conventions and Domestic Unimodal Rules*

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I. INTRODUCTION

Historically, ocean cargo carried from an inland location in one country (such as a manufacturing plant) to an inland location in another country (such as a retailer's warehouse) would travel under three contracts of carriage. The cargo would first travel by land under a railroad or trucker's bill of lading from the manufacturing plant to the port of loading. It would then travel by sea under an ocean bill of lading to the port of discharge. The cargo would then complete its journey by land under another inland bill of lading. Each of these three contracts of carriage would be legally distinct and thus subject to its own legal regime.

In the modern world, the business practices are typically very different. Today a single multimodal contract of carriage commonly covers both the ocean voyage and one or more inland legs. The shipper does not have distinct contracts of carriage for each leg of the journey (even if its carrier may have distinct sub-contracts for some or all of the separate legs). From the shipper's perspective, there is only a single contract of carriage — a "mixed contract" covering both land and sea elements — that should logically be governed by a single legal regime.

Although many variations arise in practice, a simply hypothetical might help to illustrate the different approaches. Suppose that a shipper in Berlin wishes to have cargo transported to Chicago, and that it arranges to have the cargo carried by road from Berlin to Rotterdam, by sea from Rotterdam to Montreal, and by rail from Montreal to Chicago. Historically, the shipper would have been likely to have had three separate contracts — one with a European trucker, one with an ocean carrier, and one with a North American railroad. Some or all of these three contracts would have been concluded through agents, but the shipper's legal relationship would have been with each of the three carriers.

Today, it is more likely that the shipper would enter into a single contract of carriage to transport the goods all the way from Berlin to Chicago. It might contract with an ocean carrier that will perform the ocean carriage under that contract itself while sub-contracting with inland carriers to perform the other two legs. Or the shipper might contract with an NVO (a non-vessel operating carrier) that will perform none of the carriage itself but will instead sub-contract with ocean and inland carriers to perform all three of the legs. In either case, the shipper's legal relationship is with a single carrier under a single contract for the entire journey (and it generally has little interest in its carrier's sub-contracts).

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II. THE GOVERNING LEGAL REGIMES

When the first international transport convention was negotiated in the early 1920s, separate contracts for each leg of the journey were still the norm. Thus the period of responsibility under the Hague Rules of 1924 was carefully limited to ocean transport alone. Indeed, the Hague Rules apply only to the so-called tackle-to-tackle period — the time between loading and discharge — and do not apply even to the time when the goods are under the ocean carrier’s control in the port area.¹

The Hague-Visby Rules do not change the period of responsibility. They were negotiated early in the “container revolution,” before multimodal contracts had become the norm, and thus the drafters of the Visby Amendments did not perceive a pressing need to make any change to that provision.

The Hamburg Rules extend the period of responsibility, but only to cover the time when the goods are under the ocean carrier’s control in the port area. This is not a fundamental change; the Hamburg Rules are still a unimodal regime.

Because the three international maritime conventions all have limited periods of responsibility, other law must fill the void for inland carriage. Because there is no international regime for inland carriage comparable to the Hague, Hague-Visby, and Hamburg Rules, different nations have filled that void differently. In some regions (most prominently Europe), regional unimodal conventions generally apply to international road and rail carriage. (Thus the CMR governs European road carriage and CIM-COTIF governs European rail carriage.) In some countries, mandatory domestic law applies to inland carriage. In some countries (such as Canada), this would be unique domestic law. In other countries (particularly in Europe), the domestic law is closely modeled on the relevant regional regime. Many countries have no mandatory law, however, thus effectively leaving the parties to address the issue in their contracts of carriage.

In the United States, the country with which I am most familiar, confusion reigns on this issue. The federal appellate courts in some parts of the country have held that the 1906 Carmack Amendment to the Interstate Commerce Act (which has itself been amended many times) is mandatorily applicable to the U.S. portion of the inland leg of a multimodal shipment such as we saw in our original Berlin-to-Chicago hypothetical. Under these decisions, the Carmack Amendment would govern the carrier’s (and the railroad’s) liability if the cargo were damaged on the train after crossing the U.S. border. The federal appellate courts in other parts of the country have held that the Carmack Amendment does not apply, even to the inland U.S. leg, if a single bill of lading has been issued. Under these decisions, the carrier’s (and the railroad’s) liability would be governed by the terms of the bill of lading (subject to the restrictions of maritime law) if the cargo were damaged after crossing the U.S. border. Earlier this year, the U.S. Supreme Court agreed to resolve the conflict among the lower federal courts, but the parties settled the case before the Court could hear argument.²

Under our original Berlin-to-Chicago hypothetical, therefore, as many as six different legal regimes could govern each of the six distinct segments of the single multimodal journey under a single contract of carriage: (1) The European CMR would govern any cargo damage that occurred during the Berlin-to-Rotterdam road leg. (2) The bill of lading would probably govern any cargo damage that occurred in the port of Rotterdam after delivery by the trucker before loading on the vessel (although the bill of lading terms could be displaced by mandatory Dutch law to the extent applicable). (3) The Hague-Visby Rules would govern any cargo damage that occurred during the Rotterdam-to-Montreal sea leg. (4) The bill of lading would probably govern any cargo damage that occurred in the port of Montreal after discharge from the vessel before delivery to the railroad. (5) The mandatory Canadian law governing domestic rail carriage would govern any cargo damage that occurred on the train before crossing the U.S. border. (6) The U.S. Carmack Amendment might (or might not) govern any cargo damage after crossing the U.S. border (depending on the U.S. court in which the dispute was heard).

1. The drafters felt that the immediate need at the time was for international uniformity during the ocean voyage, and that it would be unnecessarily complicated to extend the new rules to situations in which the domestic law of a single country could provide a single, predictable rule.

2. See *Altadis USA, Inc. v. Sea Star Line, LLC*, 127 S. Ct. 1209 (2007) (noting dismissal under Rule 46).

III. PROSPECTS FOR IMPROVEMENT

In the United States, the Supreme Court recently recognized the value of having a single contract of carriage, even a multimodal one, subject to a single legal regime during the entire period of its performance. As the Court explained in the context of a multimodal contract for carriage of goods from an Australia port to an interior point in the United States, “[c]onfusion and inefficiency will inevitably result if more than one body of law governs a given contract’s meaning.”³

Despite our clear recognition of the problem, the prospects for improvement do not look very good at the moment. The international community has already tried at least once. Under the 1980 U.N. Convention on International Multimodal Transport of Goods (the Multimodal Convention), a “multimodal transport operator” would generally have been governed by a single legal regime throughout the performance of its contract of carriage, but article 19 would have created a “network” exception to preserve the operation of national or international unimodal regimes that impose greater liability on the carrier. Even this limited effort to unify the law for multimodal carriage failed. The Convention achieved virtually no support, and there is essentially no prospect of its entering into force in the foreseeable future.

The current UNCITRAL Transport Law project holds out the most promise for improving the situation, but it would still produce only a partial step toward a true multimodal convention. It would not create a single regime to govern a single multimodal contract’s meaning. Under article 11 of the current⁴ “Draft Convention on the carriage of goods [wholly or partly] [by sea],” the period of responsibility is defined by the contract of carriage. Thus a multimodal contract would produce a door-to-door period of responsibility for the carrier (which is equivalent to the Multimodal Convention’s “multimodal transport operator”). But article 26 also creates a “network” exception to preserve the operation of unimodal regimes and article 19, which makes maritime performing parties liable under the draft convention, does not apply to inland carriers. Thus inland carriers would be outside of the new regime entirely, and the carrier’s liability for damage on an inland leg would often be defined by reference to a unimodal regime.

What is the explanation for this failure to address such an obvious and pressing problem? The simple answer is that industry does not want it. Experience has shown that efforts to impose an unwanted legal regime on unwilling commercial parties are doomed to failure. We have seen this in the Hamburg Rules and again in the Multimodal Convention. In both Europe and North America, inland carriers have been particularly vocal about their desire to be excluded from any new convention.⁵ Ocean carriers and NVOs — the carriers who typically enter into multimodal contracts — wish to have their liability defined on the same terms as they have recourse against their inland sub-contractors, and thus they have insisted on the network exception.

Because the current UNCITRAL project is driven by commercial needs, legal elegance has sometimes had to take a back seat. In a pragmatic world, there is no point in having a perfect convention that no one ratifies. It is far better to have an imperfect but nevertheless useful convention ratified by nations representing as much of world trade as possible. Although logic may demand that a single body of law should govern a single contract’s meaning, commercial demands seem more than strong enough to preserve the fractured approach that the world now follows.

There can be no doubt that sea carriage will continue to go ashore. The container revolution has guaranteed that as a matter of economic necessity. It also appears that for the foreseeable future, we will continue to face questions about the relationship between multimodal conventions and domestic unimodal rules.

3. *Norfolk Southern Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 29, 2004 AMC 2705, 2715 (2004).

4. A/CN.9/WG.III/WP.81.

5. Inland carriers oppose uniform multimodal whenever an international convention is under discussion. In the context of individual litigation, however, when inland carriers might benefit from the maritime rules, their story can be very different.