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I. – INTRODUCTION

The multimodal aspects of the Rotterdam Rules [1] were one of the most contentious subjects throughout the whole discussion on this new Convention. The basic issue was: should the draft apply not only to the maritime part of a carriage by sea, but also to ancillary carriage by other modes prior to, or after, the carriage by sea?

An affirmative answer to this question was viewed by some delegates as a serious obstacle to achieving their multimodal ideal: a uniform liability regime applying to all modes of transport. Others saw maritime law intruding on an area where it ought not to be: ashore is the legal domain of the CMR, the COTIF/CIM Rules 1999 and the Budapest Convention! At best, in their view, a network system could be tolerated.

Other delegations were adamant that the inland parts of a maritime carriage should be included in the scope of the Rotterdam Rules when these parts are covered by the same contract of carriage. In their view, it would not make sense to restrict the scope to port-to-port carriage only: doing so would just add another maritime convention to the three existing ones. The modern maritime contract, it was said, is multimodal. And a network system might be possible for carrier's liability only, but the application of different conventions to the various parts of a voyage under a single contract of carriage would, in this view, be unworkable.

In the end, a remarkable level of consensus was reached within UNCITRAL on what is now known as the "maritime plus" concept.

Article 5, dealing with the scope of application, starts with:

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1 On 11 December 2008, the UN General Assembly adopted Resolution A/RES/63/122, recommending that the *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* be known as the "Rotterdam Rules". To avoid the somewhat cumbersome full title of the Convention, this paper will refer to the "Rotterdam Rules", to "the (new) Convention" or to "RR".

> "Subject to Article 6, this Convention *applies to contracts of carriage* in which ... " *(there follow the connecting factors)* (emphasis added),

while Article 1(a) defines "contract of carriage" as:

> "*a contract* in which a carrier, against 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*." (emphasis added)

Furthermore, according to Article 5, both the whole carriage of the goods and the sea carriage must be international. This means that the Convention applies, for example, to a carriage from Malta through the port of Genoa to Milan but not to a carriage from Sicily through the port of Genoa to Zurich.

In this connection, I should like to underline that the basic concept of the Convention is not so much a modal approach or a documentary approach, but a contractual approach.[2,3]

It follows more or less automatically from this contractual approach that the new Convention *had to cover inland transport* that is ancillary to carriage by sea, because the modern maritime transport contract in the liner trade is, to a substantial extent, a multimodal transport contract.

Therefore, it was not only pragmatic reasons that led to the "maritime plus" application of the Rotterdam Rules: the contractual concept itself left no other choice but to include ancillary inland transport.

II. – A "LIMITED NETWORK SYSTEM"

The first question that arises is whether, in view of the different nature of maritime transport compared with inland transport, special provisions should

2 Anthony Diamond rightfully points out that the actual carriage by sea may play a role when it comes to the interpretation as to whether a transport contract is a contract as defined in Article 1(1). Some contracts of carriage do not specify a mode of transport or leave the mode optional to the carrier. In such cases, the mode of transport that is actually used may be (one of) the factor(s) used to determine whether the contract of carriage falls under the definition of Article 1(1). See A. DIAMOND "The Next Sea Carriage Convention?", 2 *Lloyd's Maritime & Commercial Law Quarterly* (2008), 140-141. I note that the definition of "contract of carriage" does not include the word "states" or "specifies", but uses the wider term "provides".

3 This approach is not exceptional, on the contrary: other transport conventions, too, such as the Hamburg Rules, CMR, the COTIF/CIM Rules 1999, the Budapest Convention and the Montreal Convention apply to a certain type of contract. In all of these except the Montreal Convention this is clear from their scope rules. The scope rules of the Montreal Convention seem to suggest otherwise, but looking at the text as a whole, one cannot but conclude that it applies to contracts for international air transport.

apply to inland parts of the carriage that deviate from those applicable to the maritime leg. The answer given by the Rotterdam Rules to this question is affirmative.

The main special provision is Article 26 dealing with the carrier's liability during the inland parts of the maritime carriage. Article 26 reads:

> "Article 26. Carriage preceding or subsequent to sea carriage
>
> When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, *occurs* during the carrier's period of responsibility but *solely* before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, *at the time of* such loss, damage or event or circumstance causing delay:
>
> (a) Pursuant to the provisions of such international instrument *would have applied* to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;
>
> (b) Specifically provide for the *carrier's liability, limitation of liability, or time for suit;* and
>
> (c) *Cannot be departed from by contract* either at all or to the detriment of the shipper under that instrument." (emphasis added)

At first glance, this article may look complicated. Summing it up, however, it means that in case there is a relevant inland transport convention, the liability rules of that convention may apply when loss or damage occurs during the inland part of the voyage.

Some explanatory notes on this article and its wording follow.[4]

(a) Only Convention, no national law

There was substantial discussion in UNCITRAL on whether to broaden the scope of Article 26 to national law as well. In particular, "large surface" countries like China, India, Canada, Australia and Sweden were in favour of such a move. The counter-argument was that inclusion of "national law"

4 The most relevant parts of the UNCITRAL WG III reports on Article 26 are: A/CN.9/526, Report of the 11th Session, paras. 245-250; A/CN.9/544, Report of the 12th Session, para. 25; A/CN.9/616, Report of the 18th Session, paras. 216-228; A/CN.9/621, Report of the 19th Session, paras. 185-203; A/CN.9/645, Report of the 21st Session, paras. 83-87 and 204. For the Commission's view on Article 26, see A/63/17, Report of UNCITRAL's 41st Session (16 June – 3 July 2008), paras. 92-98.

would dilute uniformity. Eventually, the aim of uniformity prevailed. Even a compromise proposal permitting States to make a declaration that their own courts would be allowed to apply national law, was rejected.[5]

As a result, Article 26 only applies when another transport convention [6] would have applied under the hypothetical contract of carriage relating to the inland part of the multimodal transport. The relevant inland part is the part – either before or after the sea leg – during which the damage (solely) occurred. Since the existing transport conventions apply to international carriage, this inland part must, in practice, be international.[7]

Consequently, the normal liability provisions of the Rotterdam Rules apply if the loss of, or damage to, the goods or delay occurs during an ancillary inland transport to which, under a hypothetical contract, national law would have applied. This inland carriage may be either national or international.

(b) Only liability provisions

The provisions which prevail must be directly related to liability. Therefore, the provisions on limitation of liability and time for suit are included, but all provisions that indirectly may have an impact on carrier's liability, such as provisions relating to jurisdiction, evidentiary aspects of transport documents, successive carriers and so on, are excluded. *A fortiori*, relating to non-liability matters, the Rotterdam Rules always prevail.

The general view was that if the network principle were to be extended to issues other than carrier's liability for loss of, or damage to, the goods (and delay), the switch from one legal regime to another legal regime under a single contract of carriage might, from an operational or commercial standpoint, create unworkable situations for the parties to the contract. The marked difference in the position of a bill of lading holder under the RR and the possessor of a consignment note under the *Convention on the Contract for the International*

5 See A/CN.9/621, Report of the 19th Session, paras. 189-190; A/63/17, Report of UNCITRAL's 41st Session, paras. 92-96 and 98.

6 To be more precise: the draft refers to an "international instrument". This term includes an EU Regulation or Directive, which may not qualify as a convention but certainly is an international instrument.

7 To my knowledge, there may be one exception. Article 31 of the Budapest *Convention on the Contract for the Carriage of Goods by Inland Waterway* (2000) allows State-Parties to declare that it will apply the Convention to its own *national* carriage as well. Therefore, it is arguable that under the Rotterdam Rules, in cases where the damage occurs during a national inland navigation carriage in a State that has made such a declaration, the liability rules of the Budapest Convention must be applied.

Carriage of Good by Road (CMR) 1956 or the *Convention concerning International Carriage by Rail* (COTIF/CIM Rules) 1999 may be illustrative.[8]

Under the RR, a bill of lading legitimates its holder to the rights embodied in this document; the conclusive evidence rule applies to a bill of lading; the holder of the complete set of originals has fully transferable right of control of the goods during the whole period of responsibility of the carrier under the contract of carriage and the holder of one original is entitled to delivery of the goods at the end of the carriage. In the seaborne trade, the bill of lading holder needs this strong position for commercial purposes: in combination with the usual "cash against documents" payment condition under a sale contract, it is the basis of the seller's protection against the buyer's insolvency and it provides for the bank's security under a documentary credit.

Under the CMR and COTIF/CIM Rules 1999, however, the consignment note does not embody rights; it is *prima facie* evidence only; when issued in three originals, each original consignment note has a different function; the transfer of the right of control of the goods is restricted and, most importantly, when the goods have arrived at destination, the sender (who may be an unpaid seller) loses its right of control of the goods once the consignee (who may be an insolvent buyer) claims the goods for delivery from the carrier.

From this example it may be clear that the RR provisions on transport documents and right of control must apply during all parts of the carriage under a multimodal contract. If under a full network system some parts of the carriage were to be covered by the (whole) CMR or COTIF/CIM Rules 1999 instead of the RR, the bank's documentary security and the protection of the seller against the buyer's insolvency would be gone for the whole multimodal contract of carriage.

(c) Mandatory

Further, the provisions which prevail must have a mandatory character. Whether such mandatory character is one-sided or two-sided does not matter.

(d) "Occurs"

In order for the inland transport convention possibly to apply, the loss of, or damage to, the goods or delay must have occurred during the period that the goods were ashore. The choice, in principle, was between the words "detected", "caused", or "occurred".

8 See A/CN.9/616, Report of the 18th Session, para. 222.

"Detected" has the advantage that the time and location of detection of a loss or damage can be clearly established. The disadvantage, however, is that the carrier's liability will, in many cases, be allocated to the final (inland) part of the carriage, because damage to goods is often detected upon or after completion of the carriage of the goods.

"Caused" has the disadvantage that the carrier's liability will often be allocated to the first (inland) leg of the voyage, because the most common cause of damage in the container trade is bad stowage of the goods in the container by the shipper and this occurs before the voyage begins. An even greater disadvantage of "caused" is that the matter of causation must first be resolved before it can be determined whether an inland convention is applicable to the carrier's liability.

Eventually, the choice fell upon "occurred" because, it was felt, an occurrence is, in most cases, reasonably easy to establish and may be expected to produce the fairest results.

(e) "Solely"

The loss of, or damage to, the goods or delay must have occurred *solely* before or after the maritime part of the voyage. This means that, instead of Article 26, the general liability rules of the Convention (*i.e.* those that apply to the maritime part of the transport) continue to apply when:

(i) the loss of, or damage to, the goods or delay occurs during the carriage by sea as well as another mode of transport, such as gradually occurring damage, or

(ii) it cannot be determined where the damage occurred ("concealed damage").

(f) Hypothetical contract

In initial drafts of the Convention, Article 26 was formulated as a conflict of conventions provision. The words in the *chapeau* "do not prevail over" are reminiscent of this. In earlier texts, wording was used to the effect that another (inland) convention would apply if according to its own terms it had to apply to the inland part of the multimodal maritime carriage. The objection against this earlier wording was that it would introduce in the Rotterdam Rules specific differences in interpretation of the scope rules of other conventions.[9]

9 In particular, such differences exist in respect of the CMR. In England, the CMR is held

In the final draft, however, the legal technique of the "hypothetical contract" is used.[10] The great advantage of the final wording is that the application of Article 26 does not depend on any specific interpretation of the scope rules of *other* conventions, but that it applies when its *own* conditions are met.

An example may illustrate this. Let us assume a carriage from Houston to Berlin through the port of Rotterdam. The carriage from Houston to Rotterdam is performed by sea and the on-carriage to Berlin by road haulage. The damage occurs between Rotterdam and Berlin. Now, according to the hypothetical contract formula, "if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to, the goods … occurred", the liability rules of the CMR apply to this damage, because (i) Germany or the Netherlands is a Party to the CMR (in fact both are) and (ii) the damage occurred during the period of the hypothetical CMR contract.

(g) Incorporation by reference of provisions of other conventions

In order to illustrate this aspect of Article 26, the above example may be somewhat extended: the carrier's bill of lading refers to Houston jurisdiction and Texas law to apply. The United States is a Party to the Rotterdam Rules but not a Party to the CMR. Must, in this extended example, a Houston court apply the CMR?

In my opinion, the answer is yes. It is the intention of Article 26 that the courts of a State Party to the Rotterdam Rules should do so even where that State is not a Party to the CMR. And, for such courts, it is equally irrelevant in terms of the application of the CMR whether the Netherlands and/or Germany are a Party to the Rotterdam Rules (but one of them must be a Party to the CMR, which is a requirement of the CMR itself to apply to the hypothetical contract).

In earlier drafts, a further paragraph had been added to Article 26 to the effect that the article would apply "regardless of the national law otherwise

applicable to an international road leg under an international air carriage: *cf. Quantum Corporation Inc. and others* v. *Plane Trucking Ltd. and another* [2002] EWCA Civ 350; [2002] 2 Lloyd's Rep 24 (CA). In Germany, the CMR does not apply to the road haulage part of a multimodal carriage: *cf.* the German Supreme Court in BGH 17 July 2008, I ZR 181/05. In the latter jurisdiction, the CMR can only apply to the road haulage subcontract that is made between the multimodal carrier and the road (sub)carrier.

10 This switch was made at the 19th Session; see its Report A/CN.9/621, para. 192.

applicable to the contract of carriage." [11] This paragraph was meant as a conflict-of-law provision intended to safeguard the applicability of the inland convention. Eventually, it was decided to delete the paragraph because it was regarded as superfluous, in particular after the drafters had opted for the hypothetical contract formula.[12] It is this formula, combined with the general scope provisions of the CMR, that determines that the CMR liability provisions apply to the damage in question. Or, in other words, the effect of Article 26 is that the liability provisions of other inland transport conventions have been incorporated by reference in the Rotterdam Rules and, in this way, become an integral part of the RR provided the conditions of their application set out in Article 26 are met.[13]

Likewise, in the above example, the words in the *chapeau* "do not prevail over" may not be interpreted as though a court of a non-CMR State had a sort of option to apply the CMR. There was discussion in UNCITRAL whether these words (which were a leftover from an earlier draft) should be replaced upon the introduction of the hypothetical contract formula, but the general view was that there was no need to do so. The draft of Article 26, as a whole, was regarded as sufficiently clear.[14]

(h) "At the time of"

The other convention must have been applicable to the hypothetical contract at the time of the loss or damage to the goods or the event or circumstance causing delay in delivery. In other words, not only the liability provisions of existing conventions are incorporated by reference in the Rotterdam Rules, but also those of possible future conventions. The date of occurrence of the loss or damage under the RR is the relevant moment for the determination whether the liability rules of the other convention apply.

(i) Effectiveness of Article 26

Criticism was voiced that Article 26 would be ineffective because the carrier (who, according to the Article 17 system, bears the onus of proof of the cause

11 See A/CN.9/WG.III/WP.56 and earlier drafts of the Convention.

12 Another argument in favour of deletion was that the RR should, generally, not deal with applicable law matters. See, generally, about the applicable law issue the Reports of the 19th Session, A/CN.9/621, para. 201 and of the 21st Session, A/CN.9/645, paras. 85 and 204.

13 For transport conventions, incorporation by reference of provisions of another convention is not unique: the second sentence of Article 2 CMR does the same.

14 See A/63/17, Report of UNCITRAL's 41st Session, para. 97.

of the damage) would not be interested in proving that the damage was caused during the inland part of the carriage.

I do not share this view. First, because the vast majority of damage in inland transport has obvious causes: road accidents, theft of cargo, etc. Therefore, in many cases, the cause of damage in inland transport is clearly evidenced by the facts and the onus of proof is no issue at all.

Second, this criticism is based on the assumption that the inland liability regime is more favourable to the cargo claimant than that of the RR. In many cases, this assumption is wrong. There is no longer much substantial difference in the practical results of the liability regime of the RR and that of the inland conventions. In addition, and this may be even more important in practice, the limitation levels for the relevant damage may be (much) higher under the RR than under the relevant inland convention.

The Rotterdam Rules include a package limitation (875 SDR per package) and a weight limitation (3 SDR per kilogram), while the inland conventions only include a weight limitation (CMR: 8 SDR per kilogram). Since multimodal transport is primarily relevant to the carriage of containerized packed goods, in most cases the package limitation of the RR will result in a (much) higher limitation level than the weight limitation of the inland convention will. A comparison between the RR and the CMR shows that with regard to packages weighing less than about 109 kilograms, the RR will produce a better limitation result for the cargo claimant, whereas for packages weighing more than about 109 kilograms the outcome will be more favourable to the carrier. And it is common knowledge for any insider in the container transport business that in any container, packages weighing over 109 kg are pretty exceptional. In other words, the result of this difference in limitation levels will be that, in many cases, a carrier may have an interest in proving that the damage occurred during the inland leg.

(i) Conclusion

It may be concluded that Article 26 indeed provides for a network system, but because of the restrictions outlined in (a) to (e) above, the article is correctly labelled as a *"limited network system"*.

The article is intended to incorporate the liability provisions of certain inland conventions in the Rotterdam Rules by reference. These must be applied when the conditions referred to in the *chapeau* of Article 26 are met.

In addition, the practical effectiveness of Article 26 is beyond reasonable doubt.

III. – THE POSITION OF THE INLAND CARRIER

Moving on from the liability of the carrier under the main contract, discussed *supra*, a further question that may arise is how the Rotterdam Rules affect the position of the inland (sub)carrier.[15]

The position of, amongst others, subcarriers is dealt with in Articles 18 and 19 of the Rotterdam Rules. The main rule is that the contracting carrier is responsible for the performance of all subcarriers involved in the carriage. However, a cargo claimant is also entitled to sue a subcarrier directly, in which case the subcarrier may rely on all the rights and remedies provided by the new Convention in respect of the contracting carrier. This direct action is, however, only allowed against "maritime performing parties", a category of persons defined in Article 1(7) which does not include inland (sub)carriers, unless they operate exclusively within a port area.[16]

It follows that the Rotterdam Rules do not directly affect inland carriers. Article 4 does not even list them among the persons enjoying a Himalaya protection under the new Convention.

There was considerable support amongst the delegates to leave the position of inland carriers untouched. This support was twofold. It came from delegates who did not want "maritime law coming ashore", the inland transport liability regime in their countries being more favourable to the claimant. And it came from delegates from countries where the opposite is true, with inland carriers being subject under their national law to a liability regime that is more favourable to them than the RR regime. An inland carrier, it was argued, might be unaware that its operations were part of an overall multimodal contract and, in case of a direct action against it under the RR, it might be faced with much higher limits than it was insured for.

15 The most relevant parts of the Reports of UNCITRAL WG III on this matter are: A/CN.9/526, Report of the 11th Session, paras. 253-254 and 256; A/CN.9/544, Report of the 12th Session, paras. 20-24, 26-27 and 159-162. For the Commission's view on Article 19, see A/63/17, Report of UNCITRAL's 41st Session (16 June – 3 July 2008), paras. 79-81.

16 The requirement that the inland (sub)carrier operate exclusively in the port area is related to the inland carrier's performance under the relevant contract of carriage. Examples of such inland carriers are the fork lift truck operator shifting a container within a terminal, a road haulage carrier transferring a transhipment container from one terminal to another in the same port, or a rail operator shunting rail wagons loaded with containers within the port area in order to make up a full train. However, if subsequently the same rail operator in its capacity as subcontractor under the same multimodal carriage contract pulls that train to a destination outside the port area, it is not a maritime performing party, not even for the shunting part of its performance.

As a result, a party to the contract of carriage can only institute an action against an inland carrier based on tort.[17] This means that such a claimant not only has to prove the damage and that it occurred during the transport period, but it must also prove the cause of the damage and the causation. In such a case, the inland carrier may enjoy a Himalaya protection under an applicable inland convention or under national law, while it is also possible that the inland carrier is able to invoke a Himalaya clause in the multimodal contract (under which the inland carrier is a (sub)carrier), referring to defences available to it under the Rotterdam Rules.

In conclusion, then, except in the exceptional case where it operates exclusively within a port area, the inland carrier will not be affected by the Rotterdam Rules. As a rule, (i) under a recourse action by the main carrier, (ii) in the circumstances referred to in footnote 17, or (iii) by invoking a possible Himalaya protection in case of a tort claim, the inland carrier will only be faced with national law or a convention relating to its own business: inland transport.

IV. – CONFLICTS WITH OTHER CONVENTIONS

The third pillar under the "multimodal compromise" in the Rotterdam Rules is the conflict of conventions issue which, as it relates to multimodal transport, is a notoriously difficult subject. The RR deal with it as follows:

First, Article 26 has a conflict-avoiding effect.[18] It incorporates the liability provisions of the inland transport conventions by reference, meaning that when the conditions for the application of Article 26 are met, the liability provisions of the other conventions apply instead of the corresponding provisions of the Rotterdam Rules.

Second, the Rotterdam Rules include an article that deals specifically with the conflict of conventions issue: Article 82.[19] The *chapeau* of this article

17 Unless, of course, national law were to allow the claimant to sue the inland carrier under the subcontract. If the claimant is the consignee not only under the main contract of carriage, but is mentioned as the consignee under the subcontract as well, certain national laws may deem this claimant (by virtue of its claiming the goods from the subcarrier or otherwise) to have acceded to the subcontract (or otherwise to have become a party to the subcontract) and, accordingly, to have acquired contractual rights against the subcarrier.

18 It should be noted, however, that Article 26 is no conflict of conventions provision as such. For the relationship between Articles 26 and 82, see the Report of the 21st Session, A/CN.9/645, para. 257.

19 The most relevant parts of the UNCITRAL WG III Reports on this article are: A/CN.9/616, Report of the 18th Session, paras. 229-235; A/CN.9/621, Report of the 19th Session,

states that priority shall be given to four categories of convention – and even future amendments thereof, but no future new conventions [20] – that regulate the liability of the carrier for loss of, or damage to, the goods. These categories are subsequently listed, but in respect of three of them the priority rule is restricted to a specified assumed area of overlap between the Rotterdam Rules and the other convention. Since the assumed area of overlap is specified, outside this assumed area of overlap the Rotterdam Rules prevail over the other, possibly conflicting, convention. And if, in a given case, the assumption is wrong, there is no overlap and therefore no conflict.[21]

I should like to emphasize that the specification in Article 82 of areas of overlap does not mean that the application of the conflict rule is restricted to a certain part of the carriage. The aim of the conflict rule is to determine which convention applies to the contract of carriage, as defined in Article 1(1): either the RR or the other convention that the relevant subparagraph in Article 82 refers to.

The listed categories of convention are the following:

– under (a) reference is made to "any convention governing the carriage of goods by air." No specific area of possible overlap is mentioned here. There is only the general statement "to the extent that such convention according to its provisions applies to any part of the contract of carriage." [22] For the multimodal practice, a conflict provision between air and sea transport conventions was not regarded as very important since sea/air combinations under a single contract of carriage are rare.

– (b) refers to "any convention governing the carriage of goods by road" and the assumed area of overlap with the RR is "the carriage of goods that remain loaded on a road cargo vehicle carried on board of a ship." This description does not refer to a certain part or period of

paras. 204-206; A/CN.9/642, Report of the 20th Session, paras. 228-236; A/CN.9/645, Report of the 21st Session, paras. 257-258. For the Commission's view on this article, see A/63/17, Report of UNCITRAL's 41st Session (16 June – 3 July 2008), paras. 249-254.

20 See A/63/17, Report of UNCITRAL's 41st Session, paras. 249-254.

21 See *infra* note 23.

22 For a list of possible conflict situations between the Montreal Convention and the Rotterdam Rules, see Christopher HANCOCK, "Multimodal Transport and the new UN Convention on the Carriage of Goods", 14 *Journal of International Maritime Law* (2008), 494. Also the fact that under the Rotterdam Rules the place of *occurrence* determines the applicability of the other convention while under the air transport convention the place where the damage is *caused* is relevant for its applicability, may result in a conflict between the air transport conventions and the RR.

the carriage, but it refers to a certain type of carriage, namely roll-on roll-off carriage, such as the carriage to which Article 2 CMR applies.

An example may illustrate how this provision is intended to operate. Let us assume a contract of carriage of goods by road in a vehicle between Berlin, Germany and Manchester, United Kingdom. To get to the UK, the road carrier makes use of a ferry connection between Rotterdam, the Netherlands, and Hull, UK. The CMR, including its Article 2, applies to this contract of carriage. Since the goods are also carried by sea, the Rotterdam Rules may apply to this contract of carriage as well. According to the priority rule, in this example the Rotterdam Rules yield to the CMR, since what matters here is "the carriage of goods that remain loaded on a road cargo vehicle carried on board of a ship." [23] Had the cargo been offloaded from the road haulage vehicle and stowed separately in the seagoing vessel, the Rotterdam Rules would have applied to this contract of carriage, because in that case the contract of carriage would have satisfied the requirements of Article 1(1) of the RR. In both cases, the respective conventions apply to the whole transport under the contract of carriage and the "period aspect" is covered by the respective conventions themselves.[24] When the CMR applies and the damage occurs during the ferry part of the carriage, Article 2 CMR deals with this situation. When the RR apply and the damage occurs during the road haulage part, Article 26 RR may be relevant for such damage.

– (c) refers to "any convention governing the carriage of goods by rail" and the possible area of overlap with the RR is "carriage of goods by sea as a supplement to the carriage by rail." This provision takes into account that Article 1(4) of the COTIF/CIM Rules 1999 extends the application of these rules to the sea leg of an international railway

23 Another matter is whether there is an overlap here. In other words, do the Rotterdam Rules also apply to the ferry part of the road haulage? If so, the contract of carriage concluded under the CMR must also qualify as a maritime contract under Article 1(1) of the RR and be a contract that "provides for the carriage by sea and may provide for carriage by other modes of transport in addition to sea carriage". In my view, it is arguable that, unless the operator of a road cargo vehicle with whom the contract of carriage is concluded and the ferry operator are the same legal entity, such a CMR contract would not qualify as an Article 1(1) RR contract. However, it was thought useful for any doubt about a possible overlap between Article 2 CMR and the scope rules of the RR to be removed and Article 82, subparagraph (b), aims to provide this clarity.

24 DIAMOND, *supra* note 2, questions this point at pp. 142-143, and HANCOCK, *supra* note. 22, does the same at p. 493.

service listed in accordance with Article 24(1) of the COTIF Convention 1999. Actually, this list includes several railway services with a sea leg.

– (d) refers to "any convention governing the carriage of goods by inland waterways" and the possible area of overlap with the RR is "carriage of goods without trans-shipment both by inland waterways and sea." It is a fact that (small) seagoing vessels may carry goods to or from ports at distant inland locations. For such cases, the question of whether or not the Budapest *Convention on the Contract for the Carriage of Goods by Inland Waterway* (CMNI) 2001 applies, is settled in its Article 2(2). If the contract of carriage also qualifies as a contract under Article 1(1) of the RR, this CMNI rule of application may conflict with the scope rules of the RR.

The general opinion of the delegates was that the matter of a possible conflict between the Rotterdam Rules and other transport conventions was adequately solved through the provisions outlined above.[25] This implies that, in respect of the CMR, the English appeal judge's view in the *Quantum* case [26] was rejected in favour of the German Supreme Court's line of thinking according to which the unimodal conventions do not *ex proprio vigore* apply to the different parts of a multimodal contract of carriage.[27]

V. – "MARITIME PLUS" – AN INNOVATIVE CONCEPT?

In my opinion, the answer to this question should tend to the negative.

First, the phenomenon "unimodal plus" is well known in other conventions. For many years now, the air transport conventions have applied to "pick-up and delivery services", in respect of which no geographical limits are set.[28] Further, the COTIF/CIM Rules 1999 apply to national road and

25 For the line of thinking that only a limited conflict of conventions provision was needed, see the Report of the 20th Session, A/CN.9/642, paras. 228-236.

26 See *supra* note 9.

27 In jurisdictions that follow the "Quantum interpretation" of Article 1 CMR and where consequently residual cases may remain in which any unimodal convention may conflict with the RR, the RR may prevail on the grounds of the application of the *lex posterior* rule. See also paragraph 2(b) of this contribution.

28 In addition, Article 18(4) Montreal Convention refers to non-agreed substitution of air carriage by another mode of transport. The result of this rule is that inter-airport trucking, usually taking place within the scope of the first or final stage of the carriage, is also covered by the Montreal Convention.

inland waterways transport that is supplementary to an international rail carriage.[29] The same applies to "listed" supplementary maritime and international inland waterways transport.[30] In my view, as a matter of principle, there is not that much difference between these precedents [31] and the "maritime plus" concept of the Rotterdam Rules.

Second, as to carrier's liability, the Rotterdam Rules do not make a great many changes in practice. As outlined above, for the inland (sub)carrier nothing changes at all, whereas a large majority of maritime container carriers already operate under multimodal contracts of carriage encompassing a network liability regime for decades without difficulties being reported. The main practical change will be that the RR network system is not extended to national law, whereas the bill of lading network systems often are.

VI. – CONCLUSIONS

- The Rotterdam Rules apply also to inland carriage if it is performed prior to or after the maritime part of the carriage and if it is covered by the same contract as the maritime leg.
- Article 26 of the Rotterdam Rules incorporates the liability rules of the inland transport conventions. These rules replace the liability provisions of the Rotterdam Rules when the conditions set in Article 26 for their application are met.
- A direct action against the inland carrier is not possible under the Rotterdam Rules.
- To the extent that the scope of other transport conventions may include carriage by sea, these other conventions prevail over the Rotterdam Rules.
- The "maritime plus" concept is certainly not revolutionary, at best it is evolutionary.

29 Art. 1(3) COTIF/CIM Rules 1999.

30 Art. 1(4) COTIF/CIM Rules 1999.

31 I do not refer to Article 2 CMR because I do not consider "piggy back" carriage as genuine multimodal carriage. In such a case, the vehicle does not make use of its "proper" infrastructure, the road, but through necessity and for a certain part only, uses another type of infrastructure such as rail or water. In my view, the yardstick for the application of CMR is not the use of a certain type of infrastructure; it is whether a certain type of contract has been concluded. However, for those that do not share my view, Article 2 CMR may be a further precedent.