The new regime and Multimodal Transport

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The international legislation on Multimodal Transport is in a sorry state. There is no uniform set of rules in force internationally at present. Neither the network or uniform proposals, whether by way of private voluntary rules or through a mandatory Convention, have obtained general acceptance. Meanwhile, national laws and regional agreements have flourished and more than 20 countries are currently engaged in the process of each drawing up their national response to multimodal transportation. There is a blatant need for harmonizing those laws worldwide. Ideally, the task might have been to unify or harmonize all existing unimodal Conventions and agreements with a view to setting a uniform pattern of Transport Law, as the trend for abolishing inner peculiarities under each mode (e.g., fault in navigation and management of the ship under Sea Carriage) seemed to be making some progress ahead. Another approach has been taken by CMI/UNCITRAL taken Sea Carriage as a base-line for extending to a door to door service, thus rewriting marine and multimodal transportations into one single Convention, though limiting the scope of multimodalism, which may as result continue to go adrift through the rough seas of disparity and disuniformity of legislations.

Nearly 22 years ago your University held a similar discussion in Southampton\(^1\) over the 1980 U.N. Convention on International Multimodal Transport of Goods. The speakers were Prof. E. Selvig, Mr. C.W.G. Wilson, Mr. Matthew Marshall, Mr. M. Booker, Mr. M.G. Graham, Prof. D.C. Jackson and Anthony Diamond, Q.C.; albeit none of them have joined us in this colloquium, A. Diamond has had a rather active share in the making of the CMI draft Instrument of Transport Law.

He then said, and wrote later in August 1981, the following:

- “I have no doubt that the great merit of the 1980 Multimodal Convention, if it comes into general force, will be to achieve a measure of uniformity in the field of combined transport liability”.

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\(^1\) 12\(^{th}\) September 1980
“I greatly regret that the topic of combined transport was not comprehensively dealt with at the same time as carriage by sea in a single Convention”, and concluded that “there can be said to be a need for the general adoption of a new Sea Carriage Convention but there is no comparable need for a Multimodal Convention”.

The 1980 U.N. Convention did not gain international force but A. Diamond’s premonitory views seem to have proven right and true.

Will the future UNCITRAL Convention come to achieve the desired uniformity in the field of combined transport liability that the 1980 Convention did not?

That is, to me, the fundamental question to be addressed from a multimodalist perspective. I will attempt to throw some light in this paper on issues that may search for, if not lead to, an appropriate answer.

I. “Port to Port”, “Door to Door”, “Multimodal transport”. Why the confusion?

“Port to port”, as differentiated from “tackle to tackle”, makes reference to a sea carriage in which any minor transportation of the goods between the place of their storage within the port to the ship, and viceversa at the port of destination, effected by land carriage is regarded to be supplementary to the sea carriage as usually undertaken by the Sea Carrier.

“Door to door” is an expression that the market has understood to refer to a carriage of goods from a place situated inland outside the port of loading to another place inland outside, even far away from the port of destination. It involves transportation by more than one mode,
which normally are land and sea or railway and sea. However, that is not necessarily always
the case as “door to door” may also fit with land transportation only though using one or
several Carriers and with two or more modes of transportation without involving a sea leg.

“Multimodal transport” means the carriage of goods by at least two different modes of
transport on the basis of a multimodal transport contract from a place at which the goods are
taken in charge by the multimodal transport operator to a place designated for delivery. It
differs from the concept “door to door” in that it requires the presence of a single contract for
multimodal transportation, one document and one responsible party for the entire transit,
while the latter does not necessarily do so as it may be organised with various Carriers, or
indeed as the parties may wish.

“Intermodal Transport” has been defined as the movement of goods in one and the same
loading unit or road vehicle, which uses successively two or more modes of transport without
handling the goods themselves in changing modes\(^2\).

Thence, the fact will strike no one with some expertise in the field that we can only and
properly call “Multimodal International Transport” what it actually is according to the legal
definition stated earlier\(^3\).

The confusion arises where the various expressions are used in an operational or commercial
sense, because we are aware that most, if not all, of the multimodal arrangements are “door to
doors” but not the reverse case.

\(^2\) UN/ECE

\(^3\) taken from Art. 1.1 of the 1980 U.N. Convention
The expression “door to door” would thus oppose to “port to port”.

However, further confusion may arise if we mix up concepts so to conceive a “door to door” transportation by different modes but in which one must be a sea carriage.

The more will be so as such marine segment is to be the main and axis of the others and a single contract and document are to be used. Such a model of two or more carriages, though supplementary to the sea carriage, will be for sure “door to door”, and insofar as it is arranged with one Carrier, in one contract and under one document it will be also “multimodal”, but other forms of multimodalism excluding the sea carriage could not be assimilated to that particular structure.

2. A little walk through the legal instruments lying in the background.

*The Hague-Visby Rules* contemplated the carriage of the goods from the loading to the discharge only. It is neither a “port to port” nor a “door to door” instrument.

*The Hamburg Rules 1978* widened the earlier scope so to include the carriage by sea from one port to another. Also, by an addition made in the Diplomatic Conference, the Rules would also bring in the sea leg of a multimodal transit. The Rules are a “port to port” instrument but not “door to door”, though they may regulate a maritime segment in a “door to door” contract.

*The ICC uniform rules for a combined transport document 1975* referred to the carriage of goods by at least two different modes of transport (such as transport by sea, inland waterway,

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4 Art. 1-e
5 Art. 1
air, rail or road) from a place at which the goods are taking in charge situated in one country to a place designated for delivery\textsuperscript{7}. The option here is truly “multimodal” and may also be “door to door”.

*The Tokyo Rules 1969*, drafted as a Convention on Combined Transports, focused the Bill of Lading for combined transport and conceived a carriage of goods between two States by at least two modes of transport, of which at least one is by sea or inland waterways and at least one is not by sea, using a single contract and document\textsuperscript{8}. The concept of the Tokyo Rules was both “multimodal” and “door to door” but always including a sea or inland waterway carriage, not openly multimodal. Except for the inland waterways option, the Tokyo Rules is a clear precedent of the CMI’s draft instrument under review.

*The 1980 UN Convention on International Multimodal Transportation* defines a service unrestrictedly “multimodal”, from which no combination of modes of carriage is excluded\textsuperscript{9}.

*The ICC/UNCTAD Rules relating to documents for multimodal transportation 1992* also contemplate a transportation service performed by at least two modes of carriage, by a single operator and under one contract. The concept was “multimodal” without limitation.

*The US COGSA Senate Bill*, September 24, 1999, focused the carriage of goods either by sea or partially by sea and partially by one or more other modes of transportation, to run from the time the goods are received by a Carrier to the time they are delivered by a Carrier to a person

\textsuperscript{6} Para 6  
\textsuperscript{7} Rule 2, a and d  
\textsuperscript{8} Art. I.2  
\textsuperscript{9} Art. 1.1
authorized to receive them\textsuperscript{10}. The concept seems to be “door to door” and also “multimodal” though always including a sea leg. The Bill has a more direct and recent weight over the CMI’s draft instrument.

*The Budapest Convention on the Contract for the Carriage of Goods in Inland Navigation* (CMNI) 2000, at Art. 1.1 and 2.1, contemplates a unimodal carriage by inland waterways but extended to the parts of the carriage from the place of taking over the goods to the port of loading and from the port of discharge to the place of delivery, as may be agreed by the parties. The concept may include a “door to door” service but not “multimodal”.

The above list will have illustrated that the various options are not usually perfectly identified in isolation or easily distinguishable one from the other. The confusion is, thus, understandable but we should work to avoid it to increase further.

3. **The CMI’s proposed new regime**

The CMI, by its Draft Instrument on Transport Law of 10.12.01, has opted for the proposal of “wet multimodal”, i.e., a door to door transportation in which the main transit of the goods goes by sea.

Thus, at Art. 1.5 defines “contract of carriage” as an undertaking in the part of a Carrier to transport goods \textit{wholly or partly by sea} from one place to another, purporting to include carriage preceding or subsequent to carriage by sea if such carriage is covered by the same contract. The concept, which follows the pattern of the US COGSA Senate Bill and also the so-called Tokyo Rules, extends itself to Multimodal Transport performed by sea carriage and

\textsuperscript{10} Sec. 2, 5(a) and 8
other modes of transport provided that the unimodal parts (road, railways, etc.) add to the main leg by sea and all are covered by a sole and same contract. In fact, the proposal for application of the rules contained in the Draft Instrument is a maritime transport effected door to door with the supply of other non-marine modes of carriage. In other words, is a carriage of goods by sea extendable to inland or other unimodal services in order to make it work door to door. To the extent that it will mean to use (“partly by sea”) more than one mode, the entire transportation shall be deemed to be MULTIMODAL, though any other choice of combined transport excluding sea carriage would not fit in the scope of the new regime, which therefore will serve for a limited concept of multimodalism only.

The Draft, at Art. 3.1 refers very explicitly to a door to door option by setting out the scope of application of the new rules in accordance with the place of receipt and the place of delivery of the goods in different countries, of which it will suffice only one to be a contracting State. Thence, the transits from the place of receipt to the port of loading the goods on board the carrying vessel and from the port of discharge to the final place of delivery will be normally performed by road or railway, or indeed, by road and air or inland waterways, so rendering the whole service to be multimodal and door to door.

It is important to remark that the Carrier’s period of responsibility extends from receipt to delivery of the goods\textsuperscript{11}, which serves the purposes of uniform liability for the entire transportation. That is in principle only, because the uniform rule breaks off later.

At Art. 4.2.1 the Draft, in respect of transportation preceding or subsequent to sea carriage, gives way to other mandatory International Conventions to apply to such modes. The provisions from national laws, by effect of Art. 4.2.2, cannot interfere with the application of
such mandatory international Conventions but they may certainly apply where a contracting State has enacted domestic rules relating to inland or other non-marine carriage and such a State is not party to a mandatory International Convention\textsuperscript{12}.

The CMI instrument will be then only displaced where a Convention which constitutes mandatory law for inland (or other) carriage is applicable to the inland (or other) leg of a contract for carriage by sea, and it is clear that the loss or damage in question occurred solely in the course of the inland (or other) carriage. It will mean that where the damage occurred during more than one leg of the carriage, or where it cannot be proved where the loss or damage occurred, the CMI’s instrument will prevail during the whole door to door transit.

The Instrument adheres to the so-called “network liability” system, adopted by the ICC/UNCTAD Rules 1992 and partly (for limitation of liability only) by the 1980 Multimodal Convention. However, it will be a peculiar proposal of “network” that has been remarked to be “minimal”, such as the following:

(a) the Instrument provisions relating to the liability of the Carrier, limitation of liability and time for suit ONLY shall not prevail over International Conventions applicable to the modes of transport preceding or subsequent to the sea carriage.

(b) that will be so in the case of International Conventions which are “mandatory”, that is, the provisions of which cannot be departed from by private contract either at all or to the detriment of the shipper\textsuperscript{13}.

\textsuperscript{11} Art. 4.1.1
\textsuperscript{12} e.g., CMR
(c) all other provisions contained in the Instrument shall not be removed by other International mandatory Conventions (on road, air, railways or inland navigation).

(d) the application of such mandatory Conventions will only take place where the loss or the damage to the goods occurred, undoubtedly and solely, in the segment of transport regulated by such Conventions.

Bearing the above conditions in mind the Instrument shall adhere to the “network” principle, otherwise holding to the concept of “uniform liability”.

The CMI Instrument will allow the Contracting States to opt out in respect of non-marine segments by adopting the other mandatory Conventions; it may also happen with Contracting States enacting domestic rules to govern carriages other than sea transport.

4. The issue of “localised damage”

The problem of the localisation of the loss or of the damage is crucial and fundamental in any multimodal system. Many scholars and expert executives have written and said extensively about the need for saving the application of one law or another according to the place in which the loss or damage is located to have occurred or it is considered to have occurred. It is a difficult matter which hits directly and at the heart of the “network system”. Hans CARL suggested that a high percentage of cargo damage is non-localized and that container claims nearly always involve concealed damage, so there is generally little proof as to who or what

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13 Art. 4.2.1, (iii)
14 e.g. obligations of the shipper, freight, delivery to the consignee, right of control, etc.
15 e.g. CMR, CIM-COTIF, CMNI, etc.
caused the damage. Lord DIPLOCK\textsuperscript{17} remarked that “in practice, nearly all claims are settled without any recourse to the network system, particularly as recourse to it has no practical effect upon the liability of the Combined Transport Operator”.

The pure network principle poses certain difficulties for the parties to anticipate and assess their respective risk exposures\textsuperscript{18}.

How the CMI Draft deals with the problem? Indeed, through a rather interesting proposal standing a little away from the pure network system. At Art. 4.2.1 the Draft lays down a proposal of “limited” (or minimal) network system which will apply where the loss or damage actually occurred during the precarriage, oncarriage or postcarriage (by sea). Where the place of occurrence cannot be detected or where it cannot be established that the loss or the damage was caused solely, not contributorily or concurrently with, during a transit other than the sea carriage, then it will be a matter of proof to the extent that in the absence of proof to show that the occurrence took place solely in the course of such carriage the rules of the CMI shall prevail over any others from International Conventions or from national laws.

A serious objection has been reckoned to arise against the reference to the place where the damage is caused because the question of proper causation according to the applicable law will have to be resolved before it can be determined whether the provisions of the Instrument or of another Convention is applicable.

Probably more important, in my view, will be the issue of the burden of proof falling on the party seeking the application of another unimodal Convention to show that the loss or damage

\textsuperscript{17} “The Genoa Seminar on Combined Transport”, Universitá de Genova, Stabilimento Tipografico “Pliniana”, Selci Umbro (Perguia), 1974, page 8
solely occurred in the course of the carriage governed by such Convention. The Instrument does not lay down rules for uniform and general acceptance over the burden of proof, which would then be subject to the national law in force in the place of jurisdiction, so leading to diverse and probably frustrating results. The dividing line of application between the Instrument and the mandatory Conventions cannot be left to such a complex and relative matter as is the burden of proving the location of the loss or damage to the goods, because then the exposure of risks shall continue to be far from predictable. The solution suggested by the Draft is interesting but, I am afraid, not sufficient to eliminate legal uncertainty.

5. Final commentary

The CMI/UNCITRAL Draft Instrument will make its provisions to apply to multimodal transportation. As it matters to regulating a carriage by sea door to door the exercise is reasonable and probably unobjectionable.

However, through its variations, opting-outs and limitations on both the uniform and network liability principles, the Draft has set its own course to become “another solution” only.

The Draft Instrument does not scope Multimodal Transport though any combined modes but by sea-carriage and others only, so such scope is not suitable to a project of uniformity in the international legislation on Multimodal Transportation.

The area of Maritime Carriage may well need to be updated so to contemplate and take up the needs of the trade for door to door arrangements. To that effect and extent the CMI’s Draft is valid and meritorious. Whether it will add to procure international uniformity for Multimodal

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18 H. CARL, opus citae
Transport law, given the existing lack of a uniform liability regime in force internationally, is another matter which I personally doubt.