MultiRELOAD

PORT SOLUTIONS FOR SUSTAINABLE MOBILITY

# RHINE-ALPINE AND RHINE-DANUBE MULTIMODAL TRANSPORT CORRIDORS REGULATORY FRAMEWORK ANALYSIS

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- European Council conclusions, 12 December 2019
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- Morr v. Harris, 1876 1 A.C. 318 ; Pierre BONASSIES, U.A.E. : Le transport multimodal en Europe, Revue Scapel, 2001, p. 197.
- I. Bon-Garcin, M. Bernadet et Ph. Delebecque, Droit des transports : Précis Dalloz, 2e éd., n° 379, p. 353 et s.
- Doyen Rodière, Traité général de droit maritime, Affrétements et Transports, t.III : Dalloz, 1970, n°986
- [1954] 2 QB 402; European Transport Law 1980. 194, Revue de Droit Uniforme 1982. II. p. 173; IDIT n°19057
- 1984, 1 Lloyd's Rep. 317
- Franck HAMONIER, Le transport fluvio-maritime en France, Aix-en-Provence, Aix-Marseille III, Centre de droit Maritime et des transports, 1999, p. 5
- Marie TILCHE, "Vol camionné. Quel régime?", (2000) BTL.744
- Malcom CLARKE, « Air Carriage by Road Quantum Rumble On », dans General Trends in Maritime and Transport Law 1929-2009, Dir. Johan Schelin, Stockholm, Johson Institute of Maritime and Transport Law, 2009,p. 235 à la page 238.
- Jacques PUTZEYS, Le contrat de transport routier de marchandises, Bruxelles, Bruylant, 1981, IDIT n°726
- Valérie Bailly-Hascoët et Cécile Legros, Corridors de transport et construction du statut juridique de l'entrepreneur de transport multimodal, ; LES CORRIDORS DE TRANSPORT, Sous la direction de Yann ALIX © Editions EMS, 2012 p.153
- Delebecque Philippe. Le transport multimodal. In: Revue internationale de droit comparé. Vol. 50 N°2, Avril-juin 1998. Etude de droit contemporain. pp. 527-537
- C. Legros. Fascicule n 775 : Transport routier international : Contrat de transport routier de personnes et de marchandises - Sources. Régime. Parution 11/2021 – refonte (55 pages) ; Fascicule n° 776 : Transport routier international : Responsabilité du transporteur routier international de marchandises. Parution 2022 – refonte (89 pages).
- J. Salmon, Dictionnaire de droit international public, Bruylant, 2001, p.547
- Pr. Pierre BONASIES , « Le domaine d'application des règles CNUCED/CCI », in Le transport multimodal transmaritime et le transaérien, IMTM, 1994, 115 s.

# LIST OF ABBREVIATIONS

TEN-T: Trans-European Transport Network
TFEU: Treaty on the Functioning of the European Union
MIE: Mechanism for the Interconnection of Europe
ITS: Intelligent Transport System
NAP: National Access Points
eFti: Regulation (EU) n°2020/1056
MTC: Multimodal Transport Undertaking
ECMT: European Conference of Ministers of Transport,
ITF: International Transport Forum
CMR: Convention on the Contract for the International Carriage of Goods by Road, of 19 May 1956
COTIF-CIM: Convention concerning International Carriage by Rail of 9 May and its Uniform Rules concerning the Contract for International Carriage of Goods by Rail (UCMR). International Carriage of Goods by Rail ( CIM-RU )
CMNI: Convention on the Contract for the Carriage of Goods by Inland Waterway, of 3 October 3 October 2000
ETM: Multimodal transport company/contractor
CMI: United Nations Convention on the International Multimodal Transport of Goods of 1980
SMGS: Agreement concerning the International Carriage of Goods by Rail of 1 November 1951
RO-ro (Roll-on/Roll-off): refers to ro-ro traffic, i.e. the transport of heavy goods vehicles or trailers by special vessels known as “ro-ro ships”

# EXECUTIVE SUMMARY

Increasing throughput on Europe's main Rhine-Alpine/Rhine-Danube TEN-T corridors, with a view to more effective, efficient and sustainable management of goods and freight flows, requires the development of multimodal transport. However, multimodal transport is complex. There are no specific international rules. The liability of the carrier or multimodal operator is governed by a patchwork of international conventions on air, road and inland waterway transport (etc.) and aborted draft conventions. The difficulty of reaching a consensus between the various players in the industry (carriers and shippers) has led to persistent legal uncertainty.

The single liability regime seems to be the one that best meets the needs of freight interests. However, it is opposed by the transport sector because of the difficulty of finding a satisfactory recourse solution. The current legal framework most closely resembles a system of network liability, which determines the liability of the multimodal operator on the basis of international or national unimodal liability rules applicable to the mode of transport to which a given damage can be attributed. However, this system is highly fragmented and complicated, making it neither a satisfactory nor a cost-effective option. A new option seems to be emerging, the modified network system, which is a compromise between the unimodal system and the network system. Certain rules apply irrespective of the unimodal transport stage at which the loss, damage or delay of goods occurs.

Faced with the failure of the conventional method, practitioners have developed rules to meet their needs. However, these rules do not have the same legal nature as standard-setting instruments, which have legal force. The instrument developed by practice has only contractual value and will only be applicable on the basis of the will of the parties to the multimodal transport contract, who will have expressed their choice by exercising an option in favour of the optional instrument. As such, it will take precedence over mandatory rules (international and national law).

There are a number of options open to the world of multimodal transport. The first is the status quo. The main argument for maintaining current practice is the freedom of contract approach. However, this approach is contractual in nature and does not have the force of law. Consequently, in the event of a conflict with a convention or mandatory national law, the convention or relevant mandatory international or national law will prevail. The second solution is to adopt a new convention. For some time, the European Union has been considering the adoption of a uniform liability regime for TCMs. Several projects have been carried out: the draft regulation of 2005 and the voluntary regulation of 2009. However, none of these came to fruition, as the Commission preferred to promote the technical aspect of multimodal transport by developing interoperability through Regulation 1315/2013 establishing the TEN-T. This European solution does not seem to

be legal. A global solution would be preferable. However, the introduction of an international convention would necessarily involve a large number of parties with conflicting and competing interests. Reaching a consensus would be an enormous challenge.

# AMBITIONS AND OBJECTIVES

MultiRELOAD project (Port solutions for efficient, effective and sustainable multimodality) focusses on the specific role and challenges of inland terminals as multimodal freight nodes in reducing GHG emissions through shifting inland road flows to rail and inland waterways by increasing operational efficiency, safety and reliability of inland infrastructures through digitalization. In this regard, inland ports form the main backbone for enabling modal shift, as they serve as nodes that facilitate the modal shift. However inland ports are facing multiple challenges and constraints such as lack of space or investment, the demand volatility and urbanization to list a few. MultiRELOAD builds on 3 demonstration sites which concern the multimodal platform of Duisburg (Duisport - DE), the trimodal terminal of Vienna (Ports of Vienna – AT) and Port of Basel. These 3 sites are strategically well located along the Rhine and Danube within the TEN-T networks with a high potential of shifting to rails and waterways.

Therefore, MultiRELOAD envisions to enhance the collaboration between these intermodal logistics nodes in Europe to test innovations and propose favorable market solutions for strengthening the use of multimodal freight transport. It will enable an increase in operational efficiency through data sharing between actors within and between nodes. The ambition is to reach sustainability and terminal transshipment efficiency at nodes and corridors, by optimizing the use of assets and infrastructures. These efforts will contribute to lowering GHG emissions which are fully aligned with the EU's Smart Mobility Strategy and Alice's vision to implement Physical Internet concept[1] by 2030 to pave the way to zero emissions by 2050 (see Alice roadmap–- https://www.etp-logistics.eu).

The MultiRELOAD project is also aligned with the European Green Deal. Indeed, climate change and environmental degradation remain a threat to Europe and the world. The European Green Deal seeks to transform the EU into a modern, resource-efficient, and competitive economy, ensuring[2]:

[1] The Physical Internet builds on the extensive and systemic consolidation of flows and the network of networks concepts. The Physical Internet proposes a full consolidation of logistics flows from independent shippers (e.g. extended pooling) in logistics networks. The Physical Internet proposes to pool resources and assets in open, connected, and shared networks (i.e. connecting existing (company) networks, capabilities and resources) so they can be used seamlessly by network users and partners. By pooling demand and resources to answer that demand, it is expected that the usage of the resources is more efficient. The Physical Internet includes transport, storage and physical handling operations of load units such as containers, swap-bodies, pallets, boxes, etc and any other resource needed for a freight transport and logistics operation - » ALICE Roadmap to Physical Internet released! (etp-logistics.eu)

[2] https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en

- no net emissions of greenhouse gases by 2050;
- economic growth decoupled from resource use;
- no person and no place left behind.

The European Commission adopted a set of proposals to make the Europe's climate, energy, transport, and taxation policies fit for reducing net greenhouse gas emissions by at least 55% by 2030, compared to 1990 levels. All 27 EU Member States committed to turning the EU into the first climate neutral continent and more specifically a zero-emission logistics ecosystem by 2050.

To contribute to the above ambitions, MultiRELOAD will develop 3 innovation areas to demonstrate and validate innovative multimodal transport solutions:

- Innovation Area A: Smart multimodal logistics
- Innovation Area B: Digital and automated multimodal nodes and corridors
- Innovation Area C: Innovative business models

# INTRODUCTION

**1. Common transport policy:** The Single European Act of 1986 made the proper functioning of the Single Market inseparable from the objective of economic and social cohesion. However, the free movement of people, goods and capital has not enabled regional and national disparities within the Union to be levelled out. Consequently, the interconnection and interoperability of national infrastructure networks have emerged as key factors in the coherent development of the Union's territory. To this end, the Union has drawn up guidelines covering the objectives, priorities, definition of projects of common interest and broad lines of actions envisaged for the development of the trans-European transport network. The first guidelines were adopted in 1996, then amended several times, notably in 2001 and 2004. They were recast in Decision No 661/2010/EU of the European Parliament and of the Council of 7 July 2010. This decision is now repealed and replaced by Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013[3].

Finally, Article 91 of the Treaty on the Functioning of the European Union (TFEU) provides for the establishment of: common rules applicable to international transport to or from a Member State, or passing across the territory of one or more Member States; the conditions under which non-resident carriers may operate national transport services within a Member State; measures to improve transport safety; and any other useful provisions[4].

**2. European Green Pact:** *The transition to climate neutrality will offer significant opportunities, including possibilities for economic growth, new business models and markets, job creation and technological development[5].*

The world is facing global warming. To counter the effects, Europe has taken measures to reduce activities that generate greenhouse gases. The main objective of the Green Pact is to make **Europe climate neutral by 2050**. The European Climate Act, finally adopted in June 2021, has set the goal of climate neutrality in stone in European legislation, along with the interim target of reducing the EU's greenhouse gas emissions by at least 55% by 2030 compared to 1990 levels.

[3] https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A32013R1315
[4] See Annex 1: Common rules for transport
[5] European Council conclusions, 12 December 2019

In July 2021, the Commission presented a package of proposals to bring EU policies and legislation in line with the objective of climate neutrality. This 'Fit for 55' package is a set of twelve legislative proposals to help Member States implement European climate legislation. **Of these twelve proposals, five are directly related to road transport. Some are new, while others are revisions of existing texts.** The new road transport measures concern emissions trading schemes, energy taxation, alternative fuel infrastructure, renewable energy and $CO_2$ standards for cars and light commercial vehicles.

**3. Multimodal integration:** *"Measures to support multimodal integration play an important role in achieving low-emission mobility by encouraging a shift to low-emission modes such as inland waterways, short sea shipping and rail[6]".*

The EU establishes guidelines covering the objectives, priorities, definition of projects of common interest and broad lines of actions envisaged for the development of the trans-European transport network. Regulation (EU) No 1315/2013 of 11 December 2013 on the Union guidelines for the development of the trans-European transport network applies to the trans-European transport network, which it describes in detail in numerous maps published in an annex. The trans-European transport network includes transport infrastructures and telematics applications, as well as measures to promote the efficient management and use of these infrastructures and to enable the development and management of sustainable and efficient transport services. Another regulation aims to provide the legal basis for the European Interconnection Mechanism (EIM) for the period after 2020. The general objective of the EIM is to develop and modernise trans-European transport, energy and digital networks and to facilitate cross-border cooperation in the field of renewable energy, taking into account long-term decarbonisation commitments.

The EU has defined a transport infrastructure development program covering all modes of transport, based on an objective planning methodology. This program is based on core **network corridors**. These bring together the main public and private actors involved in the main transport routes to plan and develop infrastructure in line with needs and available resources. **Their main objective is to promote modal integration, interoperability and coordinated infrastructure development, especially cross-border sections and bottlenecks.**

The TEN-T Regulation introduces **a two-layer network** consisting of a global network and a core network. The aim is to complete the latter **by 2030**, while the binding **deadline for the**

[6] Communication from the European Commission "A European Strategy for Low Emission Mobility

**former is 2050**. The backbone network must ensure accessibility and connectivity for all regions of the EU. **The core network** consists of those parts of the overall network which are of the greatest strategic importance for achieving the development objectives of the TEN-T, linking the most strategic urban and other nodes (ports, airports, cross-border hubs, etc.). These two components of the network will cover all modes of transport and their interconnections.

The aim is to address the main problems encountered:

- ✓ missing links, particularly on cross-border sections;
- ✓ infrastructure disparities between and within Member States;
- ✓ insufficient multimodal connections (connections between different modes of transport);
- ✓ excessive greenhouse gas emissions from transport and lack of interoperability (compatibility of different transport-related systems).

The Trans-European Transport Network (TEN-T) **is an essential part of the Green Pact for Europe** and the strategy for sustainable and intelligent mobility. However, certain problems remain. That is why the Commission has proposed to amend Regulation (EU) No 1315/2013 to make transport more environmentally friendly, to promote seamless and efficient transport, to promote multimodality and interoperability between transport modes, to better integrate urban nodes into the network and to make TEN-T governance instruments more effective[7]. The text is still under discussion.

**4. European transport corridors:** A "corridor" is a geographical area in which **territories are connected by multimodal land or sea links**. A corridor is also a transit route with a special administrative regime to facilitate the passage of goods when geopolitical conditions are unfavourable or when territories are landlocked.

Nine corridors form the backbone of transport within the European single market: two north-south corridors, three east-west corridors and four diagonal corridors. Each corridor involves three modes of transport, three Member States and two cross-border sections:

[7] Doc. COM (2021) 812 final, 14 déc. 2021

- **the Baltic-Adriatic Corridor** connects the Baltic Sea with the Adriatic Sea, passing through industrialised regions in southern Poland (Upper Silesia), Vienna and Bratislava, the eastern Alps and northern Italy;

- **the North Sea-Baltic Corridor** connects the ports on the east coast of the Baltic Sea with those on the North Sea. It connects Finland with Estonia by ferry and provides modern road and rail links between the three Baltic States and Poland, Germany, the Netherlands and Belgium;

- **the Mediterranean Corridor** links the Iberian Peninsula to the border between Hungary and Ukraine. It follows the Mediterranean coasts of Spain and France, crosses the Alps in the east and north of Italy and leaves the Adriatic coast in Slovenia and Croatia towards Hungary;

- **the Eastern Corridor-Eastern Mediterranean** links the maritime interfaces of the North Sea, the Baltic Sea, the Black Sea and the Mediterranean Sea, optimising the use of their ports and their respective motorways of the sea. Including the Elbe as a waterway, it will improve multimodal connections between northern Germany, the Czech Republic, the Pannonian region and south-eastern Europe. It stretches across the sea from Greece to Cyprus;

- **the Scandinavian-Mediterranean Corridor** is a key north-south route for the European economy. Crossing the Baltic Sea from Finland to Sweden, through Germany, the Alps and Italy, it links the major urban centres and ports of Scandinavia and northern Germany, and continues through the industrialised centres of large-scale production in southern Germany, Austria and northern Italy to the Italian ports and Valletta;

- **the Rhine-Alps Corridor** is one of the busiest freight routes in Europe, linking the North Sea ports of Rotterdam and Antwerp with Genoa in the Mediterranean via Switzerland and certain major economic centres in the Rhine-Ruhr and Rhine-Main-Neckar regions, as well as the Milan conurbation in northern Italy. The multimodal corridor includes the Rhine as a waterway;

- **the Atlantic Corridor**, linking the eastern part of the Iberian Peninsula and the ports of Le Havre and Rouen to Paris and on to Mannheim/Strasbourg by high-speed rail and other parallel conventional lines, and the Seine as an inland waterway;

- **the 8th North Sea-Mediterranean Corridor** stretching from Ireland and the north through the Netherlands, Belgium and Luxembourg to the Mediterranean in the south of France. As a

result of Brexit, the emphasis is increasingly on direct links between Ireland and the Benelux countries, whereas initially the link with Ireland was via the UK[8];

- the 9th and last **Rhine-Danube Corridor**, whose mainstays are the rivers Main and the Danube, linking the central regions around Strasbourg and Frankfurt via southern Germany to Vienna, Bratislava, Budapest and finally to the Black Sea.

5. **Intelligent Transport Systems in road transport**: *"Intelligent Transport Systems are essential for improving road safety and solving Europe's growing emissions and congestion problems[9]".*

Intelligent Transport Systems (ITS) use a variety of technologies to monitor, evaluate and manage transport systems in order to improve efficiency and safety. This definition can be simplified by the following concepts of what constitutes intelligent transport: management, efficiency and safety (Figure 1) . In other words, intelligent transport uses new and emerging technologies to make travel safer.


**Figure 1: Intelligent Transport Systems ©CEREMA**

[8] European Parliament resolution, 20 Jan. 2021 on the revision of the guidelines for the trans-European transport network (TEN-T)

[9] Andreas Carlson, Swedish Minister for Infrastructure and Housing

In the past, some Member States developed national applications combining telecommunications, electronics and information technologies in order to limit the growing congestion of road infrastructure and the increase in energy consumption. As these applications have proliferated without coordination, the EU has defined a common framework for intelligent transport systems. Directive 2010/40/EU of 7 July 2010 aims **to ensure the coordinated and coherent deployment of ITS** in the road sector. The objectives of this directive are to ensure the interoperability of systems, which must be based on open and public standards and accessible to both suppliers and users, the provision of uninterrupted access, the continuity of services and the establishment of an effective cooperation mechanism.

The advantages of intelligent technologies and the benefits they bring to transport are numerous.

- Intelligent transport is safer
- Smart transport is better managed: Data collection is an important key to responsible public management of infrastructure. Intelligent transport provides detailed data points on every aspect of the transport system, but it also enables administrators to better monitor operations, track maintenance needs and identify key sources of problems that need to be addressed.
- Smart transport is more efficient: Good data can help identify areas where efficiency can be improved. For example, a small adjustment to train timetables could result in a higher occupancy rate, or perhaps bus routes would serve the community better if stops were distributed differently.
- Intelligent transport is cost effective: Because intelligent transport makes better use of available resources, it can reduce costs through preventive maintenance, lower energy consumption and fewer resources used for accidents. Users can also save money if low-cost public transport is efficient enough to compete with private car ownership.
- Intelligent transport provides fast information: Traffic Management Centres [10] (TMCs) can gain visibility and rapid notification of hotspots or city-wide issues affecting road congestion, public safety and emergency response systems to take action or communicate more effectively with other agencies and emergency responders.

[10] The engineering and traffic management centres are one of the tools at the service of the master plan for road operations in the three areas of maintaining viability, traffic management and travel assistance.

Directive 2010/40/EU was designed to provide a framework for accelerating and deploying the use of intelligent transport systems in road transport and its interfaces with other transport modes. Significant technological developments since 2010 have made it necessary to reform the legislative framework. In particular, it is necessary to improve the digital availability of road and traffic data, such as speed limits, traffic plans and road works. Directive (EU) 2023/2661 of 22 November 2023 adds **a new Annex III to this Directive, listing the road data that Member States must make available on National Access Points (NAPs)** by various dates (2025 to 2028).

These include:

- Static and dynamic traffic rules: access conditions to tunnels and bridges, speed limits, overtaking bans for lorries, weight/length/width/height restrictions, one-way streets, freight delivery regulations, road maps, etc.
- Data on network conditions: road closures, road works, temporary traffic management measures, etc,
- Data related to information and reservation services for safe and secure parking areas for lorries and commercial vehicles,
- Data related to detected road safety events or conditions,
- Static multimodal traffic data for multimodal travel information services: location of identified access nodes for all planned modes, including information on the accessibility of stops and routes within a node (e.g. presence of lifts, escalators).

**6. Digitising transport:** The digitisation of road transport systems helps to optimise the entire process and ensure an efficient supply chain. The digitalisation of road transport and its tools play a facilitating role: better visibility of transport operations (current and future); flexibility in response to requests and the ability to modify transport information with just a few clicks; responsiveness to spot loading requirements.

Regulation (EU) 2020/1056, known as "eFTI", published as part of the "Mobility" package of 15 July 2020, aims to promote the digitalisation of freight transport and logistics. It establishes a legal framework for the electronic communication between the economic operators concerned and the competent authorities (BtoA) of regulatory information relating to the transport of goods within the territory of the Union.

To this end, the text sets out

- The conditions under which competent authorities are required to accept regulatory information made available by electronic means by the economic operators concerned;

- The rules applicable to the provision of services linked to the electronic provision of regulatory information to the competent authorities by the economic operators concerned.

This Regulation does not require the dematerialisation of transport documents, and operators will still be able to use the paper format. However, it aims to remove a major obstacle to digitisation by preventing supervisory authorities from requiring the submission of paper documents, which will certainly have a positive impact on the dematerialisation of transport documents and data exchange. The Regulation will apply from 21 August 2024.

**7. International rail corridors:** Making rail freight more competitive in the European Union was one of the Commission's objectives and in December 2008 it proposed the creation of "international rail corridors". Since rail freight was opened up to competition on 1 January 2007, many initiatives have been taken to modernise the railways and improve services. Incumbent operators have restructured and new players have emerged. While these initiatives have undoubtedly had a positive impact, they need to be completed, strengthened and accelerated if the progress needed to integrate the railways and develop freight transport is to become a reality. The Regulation establishing 9 international rail freight corridors was adopted on 22 September 2010. The corridors consist of a set of pre-defined rail lines and routes linking several terminals, ports and multimodal hubs along a route (Figure 2).


**Figure 2 Rail Freight Corridors map 2020 © RailNetEurope**

While remaining consistent with the trans-European transport network, these corridors should make it possible to:

- Integrate national infrastructures **through closer cooperation between infrastructure managers**, both in terms of investment and operational management;
- Better **meet the needs of rail freight operators**. For example, a freight train wishing to use the corridor will no longer have to request a train path (a timetable allocated to the traffic) from the relevant administration in each country through which it passes. The application will be made to the corridor's one-stop shop, which will take care of the entire train path from start to finish.
- **Efficient management of infrastructure** so that freight is no longer disadvantaged;
- **Better integration of rail infrastructure with other modes of transport** by linking several ports and multimodal terminals. "European freight corridors" make it possible to link rail, sea, inland waterway and road freight services.

To this end, Regulation (EC) No 913/2010 lays down the principles for the design and governance of freight corridors, investment in infrastructure and the management and operation of corridors. It applies to the management and use of infrastructure by establishing

a management committee for infrastructure managers and a one-stop shop as a coordination tool.

**8. Interoperability of the railway system:** Interoperability is the ability of a rail system to allow the safe and uninterrupted movement of trains by achieving the performance required for these lines. This ability depends on all the regulatory, technical and operational conditions that must be met in order to satisfy the essential requirements[11]. In other words, it is the ability to allow trains to run without hindrance on different rail networks, in particular those located in different States.

Directive (EU) 2016/797 establishes the conditions to be met in order to achieve interoperability within the rail system of the European Union and defines the structural and functional subsystems that make up this system. **The Directive establishes the conditions for achieving interoperability within the European Union rail system** in order to define an optimum level of technical harmonisation, to facilitate, improve and develop rail transport services within the European Union and with third countries and to contribute to the completion of the single European railway area and the gradual establishment of the internal market. These conditions concern the design, construction, placing in service, upgrading, renewal, operation and maintenance of the elements of this system, as well as the professional qualifications of the staff who contribute to its operation and maintenance and the health and safety conditions applicable to the said staff.

The aim is therefore **to remove the technical obstacles to the development of rail transport.** To this end, the Directive lays down the technical specifications for interoperability (TSIs) which are essential if trains are to be able to travel safely and smoothly on the rail network throughout the Union.

**9. The issue:** As we have just seen, the EU has been very active in promoting the interconnection and interoperability of national infrastructure networks. The European Union is promoting multimodal transport as a "greener" mode of transport. To this end, a revision of Directive 92/106/EEC on combined transport is planned and the Commission has already launched a public consultation. The aim of this initiative is to facilitate an increase in the share of rail, short sea and inland waterway transport in total freight transport. The revision aims to

[11] Definition of Article 2 of DIRECTIVE (EU) 2016/797 of 11 May 2016 on the interoperability of the rail system within the European Union

improve the existing support for combined transport by extending it to a wider range of operations (scope), increasing the choice and level of support measures and thereby encouraging transport organisers to make more use of intermodal or multimodal transport in the EU with a view to more sustainable modal transport.

**However, while the technical lever has been or will be removed, there is still a major obstacle to the development of multimodal transport: the lack of a uniform liability regime.**

What rules apply to multimodal transport contracts?

In the first part, we will present the various existing international texts and how they relate to each other. In the second part, we will examine how the various players have adapted in practice.

# PART 1 THE LACK OF A UNIFORM REGIME

**10**. Multimodal transport issues are more topical than ever. From 2019, the European Green Pact, under which the EU has defined its "new growth strategy", aims to reduce greenhouse gas emissions "while creating jobs and improving our quality of life". The main objective of the Green Pact is to make Europe **climate neutral** by 2050. **The transport sector**, which accounts for 5% of the EU's GDP and employs more than 10 million people, is **fundamental to European businesses and global supply chains**. Today, greenhouse gas emissions from transport account for around 25% of total EU emissions and this share has been increasing in recent years. In 2020, more than 50% of freight will be transported by road. This mode is a major contributor to greenhouse gas emissions. **The Commission therefore encourages the development of multimodal transport.**

**11. What is multimodal transport?** Transport operations that are carried out end-to-end and using several modes of transport, have long been referred to as multimodal transport. The oldest transport operation to be described in this way was a Court of Appeal decision in 1876 concerning sea transport from London to Montreal, followed by rail transport from Montreal to Toronto[12]. However, authors, aware of the growing diversity of possible hypotheses:

[12] Morr v. Harris, 1876 1 A.C. 318 ; Pierre BONASSIES, U.A.E. : Le transport multimodal en Europe, Revue Scapel, 2001, p. 197.

sea/rail or rail/sea, road/sea or sea/road, road/rail or vice versa, road/air/sea, road-fluvial, etc., have sought to refine the terminology[13].

Today there are different terminologies, including "multimodal", "intermodal" and "combined".

The term "combined" was first used in the context of work on a Convention on "combined transport", which began in 1965 when discussions were held with a view to adopting a Convention on Combined Transport. Combined transport is "*the carriage of goods from a point of origin to a point of destination by a combination of modes of transport*". However, the draft Convention on the International Combined Carriage of Goods was rejected by both States and international trade operators (shippers and carriers), who felt that the text did not meet their expectations.

The term "multimodal transport" reappeared in 1980 when a new text was proposed, **the United Nations Convention on International Multimodal Transport of Goods (known as the CIM)**. Article 1 of this Convention defines multimodal transport as "the carriage of goods by at least two different modes of transport, under a multimodal transport contract, from a place in one country where the goods are taken over by the multimodal transport operator to the place designated for delivery in another country". Here, the performance of a multimodal transport operation involves several carriers: a contractual carrier and substitute carriers. The multimodal transport contractor, or MTC, is "*the person who concludes a multimodal transport contract on his own account or through a third party who is not acting as a servant or agent of the consignor or of the carriers involved in the multimodal transport operation and who assumes responsibility for the performance of the contract*". He is the operator who "performs" or "causes to be performed" all or part of the operations. It is a contractual (principal) carrier who either actually transports the goods from the place of departure (take-over) to the place of destination (delivery), or who undertakes part of the journey and organises the rest with other unimodal carriers. It may also be an operator who organises the whole journey but is not "actually" involved in the transport operations. However, none of this has any legal value as the CMI Convention never entered into force due to a lack of ratifications.

[13] Aristide EBONGUE, « TRANSPORTS SUCCESSIFS », JurisClasseur Transport, Fasc. 965 , 10 oct. 2019

A new definition of combined transport is given in Directive 92/106/EEC of 7 December 1992. Combined transport *"means the carriage of goods between Member States in which the lorry, trailer, semi-trailer, with or without tractor, swap body or container of 20 feet or more uses the road for the initial or final leg of the journey and, for the other leg, the railways, inland waterways or, where the distance by sea is greater than 100 kilometres as the crow flies, the sea, and the initial or final leg of the journey is made either by road or by rail:*

- *either between the place where the goods are loaded and the nearest appropriate railway station of embarkation for the initial leg of the journey and between the nearest appropriate railway station of disembarkation and the place where the goods are unloaded for the final leg of the journey, or*
- *or within a radius not exceeding 150 kilometres as the crow flies from the river or sea port of embarkation or disembarkation".*

This is the definition adopted by the European Conference of Ministers of Transport (ECMT), which became the International Transport Forum (ITF) in 2006. **Multimodal transport is transport that allows goods to be carried by at least two different modes of transport[14].**

## 1.1 Current legal framework

**12. Multimodal transport** currently suffers from the lack of a harmonised legal regime, resulting from a compromise between the various players (shippers, multimodal transport operators, actual carriers) and guaranteeing the protection of the interests of all parties. None of the existing instruments provides for a single liability regime. It is therefore important to recall the unimodal texts, which can nevertheless be applied to multimodal transport, before mentioning the attempts at international multimodal or multimodal conventions.

### 1.1.1 Single-Mode Conventions

**13. International conventions:** There are several international conventions dealing with issues relating to the contract for the carriage of goods and the carrier's liability, but none of them is fully satisfactory for multimodal transport.

[14] I. Bon-Garcin, M. Bernadet et Ph. Delebecque, Droit des transports : Précis Dalloz, 2e éd., n° 379, p. 353 et s.

- The Brussels Convention of 25 August 1924 for the Unification of Certain Rules Relating to Bills of Lading, as amended by the Protocols of 23 February 1968 and 21 December 1979 (known as the Hague-Visby Rules);
- The 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air, known as the Warsaw Convention;
- The Convention on the Contract for the International Carriage of Goods by Road of 19 May 1956 (known as the CMR Convention);
- The United Nations Convention on the Carriage of Goods by Sea, of 31 March 1978 (known as the "Hamburg Convention");
- The Convention concerning International Carriage by Rail of 9 May 1980 (known as "COTIF"), as amended in 1999, and its Uniform Rules concerning the Contract for International Carriage of Goods by Rail (UCMR). International Carriage of Goods by Rail (CIM-RU);
- The Convention for the Unification of Certain Rules for International Carriage by Air of 28 May 1999 (known as the "Montreal Convention").
- The Convention on the Contract for the Carriage of Goods by Inland Waterway of 3 October 2000 (known as the "CMNI").

**Table 1 Summary table of single-mode conventions @IDIT**

| Currents agreements | Conventions not in force |
|---|---|
| The Brussels Convention of 25 August 1924, known as the : **Hague-Visby Rules** | The 1980 United Nations Convention on International Multimodal Transport of Goods, known as **CMI** |
| The 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air, known as the **Warsaw Convention** | United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea of 11 December 2008, known as the **Rotterdam Rules** |
| The Convention on the Contract for the International Carriage of Goods by Road of 19 May 1956 , the **CMR** | |
| The United Nations Convention on the Carriage of Goods by Sea of 31 March 1978, known as the **Hamburg Rules** | |
| The Convention concerning International Carriage by Rail of 9 May 1980, known as **COTIF**, and its Uniform Rules, **RU-CIM** | |
| The Convention for the Unification of Certain Rules for International Carriage by Air of 28 May 1999, known as the **Montreal Convention** | |
| The Convention on the Contract for the Carriage of Goods by Inland Waterway of 3 October 3 October 2000, known as **CMNI** | |

**14.** **Maritime transport** is governed by **the Hague** and **Hague-Visby Rules** or by the **Hamburg Rules**[15]. The Hague and Hague-Visby Rules do not mention multimodal transport and do not extend their scope beyond international carriage by sea under a bill of lading. The Hague-Visby Rules apply mainly to the document covering the contract of carriage, i.e. the bill of lading, from the time the goods are loaded on board the ship until they are unloaded (Art. 1), although the loading and unloading phases are included (Art. 2). The Convention "*acts as if there had never been a successive carriage by sea or a mixed carriage by sea and by another mode of transport*"[16]. Sometimes, however, the judge may decide otherwise.

In the 1984 case of ***Mayhew Foods Ltd v Overseas Containers Ltd***[17], the English High Court ruled in favour of the application of the Hague-Visby Rules to the period of intermediate storage of a container in port, but only on the basis that the Hague-Visby Rules applied for the entire duration of the transport operation in question.

The main difference between **the Hague/Hague-Visby Rules and the Hamburg Rules** lies in their scope of application to maritime transport. The Hague and Hague-Visby Rules apply to contracts of carriage covered by bills of lading, but only for the "match to match" period, whereas the Hamburg Rules contain a specific reference to multimodal transport and apply to the entire contract of carriage by sea.

Contracts of carriage by sea are defined in **Article 1(6) of the Hamburg Rules**, which, however, provides that the term "*contract of carriage by sea*" includes contracts "*which, in addition to carriage by sea, include carriage by another mode of transport", provided that "they relate to carriage by sea*". Thus, this Convention is likely to cover situations where the carriage of goods by sea is part of a wider multimodal contract of carriage. Thus, according to this text, the multimodal transport company remains responsible for the entire sea voyage, with each carrier being liable on a port-to-port basis. However, the Hamburg Rules recognise that a contract of carriage by sea may include carriage by other means, while remaining a contract of carriage by sea. Indeed, the terms multimodal contract and contract of carriage by sea are not considered to be mutually exclusive. The contract of carriage by sea is one of the

[15] Subject to the conditions of application and the contracting states. In the absence of one of these maritime conventions, it will be necessary to determine the national law applicable to the contract in question by means of the conflict-of-laws mechanism in force in the State of the court seised. In the European Union, this is Regulation (EU) N01215/2012 of the European Parliament and of the Council of 12 December 2012, known as "Brussels I bis", which entered into force on 10 January 2015.

[16] Doyen Rodière, Traité général de droit maritime, Affrétements et Transports, t.III : Dalloz, 1970, n°986

[17] 1984, 1 Lloyd's Rep. 317

components of multimodal transport in the broadest sense. However, despite the inclusion of other modes of transport in the contract, the Hamburg Rules do not apply to the contract as a whole. **Their application is limited to international maritime transport (Art. 1).**

**15. International river transport** is governed by the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI). The CMNI expressly provides for the conditions of its application to river-sea transport (art.2 (2)) **unless a maritime bill of lading has been issued**, or if the maritime journey to be made is longer than the distance to be covered on waters subject to a river regime. Another feature of river-sea transport is the use of a single vessel. *"Broadly speaking, it can be said to be transport from a river port to another river or sea port in the same or another country, using a mixed river-sea route, without the goods having to undergo the slightest break in loading*."[18] It does not fall within the scope of the CMNI. In conclusion, the CMNI Convention is a unimodal convention which applies only to inland waterway transport. The sea-river transport referred to in Article 2(2) only concerns vessels which are technically capable of using any navigable waterway (sea or inland) for a straight voyage without transhipment.

**16. Air transport** has two conventions: **Warsaw** of 1929 and **Montreal** of 1999. Both have the same scope, but according to Article 55 of the Montreal Convention, the Warsaw Convention is superseded when two States have ratified both texts. Although the scope of these two Conventions only covers carriage covered by an air waybill, there are cases where such carriage is carried out in whole or in part by road at the initiative of the air carrier. This is known as **Road Feeder Services** (trucked air transport or trucked flight in France).

Article 18-3 of the Warsaw Convention, after stating that carriage by air does not in principle include carriage by land outside an aerodrome, provides, on the other hand, that if, in performance of the contract of carriage by air, carriage by land, sea or inland waterway is performed outside an aerodrome for the purpose of loading, delivery or transhipment, any loss or damage shall be presumed to have been caused by an event occurring during the carriage by air. Consequently, the non-air carrier's liability is subject to the rules of aviation law. Article 18-4 of the Montreal Convention contains a similar provision. However, in order for the provisions of the air transport conventions to apply *ipso jure*, the carriage must fall within the scope of the **three hypotheses** provided for, which are limited to loading,

[18] Franck HAMONIER, *Le transport fluvio-maritime en France*, Aix-en-Provence, Aix-Marseille III, Centre de droit Maritime et des transports, 1999, p. 5

transhipment or delivery. This includes pre- or post-carriage for the purpose of loading or unloading the aircraft, as well as transport between two airports[19].

A second, more delicate scenario is the pure substitution of road transport for air transport. In practice, airlines include **a "substitution" clause** in their general terms and conditions and on air waybills, whereby they reserve the right, without prior notice and taking into account the interests of the consignor, to transport the goods by means other than air.

In application of the Warsaw Convention, the French courts have accepted the application of this clause and the provisions of the Air Convention to the overland phase of the carriage, provided, however, that the clause is enforceable against the consignor, as illustrated by a judgment of the Paris Court of Appeal on 4 March 1998[20]. It was therefore necessary for the carrier to prove its knowledge and acceptance of the said clause at the time of the conclusion of the contract in order for the liability regime of the Warsaw Convention to apply. However, this proof was facilitated by the presentation of the air waybill signed by the consignor.

Article 18-4 of the Montreal Convention provides that its provisions apply to the land phase of the carriage, even if the air carrier has substituted the carriage, if the consignor's consent has not been given. In other words, the Montreal Convention applies to the land leg of the carriage unless the consignor has agreed to the application of the CMR[21].

**17. Road Transport:** Articles 1 and 2 of the CMR Convention define its scope. Article 1 states that it applies to all contracts for the international carriage of goods by road. The conditions for its application to overlay transport are set out in Article 2[22].

Article 1 states

> *"1. - This Convention shall apply to any contract for the carriage of goods by road for reward by means of vehicles when the place of taking over of the goods and the place designated for delivery, as indicated in the contract, are situated in two different countries, at least one of which is a contracting country. This applies irrespective of the domicile or*

[19] Paris Court of Appeal, 30 April 1997, Cie Air France c. Cie Helvetia et autre", BTL 1997. 386 , IDIT no. 20085
[20] Paris Court of Appeal of 4 March 1998, BTL 1998. 231, IDIT n°20084; Paris Court of Appeal 30 April 1997, IDIT n°20085
[21] Cass. com. 17 Oct. 2000: Bull. Civ. IV, n°158, IDIT n°20077; Rejecting the appeal against CA Paris, 4 March 1998: BTL 2000, p. 749 + Marie TILCHE, "Vol camionné. Quel régime?", (2000) BTL.744
[22] Intermodal transport is where a vehicle, usually a road vehicle, containing goods is transported on or in a non-road vehicle for part of the journey to fulfil a single contract, without breaking the load. E.g. car-ferry, piggyback.

*nationality of the parties. 2 - For the purposes of this Convention, "vehicles" means motor vehicles, articulated vehicles, trailers and semi-trailers as defined in Article 4 of the Convention on Road Traffic of 19 September 1949. 3 - This Convention shall apply even if the carriage falling within its scope is performed by States or by governmental institutions or organisations. 4 - This Convention shall not apply (a) carriage performed in accordance with international postal conventions; (b) funeral transport; (c) removals. 5 - The Contracting Parties shall refrain from amending this Convention by means of special agreements concluded between two or more of them, except in order to exclude from its application their frontier traffic or to permit the use of the consignment note representing the goods in transport operations passing exclusively through their territory.*

Its scope has been the subject of different interpretations, some suggesting that it applies to multimodal transport, others to the contrary. The CMR applies to any contract for the international carriage of goods by road. But does the expression "any contract for the carriage of goods by road" mean that the carriage must necessarily be by road or not? For some authors, the answer is no[23]. It also applies to what is known as "superimposed carriage", where the lorry and the goods are carried on a train or other means of transport without the goods being unloaded from the lorry. **In other words, there is no break in the load.**

This position was followed in *Quantum Corporation Inc v Plane Trucking Ltd. and others*[24]. An airline was contracted to transport computer equipment from Singapore to Dublin under a single contract. The airline flew the goods to Roissy Charles de Gaulle airport and then used a road haulier for the final leg of the journey. When the goods were stolen during the final leg of the journey, the consignor brought an action against the air and road carriers, claiming liability for the loss. The latter claimed the benefit of the limitations on compensation provided for in the airline's general terms and conditions.

At first instance, the High Court first held that the Warsaw Convention did not apply in this case because the theft did not occur in the course of air transport or on an airport. In order to determine the applicable law, the High Court noted that the parties had intended to make the Roissy-Dublin journey by road, but that the airline was not contractually obliged to do so, as it was free to change the mode of transport. Such a contract is therefore not a contract for

[23] Malcom CLARKE, « Air Carriage by Road Quantum Rumble On », dans *General Trends in Maritime and Transport Law 1929-2009*, Dir. Johan Schelin, Stockholm, Johson Institute of Maritime and Transport Law, 2009,p. 235 à la page 238.

[24] [2002] EWCA Civ 350 ; Court of Appeal (Civil Division) 27 mars 2002; *Quantum Corporation Inc v Plane Trucking Ltd. And Another*; The Weekly Law Reports 4 octobre 2002, p. 2678, Revue de Droit Uniforme 2003-3, p.781, Droit Européen des Transports 2004 . 535, IDIT-CMR n°22287

the carriage of goods by road within the meaning of Article 1 of the CMR, but rather a contract principally for carriage by air. The CMR was therefore not intended to apply, leaving room for the air carrier's general conditions and, consequently, the limitations on compensation contained therein. The consignor appealed.

Faced with the problem of the application of the CMR to the road leg of a contract of carriage by air and by road, the Court of Appeal examined the concept of "contract for the carriage of goods by road" within the meaning of Article 1 of the CMR. It distinguished four situations, depending on whether the carrier

(a) unconditionally undertakes to perform the carriage by road

(b) undertakes to carry by road but reserves the right to choose another mode of transport (as in the present case); or

(c) allows himself to choose the mode of transport, including road; or

(d) promises to carry by a non-road mode but reserves the right to carry by road.

While in the first three cases the contract is undoubtedly "for" carriage by road within the meaning of the CMR, the last case is more difficult. However, the Court of Appeal does not hesitate to grant this qualification if the carriage is actually carried out by road. **Thus, in order to determine whether there is a contract for the carriage of goods by road within the meaning of Article 1 of the CMR, the actual performance of the contract in accordance with its terms must be taken into account.** Furthermore, Article 2 of the CMR, concerning overlapping carriage, does not prevent the application of Article 1 in the case of a contract providing for carriage by several modes of transport, provided that the contract provides for the use of road transport (scenarios a, b and c) or that it provides for the possibility of carriage by road and that such carriage is actually carried out (scenario d). **Article 1 of the CMR can therefore be interpreted as meaning that the CMR applies to the international road leg of a multimodal contract of carriage, even if the non-road leg predominates**. Consequently, the CMR applies to the Roissy-Dublin journey, thus depriving the air and road carriers of the benefit of the limitation of compensation provided for in the general conditions of the airline.

Article 2 of the CMR regulates the continuous combined transport of road vehicles.

*"1. If the vehicle containing the goods is carried over a part of the journey by sea, rail, inland waterway or air without intermediate transhipment, this Convention shall nevertheless apply to the whole of the carriage, except where the provisions of Article 14 apply. However, to the extent that it is proved that any loss, damage or delay in delivery of the goods which occurs during the carriage by a mode of transport other than road was*

*not caused by any act or omission of the carrier by road and that it results from an event which could only have occurred in the course of and by reason of the carriage by that other mode of transport, the liability of the carrier by road shall be limited to the loss, damage or delay in delivery of the goods which occurred during the carriage by road, the liability of the carrier by road shall be determined not by this Convention but in the manner in which the liability of the carrier by non-road modes of transport would have been determined if a contract of carriage had been made between the sender and the carrier by non-road modes of transport solely for the carriage of the goods, in accordance with the mandatory provisions of the law governing the carriage of goods by a mode of transport other than road. In the absence of such provisions, however, the liability of the carrier by road shall be governed by this Convention.*

*2. - If the carrier by road is at the same time the carrier other than by road, his liability shall also be determined by the provisions of paragraph 1, as if his functions as carrier by road and as carrier other than by road were exercised by two different persons"*

Combined transport occurs *"when, for the purpose of performing a contract for the carriage of goods, a vehicle already loaded with those goods is itself carried on or in another vehicle, without the load being broken up"*[25]. The carriage is performed on the basis of a single contract covering the entire journey, carried out by several carriers and by different modes of transport, subject to different legal regimes. Thus, the CMR does not cover combined transport involving a break in the load, such as the unloading of a container from a road vehicle to be loaded onto a ship.

The CMR shall be set aside in favour of the rules applicable to the other mode of transport only to the extent that mandatory provisions are applicable. Therefore, case law has endeavored to determine what are mandatory provisions. The French Court of Cassation in a 1988 judgment had the opportunity to rule on the question. The judgment overturns the decision of the Paris Court of Appeal[26] and decides that in the event that damage had occurred to goods placed in a vehicle transported on deck, that the Brussels Convention of 1924 did not govern the liability of the road carrier, because this text excludes this type of transport from its scope.

[25] Jacques PUTZEYS, *Le contrat de transport routier de marchandises*, Bruxelles, Bruylant, 1981, IDIT n°726

[26] Paris Court of Appeal, CA Paris, October 13, 1986, (1989) Bulletin des Transports 1986.689, IDIT n° 4561

*"Having regard to article 2 §1 of the CMR and article 1-c of the Brussels Convention of August 25, 1924;*

*Whereas under the terms of the first of these texts, in the absence of mandatory provisions of the law concerning the transport of goods by a mode of transport other than road, the liability of the road carrier is determined by the CMR and that the second text excludes transport on bridges from its scope;*

*Whereas in order to decide that the Brussels Convention was applicable in the present case, the Court of Appeal held that Article 10 of this convention, as it was modified by the protocol of February 23, 1968, authorizes the parties the maritime transport contract to stipulate in the bill of lading that the contract will be governed by the said convention and that the so-called "Paramount" clause inserted in this case in the bill of lading includes such a provision;*

*Whereas by making this determination when Article 10 of the Brussels Convention is not mandatory, the Court of Appeal violated the above-mentioned texts."*[27]

In the Netherlands, case law has taken a different approach. In this case[28], semi-trailers were being transported on deck on the *Gabriële Wher* between Gothenburg and Rotterdam as part of a ro-ro operation. Following a hurricane, the goods on the semi-trailers were damaged. The person entitled to the goods sued the road haulier for compensation under the CMR liability regime. The road haulier invoked the "*perils of the sea*" exception provided for in the Maritime Convention. The solution adopted is that, in the case of a roll-on/roll-off transport operation carried out partly by land and partly by sea, the sea leg is not subject, as far as **the consignor is concerned, to the provisions of the CMR Convention**, **but to the uniform law of the Hague-Visby Rules**. *"The decision of the Court of First Instance, according to which the Hague-Visby Rules are applicable as mandatory rules of law to the other mode of transport only if a bill of lading has been issued, is wrong in law in so far as it is contrary to Article 2 of the CMR."*[29]

[27] Cass.com. 05 juill. 1988, Pourvoi n° 87-10566, JCP 1988 p. IV. 330, Droit Européen des Transports 1990 p. 221, BT.1989. 449, IDIT-CMR n°7231

[28] Supreme Court of the Netherlands, June 29, 1990, European Transport Law 1990 n° 5 p.589, IDIT-CMR n° 7632

[29] IDIT-CMR n°7632, Thanks F.Smeele.

These two decisions show that the case law of the various Contracting States to the Convention is not uniform, which undermines the Convention's objective of unifying the law[30].

**The CMR does not cover combined transport involving a break in the load[31]**, such as the unloading of a container from a road vehicle to be loaded onto a ship. This principle was recognised by the Danish Supreme Court in a decision of 28 April 1989[32]. The Court held that the transfer of a container to a trailer by the shipowner on board a ro-ro vessel, which interrupted the same transport on a chassis, did not allow the CMR to be applied to the latter.

**18. Rail transport:** The CIM Uniform Rules for Rail Transport provide that, in international traffic, land and sea routes may be used in addition to rail routes. However, the liability rules provided for in the CIM Uniform Rules may not be waived.

> *"When an international carriage which is the **subject of a single contract includes, in addition to carriage by rail**, carriage by sea or international carriage by inland waterway, these Uniform Rules shall apply if the carriage by sea or the carriage by inland waterway is performed **on lines included in the list referred to** in Article 24, § 1 of the Convention."*
> Article 1.4 of CIM

Article 1 of CIM allows two extensions to the Convention: a mode of carriage by sea or inland waterway complementary to carriage by rail and the system of registered lines.

**19.** This review of the unimodal international conventions leads to the conclusion that, with the exception of certain articles which do not answer all the questions raised, none of the existing instruments provides for a uniform system of liability. A judgment of the Spanish Supreme Court illustrates the complexity of the situation created by the absence of a uniform law[33]. In this 2020 judgment, the Spanish judge states that "*in the absence of a legal or contractual regulation of the liability regime for damage in the multimodal transport of goods with an international road leg and another international maritime leg under the bill of lading*

[30] A research group, the CMR Advisory Council, is currently working to improve the uniform application of the CMR. See: https://www.cmr-ac.org/
[31] See also Rouen Court of Appeal, June 29, 2017 RG No. 16/00591, IDIT-CMR No. 41821 + Supreme Court of the Netherlands, June 1, 2012, HR June 1, 2012, LJN: BV3678, Hoge Raad, 10 /05322; NJ 2012, 516 teacher note. KF Haak, French maritime law n°746, April 2013 p.360, IDIT-CMR n°41699
[32] Supreme Court of Denmark, April 28, 1989, (357/1987) SCAN Service K/S c/. DFDS A/S; EUROPEAN TRANSPORT LAW 1989 – No. 3 p. 345, IDIT-CMR n°7588
[33] Spanish Supreme Court, 29 September 2020, STS no. 495/2020

*regime, and in particular of the time limit for bringing an action, (...) it is appropriate to apply the regime that is least restrictive for the shipper*".

The need to harmonise these systems is therefore obvious. However, the various attempts at harmonisation have all failed.

### 1.1.2 Unsuccessful attempts at multimodal or multimodal agreement

20. Multimodal transport exploded with the development of standardised containers, which made it possible to transport goods over long distances without the need for handling or changing from one mode to another. There are many actors involved in multimodal transport, ranging from freight forwarders to specialised operators. The regulatory framework for multimodal transport is fragmented and complicated. It consists of a complex network of international unimodal transport conventions designed to regulate the carriage of goods by sea, air and road respectively. The consequence of having a network of unimodal transport conventions is that there are several mandatory rules that could apply simultaneously to any case of multimodal transport. The actors involved, be they carriers or MTC, need legal certainty. This is why attempts have been made to introduce a single regime.

**21. MTC:** Multimodal transport is the business of specialised companies that offer end-to-end freight management to their customers. They may be sea[34], air or land carriers who decide to organise the entire transport, or they may be generalists who handle all types of multimodal transport[35], such as transport organisers, the freight forwarders. In France, by definition, the freight forwarder is responsible for organising the end-to-end transport and guaranteeing the safe arrival of the goods[36]. But the fact remains that this technique, however perfected, is not universal. This system only exists by law in France. **There is therefore no uniformity in the MTC profession**, and this shortcoming is also reflected in the liability to which the MTC may be subject.

[34] Increasingly, the major liner shipping companies, some of which dominate the maritime container trade, are also extending their services to offer door-to-door transport by contracting other carriers to carry out the various modal stages of a multimodal transaction.

[35] Valérie Bailly-Hascoët et Cécile Legros, Corridors de transport et construction du statut juridique de l'entrepreneur de transport multimodal, ; LES CORRIDORS DE TRANSPORT, Sous la direction de Yann ALIX © Editions EMS, 2012

[36] Delebecque Philippe. Le transport multimodal. In: Revue internationale de droit comparé. Vol. 50 N°2, Avril-juin 1998. Etude de droit contemporain. pp. 527-537

**22**. **The 1980 United Nations Convention on International Multimodal Transport of Goods (CIM).** The rules applicable to the liability of the Multimodal Transport Operator are set out in a patchwork of single mode conventions, hence the idea of the first Convention. This Convention, on Multimodal Transport, was adopted in response to shippers' demands for binding rules and compensation limits that would apply uniformly to all phases of a multimodal transport operation. Unfortunately, this United Nations Convention on the International Multimodal Transport of Goods, signed in Geneva on 24 May 1980, never entered into force due to a lack of ratifications.

**22. Liability Regime.** CIM is based on a single regime. It applies to all types of international multimodal carriers and offers the shipper a single liability regime. The shipper no longer has to deal with the complexity of different liability regimes applicable to the voyage of his goods. they have a single co-contractor that takes responsibility for the entire journey. Under the Convention, **MTC is responsible from the time the goods are taken over until the time of delivery** (Art. 14.1). It is liable while the goods are in its custody or in the custody of its designated carriers. MTC's liability is based on the presumption of fault (art. 16). It is up to MTC to prove that it is not at fault.

**24. Compensation.** There are two kinds of compensation. In the first case, the damage is localised. In this case, the mandatory national law or the applicable international convention is applied, if the limits set by the latter are higher (Art. 9). In the second case, the place of the loss or damage is not localised. The limits established by the CIM Convention shall apply. MTC's liability is limited to 920 SDRs per package or 2.75 SDRs per kg, whichever is the greater.

**25.** However, the CMI Convention **never came into force** due to a lack of ratifications. An UNCTAD report reveals some of the reasons for this, such as the close association of the CMI with the Hamburg Rules.

**26. The Rotterdam Rules.** The United Nations Convention on Contracts for the Carriage of Goods Wholly or Partly by Sea of 11 July 2008, the Rotterdam Rules, apply to *door-to-door* carriage. More specifically, and in accordance with its definition of a contract of carriage (Article 1(1)), the Rotterdam Rules apply to unimodal carriage where the contract of carriage provides only for carriage by sea, but they also have the dual capacity to function as a multimodal convention where the contract provides for carriage by sea and carriage by other modes of transport. Although they are not applicable, the **Rotterdam Rules** apply to "*door-to-door*" transport, more precisely to intermodal maritime transport, taking care not to conflict with the unimodal conventions in force (Art. 82).

**27.** In order to avoid any conflict with the unimodal Conventions, the Rotterdam Rules establish the "*modified network liability system*"[37] for the carrier's liability, which consists in applying the rules determined according to the modal phase during which the damage occurred. **In fact, the Rotterdam Rules are not a true multimodal convention.** If the damage (loss, damage, delay) or its cause occurs only during the maritime phase of the carriage, the Rotterdam Rules apply. On the other hand, if the damage or its cause occurs (even partially) before or after the maritime phase, the provisions of the Rotterdam Rules relating to liability, limitation of liability and the time limit for bringing an action must be set aside in favour of those provided for in the unimodal international conventions to be applied, namely the CMR for road transport, the COTIF for rail transport and the CMNI for inland waterway transport (Art. 26).

Multimodal transport is complex, all the more so because there are no international rules dedicated to it. The liability of the carrier or multimodal operator is governed by a patchwork of international conventions relating to air, road, river (etc.) transport.

At a time when door-to-door transport is growing and becoming inevitable, there is an urgent need for a more harmonised international regime. However, the introduction of a new convention involves a large number of parties with conflicting and competing interests. This presents an enormous challenge to achieving a consensus, which neither the 1980 United Nations Convention on International Multimodal Transport of Goods nor the Rotterdam Rules have been able to do.

## 1.2 Focus on the Rhine/Danube corridor conventions

**28.** Multireload is a European project on the Rhine-Danube corridors. Therefore it is interesting to look at the system of liability applicable to contracts of carriage and, in particular, to international contracts of carriage by road, inland waterway and rail as they relate to this corridor.

[37] See below

### 1.2.1 The international road transport contract: The Convention on the Contract for the International Carriage of Goods by Road (CMR)[38]

**29.** The Convention on the Contract for the International Carriage of Goods by Road (CMR), signed in Geneva on 19 May 1956, entered into force on 2 July 1961. An additional protocol to the CMR on the electronic consignment note is currently open for signature. "*The Geneva Convention is a convention for the unification of mandatory law, the provisions of which are binding on the parties to a contract for the international carriage of goods by road.* " [39]The CMR is intended to govern all carriage to or from a country which has ratified it (Art. 1, § 1)[40], even if the country of departure or destination is not a party to the Convention. This merely makes it possible to determine the countries in which the Convention is certain to be applied in the event of a dispute arising abroad.

**30. The contract of carriage.** The Geneva Convention recognises the principle of the consensual nature of international contracts of carriage: *"The contract of carriage shall be evidenced by a consignment note.* ***The absence, irregularity or loss of the consignment note shall not affect the existence or the validity of the contract of carriage****, which shall remain subject to the provisions of this Convention"* (Art. 4)[41]. It is in the interest of the parties to draw up a consignment note, since it is the best proof of the existence of the contract of carriage and constitutes prima facie evidence of the terms of the contract and of the carrier's receipt of the goods (Art. 9-1). An Additional Protocol to the Geneva Convention (**e-CMR Protocol**) was adopted on 20 February 2008 to adapt the CMR to technical developments in **the dematerialization of documents and the exchange of data by computer**. It entered into force on 5 June 2011 between the first seven States to ratify it, namely Bulgaria, Spain, Latvia, Lithuania, the Netherlands, the Czech Republic and Switzerland. The e-CMR Protocol allows parties to use an electronic consignment note, giving it the same value as a paper consignment

[38] C. Legros. Fascicule n 775 : Transport routier international : Contrat de transport routier de personnes et de marchandises - Sources. Régime. Parution 11/2021 – refonte (55 pages) ; Fascicule n° 776 : Transport routier international : Responsabilité du transporteur routier international de marchandises. Parution 2022 – refonte (89 pages).

[39] Douai Court of Appeal, 22 Nov. 2012, no. 11/05273, IDIT no. 23916

[40] Paris Court of Appeal, 14 Dec. 2020, no. 19/04436, IDIT no. 25045

[41] In the absence of a consignment note, the existence of a contract of carriage was proved by an offer of services showing that the service provider was engaged in road transport and by a voucher showing that the customer had ordered the carriage of three presses by road and had given instructions for their handling and loadin : Paris Court of Appeal, 27 June 1979, B.T. 1979.440, IDIT no. 19086.

note. The e-CMR is authenticated by the parties using a reliable electronic signature and guarantees the integrity of the information it contains. **The e-CMR contains the same information as the paper consignment note.**

**31. Particulars to be entered in the consignment note.** "*The consignment note shall be made out in triplicate and signed by the sender and the carrier; these signatures may be printed or replaced by the stamps of the sender and the carrier if the law of the country where the consignment note is made out so permits*" (Art. 5.1). The first copy is given to the sender, the second accompanies the goods and the third is retained by the carrier. The list of particulars to be entered on the consignment note is given in Article 6 (e.g. identification of the sender, the carrier, the consignee, etc.).

**32. The parties to the contract of carriage are, in principle, the carrier and the consignor. The carrier** is the person designated as such in the consignment note. Article 9 of the Convention provides that the consignment note is valid only until the contrary is proved. Thus, for example, the French Court of Cassation did not hold liable a carrier whose company stamp and signature were on the original consignment note, but took into account another consignment note which showed that the carriage had been carried out by another carrier to whom the first had hired a tractor and driver[42]. **The consignor** is the person who concludes the contract and deals with the carrier. The mere mention on the consignment note of the name of a company as consignor is not sufficient to prove this capacity if it is disputed and the consignment note does not bear his signature or stamp. Anyone claiming to be the actual sender must prove it. The consignee of an international carriage who receives the goods is a party to the contract, even if he did not participate in the conclusion of the contract. The CMR establishes the principle that the consignee can enforce the rights deriving from the contract of carriage against the carrier in his own name (art. 13-1). In order to obtain payment of the freight from the consignee named in a consignment note signed by the carrier alone, the carrier must prove that the said consignee has actually agreed to be a party to the contract of carriage (correspondence, telex, attitude towards the goods, etc.). Otherwise, the carrier's action is inadmissible[43]. The actual consignee is the company to which the carrier finally delivers the goods after having made them available to a forwarding agent designated as "consignee" in the consignment note, provided that other documents issued by the carrier

[42] French Court of Cassation, 29 October 1991, no. 90-14.101, no. B.T. 1991.735, IDIT-CMR no. 2771
[43] Paris Court of Appeal, 6 January 1975, B.T. 1975.93; IDIT-CMR no. 19090

prove that the goods were intended for that company, which unloaded them and made reservations[44].

**33. Performance of the Contract of Carriage and Principle of Liability.** The international carriage of goods by road requires that certain operations be performed before or after the journey. The carrier is liable if he fails to fulfil any of his obligations.

**34. Acceptance of the goods.** Article 8.1 of the CMR obliges the carrier to check what is handed over to him or what is declared to him with a view to the external control of the condition of the goods and of the packaging. This article provides for two types of reservations: reservations to be made by the carrier when he has no reasonable means of verifying the accuracy of the information concerning the number of packages, their marks and numbers. These reservations must be entered in the consignment note[45], justified (the carrier must mention any shortages, describe any apparent damage and explain why it is not reasonably possible to check the goods) and expressly accepted by the sender in the consignment note.

**35. Moving goods.** Carriage is the sum of several operations: loading, stowing and securing, movement and delivery. The CMR **does not contain any provisions concerning the respective obligations and responsibilities of the consignor, the carrier and the consignee with regard to loading, stowing and unloading operations.** Nor does it deal with the problem of damage caused to the vehicle by the goods carried[46]. In the absence of an agreement between the parties, **the goods must be transported within a period not exceeding "*the time reasonably available to a diligent* carrier, *having regard to the circumstances and, in particular, in the case of a partial load, the time necessary to make up a full load under normal conditions*"** (Art. 19). The normal time available to the carrier is therefore **assessed on a case-by-case** basis according to the circumstances. If, for whatever reason, performance of the contract in accordance with the terms of the consignment note is or becomes impossible before the arrival of the goods at the place designated for delivery, **the carrier must request instructions from the person entitled to dispose of the goods** in accordance with Article 12 of the CMR (sender or consignee). However, if circumstances make it possible to carry out the carriage under conditions other than those provided for in the consignment note, and if the carrier has

[44] French Court of Cassation, 12 May 1980, B.T. 1980.370; IDIT- CMR No. 19007

[45] "*Imprecise reservations in the form of a wet stamp, which do not refer to the number of packages or their weight but to the shipper's responsibility for the handling operations, are not valid in the event of a shortage*", Paris Court of Appeal, 7 October 1993, B.T. 1993.741; IDIT-CMR no. 5756.

[46] Antwerp Court of Appeal, 13 December 1989, Revue de Droit Uniform 1990.11.430; IDIT-CMR no. 18971

been unable to obtain instructions in good time from the person entitled to dispose of the goods, he must take such measures as appear to him to be in the interest of that person (Art. 14). **The sender has the right to dispose of the goods**, in particular by requiring the carrier to interrupt the carriage, to change the place of delivery or to deliver the goods to a consignee other than the consignee indicated in the consignment note (Art. 12-1). The exercise of the right of disposal is subject to the following conditions the sender or the consignee (if he has acquired the right of disposal when the consignment note is restored) who wishes **to exercise this right must present the first copy of the consignment note** on which the new instructions to the carrier have been entered and must indemnify the carrier against any expenses, loss or damage arising from the carrying out of such instructions; **the instructions must be capable of being carried out at the time when they reach the person who is to carry them out; the instructions must never have the effect of splitting the consignment** (Art. 12-3).

**36. Delivery** terminates the carrier's contractual liability for the goods and the limitation period provided for in Article 32 of the CMR begins to run. At the time of delivery, **the CMR distinguishes between apparent damage and non-apparent damage** (damage or missing articles) which may affect the goods on arrival at the place of destination. This distinction is essentially reflected in the different time limits for lodging reservations with the carrier. In the case of apparent damage, the consignee must lodge a reservation with the carrier "*at the latest at the time of delivery*" (Art. 30-1). In the case of non-apparent damage, the consignee has seven days from the date of delivery to make reservations with the carrier (art. 30-1). In the absence of valid reservations or of a report to the contrary, the consignee is "*presumed, until the contrary is proved, to have received the goods in the condition described in the consignment note*" (art. 30-1).

**37. Principle of liability.** If the carrier has made no reasoned reservations in the consignment note, it shall **be presumed** that the goods and their packaging **were apparently in good condition** when the carrier took them over and that the number of packages and their marks and numbers corresponded to the statements in the consignment note (art. 9-2). **He shall be liable** for any total or partial loss or damage occurring between the time when the goods are taken over and the time of delivery, as well as for any delay in delivery (Art. 17-1). The carrier may exonerate himself by proving (art. 18-1) that the loss, damage or delay was caused by one of the events referred to in article 17-2, namely:

- **the fault** of the person entitled to compensation or an act on his part not attributable to the fault of the carrier, or - **a defect inherent in the goods**;
- **circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.**

The compensation payable by the carrier in case of loss or damage **shall be calculated on the basis of the value of the good**s at the place and time when they were taken over (Art. 23-1 and 25-1.). The carrier may not avail himself of the provisions of the CMR which exclude or limit his liability or which reverse the burden of proof, if the loss or damage is due **to his wilful misconduct or to a fault attributable to him** which, according to the law of the court or tribunal seised, is **assimilated to wilful misconduct** (Art. 29-1).

The right of action against the carrier belongs **to the persons designated in the consignment note as consignor or consignee**[47]. Actions arising from carriage subject to the C.M.R. are subject to **a limitation period of one year** (art. 32-1).

### 1.2.2 International contract for the carriage of goods by river: Budapest Convention on the contract for the carriage of goods by river (CMNI)

38. **The contract for the international carriage of goods by inland waterway** is governed by the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI). This Convention entered into force on 1 April 2005. It is applied by all the countries participating in the Multireload project. With the exception of certain provisions relating to the carrier's liability, which cannot be waived, the parties are free to organise their contractual relationship differently**. Each State may decide to apply the CMNI to national contracts of carriage by inland waterway** (CMNI, Art. 31). Only Dutch legislation allows the parties to a national contract of carriage to agree that the provisions of the CMNI shall apply to that contract.

**39. The contract of carriage**. The rules governing the actual formation of the contract of carriage of goods by inland waterway are laid down in Chapter III of the CMNI. The contract of carriage of goods within the meaning of the CMNI, which is *consensual in nature*, refers to "*any contract, by whatever name called, by which a carrier undertakes to carry goods by inland waterway in return for payment of freight*" (Art. 1, § 1). The CMNI requires the carrier to draw up a transport document for each carriage of goods covered by the CMNI (CMNI, art. 11, § 1). This document, which also records the taking over or placing on board of the goods by the carrier, consists of a consignment note or a bill of lading or "*any other document customary in the trade*" ( CMNI , art. 1, § 6). This document must be designated (consignment note or bill

[47] And even if the contract of carriage was concluded through a forwarding agent

of lading) and contain a certain number of particulars. **The transport document has a dual function**: it provides proof of the contract of carriage and records the taking over or placing on board of the goods. It can also be used to establish the status of the parties involved[48]. At the shipper's request, and if agreed with the carrier before the goods are loaded (or taken over), the carrier is obliged to issue a bill of lading. In this case, a number of specific rules must be observed (originals constituting "guarantees of value", right of disposal, enforceability against the consignee, delivery on delivery, etc.). The Convention lists the data to be included in this transport document:

- the name, domicile, registered office or place of residence of the carrier and of the consignor (CMNI, art. 11, § 5, a))
- the consignee of the goods (CMNI, art. 11, § 5, b));
- the name or number of the ship, if the goods are on board, or the statement in the transport document that the goods have been taken over by the carrier but have not yet been loaded on board (CMNI, art. 11, § 5, c));
- the port of loading or the place of taking over and the port of discharge or the place of delivery (CMNI, art. 11, § 5, d));
- the agreed conditions of carriage (CMNI, art. 11, § 5, h));
- whether it is an original or a copy - in the case of a consignment note - or the number of originals - in the case of a bill of lading (CMNI, art. 11, § 5, i));
- the place and date of issue (CMNI, art. 11, § 5, j)).

The bill of lading may be a paper or electronic document (art. 1.8 and 11).

**The carrier is entitled to make reservations** concerning the dimensions, the number or the weight of the goods, the identification marks and the apparent condition of the goods (Art. 12). **The consignee may make reservations** in the case of apparent loss or damage (at the time of delivery) or in the case of damage that is not apparent (within 7 consecutive days following delivery of the goods) (Art. 23-3 & 23-4).

**40. The parties to the contract of carriage.** The main parties to the contract of carriage are the carrier and the consignor. The sender has three obligations: to provide information, to pack and load the goods and to pay the freight. Before handing over the goods, **the consignor must inform the carrier in writing of the characteristics of the goods**, the various items of

[48] CA Colmar, 9 March 2022, no. 20/00650, Sté Novo Porto Scheepvaart c/ Total Marketing France et a., BTL 2022, no. 3872, p. 188, IDIT no. 25280

information required (stowage coefficient, identification marks, customs or administrative treatment, etc.) and hand over all the accompanying documents (Art. 6.2)[49]. In the event of inaccurate information, the consignor may be held fully or partially liable. **The shipper is then obliged to pack the goods in such a way as to prevent their loss or damage** and to ensure that they do not cause any damage to the vessel or to other goods (art. 6.3). Unless otherwise agreed, he is also responsible for loading, stowing and securing the goods in accordance with the customs of inland navigation (Art. 6, § 4)[50]. Finally, **the shipper is responsible for the payment of the freight** and, more generally, for the payment of the "sums due under the contract of carriage" (Art. 6.1). **This is his main obligation**. Transport incidents (loss or damage) do not normally affect the freight. The freight remains due according to the terms of the contract of carriage or, failing that, according to national law or custom (Art. 19.5).

**The carrier also has three obligations: to carry the goods, to make his vessel seaworthy and to choose whether to carry the goods on deck or in an open hold.** The carrier's main obligation is "*to deliver the goods to the place of delivery within the time specified*" (Art. 3.1). If no time limit is specified, he must deliver within a reasonable time "having regard to the circumstances of the voyage and the freedom of navigation" (Art. 5). The goods must be taken on board the vessel, unless otherwise agreed (Art. 3.2). As regards the vessel, **the carrier is in principle free to choose the vessel to be used** (Art. 3.3). **He must ensure that it is seaworthy**. This is a duty of means which covers both nautical seaworthiness (condition of the hull, engine, fuel, etc.) and commercial seaworthiness (ability to carry the cargo).

> Although the primary responsibility for loading, stowing and securing the goods lies with the shipper, the carrier is nevertheless obliged to ensure the safety of the vessel. He must therefore ensure that these operations "do not endanger the safety of the vessel" (Art. 3, § 5).

**41. Performance of the contract of carriage and the principle of liability.** The carriage of goods by inland waterway requires certain operations to be carried out before or after the voyage. The carrier is liable if he fails to fulfil any of his obligations.

**42. Movement of the goods.** If the sender is obliged to load, stow and secure the goods, the contract of carriage begins for the carrier, unless otherwise agreed, when the goods are taken

[49] CA Douai, 2nd Ch. sect. 2, 11 Apr. 2013, no. 12/00850
[50] CA Amiens, 13 Jan 2022, no. 20/00146, Haeger & Schmidt International v Giocanti Multimodal, BTL 2022, no. 3863, p. 44; IDIT No. 25253

over. **At this stage, the carrier has the right to make reservations on the transport document** (art. 12.1).

**During carriage**, the performance of the contract may be modified. As long as the consignee has not asserted his right to delivery and unless otherwise provided in the consignment note, **the sender may give new instructions to the carrier**. In particular, he may request that the carriage be discontinued, that the place of delivery be changed or that the goods be delivered to another consignee (Art. 14). The exercise of this right of disposal is subject to the presentation of the transport documents (originals in the case of bills of lading) and the payment of additional charges.

Transport is completed when **delivery** is made. Delivery is defined as "the placing of the goods at the disposal of the consignee in accordance with the contract of carriage or the relevant commercial practice or the regulations in force at the port of discharge". Delivery also means "the handing over of the goods to an authority or a third party" (Art. 10.2). Unless otherwise agreed, **delivery takes place on board the vessel** (Art. 3.2). **Delivery is made on presentation of the original bill of lading**, if one has been issued. The carriage of goods on deck or in open holds is a special case. It must have been agreed with the shipper or be in accordance with the practice of the trade concerned. This type of carriage cannot be imposed by the carrier (Art. 3.6). It is also a circumstance in which the carrier is relieved of liability (Art. 18.1 c).

**43. Principle of liability. The carrier's liability is presumed**. However, **it is limited and may be waived for various reasons**. The carrier "*shall be liable for the loss of or damage to the goods from the time when the goods were taken over for carriage until delivery or in case of delay in delivery*" (Art. 16). The carrier "shall be liable for the acts and omissions of his servants and agents whom he employs for the performance of the contract of carriage in the same manner as for his own acts and omissions" (Art. 17.1). He is liable in the same way for the acts and omissions of the carrier whom he has substituted, as well as for the acts and omissions of the servants and agents of this substitute carrier, provided that they acted "in the exercise of their functions" (Art. 17.2). However, for the carrier to be liable for persons acting on its behalf, they must have acted "in the exercise of their functions". If this condition is met (which must be proved), these persons may benefit from the same liability regime as the carrier and, for example, from its limitations and exemptions.

The liability of the carrier is limited: "*Whatever action may be brought against him, the carrier shall in no case be liable for sums exceeding 666.67 units of account for each package or other shipping unit or 2 units of account for each kilogram of the weight stated in the transport document, whichever is the greater, in respect of goods lost or damaged*" (Art. 20). The unit of account used by the Convention is the Special Drawing Right (XDR). This fictitious international

currency, based on a "basket" of national currencies (the US dollar, the euro, the yen, the yuan and the pound sterling), is quoted almost daily. To determine the maximum amount of compensation, the XDR rate on the date of the judgment or on the date agreed by the parties must be taken into account (Article 28).

The **carrier may be exonerated from liability** if he proves that "the damage was caused by circumstances which a diligent carrier could not have avoided and the consequences of which he could not have prevented" (Art. 18.1). The CMNI also lists seven grounds for exemption (Art. 18):

- acts or omissions of the sender, the consignee or the person entitled to dispose of the goods; or
- the handling, loading, stowage or unloading of the goods by the consignor or the consignee or by third parties acting on behalf of the consignor or the consignee;
- the carriage of goods on deck or in open holds where this has been agreed with the shipper or is in accordance with the practice of the trade concerned or is required by applicable regulations;
- the nature of goods which are wholly or partially exposed to loss or damage, in particular by breakage, rust, internal deterioration, desiccation, leakage, normal loss of volume or weight during carriage or by the action of vermin or rodents;
- Absence or inadequacy of packaging where the nature of the goods is such that the absence or inadequacy of packaging exposes them to loss or damage;
- Insufficient or defective marking of the goods;
- Rescue or attempted rescue on inland waterways;
- the carriage of live animals, unless the carrier has failed to take the necessary measures or to comply with the instructions agreed upon in the contract of carriage.

"*Any action arising out of a contract governed by the Convention shall be barred after a period of one year from the date on which the goods were or should have been delivered to the consignee. The day on which the period of limitation begins shall not be included in this period*" (Art. 24). **This period may, however, be extended**. The Convention provides that the person against whom an action is brought may extend the period of limitation "*by a written declaration addressed to the injured party*" (CMNI, Art. 25, § 2). This extension or prolongation of the limitation period may be decided at any time, but must be done within the limitation period.

The parties are free to provide for recourse to arbitration (by means of an arbitration clause) or to submit disputes to the designated national courts by means of a jurisdiction clause. In

the absence of an agreement between the parties, the applicable national law must be applied.

### 1.2.3 The international contract of carriage by rail: the legal duality of the regime between East and West on the European continent.

44. **A special legal situation**. Rail freight transport between Europe and the East faces a special legal situation. There are no uniform rules applicable to all the territories crossed. Two legal systems coexist: on the one hand, the COTIF (Convention concerning International Carriage by Rail)[51] Uniform Rules for the Carriage of Goods by Rail (UR-CIM), which tend to apply in the west of the Eurasian continent, and on the other hand, the SMGS (Agreement concerning the International Carriage of Goods by Rail)[52], which tend to apply in the east. This legal duality is likely to hamper the development of transcontinental rail freight between Asia and Europe. It is a major obstacle to the provision of regular rail freight services along the Rhine-Danube corridor.

#### 1.2.3.1 COTIF RU-CIM rules

45. The CIM Uniform Rules applicable to the contract of carriage of goods by rail are one of the annexes to COTIF, the International Convention governing the International Carriage of Goods by Rail. The purpose of COTIF is to establish a uniform legal regime for the international carriage of goods by rail, thereby solving most of the legal and practical difficulties caused by the divergence of national laws and regulations governing transport in the States concerned[53].

**46. Contract of carriage.** COTIF, in its 1999 version[54], applies, in accordance with Article 1, to any contract of carriage by rail for reward, when the place of taking over of the goods and the

[51] Convention concerning International Carriage by Rail of 9 May 1980

[52] Convention concerning the International Carriage of Goods by Rail of 1 November 1951. See the OSJD website (interministerial organisation based in Warsaw, Poland, which manages the SMGS Convention in particular. http://www.osjd.org).

[53] Valérie Bailly-Hascoët et Cécile Legros, Corridors de transport et construction du statut juridique de l'entrepreneur de transport multimodal, ; LES CORRIDORS DE TRANSPORT, Sous la direction de Yann ALIX © Editions EMS, 2012 p.153

[54] COTIF, which was concluded in 1980 and came into force in 1985, was fundamentally revised in 1999 by the Vilnius Protocol. COTIF comprises 7 Appendices:
- Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV - Appendix A to the Convention)

place designated for delivery are situated in two different States, at least one of which is a State party to COTIF, and the parties to the contract have agreed that their contract is subject to these rules[55].

The Convention also applies to combined international carriage where there is a single contract, i.e. carriage by road or inland waterway in addition to international carriage by rail (Art. 1, para. 3).

COTIF accepts the principle of the consensual nature of the contract of carriage. It is therefore formed by the mere exchange of consents. Consequently, the absence or irregularity of the transport document does not affect the existence or validity of the contract or the application of CIM.

The contract of international carriage is **evidenced by the international consignment note**, the model of which is identical for all railway networks. **It is drawn up jointly by the parties to the contract and may be drawn up in electronic form[56]**. It is a named person contract: a single person must be registered as either the consignor or the consignee.

**It must contain the so-called "mandatory" information** (Art. 13), such as the name of the contracting carrier and, where applicable, that of his representative; the costs to be borne by the sender; the number of the railway vehicle handed over as goods (important to distinguish it from the vehicle entrusted as a means of transport, which is covered by the wagon system), etc.

**The consignment note has a simple evidential value**. For example, if the goods are loaded by the carrier, the information concerning the state of the goods, their packaging and the number of packages is authentic, unless the sender provides proof to the contrary. Conversely, if the goods are loaded by the sender, the information in the consignment note is only valid if it has

- Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM - Appendix B to the Convention)

[55] This is the possibility of inserting into the contract a clause similar to the Paramount clauses frequently used in maritime transport.

[56] "*The consignment note, including any duplicate, may be made out in the form of an electronic record of data which may be converted into legible writing. The methods of recording and processing the data shall be functionally equivalent, in particular as regards the evidential value of the consignment note represented by such data*".

been verified by the carrier. A justified reservation deprives the consignment note of all evidential value.

The consignment note is a receipt for the goods, a receipt for the costs paid on departure and a document giving the sender the right to amend the contract during carriage. However, it does not have the value of a bill of lading and is therefore not a negotiable instrument (CIM Uniform Rules, art. 11§5).

**47. Principle of liability.** In the event of a dispute, **the Convention makes a distinction between apparent damage and non-apparent damage** which may affect the goods when they arrive at their destination. This distinction essentially results in different time limits for carrying out the formalities for establishing the damage. These formalities are compulsory and, if they are not carried out, the carrier is presumed to have delivered the goods in accordance with the information given in the transport document.

> However, they apply only to partial losses (shortages) and damage and not to total losses, in which case there has been no delivery. The person entitled may, without further proof, consider the goods lost if they have not been delivered within thirty days of the expiry of the delivery period (Art. 39-1).

**The discovery of loss or damage does not give rise to reservations, but to the drawing up of a report by the railway, in the presence of the person entitled**, stating the extent of the damage, its cause and the time at which it occurred.

- If the damage is obvious, the consignee must demand that the report be drawn up immediately, even before accepting the goods, on pain of forfeiture.
- If, on the other hand, the damage is not apparent and could only be discovered after delivery, the person entitled has a maximum of sixty days in which to make a written claim, which must be accompanied by the consignment note, on pain of forfeiture (Articles 57-2 and 53).

Article 23, § 1 of the CIM Uniform Rules provides that "*The carrier is liable for total or partial loss or damage occurring between the time of taking over of the goods and the time of delivery, as well as for delay in delivery*." The carrier therefore has an obligation of result which is accompanied by a presumption of liability. The mere fact that the goods arrive in insufficient quantity, damaged or late is sufficient to render the carrier liable, unless it can be proved that the damage is due to a specific cause for exoneration. Contrary to French law, which does not prohibit clauses to the contrary relating to delay, the CIM Uniform Rules render null and void any clause to the contrary, including a clause relating to delay (CIM Uniform Rules, Article 5).

A presumption of loss exists in favour of the rightful claimant if the goods have not been delivered or offered for delivery within 30 days of the expiry of the delivery period.

"*The carrier is relieved of liability if the loss, damage or delay was caused by the fault of the person entitled, by an instruction given by him, by a defect inherent in the goods or by circumstances which the carrier could not avoid and the consequences of which he was unable to prevent*" (Art. 23).

These are therefore the general causes found in national legislation:

- the act of the consignor or the consignee;
- inherent vice of the goods;
- circumstances which the carrier could not avoid and the consequences of which he was unable to prevent". These circumstances are close to the concept of force majeure, although the latter expression is not used in the Conventions and another formulation has been preferred.

In addition to these three general causes, the originality of the system of exoneration lies in the existence of so-called privileged causes of exoneration (7 of the CIM Uniform Rules). These special risks lead to a reversal of the presumption in favour of the carrier.

However, this is no more than a simple presumption of non-liability, and the exoneration is not acquired for nothing, since the rightful claimant may still rebut it by proving that the damage was not caused by one of these risks or, in other words, that the carrier has committed a specific fault.

According to Article 48 of the CIM Uniform Rules, **the action is time-barred after one year**. However, **this period may be extended to two years** in the case of actions for payment of a refund or of the proceeds of a sale by the railway or where it is proved that the carrier was inexcusably at fault (since the entry into force of the 1990 Protocol)[57]. The Convention adopts the provisions of the 1956 Geneva Convention, known as the CMR.

[57] "*However, the limitation period shall be two years in the case of an action: a) for payment of a refund received by the carrier from the consignee; b) for payment of the proceeds of a sale made by the carrier; c) for loss or damage resulting from an act or omission committed either with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result; d) under one of the contracts of carriage concluded prior to the reconsignment, in the case provided for in Article 28*" Article 48 of the CIM Uniform Rules.

Like the CMR, the CIM Uniform Rules provide, under the same conditions, for the suspension of the period of limitation in the case of a written claim against the carrier.

The Rail Convention is the only one to provide for a precise division of the right of action against the railway. Unlike, for example, the road transport regime, this right can have only one holder. It belongs in the first instance to the consignor, until the consignee has accepted delivery, and then passes exclusively to the consignee. The right of action is therefore not cumulative, but exclusive and alternative.

As far as jurisdiction is concerned, actions can only be brought before the competent court of the State of the railway concerned, unless otherwise provided for in agreements between States.

> For example In France, where there are no derogations, the SNCF can be sued either where it has its head office or where it has a branch, provided that the event giving rise to the claim is connected with that branch.

This rule is quite original in terms of jurisdiction. Traditionally, jurisdiction is linked to the content of the contract of carriage (place of taking over, delivery, etc.). However, all the rules applicable to international contracts of carriage include the principle of actro sequitur forum rei. In general, the plaintiff has a choice between the defendant's domicile and another forum. In this case, the forum "of the State having jurisdiction over the railway which is the subject of the action" corresponds to the defendant's domicile, provided that the action is brought against the railway undertaking.

Finally, there are no other optional grounds of jurisdiction, which limits the right of access to justice. This limitation can undoubtedly be explained by the fact that most railway undertakings have strong institutional links with the States. They are often public undertakings or undertakings in which the State has a shareholding. It is therefore understandable that the latter would like to enjoy a kind of jurisdictional privilege as far as jurisdiction is concerned.

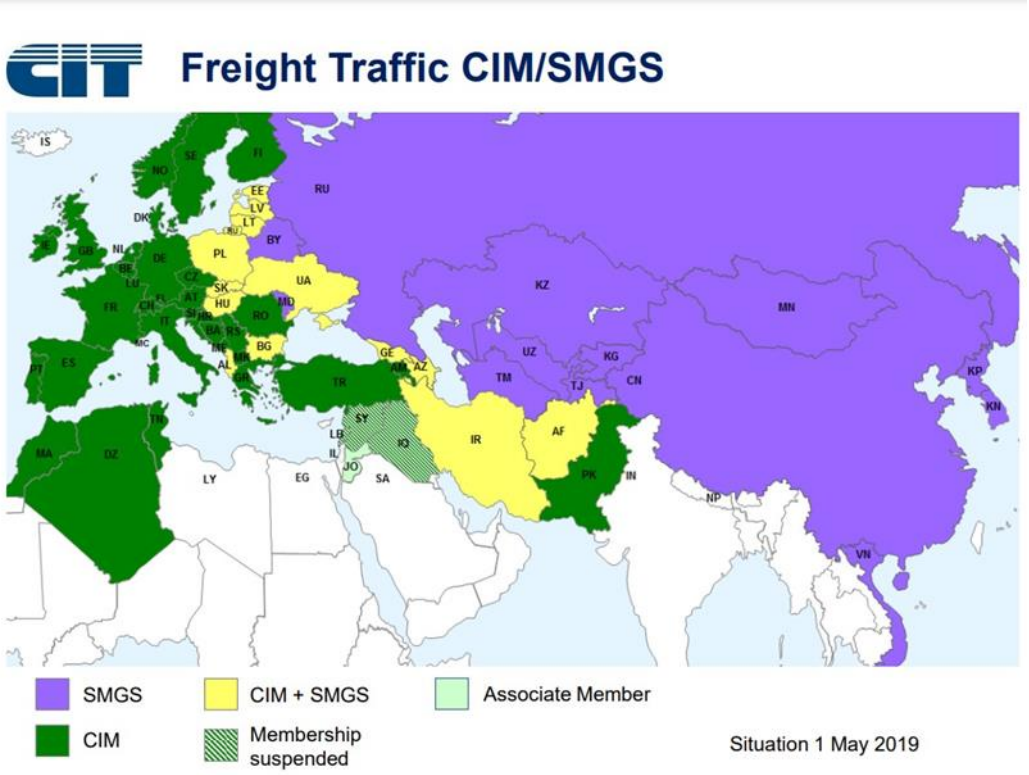


**Figure 3 Overview of the scope of application of the CIM Uniform Rules and the SMGS @ International Rail Transport Committee**

### 1.2.3.2 The SMGS

48. In the early 1950s, in response to the need to unify legal and economic principles, the USSR, together with the other countries under Soviet influence, began to draw up uniform international rules for the carriage of goods by rail between these countries. In 1948, the USSR, together with Poland, Romania, Hungary, Bulgaria and Czechoslovakia, drew up the Convention on the International Carriage of Goods by Rail, known as the MGS. Then, in 1955, China, North Korea and Mongolia ratified this agreement, now known as the SMGS. A dozen new accessions to the Convention took place in the 1990s, including the Soviet States after the collapse of the USSR. The international organisation governing the Convention is the Organisation for Cooperation between Railways (OSJD), based in Warsaw. Founded in 1956, it now has 27 Member States and, unlike OTIF, involves both States and railway undertakings. Today, Germany plays a central role, as most trains terminate in Duisburg. In legal terms, the SMGS is an agreement between railway administrations, whereas the CIM is an agreement between States. The SMGS was concluded by the railway administrations, represented by the competent ministries (Art. 1). The following States

are members Azerbaijan, Albania, Belarus, Bulgaria, Vietnam, Georgia, Iran, Kazakhstan, China, North Korea, Kyrgyzstan, Latvia, Lithuania, Moldova, Mongolia, Poland, Russia, Tajikistan, Turkmenistan, Uzbekistan and Ukraine.( See Figure 3 for the fields of application of COTIF and SMGS.)

The SMGS consists of 40 articles divided into 8 chapters concerning the conclusion and performance of the contract of international carriage by rail, the liability of the rail carrier, liability procedures, compensation in case of damage to goods, etc. Although it differs from the CIM Uniform Rules, it is also structured around provisions relating to the scope of application, the conclusion of the contract, the liability regime and the procedures for taking legal action.

49. **The contract of carriage**. The SMGS Convention applies to the international carriage of goods by rail under the SMGS consignment note on the lines of the railways participating in the Convention between the railway stations participating in the SMGS Convention (Art. 3), as well as to rail freight in transit through the countries participating in the Convention. It is binding on the railways, the consignor and the consignee (Art. 2). It does not, however, apply to carriage

- within the same State, where the goods lose their international character;
- where the place of departure and the place of destination are in the same State, even though the trains or wagons of the sending State pass through the territory of another State.

The Convention therefore regulates the carriage of international goods by rail by means of a contract of carriage which, although it appears to be similar to that of the CIM Uniform Rules, is not entirely identical to them.

Unlike the other conventions relating to the contract of carriage, in particular COTIF, the contract of carriage under the SMGS is a solemn contract. A solemn contract is a contract which, in addition to the exchange of consents, requires the performance of solemn formalities in order to be valid. The required form is usually in writing.

In fact, the contract is concluded by drawing up the consignment note, the compulsory content of which is defined by the Convention (Art. 7). The contract of carriage is concluded between a consignor and a railway undertaking which undertakes to carry the goods. It is concluded as soon as the forwarding station has accepted the goods for

carriage, accompanied by the consignment note to which it will affix its stamp. Once this formality has been completed, the consignment note becomes the contract of carriage (Art. 7). On the basis of this contract, the railway is obliged to carry the goods (art. 10).

The consignment note shall be made out in accordance with a model provided for in the Convention (Art. 7). It is written in the language of the country of departure and contains extracts translated into Russian or German. It must be clear and legible and may not be altered (except in exceptional cases).

The consignment note must contain

- The exit border stations of the country of departure and the transit countries through which the goods are to be transported;
- The description of the goods in accordance with the name and classification laid down in the Convention; this must show the nature and condition of the goods with a view to their pricing;
- The weight of the goods and the manner in which it has been determined;
- Where applicable, the full name and passport (or other form of identification) of the person transporting the goods.

Only one natural or legal person may be indicated as the consignor or consignee of a consignment. (Art. 7)

The consignor must attach to the consignment note the documents required to complete customs formalities. He is liable to the railway for the consequences resulting from the absence, insufficiency or irregularity of these documents (Art. 11).

When the goods are handed over to the railway for carriage, the consignor must declare their value in certain cases specified in the contract (art. 10), in particular for the carriage of certain goods such as precious metals and stones, furs, films, etc.. For other goods, the declaration of value is optional.

In principle, all goods can be transported under the SMGS. However, according to Article 4, certain articles are excluded from carriage or are subject to special conditions (the parallel provisions of the CIM Uniform Rules were abolished in the 1999 reform). According to Article 5 of the SMGS, goods whose carriage is excluded by the national

law of a member state of the SMGS, as well as dangerous objects such as explosives, ammunition or materials, or if a certain weight is exceeded, may not be carried.

The consignor is responsible for the accuracy of the information and declarations he enters in the consignment note. If any inaccuracies are found in the consignment note during the checks carried out by the railway at the forwarding station, a new note shall be made out by the carrier. If these inaccuracies are found during transport or at the destination, the station that carried out the inspection will draw up a report. If it is found that the goods have been incorrectly described, the carriage charge for the entire journey will be recalculated in accordance with the tariff that should have been applied.

**50. Principle of liability.** An important issue in the comparison of the two systems of OTIF (CIM) and OSJD (SMGS) is the question of the liability of the railways. It can be said that there is a certain degree of convergence between the two systems on the substantive issues. Article 22 states: "The railway which has accepted the goods is responsible for the performance of the carriage over the entire route until delivery of the goods at the station of destination. Each railway, by the mere fact of accepting the goods with the consignment note, becomes a party to the contract of carriage and assumes the obligations arising therefrom". The railway company is therefore liable for damage to or loss of the goods and for delays in delivery, as well as for the consequences of the loss of the documents accompanying the consignment note (Art. 23).

However, the carrier may be exempted from liability for loss and damage in a number of cases provided for in Article 23 of the SMGS:

- Circumstances which could not be avoided,
- The nature of the goods,
- The act of the sender or the consignee. ...

In the event of delay, the railway is exonerated in the event of bad weather or circumstances which have the effect of restricting or suspending the service. It is for the carrier to prove that the loss, damage or delay is due to one of these exonerating causes.

In contrast to the CIM, the SMGS Convention does not limit compensation in the event of damage (SMGS, Art. 25 - Loss and 26 - Damage). The amount of compensation under SMGS depends on the price indicated in the certified invoice of the foreign supplier. If this price cannot be established, it will be determined by a recognised committee of experts. If the consignor does not declare the value, he receives compensation of six francs per kilogram (Art. 25 § 1). The amount of compensation for late delivery is specified in Article 27 § 1 of the SMGS. The compensation depends on the delay. If the delivery date is exceeded by one tenth, the compensation amounts to 6% of the freight; up to two tenths, 12% of the freight; up to three tenths, 18% of the freight; and up to four tenths, 24% of the freight. If the delivery date is exceeded by more than four tenths, the compensation shall be 30% of the freight.

In the event of total or partial loss of goods whose value has been declared, the railway is obliged to compensate the injured party up to the amount of the declaration or the part of this amount that relates to the lost part of the goods. This is a very important difference, since full compensation is due, whereas in all the other conventions relating to the contract for the international carriage of goods there are legal limitations on compensation.

In the event of a dispute, and prior to any legal action by the consignor or the consignee, an administrative claim is compulsory. The railway then has 180 days from the receipt of the goods to reply to the claimant and, if appropriate, to pay the compensation due (Article 29). If the time limit for examining the claim is exceeded or if the railway refuses to do so, the rightful claimant may take legal action.

The limitation period for legal action is nine months (Art. 31). The period runs from :

- In the case of damage, partial loss or delay, from the date of delivery of the goods;
- in the case of total loss, from the thirtieth day after the expiry of the delivery period.

The submission of a written claim to the railway by the person entitled shall suspend the limitation period. The limitation period shall recommence from the date on which the railway notifies the claimant that his claim has been rejected.

Proceedings may only be brought before the competent court of the State of the defendant railway.

There may have been historical reasons for the existence of two separate regimes, but today they constitute an obstacle to the development of regular rail freight traffic between Europe and Asia.

**Table 2**

**Comparative table of liability regimes under the two Conventions[58].**

| | RU-CIM | SMGS |
|---|---|---|
| **PRINCIPLE OF LIABILITY** | Automatic liability as soon as the result is not achieved, without the need to prove fault on the part of the carrier | Automatic liability as soon as the result is not achieved, without the need to prove fault on the part of the carrier |
| **EXEMPTION** | Fault of the beneficiary<br>Order of the latter not resulting from the fault of the carrier<br>inherent defect of the goods<br>force majeure<br>+ Special risks (lack of or defective packaging, transport in an pen wagon, etc.) | Numerous exemptions<br>General exemptions (nature of the goods, fault of the person entitled, force majeure, lack of packaging, loading or unloading by a person other than the carrier, etc.)<br>Specific exceptions relating to shortages<br>Specific exceptions relating to delay<br>... |
| **COMPENSATION LIMIT** | 17 Special Drawing Rights (SDR) per kg of missing or damaged goods, calculated on the basis of gross weight, unless the carrier has committed an act or omission either with intent to cause such damage or recklessly and with knowledge that such damage would probably result. | None |
| **TIME BAR** | 1 year (2 years in the event of fraud or inexcusable fault) | 2 months for late payments and 9 months for all other cases |

[58] *IDIT Webinar, "Alternative corridors: legal issues in Asia-Europe trade" Kristina Yougatova with Olivier FAURY (EM Normandie, Metis lab) and Laurent FEDI (Kedge Business School) - 19 November 2021*

The current legal framework for multimodal transport is fragmented and complicated. It consists of a complex network of international unimodal transport conventions designed to regulate the carriage of goods by sea, road, air, rail and inland waterway. The consequence of having a network of unimodal transport conventions is that there are several mandatory rules that could apply simultaneously to any multimodal transport case. While there are arguments for maintaining the current system, there are also arguments for replacing it.

In the second part of this report we will look at the alternatives in practice - the network responsibility system and the modified limited system - and the contractual tools available to ETMs.

# PART 2 ALTERNATIVES IMPLEMENTED

**51.** The first part of this report provides an overview of the international conventions applicable to multimodal transport. This second part examines some possible solutions to the legal problems raised.

As we have seen, the current legal framework is fragmented, which complicates the task of the lawyer. It consists of a complex network of international unimodal transport conventions designed to regulate the carriage of goods by sea, air and road respectively. The consequence of a network of unimodal transport conventions is that there are several international rules that may apply, without there being a hierarchy of norms in international law. The multiplicity of international conventions on multimodal transport therefore raises the question of the compatibility of treaties in the event of a conflict between two conventions.

**52. The principle of the hierarchy of national and international standards.** The superposition of written standards naturally leads to difficulties of articulation and conflicts between the different types of standards. Traditionally, these conflicts are resolved by establishing a hierarchy between the texts. The hierarchy of norms was systematised by the jurist Hans Kelsen (Figure 4), who presented the legal order as a pyramidal structure: the authority accorded to each type of norm depends on its place in the pyramid, and according to the hierarchical principle, no text can contradict another at a higher level. The traditional conception of the hierarchy of written norms, as it can be presented with regard to texts of national origin, is renewed under the influence of norms of supranational origin.

The European Union and the Council of Europe differ from other international organisations in that they are truly supranational legal orders, superimposed on national legal orders. This peculiarity manifests itself in two ways:

- Most of the texts adopted by their organs are incorporated into the legal system and can be invoked by individuals (direct application);
- the European Union and the Council of Europe each have their own courts responsible for ensuring compliance with these texts: the Court of Justice of the European Union (CJEU) is responsible for monitoring compliance with Community law, while the European Court of Human Rights (ECHR) is responsible for ensuring the application of the provisions of the European Convention on Human Rights (ECHR).

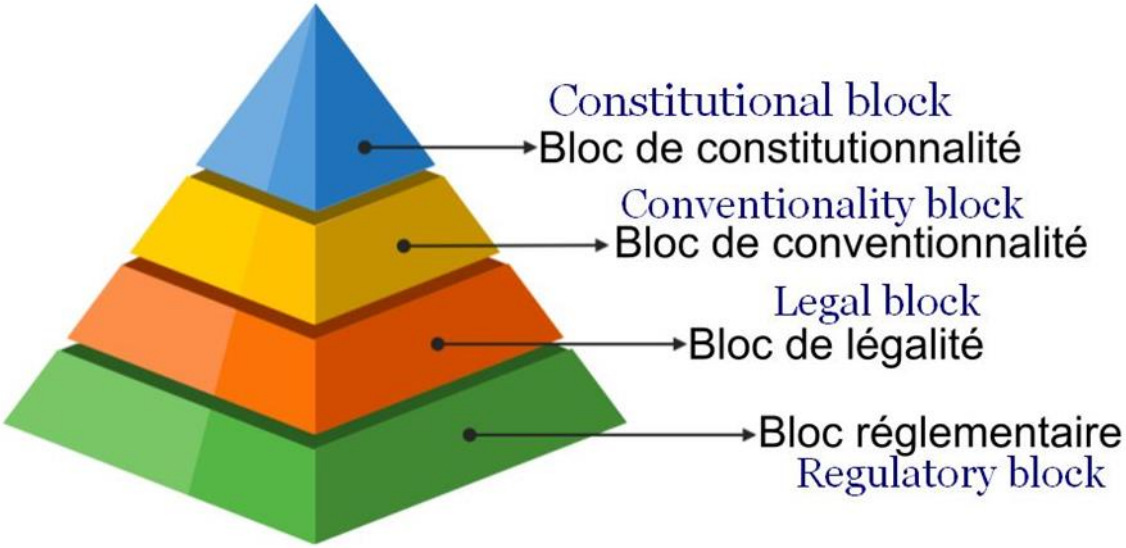


**Figure 4 The Kelsen Pyramid**

The constitution, the text that defines the various bodies that make up a state, is considered the highest standard.

**53. Examples of national applications[59].** In France, a decision of the Constitutional Council extended the constitutional song by incorporating the preamble to the 1958 Constitution[60] and the fundamental principles recognised by the laws of the Republic into the bloc de constitutionnalité. Articles 53 and 54 of the French Constitution stipulate that treaties do not enter into force until they have been ratified or approved (Article 53). If an international agreement contains a clause contrary to the Constitution, the ratification or approval of this international agreement can only be given after the Constitution has been revised. However, the decision to revise the Constitution shall be taken by the Constituent Assembly (art. 54). Under Article 55 of the Constitution, an international text that has entered into force in France

[59] https://e-justice.europa.eu/6/FR/national_legislation?ROMANIA&member=1
[60] Cons. Const. n°71-44 DC du 16 juillet 1971 DC

takes precedence over national law. In the event of a conflict, the judge will apply the international norm to the detriment of French law.

> Article 55 of the Constitution: "*Treaties or agreements duly ratified or approved shall, from the time of their publication, have an authority superior to that of the laws, subject, for each agreement or treaty, to its application by the other party*".

The Conseil d'État has ruled that "*the general principles of the Community legal order derived from the Treaty establishing the European Community have the same value as the Treaty itself*". In other words, Community law has a supra-legislative and infra-constitutional value[61].

In **Germany**, both the Federal Republic and the Länder (within the scope of their legislative powers) may conclude an international convention. A law resulting from such a convention only becomes part of national law by virtue of a national transformation law authorising ratification of the treaty. It then has the same rank as the law that transformed it. Even after their transformation into national law, international treaties can only have direct effect on citizens if their provisions are sufficiently precise and unconditionally applicable.
The general rules of universal international law are part of federal law. In the hierarchy of norms, they rank below the Federal Constitution (the Basic Law), but above all other federal laws (Art. 25) and the laws of the Länder.

> Article 25 of the Swiss Federal Constitution: *"The general rules of international law are part of federal law. They take precedence over statutes and directly create rights and obligations for the inhabitants of the federal territory".*

The supremacy of **EU law** extends to all federal and state laws, regardless of their rank. Consequently, Community law takes precedence over national constitutional law. However, the Federal Constitutional Court reserves the right to examine whether the EU had the legislative competence to enact the text in question.

Under **Austrian federal constitutional law**, generally recognised rules of international law form an integral part of federal law, and international treaties are incorporated into the

[61] *CE, 3 déc. 2001, Synd. nat . Industries Pharmaceutiques*

Austrian egal order (either by general or special transformation). The rank of international treaties in the domestic legal order is determined by their respective content.

> Article 9 of **the Federal Constitution**: *"The generally recognised rules of international law shall be regarded as an integral part of federal law.The Federation may transfer certain of its sovereign rights to international institutions and their organs by law or by a treaty approved in accordance with the procedure referred to in Article 50(1), and may subject the activities of organs of foreign states on federal territory and the activities of Austrian organs abroad to the provisions of international law".*

**Austria's accession to the European Union** on 1 January 1995 led to a comprehensive revision of the Austrian Federal Constitution. Since accession, the fundamental order underlying Austrian law is no longer determined solely by Austrian constitutional law, but also by the law of the European Union (**constitutional dualism**). It is generally accepted that **EU law takes precedence over national law** and ordinary constitutional law, but that this precedence does not extend to the fundamental principles of the Federal Constitution.

The Czech legal system is based on written law and includes statutes and other legal acts, ratified and promulgated international treaties approved by the Parliament of the Czech Republic, and the Constitutional Court, which invalidates legal acts in whole or in part. It includes all legal acts of the Czech Republic and the legal norms contained therein. The legal system also includes published international treaties whose ratification has been approved by the Parliament and by which the Czech Republic is bound. International treaties have a higher priority than other legal acts, in that if there is a difference between an international treaty and a law, the treaty applies.

The legal system of the **Czech Republic** has a hierarchical structure. At the top of the hierarchy are the Constitution and other constitutional laws, which have the greatest legal force and can be amended only by a constitutional law. Below the constitutional laws are the ordinary laws, on the basis of which implementing laws of lesser legal force are enacted. It is established that a provision of lesser legal force must always comply with a provision of greater legal force. In principle, a legal provision can only be repealed or amended by a provision of equal or greater legal force. **International treaties have a special status**. As mentioned above, they are part of the legal system and, in the event of a conflict, they take precedence over the law and, consequently, even over the constitutional laws of the Czech Republic.

> Article 10 of the Constitution: *"Published international treaties whose ratification has been approved by the Parliament and which are binding on the Czech Republic shall be part of the legal system; if the international treaty provides otherwise than the law, the international treaty shall apply".*

Since its accession to the European Union, European law has been applied in the Czech Republic under conditions similar to those in other EU member states.

The principle of the supremacy of EU law applies in the same way as in other EU member states. Under EU law, if a European standard conflicts with a standard of national law (i.e. a law, regulation or decree) of the Member State, the European standard takes precedence. This principle also applies in the case of conflict between the national standard and the primary law of the Union (i.e. the founding treaties) and between the national standard and the secondary law of the Union (regulations, directives, etc.). According to the prevailing interpretation of the law, even the fundamental legal instruments of the Member States are not excluded from the application of the principle of primacy: European law even takes precedence over the constitution or a constitutional law of a Member State.

**54.** *"International law does not have a system in which norms are ranked according to their formal source"*[62]*.* This lack of hierarchy is a problem in the context of multimodal transport. There are two approaches to regulating this aspect: the pure network system or the modified network system (2.1). In practice, multimodal operators have developed model contracts to define the conditions for this type of transport (2.2).

## 2.1 Network system

**55.** As we have seen, attempts to introduce a single liability regime have failed. As a reminder, the **uniform liability system** subjects the entire multimodal contract of carriage to the same liability rules, regardless of the modes of transport used to carry the goods from A to B. There is no distinction between cases where the loss can be located and cases where it cannot.

**56. The network liability regime** determines the liability of the multimodal contractor on the basis of the international or national unimodal liability regime applicable to the mode of

[62] J. Salmon, Dictionnaire de droit international public, Bruylant, 2001, p.547

transport to which the damage can be attributed. The purpose of the network approach is to maintain and coordinate the rules laid down by unimodal international conventions or mandatory national laws.

> For example: in France, MTC is subject to the provisions of the liability regime which is mandatory for the mode of transport involved in the damage (damage, loss, delay).

Within this approach, two proposals have been put forward: **the "pure" network system** and **the modified network system**, but the common feature of both is the distinction between cases where the "damage is localised" and cases where the "damage is not localised". As used, for example, by the CMR.

### 2.1.1 The "pure" network system

**57. The "pure" network system** does not require the drafting of a new international convention specific to multimodal transport. It is sufficient to analyse the scope of the existing regimes and to refer to them according to the time at which the damage occurs. This amounts to breaking down intermodal transport into various unimodal parts.

Under a network liability regime, the applicable liability rules depend on the identification of the particular unimodal stage at which the loss, damage or delay of the goods occurs. Thus, different liability rules apply to the different legs of the multimodal contract, as if the parties had entered into separate contracts for each leg. The application of the liability regime therefore requires the loss to be localised.

**58. If the damage occurs on a leg** for which there is an international convention or mandatory law, different liabilities apply to the different legs of the multimodal contract, as if the parties had concluded separate contracts for each of them. Thus, if damage occurs during the maritime phase of a Ro-Ro transport operation, the road carrier's liability towards his customer will be governed by the rules of maritime law. He will be able to rely on the grounds for exemption from liability provided for in favour of the carrier by the text which is mandatory for maritime transport, be it the Hague-Visby Rules or the Hamburg Rules. Similarly, in the case of rail-sea transport, the contracting rail carrier will benefit not only from the grounds for exoneration provided for in the international convention applicable to the contract of carriage by rail (COTIF and RU-CIM), but also from certain grounds for exoneration typical of maritime transport, based on the Hague-Visby Rules.

**59. By way of example**: Article 2 of the CMR Convention regulates the combined transport of road vehicles from start to finish.

Art. 2 *"1.* ***If the vehicle containing the goods is carried over a part of the journey by sea, rail, inland waterway or air without intermediate transhipment****, this Convention shall nevertheless apply to the whole of the carriage, except where the provisions of Article 14 apply. However, to the extent that* ***it is proved that the loss of or damage to the goods or the delay in delivery of the goods, occurring during the carriage by a mode of transport other than road, was not caused by any 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 mode of transport, the liability of the carrier by road shall be limited to the loss or damage sustained by the carrier by road****, the liability of the carrier by road shall be determined not by this Convention but in the manner in which the liability of the carrier by the other mode of transport would have been determined* ***if a contract of carriage had been made between the sender and the carrier by the other mode of transport solely for the carriage of the goods, in accordance with the mandatory provisions of the law governing the carriage of goods by modes of transport other than by road.*** *In the absence of such provisions, however, the liability of the carrier by road shall be governed by this Convention.*

*2. If the carrier by road is at the same time the carrier by other means of transport, his liability shall also be determined in accordance with paragraph 1, as if his functions as carrier by road and as carrier by other means of transport were exercised by two different persons".*

Article 2 provides for three elements for the qualification of a combined transport operation:

- the loading of a road vehicle onto a non-road means of transport
- to carry out part of the journey,
- without interruption of the load (i.e. there has been no voluntary transfer of the goods from one vehicle to another, or the lorry has not been emptied in order to be loaded onto the vessel), - without interruption of the load (i.e. there has been no voluntary transfer of the goods from one vehicle to another, or the lorry has not been emptied in order to be loaded onto the vessel).

The basic principle established by this article is that the international road haulier is liable for the entire journey (from end to end) in application of the provisions of the CMR. Thus, if the damage does not occur on a particular leg of the journey, the CMR applies.

**However, if the damage occurred on a non-road part of the journey (localised damage)**, the road haulier who issued the consignment note is not liable under the CMR, but under the rules specific to the mode of transport on which the damage occurred. In other words, the road carrier will be subject to a regime modelled on that of the sub-contracting (non-road) carrier.

In practice, in the case of multimodal transport (road-sea-road), if it is established that the loss, damage or delay of the goods occurred during the road leg, the court will apply the CMR to the dispute. If, on the other hand, the loss, damage or delay occurred during the sea leg, the road carrier's liability to the consignee will not be governed by the CMR but by the law applicable to the sea leg, even though the goods have not been unloaded from the vehicle.

For example, in *Thermo Engineers Ltd v Ferrymasters Ltd*[63], a heat exchanger on an open trailer from England to Copenhagen was damaged during loading onto the ship when the top of the heat exchanger struck the ship's bulkhead. As the carriage had been contracted on the basis of a ro-ro carriage within the meaning of Article 2 of the CMR, the first difficulty was to determine the beginning and end of the two legs of the carriage: which CMR Convention or the Hague Rules applied at the time of the damage.

In this case, it was established that the carriage had commenced within the meaning of the Hague Rules: in other words, when the damage occurred, the lorry load on the ship and trailer had already crossed the outer ramp and the stern line. It was therefore irrelevant that the lorry was moving on its own wheels.

> *"In view of the fact that the CMR is intended to be compatible with other international conventions, the first condition for the application of the CMR, laid down in Article 2. 1, namely that the loss, damage or delay should have occurred during carriage by a mode of transport other than road, is, as a general rule, satisfied if it is proved that the carriage by sea within the meaning of the Hague Rules commenced, as in the present case, at the relevant time when the loading of the trailer and its contents was well advanced and the trailer had already crossed the outer loading ramp at the stern and passed through the beam".*

**It was therefore established that the collision with the ship's bulkhead occurred during the loading of the ship and that such an event could only have occurred during and as a result of carriage by sea. The maritime liability regime therefore applies[64].**

[63] Thermo Ingénieurs LTD. ET Anhydro A/S c. Ferrymasters LTD. [1981] 1 Lloyd's Rep. 200

[64] Cass.com, 5 juillet 1988 ; IDIT n°7231 ; Bulletin 1988 IV n° 234 p. 161, Bulletin des Transports 1989. 449, Revue de Droit Uniforme 1998. II. p. 741

In *Und Adriyatik*, the German Federal Supreme Court followed *Thermo Engineers* and held **that where the requirements of Article 2 of the CMR are met, the Hague/Hague-Visby Rules, and not the CMR, govern the liability of road hauliers in maritime transport.**

The *Und Adriyatik* and *Thermo Engineers* judgments provide a degree of certainty. Thus, in all cases where the CMR is applicable in a multimodal transport operation, a careful analysis is required to determine which international convention is applicable in the event of damage[65].

**In a judgment of 5 July 1988, the French Cour de Cassation** had to determine the law applicable under Article 2 of the CMR to a transport operation between Sweden and France. In this case, one of the lorries involved in the carriage, loaded on deck of a car ferry without breaking bulk, was damaged during a storm. The road haulier sued for damages and sought to extricate itself from liability by relying on the "perils of the sea" exception in the Hague-Visby Rules (maritime regime), which it claimed was applicable to the dispute.

The Paris Court of Appeal[66] upheld the carrier's action. According to the court, although carriage on deck is excluded from the scope of the Hague-Visby Rules, Article 10 of the Convention nevertheless allows the parties to stipulate, by means of a paramount clause, that the carriage is subject to those rules. It concluded that the carriage was therefore subject to the maritime regime by virtue of Article 2(1) of the CMR. However, the Court of Cassation overturned the decision of the Court of Appeal and held that a consignor could not rely on a so-called "*paramount*" clause agreed between the road carrier (who was responsible for both the land and the sea carriage) and the shipowner authorising the application of the Hague-Visby Rules to the deck carriage, since the consignor had not accepted the clause and **Article 10 of the Hague Rules was not mandatory.**

> *"The Paramount clause in the bill of lading authorising the application of the Hague Rules to deck carriage is only enforceable against the consignee to the extent that he has accepted it.*
>
> *In accordance with Art. 2 par. 1 of the CMR, this Convention applies to maritime transport in the absence of mandatory provisions of maritime law.*

[65] BUNDESGERICHTSHOF, 15. décembre 2011 ; Je ZR 12/11

[66] CA Paris, 13 octobre 1986, Sté A.B. Skandia Transport c/. Sté des chaussures Jean Biotteau, Bulletin des Transports 1986. 689, Droit Maritime Français 1988 p. 101, IDIT-CMR n°41985

*The Hague-Visby Rules exclude carriage on deck from their application. Since Article 10 of the Hague Rules is not mandatory in respect of carriage on deck, the liability of the carrier in respect of such carriage must be governed by the CMR Convention."*[67]

**61.** Although the network system respects the objectives of continuity of liability, it suffers from several disadvantages. The first disadvantage of the network system is that it does not provide an answer to the question of which of the various operators involved in multimodal transport is likely to be held liable for damage that occurs only at the place of destination, i.e. non-localised damage, or for a delay accumulated in the course of the operation. The second disadvantage, however, is that the applicable liability rules governing the extent of the MTE's liability are not predictable, but depend on many factors. For example, it may depend on whether a loss can be attributed to a particular stage and mode of transport, and whether a considerable number of potentially applicable rules and/or regulations are to be considered relevant by a court or arbitral tribunal in a given situation.

| | |
|---|---|
| **Positive points** | Applies rules specific to the mode of transport concerned |
| **Negative points** | The applicable liability rules governing the extent of the ETM's liability vary according to many factors. It is not a predictable system. |

### 2.1.2 The modified network system

**62.** In order to overcome these various drawbacks, this system has undergone some reworking to become the modified network system. The idea is to focus solely on the shortcomings of the two previous systems (uniform and pure network) and to find a middle way. It is a system that is intended to be more consensual and at the same time more flexible for the parties.

**The modified network system** takes into account the advantages and disadvantages of both *the network liability system and the uniform liability system*. The consensus between the two

[67] Cass. com. (France), 5 juillet 1988, n°87-10566 : JCP 1988.IV.330 ; ETL 1990, p.221 ; BT 1989, p.449 ; RDU 1998/II, p.741 ; RTD com. 1989, p. 305, obs. B. B. ; IDIT-CMR n°41990

previous systems is that rules should be established to deal with the specific issues of door-to-door sales.

This new instrument should make it possible **to regulate situations in which no liability regime is mandatory, as well as cases of non-localised and/or gradual damage**. In these cases, it will be up to the parties to the contract to determine the amount of compensation in the absence of a mandatory regime. However, the conditions for compensation in the event of loss or damage must be favourable to the person entitled to the goods, in accordance with the various international conventions. The international conventions in force stipulate that any clause derogating from their rules is null and void if it is intended to escape or further limit the carrier's liability. Contractual freedom is therefore quite limited and only applies when it is favourable to the shipper. However, the CMR differs from other conventions in that it strictly prohibits any derogation from its provisions (Art. 41). This prohibition applies to both carriers and shippers.

More importantly, the *modified network system* generally provides that where the loss cannot be located, liability must be determined by a uniform fallback rule based on either the Hague-Visby Rules or the CMR Convention. There is a presumption of liability on the part of the ETM, which may be rebutted by proving the existence of certain grounds for exoneration (e.g. inherent vice, packaging defect, fault of the shipper, force majeure or fortuitous event, strike, lock-out, act of God). In the absence of reservations, French case law tends to apply the last carriage system.

| | |
|---|---|
| **Positive points** | Reaching a consensus that takes account of conflicting positions and interests<br><br>Provision of liability limitation schemes |
| **Negative points** | Complex in terms of applicable rules.<br><br>Does not offer all the benefits of a single system, nor does it fully address the concerns of those who favour the network system.<br><br>Does not help if the loss occurs gradually along the way. |

63. A new single international convention would help to bring much needed clarity to the multimodal industry. However, the introduction of an international convention would involve a large number of parties with conflicting and competing interests.

Although the *uniform liability regime* best meets the needs of freight interests, it has met with resistance from the transport industry because of the problem of finding a satisfactory remedy.

The current legal framework most closely resembles a *network liability system* in that it is characterised by a high degree of uncertainty. The *network liability system* is highly fragmented and complicated, making it neither a satisfactory nor a cost-effective option to replace the current legal framework.

There is an urgent need for a more harmonised international legal regime in multimodal transport. Among the options, the *modified-limited system* appears to be the approach most likely to achieve this objective. The main features of the *modified-limited system* are already widely used in standard contract forms and national rules such as the UNCTAD/ICC Rules for Multimodal Transport Documents (2.2).

## 2.2 Contractualisation

64. *"When it is impossible to adopt a standard-setting instrument such as an international convention, there has long been a tendency in international commercial law for practitioners themselves to fill the gap by creating spontaneous rules. In this field of law, and in transport law in particular, the importance of rules derived from practice (usages, customs, standard contracts or other lex mercatoria) has long been recognised[68]".*

[68] Valérie Bailly-Hascoët et Cécile Legros, Corridors de transport et construction du statut juridique de l'entrepreneur de transport multimodal, ; LES CORRIDORS DE TRANSPORT, Sous la direction de Yann ALIX © Editions EMS, 2012

### 2.2.1 UNCTAD/ITC rules

**65.** In the absence of applicable conventions, certain international organisations have proposed rules to regulate the liability of the multimodal transport operator: for example, the UNCTAD/ICC rules [69] - which are purely contractual - applicable to multimodal transport documents, which are incorporated in particular in the Fiata Bill of Lading. An amendment is currently under discussion[70].

Adopted on 11 June 1991, the UNCTAD/ICC Rules replaced the "Uniform Rules for a Combined Transport Document" published by the ICC in 1975. The UNCTAD/ICC Rules apply to multimodal transport documents and derive their force from the will of the parties who decide to refer to them. They do not have binding legal force. **They are a purely contractual instrument binding the parties who agree to them.** They are a contractual instrument[71] which users are free to accept or not[72]. These rules apply when they are incorporated into the contract of carriage.

> Rule 1 *"These Rules shall apply* ***whenever they are incorporated in any manner, whether in writing, orally or otherwise, into a contract of carriage*** *by reference to the "UNCTAD/ICC Rules for Multimodal Transport Documents", whether the contract of carriage is unimodal or multimodal and whether or not a document has been made out.*
>
> ***Whenever these Rules are invoked, the parties agree that they shall supersede and cancel any additional clauses in the multimodal transport contract which are inconsistent with them, except to the extent that they increase the liability or obligations of the multimodal transport contractor****".*

They replace and supersede any contrary contractual terms, except where they would increase the liability or obligations of the MTA. In other words, the UNCTAD/ITC rules allow only ad favourem derogations from their provisions.

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[69] (French version) https://unctad.org/fr/system/files/official-document/tradewp4inf.117_corr.1_fr.pdf

[70] A/CN.9/1134 - Report of Working Group VI (Negotiable Multimodal Transport Documents) on the work of its forty-second session, 8-12 May 2023, New York

[71] Pr. Pierre BONASIES , « Le domaine d'application des règles CNUCED/CCI », in Le transport multimodal transmaritime et le transaérien, IMTM, 1994, 115 s.

[72] *Considérations sur les nouvelles règles CNUCED/CCI applicables aux documents de transport multimodal, Eric A. Caprioli, https://www.caprioli-avocats.com*

The hierarchy of rules is therefore as follows: Mandatory rules (conventional or national) > UNCTAD/ITC rules > treaty provisions (unless more favourable)[73].

**66.** The UNCTAD/ITC rules **establish the principle of the MTC's liability** for loss, damage or delay. Four rules are devoted to this liability (4, 5, 6 and 7). The liability regime covers all transport operations, from taking over to delivery (4.1). The UNCTAD/ITC rules subject the MTC to a **presumption of fault or negligence** (5.1), from which it is exonerated by proving that it was not at fault or negligent.

There are **two grounds for exoneration** borrowed from maritime or river transport: nautical fault and fire without fault (5.4). As a reminder, nautical fault is the fault or negligence of the master, seaman, pilot or agent of the carrier in the navigation or management of the vessel. However, the MTC's liability will also be reduced if it can prove that it was not at fault or negligent.

Receipt of the goods by the consignee gives rise to a presumption of conformity. In the event of damage, the consignee must give the contractor **a reasoned "notice"** of any apparent damage at the time of delivery **or**, if the damage is not apparent, within six days of delivery.

If the consignor has not declared the nature and value of the goods prior to their acceptance by MTC and has not entered this information in the transport document, MTC may limit the amount of damages it is liable to pay to an amount exceeding the equivalent of 555.57 SDR per package or unit or 2 SDR per kilogram of gross weight of the lost or damaged goods, whichever is the greater (6.1). MTC shall not be entitled to any limitation of liability if it is proved that the loss, damage or delay in delivery was caused by an act or omission of MTC either with intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result (7).

Rules 5.2 and 5.3 deal with **delay**. A delay in delivery occurs when the goods have not been delivered by the agreed date or, in the absence of an agreed date, "*within such time as would be reasonable for a diligent DMS having regard to the circumstances of the case*". And if the goods have still not been delivered within 90 days of the expiry of the period thus fixed, the person entitled to the goods may, in the absence of proof to the contrary, consider them lost

[73] See V. Bailly-Hacoët and Cécile Legros, op. cit.

(5.3). In the event of delay, MTC's liability is limited to an amount not exceeding the equivalent of the freight payable for multimodal transport under the multimodal transport contract (6.5).

MTC's liability is subject to a limitation period of nine months from the date of delivery of the goods, or the date on which the goods should have been delivered, or the date on which the failure to deliver gives the consignee the right to treat the goods as lost (90 days)[74].

**67.** Freight forwarders who are members of FIATA refer to the UNCTAD/ITC rules in their General Conditions of the FIATA MULTIMODAL TRANSPORT BILL OF LADING (FIATA FBL). But **what about the conflict between these rules, which have only contractual value, and national law, which is generally mandatory**? The courts can annul them if they are unenforceable or incompatible with national law.

The French courts tend to apply to the issuer of the FIATA BL the system of forwarder's liability as set out in the French Commercial Code. Thus, even if the UNCTAD/ICC Rules and the General Conditions of the FIATA FBL subject the MTC to a presumption of fault or negligence, the French judge who finds that the MTC has acted as a freight forwarder and that the applicable law[75] is French law, will subject the MTC to a presumption of liability in accordance with Articles L. 133-4 to L. 133-6 of the French Commercial Code and not to a presumption of fault. Similarly, the French MTC cannot be sure that the limitation period applied by the court will be the nine-month period provided for in the UNCTAD/ICC Rules and set out in its General Conditions, and not the one-year period provided for in Article L.133-6 of the French Commercial Code in respect of actions brought against the forwarder. French courts tend to refuse to apply the FIATA limitation rules in favour of French law[76].

However, the court will apply the clause derogating from Article L.136-6 of the French Commercial Code if it is proved that there has been a long-standing and stable flow of business between the freight forwarder and the principal. Therefore, the principal cannot validly claim that he was not aware of the forwarder's general conditions (which were printed on the back of the FIATA bill of lading)[77].

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[74] Rule 10

[75] Déterminée en fonction des règles de conflit de lois

[76] CA Paris 11 January 2012, RG n°09/11105, IDIT n°23680, annulling the 9-month limitation period provided for in the general conditions printed on the back of the FIATA bill of lading; CA Paris 31 October 1991, RG n°90/2120 and 91/12982, applying the annual limitation period to the shipper's action against the ETM; CA Rouen 14 May 1991, RG n°672/90, annulling the 6-month limitation period provided for in the bill of lading issued by the ETM.

[77] CA Paris, 7 November 2012, RG n°10-19476, BTL 2012 p.693, IDIT n°23881

### 2.2.2 Contractual conditions drawn up by multimodal transport operators.

**68.** The gap left by the absence of an international instrument adapted to multimodal transport seems to be filled by the general conditions drawn up by the ETMs. These are generally based on those drawn up by the professional organisations to which the ETMs belong (e.g. Fédération des Entreprises de Transport et de Logistique de France (TLF); Allgemeine Deutsche Spediteurbedingungen (ADSp); British International Freight Association (Standard Trading Conditions)). These general conditions establish a system of protection for ETMs, with provisions allowing them to be exempted from their civil liability only in the event of damage to property (personal injury is excluded). However, the question of the enforceability of these general conditions against the co-contractor remains an important issue[78].

Faced with the failure of the conventional method, practitioners have developed rules to suit their needs. However, these rules do not have the same legal nature as standard-setting instruments, which have legal force. The instrument developed by practice **has only contractual value** and will only be applicable on the basis of the will of the parties to the multimodal transport contract, who will have expressed their choice by exercising an option in favour of the optional instrument. As such, it will take a back seat to mandatory rules (international and national law).

[78] CA Douai, 2nd ch. of 5 April 2011, RG N°10/00060, IDIT n°23505, declaring the general conditions of the Fédération des Entreprises de Transport et de Logistique de France (TLF) unenforceable; CA Orléans, 31 January 2008, RG N°06/00431, IDIT n°23087, declaring the general conditions of the Fédération des Entreprises de Transport et de Logistique de France (ADSp) unenforceable.

# CONCLUSIONS

**69.** Multimodal transport issues are more topical than ever. Since 2019, the European Green Pact, under which the EU has defined its "new growth strategy", is designed to reduce greenhouse gas emissions "while creating jobs and improving our quality of life". The main objective of the Green Pact is for Europe to become climate neutral by 2050. The transport sector, which accounts for 5% of the EU's GDP and employs more than 10 million people, is fundamental to European businesses and global supply chains. Today, greenhouse gas emissions from transport account for around 25% of total EU emissions, and this share has increased in recent years. In 2020, more than 50% of freight was transported by road. This mode of transport is a major contributor to greenhouse gas emissions. This is why the Commission is encouraging the development of multimodal transport.

Multimodal transport is not new, but it really took off with the development of the use of containers, initiated at the end of the 1950s by Malcolm McLean. The development of standardised containers meant that goods could be transported over long distances without having to be handled, and could be moved easily from one mode of transport to another.

**The 1980 United Nations Convention on International Multimodal Transport of Goods**, which we will discuss later, defines international multimodal transport as the carriage of goods by at least two different modes of transport, from a place in one country where the goods are taken over by the multimodal transport contractor to the place designated for delivery in a different country. The Convention defines a multimodal transport contractor, or MTC, as "*any person who concludes a contract of multimodal transport on his own account or through a third party who is not acting as a servant or agent of the consignor or of the carriers participating in the multimodal transport operations and who assumes responsibility for the performance of the contract*". He may be a sea, air or land carrier who also decides to take charge of organising end-to-end transport, or he may simply be a transport organiser. In France, by definition, the freight forwarder is responsible for organising end-to-end transport, while guaranteeing the safe arrival of the goods. But the fact remains that this technique, however perfected, is not universal.

**70.** When goods transit using different modes of transport and cross several countries, the question that arises is which liability regime or regimes will apply. At present, none of the existing tools provides for a uniform liability regime. The rules governing the liability of multimodal transport companies are set out in a patchwork of international conventions on the carriage of goods by sea, air and road. This report presents an overview of the regulations in force and the legal issues they raise, and then looks at the solutions used by the players to achieve a more harmonised multimodal industry.

With the exception of certain articles that do not answer all the questions raised, none of the existing tools provides for a uniform liability regime. There is, however, the United Nations

Convention on International Multimodal Transport of Goods of 1980, which we will deal with, but it never came into force.
In maritime transport, the Rotterdam Rules were initially intended to be a convention based on the door-to-door principle, regardless of the mode of pre- or post-carriage used. The drafters of the Convention wanted to bridge the multimodal gap in international conventions in the face of the increase in door-to-door container trade, which was making multimodal transport contracts the norm. However, the Rotterdam Rules are not a true multimodal convention. If the damage (loss, damage, delay) or its cause occurs only during the maritime phase of the carriage, the Rotterdam Rules will apply. On the other hand, if the damage or its cause occurs (even partially) before or after the maritime phase, the provisions of the Rotterdam Rules relating to liability, the limitation of liability and the time limit for taking legal action will have to be set aside in favour of those provided for in the unimodal international conventions that are imperatively applicable, namely the CMR for road transport, the COTIF for rail transport and the CMNI for inland waterway transport. This is the consecration of the "modified network liability system", which consists of applying the regulations identified according to the modal phase during which the damage occurred.
Article 2 of the CMR for road transport governs the end-to-end combined transport of road vehicles. This includes, for example, cross-Channel transport by Eurotunnel or roll on/roll off ferries. However, the CMR does not cover combined transport involving a break in load, such as the unloading of a container from a road vehicle to be loaded onto a ship. In rail transport, COTIF governs the end-to-end carriage of wagons, containers or swap bodies by "road-rail" (piggyback or combined rail-road transport), "sea-rail" and "inland waterway-rail". The amendment of this Convention by the Vilnius Protocol, which came into force in 2006, extended its scope.

**71.** In fact, to govern multimodal aspects, both COTIF and CMR apply the "system of network responsibility", as does the TMI Convention. The idea for the first convention adopted on multimodal transport arose from shippers' demand for mandatory rules and compensation ceilings that would apply uniformly to all phases of a multimodal transport operation. Unfortunately, the United Nations Convention on International Multimodal Transport of Goods, signed in Geneva on 24 May 1980 (known as the "TMI 1980 Convention"), never came into force due to a lack of ratifications.
In terms of liability, this convention would make the MTC responsible for the end-to-end carriage and partially standardises its liability by introducing a "modified network" system, which is a compromise between the uniform liability system and the network liability system. The uniform system establishes uniform liability for the operator, regardless of where the damage occurs, whether or not that location is determinable. The idea of the network system is that the liability of the multimodal transport contractor is not assessed as such, but will be

assimilated to that which would have fallen to the performing carrier on the route of the journey during which the damage occurred. Under the "modified network" regime provided for in the 1980 CMI Convention, certain rules apply regardless of the unimodal transport stage during which the loss, damage or delay of the goods occurs. However, what complicates matters is the application of other rules that depend on the unimodal stage of carriage during which the loss, damage or delay occurs. The influence of the network system only really manifests itself in the compensation ceilings applicable in the case of localised damage: the compensation ceiling provided for by the Convention or the national law applicable to the mode of transport concerned must be applied where this ceiling is higher than those provided for by the Convention. If the place of the damage cannot be determined, the compensation ceilings in the CMI Convention must be applied. (alternative or fallback rules). Despite its advantages, only six States have ratified the Convention. One of the reasons that has prevented this Convention from coming into force is the difference between the principle of liability of the MTE laid down by this Convention and that laid down by several of the unimodal conventions with regard to carriers, particularly in maritime transport where the liability regime in place was unfavourable to the MTC.

**72.** Part 1 of this report provides an overview of the international conventions applicable to multimodal transport. The second part examines some possible solutions to the legal problems raised. As we have seen, the current legal framework is fragmented, which complicates the task of the lawyer. It comprises a complex network of international unimodal transport conventions designed to regulate the carriage of goods by sea, air and road respectively. The consequence of having a network of unimodal transport conventions is that there are several international regulations that can apply without there being any hierarchy of norms in international law. What we do know - and in summary - is that in France, as in many other countries, these international conventions must comply with the Constitution before they can be ratified and published. Once they have entered into force in national law, they take precedence over law in the event of conflicts of law.

The multiplicity of international conventions on multimodal transport therefore raises the question of the compatibility of treaties in the event of a conflict between two conventions.

To govern the multimodal aspects of transport, two conventions (CMR and COTIF) apply the "network liability system". As mentioned above, the network liability system determines the liability of the multimodal contractor on the basis of the international or national unimodal liability rules applicable to the stage of transport to which the damage can be attributed. In France, the operator is subject to the provisions of the liability regime that is imperatively applicable to the mode of transport concerned by the damage (damage, loss, delay).

Where the place of the damage is not localized, certain legislations impose on the ETM a presumption of liability similar to that imposed on the carrier, since they are based either on

the Hague-Visby Rules or on the CMR Convention, a presumption from which the ETM is exonerated by proving the existence of certain grounds for exoneration (e.g. inherent vice, packaging defect, fault of the shipper, force majeure or fortuitous event, strike, lock-out, act of God). Where there are no reservations, French case law will tend to apply the last carriage regime.

On the other hand, if the damage is located on a section for which there is an international convention or a mandatory law providing for a different liability regime, the majority of these legislations adopt either the "network" system or the "modified network" system, providing for the application of all or only part (compensation ceilings) of the regime specific to the mode of transport concerned (e.g. Germany and the Netherlands).

Different liabilities apply to the different sections of the multimodal transport contract as if the parties had drawn up separate contracts for each of them. Thus, when damage occurs during the maritime phase of a roll-on/roll-off transport operation, the road haulier's liability to his customer will be governed by the rules of maritime law. He will be able to invoke the grounds for exoneration from liability provided for in favour of the maritime carrier by the text imperatively applicable to maritime transport, whether the Hague-Visby Rules or the Hamburg Rules. Similarly, for rail-sea transport, the contracting rail carrier benefits not only from the grounds for exoneration provided for in the international convention applicable to the contract of carriage by rail (COTIF and RU-CIM), but also from certain typically maritime grounds for exoneration based on the Hague-Visby Rules.

In the absence of applicable conventions, certain international organisations have in turn proposed rules designed to organise the liability of the multimodal transport contractor: these are the UNCTAD/ICC rules - which are purely contractual - applicable to multimodal transport documents and appear in particular in the Fiata bill of lading. An amendment is currently under discussion. Adopted on 11 June 1991, the UNCTAD/ITC rules applicable to multimodal transport documents derive their force from the will of the parties who decide to refer to them. They have no binding legal force. They are a purely contractual instrument which binds the parties who agree to them. They constitute a contractual instrument to which users are free to adhere or not. These rules apply when they are incorporated into the contract of carriage. They replace and supersede any contractual clauses to the contrary except where they increase the liability or obligations of the MTC. They extend to the entire transport operation, from takeover to delivery. They are therefore not mandatory rules. In other words, these rules are set aside if they appear to be contrary to public policy.

The UNCTAD/ICC rules subject the MTC to a presumption of fault or negligence, from which it is relieved by proving that it has not committed any fault or negligence. There are, however, two grounds for exoneration borrowed from maritime or river transport: nautical fault and fire not at fault. As a reminder, nautical fault is the fault or negligence of the master, sailor, pilot or agent of the goods carrier in the navigation or administration of the ship. Receipt of

the goods by the consignee constitutes a presumption of conformity. In the event of damage, the consignee must give the contractor a reasoned "notice" of the apparent damage at the time of delivery, or within six days of delivery if the damage is not apparent. FIATA member freight forwarders refer to the UNCTAD/ICC rules in their FIATA MULTIMODAL TRANSPORT BILL OF LADING (FIATA FBL) general conditions.

73. However, what about the interference between these rules, which only have contractual value, and domestic law, which is generally mandatory?

Although instruments have been developed in practice, multimodal transport still suffers from the absence of an international convention offering the legal certainty needed by the various players in multimodal transport. There are currently no uniform rules, so unimodal conventions and national laws apply, with all the risks of conflict that can be imagined. National laws on multimodal transport vary widely. This lack of a uniform system undoubtedly explains the reluctance of transport operators to enter into such multimodal agreements, which are based on purely contractual provisions that offer no legal certainty. They are calling for mandatory rules and compensation ceilings that would apply uniformly to all phases of a multimodal transport operation.

At a time of global warming, when the European Union is advocating the greening of transport, perhaps it is time to consider a new text. The Commission, via the Green Pact and Fit 55, is already providing the impetus by proposing amendments to some of its texts - the regulation on the trans-European transport network and the directive on combined transport, for example - to move towards more multimodal transport. In fact, the Commission recently launched a consultation on amending Directive 92/106/EEC on combined transport. This directive encourages a shift from road freight to lower-emission modes of transport such as river and sea transport or rail. However, it does not settle questions of liability, but does establish a framework of support measures for this mode of transport. The question arises as to whether the European Union is going to address multimodal liability issues. Or will this question be answered at global level?

# ANNEXES

# Annex 1:

## European market rules



# I - INLAND NAVIGATION

## 1 Navigation rules for the Rhine and the Danube

### 1.1Rhine

Navigation on the Rhine is governed, on the one hand, by the Revised Convention for Rhine Navigation, signed in Mannheim on 17 October 1868 and amended in 1963, and by the regulations issued for its application by the CCNR (Central Commission for Rhine Navigation) and, on the other hand, by the 'local' law of 15 June 1895 on private law relationships in inland navigation (*Binnenschiffahrtsgesetz*)[79] and local legislation on civil liability in inland navigation.

France, Switzerland, Germany, Belgium and the Netherlands are currently members of the CCNR.

At the end of 2015, at the request of the European Commission, the CCNR set up the Committee for the Elaboration of Standards in Inland Navigation (CESNI), which brings together all the Member States of the European Union and Switzerland in order to draw up uniform regulations applicable on the Rhine and on the other inland waterways of the Union in the field of technical requirements, professional qualifications and information technologies.

The CCNR is traditionally active in four regulatory areas

- Regulation of **river traffic on the Rhine**: these are the navigation police regulations/road traffic regulations. The navigation regulations are drawn up by the Police Regulations Committee (RPR)[80] , which regulates the signposting of vessels and pushed convoys, the highway code, the passing, overtaking and parking of vessels, the signposting of the waterway, the dimensions of vessels and the protection of the water. Compliance with these regulations is monitored by the river police and water police services of the States bordering the Rhine.
- Regulation on the **technical requirements to** be met by vessels navigating on the Rhine. All vessels navigating on the Rhine must hold a certificate of competency, which is issued after the vessel has been inspected by an inspection commission. The inspection regulations lay down the rules according to which the inspection committees issue the certificates.

  The Rhine Vessel Inspection Regulations, which are legally applicable only on the Rhine, have become the benchmark technical regulations in Europe for the construction of new vessels, whether intended for use on the Rhine or

[79] German inland navigation law was radically changed by the Transport Law Reform Act (TRG) of 25 June 1998, which brought German inland navigation law into line with that of other modes of transport. Transport on the German part of the Rhine is now governed by the German Commercial Code (HGB).

[80] RHEINSCHIFFFAHRTSPOLIZEIVERORDNUNG

elsewhere, because of their high standards, which take account of the latest state of the art. These have been taken over by Directive (EU) 2016/1629[81], which has achieved full harmonisation between the technical specifications for inland waterway vessels and the Rhine specifications (for zone 3 of the major waterways).

On the basis of this equivalence, the CCNR has recognised the validity of Community certificates on the Rhine (Protocol 2007-II-21)[82], with Rhine certificates also being recognised on all EU waterways. From now on, the Rhine and EU regulations will evolve in a harmonised manner so as to remain identical. This harmonisation of CCNR and EU regulations is embodied in the European Standard for Technical Requirements for Inland Navigation Vessels (ES-TRIN).

- rules applicable to **personnel performing nautical functions** on Rhine vessels: rules relating to crews and personnel.
- Regulations for the **transport of dangerous goods** on the Rhine: Regulations for the transport of dangerous goods by inland waterways. The applicable regulation is the European Agreement concerning the International Carriage of Dangerous Goods by Inland Waterways (ADN).

### 1.2 Danube

Navigation on the Danube is governed by the Belgrade Convention of 18 August 1948, which today links the "Danube States", or more simply the countries bordering this Central European river[83]. The initial regime was unified, but under the direction of the Soviet Union and Comecon, excluding non-Communist states, even those involved in navigation on the Danube: Austria and Germany, and in general all the Western powers. The Danube Commission was merely an instrument with a limited role in the hands of Soviet power.

Today, the Danube system is open to new members and a revision of its statutes is envisaged. The integration of most of its member states into the European Union is

[81] See below
[82] Protocol 2007-II-21

[83] *V. H. Bokor-Szegö, La Convention de Belgrade et le régime du Danube: AFDI 1962, p. 192.*

profoundly changing the way it operates. But the Danube is still a river in the making: traffic flows need to be reconfigured, fleets renewed, the fairway developed, infrastructures modernised and the regulatory framework redefined.

Since then, the development of the European Community has led to the **unification of** the Rhine and Danube regulations. The two Commissions agreed to adopt the Rhine regulations and make them applicable at European level. The directive adopted in 2016 therefore aligns the technical requirements for vessels on major waterways with the rules applicable on the Rhine. These are the rules that apply to the Member States of the Community and therefore also to most of the Danube countries that have since become members of the European Union. As a result, the same rules now apply on the Rhine and the Danube[84] . The same procedure will apply to the regulation of dangerous goods (ADN) when a directive on this subject is adopted in 2009.

## 2. European market rules

### 2.1 Transport activity

- **Conditions for admission to the profession of inland waterway carrier**

The conditions governing admission to the occupation of inland waterway carrier were harmonised at European level by Directive 87/540/EEC of 9 November 1987 on admission to the occupation of inland waterway haulage operator in national transport operations and the mutual recognition of diplomas, certificates and other evidence of formal qualifications.

The transport of goods by inland waterway is considered to be the activity of any natural person or company that carries out the transport of goods on behalf of others by means of an inland waterway vessel, even if this activity is only carried out occasionally.

The Directive requires **professional competence**, but leaves it to the Member States to decide on the conditions of financial standing and good repute.

[84] Although on the Rhine they are known as the Rhine Vessel Inspection Rules and on the Danube as the Community Rules (implementing the Directive).

Professional competence consists of possessing the necessary knowledge of the subjects referred to in the Annex to the Directive, acquired either through training or practical experience or a combination of both. The Member States may exempt holders of certain diplomas and issue them with an attestation of competence.

- **The crew**

Directive (EU) 2017/2397 of 12 December 2017 introduces a harmonised system of **certification and recognition of professional qualifications for crews of vessels** operating on inland waterways. It allows certificate holders to operate anywhere in the EU. The Rhine is included, but national waterways (with no link to the navigable network of another Member State) are not.

This certification system applies to all deck crew and liquefied natural gas experts.

The directive stipulates that the following must hold an EU certificate of qualification: crew members, persons qualified to take action in the event of an emergency on board passenger ships and those involved in the refuelling of ships running on liquefied natural gas.

Boatmasters must also obtain special authorisations to navigate on sections of waterways presenting specific risks, to navigate on waterways of a maritime nature, to navigate by radar, to drive ships propelled by liquefied natural gas or to drive large convoys.

The aim of Directive (EU) 2017/2397 of 12 December 2017 is to enable automatic recognition of the certificates of all crew members with a role in the operation of vessels (and no longer just boat masters), including on the Rhine.

Professional qualifications certified in accordance with this directive will have to be recognised by the Member States. Consequently, holders of these qualifications will be able to practise their profession on all the Union's inland waterways.

Member States will be able to issue certificates of qualification only to persons who possess the minimum levels of competence, age, medical fitness and sailing time required to obtain a specific qualification.

To ensure mutual recognition of qualifications, the Directive specifies that qualification certificates must be based on the skills required to operate the buildings. Member States will have to verify, by means of an appropriate assessment, that the persons to whom a qualification certificate is issued possess the minimum levels of competence required. This assessment could take the form of an administrative examination or be integrated

into approved training programmes, carried out in accordance with common standards, in order to ensure a minimum level of competence comparable in all Member States for the different qualifications.

In order to ensure its implementation under uniform conditions, Directive (EU) 2017/2397 provides for the establishment of models for the issue of Union qualification certificates, which are set out in the Annex to Implementing Regulation 2020/182 of 14 January 2020.

Directive 2014/112/EU implements the European Agreement which lays down **the rules governing working time for mobile workers on European inland waterways** throughout the EU, meaning that Directive 2003/88/EC, the EU Working Time Directive, does not apply to this sector. These rules include the following points.
Working time corresponds to an 8-hour day. It must not exceed

- an average of 48 hours per week over a 12-month period;
- 2 304 hours over 48 weeks ;
- 14 hours per 24-hour period ;
- 84 hours per 7-day period ;
- an average of 72 hours per week over a 4-month period, where the duty roster provides for more working days than days off ;
- 31 consecutive days.

Rest periods must be sufficient to guarantee workers' health and safety; they must not be less than 10 hours per 24-hour period, including at least 6 hours of uninterrupted rest, nor less than 84 hours per 7-day period. Breaks must be granted if working time exceeds 6 hours per day.

Night work is limited to 7 hours and a maximum of 42 hours per 7-day period.

Every employee is entitled to at least 4 weeks' paid annual leave.

## 2.1 Technical requirements for inland waterway vessels

In the transport sector, competition rules stem from a regulation dated 19 July 1968. An instrument with a very broad scope (legal and material operations of carriers, their auxiliaries - freight forwarders, brokers or travel agents - and relations with users, customers and suppliers), this regulation was finally codified in 2009, after a growing number of substantial amendments. We now refer to the provisions of Regulation (EC) No 169/2009 applying rules of competition to transport by rail, road and inland waterway.

This rule establishing equal conditions of competition between boatmasters established in different Member States also involved harmonising the technical standards that each of them imposed - for safety purposes - on boats registered under their own legislation.

- Directive (EU) 2016/1629 lays down **technical requirements** for inland waterway vessels to ensure safe navigation. These requirements are listed in an annex and classified into zones 1, 2, 3 or 4, in addition to zone R (special regime of the Revised Convention for the Navigation of the Rhine). They do not apply to ferries, military vessels and most seagoing vessels, including tugs and pusher craft, which may only be operated occasionally in inland waters.

Article 3 provides a list of definitions for the specific purposes of the Directive. In this respect, it seems appropriate to look more closely at the definition of "linked waterways", since the obligation or lack of full implementation of the Directive depends precisely on the existence or absence of a link between the waterways of one Member State and the waterways of another Member State.

**"linked inland waterways"** means the waterways of a Member State linked, by inland waterways which may be used under national or international law by vessels falling within the scope of this Directive, to the inland waterways of another Member State. In analysing this definition, it therefore appears that the presence of a connecting waterway between the waterways of one Member State and the waterways of another Member State is not in itself sufficient to legally qualify the waterways as "linked waterways" within the meaning of the Directive, since the link between them must necessarily consist of a waterway which can be used under national or international law by vessels falling within the scope of this Directive.

**"inland waterway vessel" means** a vessel intended exclusively or mainly for navigation on inland waterways. It should be noted that the adverb "mainly" indicates that an inland waterway vessel can also navigate in coastal maritime waters, i.e. it can also carry out river-sea transport.

This particular type of navigation may be governed by Article 23 "modified technical requirements for certain zones" of this Directive, under which Member States may, where appropriate, subject to the requirements of the Revised Convention for Rhine Navigation, adopt technical requirements in addition to those referred to in Annexes II and V for vessels navigating on the waterways of zones 1 and 2 located on their territory.

Created in 2015 by the Central Commission for Navigation on the Rhine, the **European Committee for the Elaboration of Standards for Inland Navigation**

**("CESNI")** will speed up the development of harmonised, modern and clear regulations for waterway users.

The creation of this new working body is part of the CCNR's desire, shared with the European Union, to strengthen governance at European level, particularly in the regulatory field of inland navigation.

This committee brings together experts from the Member States of the European Union and the CCNR, as well as representatives of international organisations involved in inland navigation. Its aim is to simplify decision-making procedures in the field of inland navigation regulations, so that all institutional partners and stakeholders can benefit from the CCNR's experience.

The mission of the European Committee for the Elaboration of Standards for Inland Navigation is, in particular :

- **to adopt technical standards** in various fields, in particular with regard to ships, information technology and crews, to which the respective regulations at European and international level, in particular those of the European Union and the CCNR, refer with a view to their application ;
- **to deliberate on the uniform interpretation and application of standards**, on methods of application and implementation of related procedures, on procedures for the exchange of information and on control mechanisms between Member States;
- **decide on exemptions and equivalences to technical requirements** for a given building;
- **to deliberate on priority issues concerning navigation safety, environmental protection and other areas of inland navigation.**

### ➢ Special case of dangerous goods

Transporting dangerous goods by water carries a considerable risk of accident. Measures must therefore be taken to ensure that such transport takes place under the best possible safety conditions. To this end, in 1999 the Commission recommended the approximation of the ADN (European Agreement concerning the Carriage of Dangerous Goods by Inland Waterways) on the basis of the ADNR applicable on the Rhine. Taking advantage of the merger of the specific "dangerous goods applicable to road and rail transport" directives, and the introduction of safety advisers, the EU has introduced into the same text the provisions relating to the transport of dangerous goods by inland

waterway[85] . We now have a single text setting out uniform rules for the transport of dangerous goods, whatever the mode of transport used (road, rail or inland waterway).

Directive 2008/68/EC requires compliance with the regulations annexed to the ADN, as applicable from 1 January 2019. This is the European Agreement concerning the International Carriage of Dangerous Goods by Inland Waterways ("ADN 2019") adopted under the aegis of the United Nations Economic Commission for Europe (UNECE) and the Central Commission for the Navigation of the Rhine (CCNR).

The ADN has replaced the ADNR for the transport of dangerous goods on the Rhine since 2011.

**A transport document[86]** for the transport of dangerous goods is required on board.

All the information that must appear on this document can be included in the document that formalises the river transport contract (consignment note or bill of lading).

All documents must be on board in a language that the captain can read and understand.

The use of electronic data processing (EDP) or electronic data interchange (EDI) techniques to supplement or replace paper documentation is authorised, provided that the processes used for the capture, storage and processing of electronic data meet the legal requirements regarding evidential value and availability of data during transport in a manner at least equivalent to that of a paper document (ADN, art. 5.4.0.2).

When information relating to the carriage of dangerous goods is provided to the carrier by computer or EDI techniques, the consignor must be able to provide the carrier with the information in the form of a paper document (ADN, Art. 5.4.0.3).

This provision, which requires the shipper to be able to provide the carrier with information on paper, should encourage shippers to do so from the outset.

**Data to be included in the transport document by the principal** :

[85] Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods

[86] Also known as the Dangerous Goods Certificate (DGC).

- UN number, preceded by the letters "UN" or substance identification number
- Shipping name
- Labelling model numbers

Ex: "UN 1098 ALLYL ALCOHOL, 6.1 (3), I" or "UN 1098, ALLYL ALCOHOL, 6.1, (3), PG I".

- Where applicable, the packaging group allocated to the item
- Number and description of packages
- Sender's name and address
- Name and address of addressee(s)
- Declaration concerning any measures to be taken by the carrier (ADN, Article 5.4.1.2.5.2.), to be drawn up in the languages deemed necessary by the carrier or the authorities concerned. :
    - Additional requirements for the loading, stowage, carriage, handling and unloading of the package, overpack or container ;
    - Restrictions concerning the mode of transport or the vehicle or wagon and any necessary routing instructions;
    - Emergency provisions adapted to the consignment.

Additional information or declarations are required depending on the type of dangerous goods and their class.

E.g.: if the transport is part of a transport chain including sea, road, rail or air transport, the words "Transport in accordance with 1.1.4.2.1. must appear.

If the **carriage of dangerous goods in a container** precedes a sea voyage, a container stuffing certificate complying with section 5.4.2 of the IMDG Code must be supplied with the transport document.

The functions of the transport document required in 5.4.1 and the container stuffing certificate may be combined in a single document.

# II. ROAD TRANSPORT

## 2.1. Access to the profession

Access to the profession of road transport operator is governed by Regulation (EC) No 1071/2009 of 21 October 2009, supplemented by two other regulations of the same date, one on access to the goods transport market and the other on access to the passenger transport market. The regulation on freight transport was amended by the Mobility package in July 2020.

Taken together, these three regulations essentially provide for **compulsory training** to manage transport activities, a controllable definition of cabotage and mechanisms for applying certain penalties across borders between Member States. For example, any company wishing to **exercise the profession must prove that it has a real and not fictitious establishment in a Member State and must appoint a transport manager who meets the conditions of good repute and professional competence.** To this end, the transport manager must undergo 140 hours of training and pass an examination. If serious offences are committed under his responsibility, he will be disqualified and banned from managing transport activities throughout the EU for 2 years.

Regulation (EC) No 1071/2009 also improves the monitoring of companies and introduces an electronic register of companies in each Member State, which must be interconnected at European level.

- **Professional competence**

Professional competence means that the transport manager must have knowledge in the areas expressly listed in Regulation 1071/2009, namely

- civil law, commercial law, employment law and tax law

- commercial and financial management of the company

- market access

- technical standards and operations ;

- road safety ;

- for international transport: the provisions of national and European legislation and relevant international conventions and agreements, customs practices and formalities, and the main rules governing traffic in the Member States.

Professional competence is acquired by passing an examination.

- **Financial capacity**

A transport undertaking must at all times have the **necessary means to meet its financial obligations** (article 7). To assess this capacity, the competent authority takes into account the company's certified annual accounts, which show that it has equity capital of at least €9,000 for a single vehicle and €5,000 for each additional vehicle with a

laden mass of more than 3.5 tonnes, or €900 if the mass is between 2.5 and 3.5 tonnes. If the company does not operate any vehicles over 3.5 tonnes, the amount is reduced to €1,800 for the first vehicle between 2.5 and 3.5 tonnes.

The competent authority may accept or even require a bank guarantee or insurance certificate from one or more banks or insurance companies acting as joint guarantor for the carrier in order to prove the required financial capacity.

- **Honorability**

In order to practise the profession, the undertaking must continue to enjoy a good reputation. It is up to the Member States to determine the conditions to be met by undertakings and transport managers in order to satisfy this requirement.

To determine whether an undertaking is of good repute, Member States shall take into account the conduct of the undertaking, its transport managers and any other persons involved.

This condition is not met, or is no longer met, if the person or persons who are supposed to meet it have been convicted of a serious criminal offence, including in the commercial sector.

They must not have been convicted in one or more Member States of infringements of EU law, in particular with regard to

- driving and rest times, working time and use of the tachograph ;
- maximum weight and dimensions ;
- initial and ongoing training technical inspection of vehicles entering the market ;
- safety in the transport of dangerous goods by road ;
- the installation and use of speed limitation devices ;
- Driving licence ;
- access to the profession ;
- and animal transport.

To prevent drivers from establishing themselves as bogus self-employed, Regulation 1071/2009 also introduced rules on cabotage.

## 2.2 Traffic: conditions and procedures for carrying out cabotage operations

Regulation (EEC) No 3118/93 fully liberalised road cabotage from 1 July 1998.

However, as the temporary nature of cabotage has always given rise to difficulties of interpretation, Regulation 1072/2009 clarifies this concept and completely recasts and merges all the texts relating to market access and cabotage.

This regulation, which has been in force since 14 May 2010, **limits cabotage to a maximum of three consecutive international hauls within seven days of unloading in the host Member State.** Regulation 2020/1055 of 15 July 2020, adopted as part of the mobility package, did not fundamentally change the rules, but simply **introduced a four-day waiting period during which no new cabotage transport may be carried out in the same country with the same vehicle**, in order to avoid systematic cabotage.

- **Secondment of drivers**

Directive (EU) 2020/1057 of 15 July 2020 lays down specific rules on the posting of drivers in the road transport sector.

The posting rules **do not apply when a driver carries out bilateral international transport operations**. As the nature of the service provided is closely linked to the Member State of establishment, the aim is to avoid a disproportionate restriction on the freedom to provide international road transport services.

Similarly, international transport across the territory of a Member State does not constitute a posting.

However, posting does **apply to cabotage**. Where a driver carries out cabotage operations, there is a sufficient link with the territory of the host Member State within the meaning of Regulation (EC) No 1072/2009, since the entire transport operation takes place in a host Member State and the service is therefore closely linked to the territory of the host Member State.

In order to facilitate checks on compliance with the posting rules, operators shall submit a posting declaration to the competent authorities of the Member States to which they post their drivers via the public interface linked to the Internal Market Information System (IMI) established by Regulation (EU) No 1024/2012.

Member States shall determine the system of penalties applicable to consignors, freight forwarders, contractors and subcontractors who fail to comply with national provisions on the posting of drivers.

## 2.3 Rules for drivers

### 2.3.1 Training and driving licence

Regulation (EEC) No 3820/85 of 20 December 1985 laid down the conditions relating to vocational training. It was repealed by Regulation (EC) No 561/2006. Directive 2022/2561 (repealing Directive 2003/59) improves road safety by introducing **compulsory initial and periodic training** for professional drivers in the EU.

The introduction of compulsory initial qualification and periodic training for drivers has a number of objectives:

- improve road safety in general and safety at stops ;
- reduce damage to the environment, particularly fuel consumption; - learn how to react in critical situations
- Learn how to react in critical situations ;
- Ensure that you are able to load a vehicle in compliance with safety rules and the correct use of the vehicle;
- ensure that they are able to guarantee passenger comfort and safety;
- To pass on knowledge of the social environment of road transport and its regulations;
- Preventing illicit trafficking and crime ;
- Guaranteeing the ability to prevent physical risks;
- guarantee the ability to assess emergency situations.

Member States can choose between two options for setting up an initial qualification system: an option involving both course attendance and an examination, and an option involving an examination only.

The minimum requirements for initial qualification and ongoing training concern the safety rules to be observed when driving and when the vehicle is stationary.

In order to maintain their driver qualification, practising drivers must undergo periodic retraining in the knowledge essential to their activity.

Member States may also provide for an accelerated initial qualification system for applicants who are older or who opt for vehicles of lower weight and dimensions.

Directive 2022/2561 applies to the driving activities of EU and non-EU nationals employed or used by a company established in a Member State.

To ensure mutual recognition of initial qualifications and periodic training, Member States can choose between affixing a European code to driving licences and issuing a driver qualification card.

Finally, the Member States are responsible for approving training centres in accordance with the criteria set out in the directive. They must also monitor these bodies.

Directive 2006/126/EC introduced **a single European licence model** (the size of a credit card, published in the annex to the directive). Each Member State adds its own distinctive sign. To protect this document against falsification, it has a limited administrative validity (10 years and 5 years for bus and lorry drivers), which means that the latest anti-falsification methods can be used when renewing it.

It is therefore recommended:

- the introduction of minimum conditions for the issue of driving licences;
- harmonisation of driving test standards. These tests will determine the physical and mental abilities of each candidate;
- redefinition of the different categories of driving licence according to the technical characteristics of vehicles. In addition, progressive access to the categories of two-wheeled vehicles and goods vehicles will be strengthened. Each Member State will be able to raise the minimum age for driving certain categories of vehicle.

Each Member State will also remain free to apply its national provisions on the withdrawal, suspension, renewal or cancellation of driving licences.

Driving licence applicants must undergo an appropriate test to ensure that their **eyesight is** compatible with driving. This measure, which was challenged as potentially discriminatory on the grounds of disability, was upheld by the Court of Justice (ECJ, 5th Ch., 22 May 2014, aff. C-356/12, Glatzel).

Similarly, a person **with diabetes** can only be issued with or renew a driving licence if they are undergoing medical treatment and regular, personalised checks at least every five years.

Finally, a person suffering from **epilepsy** will not be able to meet the criteria for an unconditional licence. This situation must be reported to the licensing authority. If a person has suffered an isolated epileptic seizure (not repeated within a period of 5 years), a neurologist must provide a report indicating the duration of the driving ban and the necessary follow-up. Finally, applicants suffering from moderate or severe sleep apnoea will not be issued with a driving licence, unless medical advice is given to the contrary.

Directive 2006/126/EC stipulates that all driving licences issued by Member States must be mutually recognised, including those issued before the date of application of the principle of mutual recognition (Article 2).

### 2.3.2 Social measures (working hours, driving time and rest periods)

The social regulations governing road transport are based essentially on two series of measures of differing scope. The first concerns working hours, the second the regulation of driving and rest times.

With regard to working time, Directive 2002/15/EC on the organisation of the working time of persons performing mobile road transport activities was adopted on 11 March 2002.

Directive 2002/15/EC applies to all mobile workers employed by a company established in an EU country, as well as to self-employed drivers. It specifies the maximum working week, which is set at 48 hours. However, this may be extended to 60 hours, provided that the average working week does not exceed 48 hours over a period of 4 months. If the work is performed at night, the daily working time must not exceed 10 hours per 24-hour period. In this case, the driver must receive compensation.

The regulations on **driving and rest times** for drivers of passenger and goods vehicles are based on Regulation (EC) No 561/2006 of 15 March 2006.

The basic principles are as follows

- a maximum of 4 hours 30 minutes of uninterrupted driving;

- a 45-minute break for every 4 hours and 30 minutes of driving ;

- a daily driving time of 9 hours, which can be increased to 10 hours twice a week ;

- a weekly driving time not exceeding 56 hours or the maximum working time as defined by Directive 2002/15/EC, and a maximum of 90 hours over two consecutive weeks;

- a normal daily rest period of 11 hours, which may nevertheless be reduced to between 9 and 11 hours three times a week; and

- a weekly rest period of at least 45 hours every fortnight.

The regulation introduces **flexibility into the scheduling of rest periods for long-distance drivers in the international carriage of goods**. This flexibility is possible provided that it is transparent and predictable for drivers, and must under no circumstances compromise road safety by increasing their level of fatigue, nor lead to a deterioration in their working conditions.

With regard more specifically to taking reduced rest periods, the regulation stipulates that drivers may take two consecutive reduced rest periods outside the Member State of establishment, provided that they take at least four weekly rest periods in the course of four consecutive weeks, at least two of which are normal weekly rest periods.

Any reduction in the weekly rest period is compensated by an equivalent rest period.

The regulation requires transport companies to organise drivers' work in such a way that they can return to the employer's operational centre to which they are normally attached to begin their weekly rest period, or return to their place of residence during each period of four consecutive weeks, in order to spend at least one normal weekly rest period there.

However, where a driver has taken two consecutive reduced weekly rest periods, the transport undertaking may organise the driver's work so that he can return before the start of the normal weekly rest period of more than 45 hours taken in compensation.

Exceptionally, drivers may exceed the daily and weekly driving time by up to two hours, provided that they have taken an uninterrupted break of 30 minutes immediately before the additional driving in order to reach the employer's operational centre or their place of residence for a normal weekly rest period ;

To improve compliance monitoring, **tachographs** will have to reliably record when and where a lorry crosses the border, and locate loading and unloading activities.

The regulations also recommend the construction and use of safe and secure parking areas.

Directive 2006/22/EC of 15 March 2006 lays down the conditions for implementing Regulations (EC) 561/2006 and (EU) 165/2014 and Directive 2002/15/EC as regards social legislation relating to road transport activities.

The aim is to ensure the correct application and harmonised interpretation of social rules in the field of road transport by strengthening the quantity and quality of checks, cooperation between Member State authorities and the harmonisation of penalties. In

concrete terms, the text reinforces the obligation for Member States to organise roadside checks and provides a non-exhaustive list.

## 2.4 Technical measures

Regulation (EU) 2019/2144 of 27 November 2019 governs **the requirements applicable to the type-approval of motor vehicles and their trailers**, and of systems, components and separate technical units intended for such vehicles, with regard to their general safety and the protection of occupants and road users.

It concerns the **mandatory requirements for the type-approval of all types of vehicles** intended for the carriage of passengers, including passenger cars, and goods, including light commercial vehicles. It defines the technical requirements for type-approval with regard to **the general safety of vehicles and the environmental performance of tyres**.

It aims to **reduce the number of deaths and injuries on the roads** by introducing innovative safety technologies in vehicle equipment and improving the competitiveness of European manufacturers on the global market, by providing the very first European legal framework for partially automated and fully automated vehicles, as well as for hydrogen-powered vehicles.

To this end, all new vehicles must now be fitted with the following **safety devices:**

- intelligent speed adaptation system ;
- interface for fitting an alcohol ignition interlock device ;
- warning systems for drowsiness and loss of driver attention ;
- advanced driver distraction warning systems ;
- emergency stop signals ;
- reversal detection systems ;
- event data recorders ;
- Precise tyre pressure control systems.

Cars and vans must be equipped with additional advanced safety systems:

- advanced emergency braking systems capable of detecting motor vehicles and vulnerable road users ahead ;

- Emergency lane-keeping systems ;

- Extended head impact protection zones to reduce injuries in the event of an accident with vulnerable road users.

As well as meeting general requirements and being equipped with existing systems (such as lane departure warning systems and advanced emergency braking systems), buses and lorries must also... :

- be equipped with advanced systems capable of detecting pedestrians and cyclists in the vicinity of the right-hand side of the vehicle, warning the driver of their presence and avoiding accidents with these vulnerable road users;

- be designed to reduce blind spots at the front and on the driver's side.

Directive 96/53/EC of 25 July 1996 lays down **the maximum authorised dimensions of heavy vehicles** in national and international traffic and the maximum authorised weights in international traffic. It was amended in 2015 to legalise derogations from the maximum authorised weights and dimensions of vehicles in order to allow the installation of aerodynamic devices and the improvement of cab aerodynamics, as well as to promote intermodal transport and alternative fuel vehicles (Dir. (EU) No 2015/719 of the European Parliament and of the Council, 29 Apr 2015) and in 2019, by a regulation on CO2 performance standards, to take account of zero-emission vehicles (Regulation (EC) No (EU) 2019/1242 of the European Parliament and of the Council 20 June 2019).

Masses and dimensions are among the **compulsory information** that must appear on the plate affixed by manufacturers to all heavy vehicles. This information is now included in the annex to Regulation (EU) 2019/2144 on type-approval, which sets out the list of mandatory requirements for each type of vehicle.

Pursuant to this directive, an implementing regulation shall lay down uniform conditions for the interoperability and compatibility of on-board weighing equipment to ensure compliance with Article 10 of Directive 96/53/EC or with the maximum weight requirements for national traffic of the Member State in which the vehicle is used. **However, Member States may provide for a derogation from the obligation to install on-board weighing equipment for vehicles or combinations of vehicles whose**

**design or type of loading makes it impossible to exceed the maximum authorised weight**. Vehicles or combinations of vehicles benefiting from a derogation may still be subject to a check of the maximum authorised weight by the competent authorities.

In order to **limit the pollution** caused by road vehicles, Regulation (EC) No. 715/2007 introduced common requirements for emissions from motor vehicles and their specific spare parts (Euro 5 and Euro 6 standards). However, the information on fuel consumption and CO2 emissions obtained when vehicles were tested in accordance with the standards set out in this text no longer reflected the reality of emissions worldwide. This is why the Commission has introduced a new cycle to replace the one introduced by Regulation (EC) No 715/2007: the WLTP cycle (Worldwide harmonised test procedure for passenger cars and light commercial vehicles) by adopting a new Regulation (EU) 2017/1151.

Regulation (EC) No 595/2009 of 18 June 2009 lays down common technical requirements for the type-approval of motor vehicles, their engines and replacement parts with respect to emissions from heavy-duty vehicles (Euro 6 standard).

To enable the Commission to make a critical assessment of the performance of suppliers of polluting fuels (diesel and petrol), based on accurate and precise information, a directive establishes a uniform method for calculating greenhouse gas emissions (Dir. (EU) 2015/ 20 Apr 2015).

Directive 2014/45/EU of 3 April 2014 provides for the list of **roadworthiness test** points (Annex I on minimum requirements for the content and methods of testing), the minimum content of the roadworthiness certificate (Annex II), minimum requirements for roadworthiness testing facilities and equipment (Annex III), minimum requirements for the skills, training and certification of testers (Annex IV). The aim of the directive is to significantly reduce the number of road deaths.

The directive classifies defects detected during periodic technical inspections into three categories (art. 7). :

- minor defects with no significant impact on vehicle safety or the environment;

- major defects likely to compromise the safety of the vehicle, have a negative impact on the environment or endanger other road users (these defects require a new inspection within two months at the latest);

- and, lastly, critical failures that constitute a direct and immediate danger to road safety or have an impact on the environment (they can lead to the suspension of the vehicle's roadworthiness).

Roadworthiness testing must be carried out **by the Member State in which** the **vehicle** is registered, by a public body or by private establishments designated by the State, authorised for this purpose and acting under its direct supervision. The Member States must in any event remain responsible for roadworthiness testing, even if the national system allows private bodies, including those which also carry out vehicle repair activities, to carry out roadworthiness testing.

Technical inspections carried out in one Member State **must be recognised in all other Member States**[87] **.**

The directive also aims to maintain emissions at a moderate level throughout the life of the vehicle, and to ensure that heavy polluters are taken off the road until they are properly maintained.

### ➢ SPECIAL CASE OF TRANSPORT OF DANGEROUS GOODS

Directive 2008/68/EC of 24 September 2008 on the inland transport of dangerous goods aims to extend and harmonise the rules set out below to all national road, rail and inland waterway transport, except in exceptional circumstances linked to the nature of the vehicle or the limited nature of the transport.

The latter aims to harmonise national legislation in this area. It extends the scope of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) to national transport. **The Council has sought to correct disparities in national legislation by establishing uniform rules for intra-Community transport.** The directive takes account of other policies relating to worker safety, vehicle construction and environmental protection. It recognises the possibility for Member States to apply specific traffic rules on their territory, in particular the possibility of maintaining their quality assurance requirements for certain national transport operations until the Commission presents a report on the matter. It also provides for a system of derogations for rules which, for reasons other than transport safety, are in line with the United Nations multimodal recommendations in this area, such as banning the road transport of certain

[87] CJEU, 6 Sept. 2012, Case C-150/11, Commission v. Belgium.

very dangerous goods in favour of rail or inland waterway transport. Finally, Member States may apply stricter or more flexible rules to certain transport operations carried out on their territory by vehicles registered in their territory.

Directive 2008/68/EC is linked to Directive (EU) 2022/1999 on uniform procedures for checks on the transport of dangerous goods by road. This text contains a list of common elements applicable to transport and a list of infringements considered sufficiently serious to give rise to appropriate measures, depending on the circumstances or safety requirements. It also provides for preventive checks on company premises.

## III. TRANSPORT BY RAIL

### 3.1.transport activity

#### 3.1.1 Railway undertakings

As early as 1991, the European Union embarked on a process of opening up the railway market, based on three principles: the independence of network managers from national governments; the opening up of networks to competing operators; and the separation of infrastructure management from service operation.

**Railway undertakings** directly or indirectly owned or controlled by the Member States shall have **independent status, in** accordance with which they shall have separate assets, budgets and accounts from those of the Member States. While respecting the charging and allocation framework and the specific rules laid down by the Member States, the infrastructure manager is responsible for its organisation, management and internal control[88] . These railway undertakings have the status of independent operators, allowing them to operate on a commercial basis and to adapt to the needs of the market.

A **distinction is made between the operation of transport services and infrastructure management**. These two activities must be managed separately and have separate accounts. On this point, the CJEU condemned Germany for not having taken all the necessary measures to ensure that the arrangements for keeping the accounts made it possible to monitor the prohibition on transferring public funds allocated to the

[88] *Dir. 2012/34/EU of the European Parliament and of the Council 21 Nov. 2012, consolidated version, art. 4*

operation of railway infrastructure to transport services *(CJEU, 28 June 2016, Case C-482/14, Commission v Germany)*.

### 3.1.2 The rail licence

In 1995, the principle of a licence for railway undertakings was introduced. This is a single licence issued by a Member State and recognised throughout the EU, the rules for which are set out in Directive 2012/34/EU.

The licence is valid throughout the European Union. It is granted by the Member State on whose territory the undertaking is established. However, this licence does not in itself give access to railway infrastructure.

In order to obtain a licence, **a person must be of good repute, financially fit and able to carry on business, and must be covered by civil liability insurance**. The Member States define the requirements relating to good repute in accordance with the Directive. The requirements relating to financial standing are met if the company proves that it can meet its actual and potential obligations for a period of 12 months and provides the information specified in the directive. Finally, the Directive sets out the requirements for professional competence. Companies are also required to comply with national rules insofar as they are compatible with EU legislation and international agreements applicable in the countries in which they operate. A **review** may be carried out at regular intervals, and suspension or withdrawal is possible. In the event of withdrawal or suspension, the directive allows a **temporary licence to** be issued while the company is being reorganised (for a maximum of 6 months), provided that safety is not compromised. On the other hand, there are cases where a new licence application is required (for a period in excess of 6 months, merger or takeover) or a re-examination is required (extension or change of activity). In cases of insolvency, the licence cannot be retained if there is no realistic possibility of restructuring within a reasonable period. In all cases of suspension, withdrawal or modification, the Commission and the other Member States are informed.

### 3.1.3 Certification of flight and cabin crew

Directive 2007/59/EC of the European Parliament and of the Council of 23 October 2007 concerns the certification of train crews operating trains on the EU network. All drivers of passenger and freight trains, as well as single locomotives, must hold a licence based on an EU model, ensuring that they **meet the minimum conditions regarding their physical fitness, level of qualification and general professional skills**. A

regulation dated 3 December 2009 [89] publishes the model driver's licence and the application form. This licence is supplemented by one or more certificates validating **specific linguistic and professional knowledge relating to the lines used**, the equipment used and the procedures of the company for which they work. These certificates indicate the infrastructure on which the holder is authorised to operate and the type of equipment. The licence is valid for 3 years and can only be renewed after a medical and psychological examination.

## 3.2. Traffic rules

### 3.2.1 Infrastructure access and capacity allocation[90] .

Railway undertakings shall be granted a **right of access on fair**, **non-discriminatory and transparent** terms to the railway infrastructure of all Member States for the purpose of operating all types of rail freight services;

Member States shall have the option of limiting the right of access to the market where that right compromises the economic equilibrium of public service contracts and where the supervisory body gives its approval on the basis of an objective economic analysis, following a request from the competent authorities which awarded the public service contract.

Member States shall establish a framework for **charging,** while respecting management independence. Subject to this condition, they shall also establish specific charging rules or delegate this power to the infrastructure manager. The network statement shall contain the charging framework and the charging rules or shall refer to a website on which the charging framework and the charging rules are published. The Infrastructure Manager shall determine and collect the charge for the use of the infrastructure in accordance with the established charging framework and charging rules. Infrastructure managers shall have an incentive to reduce the level of access charges and the costs of providing infrastructure.

**Infrastructure capacity** is **allocated** by the infrastructure manager concerned. Once allocated, capacity cannot be transferred by the beneficiary to another company. The allocation of capacity is governed by **specific rules**. Only an authorised applicant, i.e. a natural or legal person who has commercial or public service reasons for acquiring

[89] *Commission Reg. nº (EU) 36/2010 3 Dec. 2009 : OJEU nº L 13, 19 Jan. 2010*
[90] Dir. 2012/34/EU of the European Parliament and of the Council 21 Nov. 2012

infrastructure capacity for the operation of a rail service and who meets certain conditions, may submit a request for rail infrastructure capacity. The applicant and the infrastructure manager may enter into **a framework agreement**. This agreement does not define a detailed train path, but is drawn up in such a way as to meet the commercial needs of the authorised applicant. The terms and conditions for the use of train paths granted to authorised applicants are decided by the infrastructure manager. When, within the framework of an infrastructure, a train path has been used, for at least one month, below a threshold to be set in the network statement, the infrastructure manager may require this train path to be relinquished.

### 3.2.2 Railway safety

Directive 2004/49/EC established a common regulatory framework for safety by harmonising the content of safety rules, the safety certification of railway undertakings, the tasks and role of national safety authorities and accident investigation. It was repealed and replaced in 2016 by Directive (EU) 2016/798.

This directive establishes a number of measures designed to develop and improve safety and market access for rail transport services, including :

- establish the Agency as a body that issues safety certificates to railway undertakings operating in more than one EU country;
- define the responsibilities of the various bodies involved in the EU rail system;
- develop common safety targets and common safety methods with the aim of eliminating national rules and therefore obstacles to the development of a single European railway area;
- establish the principles governing the issue, renewal, amendment, restriction or withdrawal of safety certificates and approvals ;
- ask each EU country to set up a national safety authority and a body responsible for investigating rail incidents and accidents, and define common principles for the management and monitoring of rail safety.

In 2010, the EU introduced and defined a common safety method. The purpose of the common safety method (CSM) is to provide national safety authorities with a framework for harmonising their decision-making criteria. Two regulations[91] set out the procedures and criteria for assessing compliance with the requirements of Directive 2004/49/EC, as

[91] Commission Reg. nº (EU) 1158/2010 9 Dec. 2010: OJEU nº L 326, 10 Dec. Commission Reg. nº (EU) 1169/2010 10 Dec. 2010: OJEU nº L 327, 11 Dec.

well as the principles of surveillance. The first applied to safety certificates, and the second to safety authorisation.

These two texts have been repealed and replaced by Commission Delegated Regulation (EU) No° 2018/762 of 8 March 2018 establishing common safety methods relating to safety management system requirements in accordance with Directive (EU) No° 2016/798.

The assessment of safety levels, the achievement of safety targets and compliance with other safety requirements are defined by means of common safety methods (CSMs). In particular, the following are specified: common methods for risk assessment; conformity assessment for the issue of safety certificates and approvals; supervision by national safety authorities and control by railway undertakings, infrastructure managers and entities responsible for railway maintenance; and assessment of the achievement of safety targets at European and national levels.

The minimum safety targets to be achieved by the EU rail system as a whole are set out in common safety targets (CSTs). CSTs can be expressed as risk acceptance criteria or target safety levels.

Railway safety can be improved by :

- harmonisation of the regulatory structure in the Member States ;
- defining the responsibilities of the players involved ;
- the development of common safety objectives and methods with a view to further harmonising national regulations.

Improved access to the market for European transport services is being achieved through a system of safety certification and authorisation. To gain access to rail infrastructure, a company must hold a safety certificate. Implementing Regulation (EU) 2018/763 of 9 April 2018 lays down the practical arrangements for issuing single **safety certificates** to railway undertakings. The purpose of the certificate is to demonstrate that the undertaking concerned has set up its safety management system and is able to operate safely in the envisaged area of operation. Similarly, in order to manage and operate a railway infrastructure, the infrastructure manager must obtain a safety authorisation issued by the safety authority of the State in which it is established.

### 3.2.3 Transport of dangerous goods

The issue of the transport of dangerous goods is being closely monitored by all the Member States. Europe wanted to adopt measures to guarantee safety and quality standards for the transport of dangerous goods by rail. To this end, an initial directive, Directive 96/49/EEC, was drawn up on 23 July 1996.

The purpose of this text was to set safety standards in the rail sector applicable throughout Europe in order to improve safety and the circulation of equipment throughout Europe. Its scope covered the transport of dangerous goods by rail within or between Member States. Member States had the option of excluding vehicles belonging to or dependent on the armed forces.

Certain terms were defined:

- COTIF is the Convention concerning International Carriage by Rail, signed in Berne on 9 May 1980 ;
- CIM represents the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, which is Appendix B to COTIF ;
- RID is the Regulation concerning the International Carriage of Dangerous Goods by Rail (Appendix C of COTIF).

The transport of dangerous goods was only authorised if it was carried out in accordance with the standards of the directive and in particular its annex. Certain goods were either banned outright or authorised subject to conditions.

Directive 2008/68/EC of 24 September 2008 establishes a common, uniform and clearer regime for all inland transport of dangerous goods, whether by road, rail or inland waterway. This directive incorporates the principles of the previous directive. It refers to the provisions set out in international agreements on the inland transport of dangerous goods by road (ADR), rail (RID) or inland waterway (ADN). It is regularly amended to take account of updates to these agreements.

## Annex 2

# Comparison of the different legal regimes governing the liability of carriers of goods by rail, road, inland waterway and sea in international transport

| Liability regime | COTIF (CIM) | SMGS | CMR | CMNI | HAGUE-VISBY RULES | HAMBURG |
|---|---|---|---|---|---|---|
| Liability period | Article 23 § 1: *"The carrier shall be liable for damage resulting from the total or partial loss of or damage to the goods occurring* ***from the time of taking over of the goods until delivery***. | | Article 17-1: *"The carrier shall be liable for total or partial loss of, or damage to, the* ***goods occurring between the time of taking over of the goods and the time of delivery*** | Article 16 : "The carrier is liable for loss resulting from loss of or damage to the goods **from the time they were taken over for carriage until their delivery or resulting from exceeding the delivery period**..." | Article 1(e): *"Carriage of goods covers the time elapsed* ***from the loading of the goods on board the ship until their discharge from the ship"***. | Article 4-1: *"In this Convention, the liability of the carrier in respect of the goods covers the* ***period during which the goods are in his custody at the port of loading, during the carriage and at the port of discharge***. |

**Conclusion:**
The liability of rail and road carriers of goods for loss or damage is likely to cover a longer period than the liability of the maritime carrier: whereas the latter is limited to a strictly maritime environment, by reference to the ship or the port, the CIM Uniform Rules and the CMR refer to material and legal acts (taking over and delivery) which are a priori independent of the rail or road environment. It is therefore possible to envisage that the duration of the liability of the rail or road carrier extends beyond the strict framework of carriage by rail or road (cf. 1-1-b below). In this respect, the CIM Uniform Rules and the CMR appear to be more favourable to shippers than maritime law.

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| Liability regime | COTIF (CIM) | SMGS | CMR | CMNI | HAGUE-VISBY RULES | HAMBURG |
|---|---|---|---|---|---|---|
| Liability for delay | Article 23 § 1: *"The carrier shall be liable [...] for damage resulting from* ***exceeding the delivery period***<br><br>***Article 16 § 1: "The consignor and the carrier shall agree on the delivery period. In the absence of an agreement, this period may not exceed that" set by the CIM Uniform Rules in its § 2 to 4.*** . | | Article 17-1: *"The carrier shall be liable [...] for* ***late delivery"***<br><br>Article 19: "Delay in delivery occurs when the goods have not been delivered within the period agreed or, if no period has been agreed, when the actual duration of the carriage exceeds, having regard to the circumstances and in particular, in the case of a partial load, the time required to assemble a full load under normal conditions, the time reasonably allowable to diligent carriers". | Article 5: *"The carrier* ***must deliver the goods within the time agreed in the contract of carriage or, if no time has been agreed, within such time as may reasonably be expected of a diligent carrier*** *having regard to the circumstances of the voyage and the freedom of navigation."* | None | Article 5-1: *"The carrier shall be liable for damage resulting [...] from* ***delay in delivery"***.<br><br>*Article 5-2: "Delay in delivery occurs when the goods have not been delivered [...] within the period expressly agreed or, in the absence of such agreement, within the period which it would be reasonable to expect a diligent carrier to allow under the circumstances.* |

**Conclusion :**
While almost all the above conventions lay down the principle of the carrier's liability for delay (subject to the Hague-Visby Rules), only the CIM Uniform Rules are clear as to the definition of delay. Admittedly less flexible, this system avoids the vagaries of judicial assessment of the reasonable period and offers better visibility to customers.

| Liability regime | COTIF (CIM) | SMGS | CMR | CMNI | HAGUE-VISBY RULES | HAMBURG |
|---|---|---|---|---|---|---|
| Principle of carrier liability | Article 23: The carrier is liable, unless it can be proved that the loss, damage or exceeding of the time limit was caused by one of the cases of exoneration listed exhaustively.<br><br>→Presumed liability, ipso jure (or objective), therefore independent of any fault on the part of the carrier. | Automatic liability as soon as the result is not achieved, without having to prove fault on the part of the carrier | Article 17: The carrier is liable, unless it can be proved that the loss, damage or delay was caused by one of the exceptions listed.<br><br>→ Presumed liability, therefore independent of any fault on the part of the carrier. | The carrier's liability is **presumed**. However, it is **limited** and **may be exonerated** for various reasons.<br><br>The carrier "shall be liable for loss or damage sustained by the goods from the time when they were taken over for carriage until their delivery or for delay in delivery"(art.16). | Articles 3 and 4: The carrier, who is required to exercise *"due diligence"* in maintaining the ship and to *"proceed properly and carefully"* with the carriage, is not liable for loss or damage arising from or resulting from any of the extraneous causes listed.<br><br>→The principle of strict liability is not expressly stated, but merely implied. | Article 5: The carrier is liable, unless it can prove that it *"took all measures that could reasonably be required to avoid the occurrence and its consequences"*.<br><br>→The principle is different from other agreements. The expression used is not a presumption of liability but a presumption of fault. |
| Causes for exoneration of the carrier | 4 grounds for exemption for<br><br>loss/ damage/ delay (art.23§2)<br><br>- Fault of the beneficiary<br>- Order from the beneficiary<br>- Defects in the goods<br>- Circumstances which the carrier could not avoid and the consequences of which he could not prevent<br><br>7 specific risks<br>(see note 1) :<br><br>- Missing or faulty packaging<br>- Loading by the sender or unloading by the recipient<br>- Special nature of certain goods<br>- Transport of live animals<br>- Transport under escort<br><br>Rail-sea transport :<br>4 grounds for maritime exemption (art.38)<br><br>- Fire<br>- Rescue or attempted rescue at sea<br>- Deck loading<br>- Fortune of the sea<br><br>Delay: none | Numerous exemptions<br><br>General exemptions (nature of the goods, fault of the person entitled, force majeure, lack of packaging, loading or unloading by a person other than the carrier, etc.)<br><br>Specific exceptions relating to delay | 4 grounds for exemption for loss/damage/delay (art. 17§2) :<br><br>- Fault of the beneficiary<br>- Order from the beneficiary<br>- Defects in the goods<br>- Circumstances which the carrier could not avoid and the consequences of which he could not prevent<br><br>Loss or damage :<br>6 specific risks<br>(see note 1) :<br><br>- Use of an open, unsheeted vehicle<br>- Missing or faulty packaging<br>- Handling, loading, stowage or unloading by the consignor, the consignee or their agent<br>- Special nature of certain goods<br>- Imperfect marking and numbering of parcels<br>- Transport of live animals<br><br>Delay : none | The carrier may be exonerated from liability if he proves that "the damage was caused by circumstances which a diligent carrier could not have avoided and the consequences of which he could not have prevented" (Art. 18.1).<br><br>The CMNI also lists seven grounds for exemption (Art. 18) | 18 cases of irresponsibility (art.4-2)<br>(see note 2) :<br><br>-unseaworthiness of the vessel not attributable to the carrier<br>- nautical fault<br>- fire not caused by the fault of the carrier<br>- fortune of the sea - act of God<br>- acts of war - acts of public enemies - fait du prince<br>- quarantine restrictions<br>- act or omission of the shipper<br>- strikes or lockouts - riots or civil unrest<br>- rescue or attempted rescue at sea<br>- road wear resulting from latent defect, special nature or inherent vice of the goods<br>- hidden defects beyond the scope of reasonable care<br>- any other cause not attributable to the fault of the carrier, its agents or servants | None (see note 3) |

→ Note 1): on the mechanism of special risks (CIM Uniform Rules Article 25§2 and CMR Article 18§2): These are not grounds for exoneration *stricto sensu*, insofar as they do not definitively release the carrier from liability. The carrier benefits from a simple presumption of non-liability whenever he proves that the carriage involved one of the risks listed; there is a presumption that the damage may have resulted from this. This is simply a reversal of the burden of proof on the actual cause of the damage. The person entitled may still prove the contrary.

→ Note 2): on the cases of non-liability in the Hague and Hague-Visby Rules; In France, some legal writers reject the characterisation of article 4-2 of the Hague and Hague-Visby Rules as grounds for exoneration from liability: they are rather "excepted cases" whose effect is to rebut the presumption of liability of the carrier and not to exonerate him. Such an analysis brings the excepted cases of maritime law closer to the special risks of land transport law.

→ Note 3): on the absence of grounds for exoneration *stricto sensu* in the Hamburg Convention: Insofar as this convention only imposes liability on the carrier for presumed fault, the carrier is released by proof of the absence of fault (through positive proof of reasonable diligence), which does not constitute a ground for exoneration *stricto sensu*.

**Conclusion**:
Although most of the conventions presented set out the principle of the carrier's strict liability, both on land and at sea, a study of the grounds for exoneration reveals greater protection for the customer in rail and road transport than in maritime transport, where the grounds for exoneration appear to be more numerous.

| Liability regime | COTIF (CIM) | SMGS | CMR | CMNI | HAGUE-VISBY RULES | HAMBURG |
|---|---|---|---|---|---|---|
| Proof ; Evidential value of the transport document | Article 12 | | Article 9.2 | Article 11 | Article 3.4 | Article 16.2 & 16.3 |
| Ascertainment of damage on delivery | Article 42: **report of** damage drawn up by the carrier or, in the event of disagreement, expert report (see Article L.133-4 of the Commercial Code). The CIM Uniform Rules do not provide the consignee with the option of expressing reservations to the carrier. | | Article 30 | | Article 3.6 | Article 19-3: contradictory assessment of damage or **reservations** by the consignee. |
| Calculation of compensation | Article 30 § 1 (loss) and 32 § 1 (damage): *"the carrier must pay, to* ***the exclusion of all other damages*** *, compensation calculated on the basis of the stock exchange price, failing which on the basis of the current market price and, in the absence of both, on the basis of the usual* ***value of goods*** *of the same nature and quality, on the day and at the place where the goods were taken* ***over*** *."* | | Article 23 (loss and damage): *"1-[…] compensation shall be calculated on the basis of the* ***value of the goods at the place and time of taking over*** *. 2. - The value of the goods shall be determined on the basis of the stock exchange price or, failing this, on the basis of the current market price or, in the absence of both, on the basis of the usual value of goods of the same nature and quality. […] 4. - In addition, the price of transport, customs duties and other costs incurred in transporting the goods shall be reimbursed in full in the event of total loss, and pro rata in the event of partial loss;* ***no other damages shall be*** *…"* | | article 4-5-b: *"The total sum due shall be calculated by reference to the* ***value of the goods*** *at the place and on the day when they are* ***unloaded*** *in accordance with the contract, or at the place and on the day when they should have been unloaded. The value of the goods shall be determined on the basis of the stock exchange price or, failing this, on the basis of the current market price or, failing this, on the basis of the usual value of goods of the same nature and quality."* | |
| Legal compensation | Articles 30, 32 and 33<br><br>Loss :<br><br>17 SDR / kg of missing gross weight<br><br>Damage :<br><br>compensation equivalent to the depreciation of the goods, but not exceeding the compensation due in the event of loss | None | Article 23<br><br>8.33 SDR / kg of missing or damaged gross weight | Article 20<br><br>666.67 units of account for each package or other loading unit or 2 units of account for each kilogram of the weight mentioned in the transport document, for lost or damaged goods, whichever is greater. | Article 4-5<br><br>666.67 SDR / package or unit<br><br>or 2 SDR/kg of gross weight lost or damaged | Article 6<br><br>835 SDR / package or unit<br><br>or 2.5 SDR/kg of gross weight lost or damaged |

**Conclusion:**

In terms of compensation limits, the CIM Uniform Rules are unquestionably more favourable to shippers than the other Conventions. The difference is most marked with maritime law (the ceiling of the CIM Uniform Rules is 7 times higher than that of the Maritime Conventions and 2 times higher than that of the CMR).

The difference in the compensation ceilings from one Convention to another is one of the major issues in determining the regime applicable to multimodal transport comprising a maritime phase and a land phase. The claimant will have every interest in invoking the application of the rail or road regime, which will in principle mean locating the damage during the land phase of the carriage.

| Time bar | Deadline | Starting point | Suspension | Interruption |
|---|---|---|---|---|
| **COTIF/CIM art.48** | 1 year<br><br>2 years: fraud B3or inexcusable fault + other cases | - Partial loss, damage or delay: day of delivery<br><br>- Total loss: 30ème day after expiry of delivery period<br><br>- Other actions: day on which the right can be | - by a written Complaint addressed to the carrier up to the day on which he rejects it<br><br>- Reference to applicable national law | Reference to applicable national law |
| **SMGS art. 31** | 2 months for late payments and<br><br>- Reference to applicable national law<br><br>9 months for all other cases | | | |
| **CMR art.32** | - 1 year<br><br>- 3 years: fraud and equivalent fault (in French law: faute lourde) | - Damage, partial loss and delay: day of delivery<br><br>3 months after conclusion of the contract | - Written complaint sent to the carrier (same as RU-CIM)<br><br>- Reference to the law of the court seised | Reference to the law of the court seised |
| **CMNI** | | | | |
| **HAGUE-VISBY RULES** | - Main action: 1 year or longer contractual period (La Haye-Visby)<br><br>- Recourse action: law of the court seised, but minimum 3 months (La Haye-Visby) | - Main action: day of delivery or day when goods should have been delivered<br><br>- Action for recourse: day of amicable settlement or summons of the insured party | None | None |
| **HAMBURG** | - Main action: 2 years<br><br>- Recourse action: law of the court seised, but minimum 90 days | - Main action: day of delivery or day on which delivery should have been made<br><br>- Action for recourse: day of amicable settlement or summons of the insured party | - Written statement addressed to the complainant<br><br>- Law of the court seised | None |

**Conclusion :**
A comparison of the liability regimes highlights the significant contrast between the different modes of transport. If all the conventions are mandatory, the CIM Uniform Rules come to exceed the already high level of protection afforded to the road haulier's customers. Unlike the latter, the rail carrier can validly assume greater liability and obligations.