THE LAW OF CARRIAGE OF GOODS— ATTEMPTS AT HARMONIZATION

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1. INTRODUCTION

The peculiarities of transport law have given it the character of a *jus speciale*. Even a very brief introduction into this field of the law should caution the "outsider" to follow the recommendation of Pope in his *Essay on Criticism:*

> A *little* learning is a dangerous thing
> Drink deep, or taste not the Pierian spring.

Nevertheless, a thorough analysis might disclose that the contract of carriage is not, after all, very far away from the ordinary types of contract, the roots springing from bailment and a combination of *locatio rei* and *locatio operis* (cf. German "Werkvertrag", French "louage d'ouvrage et d'industrie").[1] The rules governing those contract types have had—and still have—a strong impact on the contract of carriage.[2] When exploring the possibilities of harmonizing the law relating to the different branches, it therefore seems natural to investigate whether there is a common point of departure. Here, the issue of *the nature of*

In this article the following abbreviations are used:

ADHGB	Allgemeines deutsches Handelsgesetzbuch
A.f.L.	Arkiv for Luftrett
BGH	Bundesgerichtshof
CIM	Convention internationale concernant le transport des marchandises par chemins de fer
CMR	Convention relative au contrat de transport international de marchandises par route
E.T.L.	European Transport Law
J.B.L.	Journal of Business Law
N.D.	Nordiske Domme i Sjøfartsanliggender
U.S.C.	United States Code
ZLW	Zeitschrift für Luftrecht und Weltraumrechtsfragen

[1] *Code civil*, arts. 1779.2 and 1782.

[2] See, for historical reviews, Rodière, *Droit des transports 2*, Paris 1955 (cit. Rodière, *Transports* 2), pp. 16 ff.; Kahn-Freund, *The Law of Carriage of Goods by Inland Transport*, London 1965, pp. 193 ff.; Sundberg, *Air Charter*, Stockholm 1961, pp. 142 ff.; Gorton, *The Concept of the Common Carrier in Anglo-American Law*, Gothenburg Maritime Law Association publ. 1971.43, pp. 52 ff.; and Lewis, *Das deutsche Seerecht 1*, Leipzig 1883, p. 307.

the carrier's liability comes into the focus of attention. And, in fact, there is in Anglo-American, French, German and Scandinavian law evidence of a common feature—*a principle of strict liability.*[3]

In early English law, the well-known case of *Coggs* v. *Bernhard*[4] places upon the common carrier[5]—as distinguished from the private carrier—a strict liability. He is "bound to answer for the goods at all events". He enjoys the benefit of the exceptions for "acts of God, and of the enemies of the King". But even "though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable". The *ratio* for this rule, as described in *Coggs* v. *Bernhard,* lies in the suspicion that otherwise the carrier might enter into collusion with thieves and do this "in such a clandestine manner as would not be possible to discover".[6]

The English rule was accepted by the United States Supreme Court in *Niagara* v. *Cordes*[7] where it is stated that at common law carriers by land and by water are, in general, "insurers, and liable in all events, and for every loss or damage, however occasioned, unless it happens by the act of God, or the public enemy". But under English law, in the absence of any legislative provisions, the common carrier could alleviate this burden by contractual provisions and thus achieve the same position as a private carrier who *ex lege* is liable for negligence only.[8] In American law also, the common carrier has been permitted to *reduce* his liability but not to contract out of liability for his own negligence or that of his servants.[9]

[3] The expression "strict liability" is often used in different meanings. In this study, the term simply means a liability regardless of negligence on the part of the carrier or his servants and leaves aside the number and scope of *exceptions* from liability.

[4] (1703) 2 Ld. Raym. 909 KB (92 E.R. 107).

[5] See, for an explanation of this concept, Carver, *Carriage by Sea,* 12th ed. London 1971 (*British Shipping Laws,* vols. 1–2), pp. 1 ff.; Kahn–Freund, *op. cit.,* pp. 193 ff; and Gorton, *op. cit., passim.*

[6] See, for further commentaries on this case and its impact on subsequent developments, Gorton, *op. cit.,* pp. 59 ff.

[7] (1858) 62 U.S. 7.

[8] See, e.g., *Great Northern Railway Co.* v. *L.E.P. Transport and Depository Ltd.* [1922] 2 K.B. 742 C.A. per Bankes L.J., p. 754, Scrutton L. J., p. 787 and Atkin L. J., pp. 770–76; Kahn–Freund, *op. cit.,* pp. 198 ff., 214; Ridley, *The Law of Carriage of Goods by Land, Sea & Air,* 3rd ed. London 1971, p. 19.

[9] See, e.g, in *Niagara* v. *Cordes, supra,* where it is added after the traditional exceptions from strict liability: "or by some other cause or accident, *with-*

On the other hand, no restrictions were placed upon private carriers which, in turn, explains the coming into being of bill of lading provisions favouring the carrier at the cost of the shipper and the subsequent enactment of the Harter Act in 1893,[1] the Hague Rules[2] in the 1920's and the United States and British Carriage of Goods by Sea Acts ("Cogsa") giving effect to the Hague Rules in the United States and Great Britain.[3]

Similarly, in French law, the basic principle rests on strict liability. Following the general pattern of the *Code civil* (arts. 1147-8, 1784), the provisions of the *Code de commerce,* art. 103, provide that the "voiturier" is "garant de la perte des objets à transporter, hors les cas de la force majeure". Consequently, he is liable for loss of or damage to the goods unless it has been caused by "vice propre de la chose" (i.e. inherent vice of the goods) or by *force majeure.* In addition, art. 103.2 provides that "toute clause contraire insérée dans toute lettre de voiture, tarif ou autre pièce quelconque, est nulle".[4] However, art. 103.2 of the *Code de commerce* applies only to surface transport other than maritime and primarily concerns total *exemption* from and not limitation of liability.[5] Furthermore, the strict liability with the exceptions for inherent vice of the goods and *force majeure* has been extensively discussed in French jurisprudence[6] and the present opinion seems to favour an amalgamation of the concepts of *force majeure* and *cas fortuit,* which have been said to denote "une fausse dualité".[7] Hence, when the carrier can prove a *cas fortuit* he escapes liability and this, for all practical purposes, is equivalent to a liability for negligence with the burden of proving non-negligence placed upon the carrier who

out any fault or negligence on part of the carrier [my italics], and excepted in the bill of lading". See also *New Jersey Steam Nav. Co.* v. *Merchant Bank* (1848) 47 U.S. 344, p. 383; *Railroad Co.* v. *Lockwood* (1873) 84 U.S. 357, p. 384, and Longley, *Common Carriage of Cargo,* Albany-San Francisco-New York 1967, pp. 1–2.

[1] 46 U.S.C., secs. 190–194 App. C.

[2] International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, signed at Brussels on August 25, 1924.

[3] British Carriage of Goods by Sea Act, 1924, and the United States Carriage of Goods by Sea Act, 1936.

[4] Loi Rabier 1905. See, in general, Rodière, *Transports 2,* pp. 376 ff. and pp. 511 ff.

[5] See Rodière, *Transports 2,* pp. 521–2.

[6] See, e.g., Mazeaud, H., Mazeaud, L. & Tunc, A., *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle,* 5th ed. Paris 1958, pp. 545 ff., and Rodière, *Transports 2,* pp. 446 ff.

[7] Rodière, *Transports 2,* p. 446.

is *presumed* liable until he can satisfy the court that he himself and his servants have not been negligent but have taken all possible and necessary measures to avoid the loss or damage. In other words, he has a duty of *exculpation*.

In earlier German law, until the coming into force of the present *Handelsgesetzbuch (HGB)* in 1897, sec. 607 of *ADHGB*—influenced by the *receptum nautae, cauponis et stabularii* from Roman law[8]—provided for a strict liability with the exception for *vis major*.[9] The carrier was liable for loss of or damage to the goods occurring during the period from the receipt until delivery "sofern er nicht beweist, dass der Verlust oder die Beschädigung durch Höhere Gewalt (*vis major*) oder durch die natürliche Beschaffenheit der Güter, namentlich durch inneren Verderb, Schwinden, gewöhnliche Leckage u. dgl. oder durch äusserlich nicht erkennbare Mängel der Verpackung entstanden ist"[1]. However, the second paragraph of art. 607 already foreshadows the switch to the principle of liability for negligence, in stipulating that loss or damage resulting from the unseaworthiness of the vessel which could not be discovered with the exercise of due diligence ("aller Sorgfalt ungeachtet") should be treated in the same way as loss or damage caused by *vis major* ("werden dem Verluste oder der Beschädigung durch höhere Gewalt gleichgeachtet"). And the present secs. 429 and 606 of *HGB* are clearly based upon the principle of negligence. The carrier is considered liable unless the loss or damage "auf Umständen beruht, die durch die Sorgfalt eines ordentlichen Frachtführers (Verfrachters) nicht abgewendet werden konnten".[2] The burden of proving this lies with the carrier.[3] In addition, the carrier is liable for the negligence of his servants in the same manner as for his own negligence,[4] albeit with the modification of the particular exceptions from the Hague Rules[5] for fire and error in the navigation or the management of the vessel, where the carrier is only responsible for his own fault.

The principle of the carrier's strict liability is also expressed

[8] Dig. 4.9.1.
[9] The term "vis major" is equivalent to "force majeure".
[1] See, for a commentary on this provision, e.g., Lewis, *op. cit.*, pp. 307 ff.
[2] See, for a commentary on *HGB* § 606, Schaps–Abraham, *Das deutsche Seerecht 2*, Berlin 1962, pp. 428 ff.
[3] See Schaps–Abraham, *op. cit.*, p. 440 Anm. 27.
[4] *HGB* § 607.1.
[5] See further *infra*, p. 219.

in earlier Scandinavian law. Thus, before the amendments in the 1930s, sec. 142 of the Uniform Scandinavian Maritime Codes provided that the carrier was liable unless it could be assumed ("där ej antagas må") that the loss or damage was caused by a marine accident, capture or other accident which it was impossible for the master to avoid or by insufficient package or inherent vice of the goods ("sjöolycka, uppbringning eller annan olyckshändelse, som det ej stått i befälhavarens makt att afvärja eller orsakats af bristfällighet i godsets inpackning eller af dess egen beskaffenhet att fördärfvas eller minskas ...").

Sec. 142.2 also provided, as did *ADHGB*, sec. 607, that the carrier did not have an *absolute* obligation to provide a seaworthy vessel; it was sufficient to avoid liability that he exercised due diligence. But, in connection with the adoption of the Hague Rules in the 1930s, the former rule of sec. 142 was replaced by the present sec. 118 expressing a principle of negligence with the burden of proving non-negligence placed on the carrier. The discussion in the *travaux préparatoires* regarding the meaning of the earlier sec. 142 provides a good example that a principle of strict liability with exceptions need not necessarily lead to *other results in practice* than a principle of negligence with the burden of proof on the carrier and enlarged to encompass the negligence of his servants as well.[6] When those favouring the principle of strict liability interpret the permitted exceptions generously in the carrier's favour and those favouring the principle of negligence demand the foresight and caution of "supermen" before accepting the *exculpation* of the carrier and his servants, the practical difference between the two principles may be made to fade away.[7] In Scandinavian law also, the carrier may contract out of liability within the limits drawn by mandatory law.[8]

The above outline of some basic features of the carrier's liability is intended to show that, at one time at least, an international agreement on a uniform principle governing the basis for the carrier's liability generally, regardless of the means of conveyance used to perform the transport, would not have been a Utopian idea.

[6] But see, for cases where the application of the different principles leads to different results in practice, *infra*, pp. 224 ff.

[7] See, from the *travaux préparatoires*, *S.O.U.* 1936: 17, p. 144, and from the discussion in Scandinavian legal writing, Kôersner, *T.f.R.* 1919, p. 110, and Selvig, *T.f.R.* 1966, p. 367.

[8] See further *infra*, p. 220.

2. THE MANDATORY "MINIMUM" LIABILITY OF THE HAGUE RULES

In practice, the normative rules governing the carrier's liability were to be disturbed by the abuses flourishing under the principle of freedom of contract. As already indicated, the carrier was in principle permitted to contract out of liability, and, particularly in marine transport, this advantage was frequently used to the detriment of the customer. And, as a result, the mandatory Hague Rules were introduced. However, when determining the scope of the mandatory rules and the permissible encroachment on the principle of freedom of contract, a compromise had to be made. This may seem fair enough but, as we shall see, the compromise brought about an unfortunate disharmony within the field of transport law.

The scope of the mandatory system of the Hague Rules is limited, since, under the convention, they only apply to bills of lading issued in a contracting State (art. 10).

> Art. 10 of the Hague Rules is applied differently in the different countries signatories to the convention. The British Cogsa only applies to *outward* bills of lading. See Scrutton, *Charterparties and Bills of Lading*, 17th ed. by McNair, Mocatta and Mustill, London 1964, p. 400, and Carver, *op. cit.*, p. 222. In the United States they apply to outward-bound as well as inward-bound shipments. See US Cogsa (Preamble U.S.C. 46, 1300) and, for a commentary, Knauth, *The American Law of Ocean Bills of Lading*, 4th ed., New York 1953, pp. 161 ff. In Scandinavian law, they apply to all outbound shipments and to inbound shipments from countries signatories to the convention. See preamble to the Uniform Scandinavian Bills of Lading Acts and, for a commentary, Schmidt *et al., Huvudlinjer i svensk frakträtt*, 2nd ed. Stockholm 1962, p. 33. See for general comparative surveys Götz, *Das Seefrachtrecht der Haager Regeln nach anglo-amerikanischer Praxis*, Bielefeld 1960, pp. 20 ff., Markianos, *Die Übernahme der Haager Regeln in die nationalen Gesetze über Verfrachterhaftung*, Hamburg 1960, pp. 63 ff. (Übersee-Studien zum Handels-Schiffahrts- und Versicherungsrecht, vol. 26), Necker, *Der räumliche Geltungsbereich der Haager Regeln*, Berlin 1962, *passim* (Übersee-Studien zum Handels-Schiffahrts- und Versicherungsrecht, vol. 31). The amended art. 10 of the 1968 Hague/Visby Protocol improves the situation by adding that the convention also applies if the carriage is from a port in a contracting state or the contract contained in or evidenced by the bill of lading provides that the rules of the convention or legislation of any State giving effect to them are to govern the contract.

The scope of the Hague Rules is limited in a number of other essential respects also. They do not cover the contract of carriage generally but only if such contract is covered by a bill of lading or any similar document of title and in so far as such document relates to the carriage of goods by sea. A bill of lading issued under or pursuant to a charter party is covered as well, but only from the moment it regulates the relation between a carrier and the holder of the bill of lading (art. 1 b). Furthermore the Rules

- by a *restricted definition of "goods"* do not cover "live animals" and "deck cargo" (art. 1 c);
- only cover the period from the time when the goods are loaded on board the vessel to the time when they are discharged from it (arts. 1 e and 7, the so-called *"tackle-to-tackle" principle);*
- reduce the warranty of seaworthiness and the responsibility with respect to the handling of the cargo to an *obligation to exercise "due diligence"* (art. 3, rules 1–2, art. 4, rule 1);
- *exempt* the carrier from liability by a long list of defences (the so-called "Hague Rules Catalogue" in art. 4, rule 2 a–q) ;[9]
- *limit* the carrier's liability to £ 100 sterling per package or unit (art. 4, rule 5);
- require the claimant to give *notice* of loss or damage, in case of apparent loss or damage before or at the time of delivery, or else within three days, failing which it is presumed that the goods have been delivered as described in the bill of lading (art. 4, rule 6).[1]

[9] With two important exceptions—namely the defences of *fire* (art. 4, rule 2 b) and of error in the navigation or in the management of the ship (art. 4, rule 2 a)—the "long list technique" seems, in practice, to mean the same as a liability for negligence with the burden of proving non-negligence placed upon the carrier, who may exculpate himself either by referring to the enumerated defences (art. 4, rule 2 c–p) or by convincing the court that nothing has occurred which may be considered negligence on the part of the carrier or his servants (art. 4, rule 2 q). See, for an analysis to this effect, Brækhus, "The Hague Rules Catalogue" (in *Six Lectures on the Hague Rules,* ed. Grönfors, Handelshögskolans i Göteborg skrifter 1967: 3), *passim.*

[1] In Scandinavian law, the consequences of late notice are deemed to be practically nil, since, in any event, the claimant must prove that the loss or damage occurred while the goods were in the custody of the carrier. See, e.g., Schmidt *et al., op. cit.* p. 218, p. 77. The situation is entirely different according to the Uniform Scandinavian Maritime Codes, sec. 121. Here, the claimant *loses his right of action* if he fails to give notice without unreasonable delay. In *S.O.U.* 1972: 10 it is suggested that this harsh rule should be replaced by the "diluted" sanction of the Hague Rules, art. 4, rule 6. See at pp. 61 ff.

The introduction of the mandatory liability of the Hague Rules —primarily directed towards the abuse of the freedom of contract so well evidenced by numerous exception clauses—not only was desirable but created a *normative body of rules* used *outside* the scope of the mandatory coverage of the Rules.[2] To take one example, the Uniform Scandinavian Maritime Codes, which are only mandatory with respect to domestic trade (sec. 122.1) and traffic between Sweden, Denmark, Norway[3] and Finland,[4] open in sec. 122.2 the possibility for the carrier to *reduce* his liability according to sec. 118. Sec. 118 stipulates a liability for negligence on the part of the carrier and his servants with the burden of proving non-negligence on the carrier and applies to loss or damage occurring during the period when the goods are in charge of the carrier on board the vessel or ashore. Now, according to sec. 122.2, the carrier may exempt himself in respect of damage occurring before loading and after discharge as well as from fire and errors in the navigation or management of the ship. Furthermore, he may *limit* his liability to 1,800 Skr per unit. This option is frequently used and, in practice, most maritime transports therefore follow the mandatory "minimum liability" of the Hague Rules. It should be stressed that the permitted exceptions do *not* apply automatically. The carrier must make express reservations in the contract of carriage. But it has recently been suggested that the Hague Rules, which are now adopted in the respective Scandinavian countries by separate Bills of Lading Acts,[5] should be incorporated in the Uniform Scandinavian Maritime Codes.[6] In consequence, the "dual" liability system would disappear and the Hague Rules system would govern the carrier's liability generally.

The current bills of lading in most countries contain so-called Paramount Clauses whereby the carrier voluntarily incorporates the liability system of the Hague Rules, which consequently become effective outside the scope of their coverage.[7] Thus, in practice, the "minimum liability" of the Hague Rules

[2] See, e.g., Grönfors, "The mandatory and contractual regulation of sea transport", *J.B.L.* 1961, p. 46.

[3] K.K. December 30, 1938 (No. 771).

[4] K.K. December 22, 1939 (No. 885).

[5] In Sweden by the *Konossementslagen* of June 5, 1936 (S.F.S. 1936: 277).

[6] See *S.O.U.* 1972: 10, p. 39 ff. This procedure has been used in the German *HGB* and in France by the Statute of June 18, 1966.

[7] See, e.g., Selvig, "The paramount clause", *Am.J.Comp.L.*, vol. 10 (1961), pp. 205–26.

has to a considerable extent replaced the liability applicable under the different national laws. It has developed from a "minimum liability" covering certain international transports to a general normative solution.

3. CIM,[8] CMR[9] AND THE WARSAW CONVENTION[1]

International conventions regulating the other branches of transport law emanate from quite another legal environment than the Hague Rules. CIM was the result of an initiative taken by the European railways which were, if not branches of state administration, at least subjected to direct governmental control.[2] The liability system of CIM follows the traditional type of strict liability[3] without any particular restrictions as to the period of liability or anything else. It contains, however, an enumeration of contingencies where it is presumed that the carrier is not liable (art. 27 § 3 a–g) and a limitation of liability to 100 so-called *Germinal* francs per kilogramme (1 Germinal franc=approx. US $ 0.35). CMR follows the general pattern of CIM with respect to the carrier's liability,[4] but the limitation amount is less, namely 25 Germinal francs per kilogramme. The difference between CIM and CMR in this regard will, however, most probably be reduced as a consequence of the 1970 amendments of CIM, where it is suggested that the limit in CIM should be *lowered* to 50 Germinal francs per kilogramme.[5] CIM and CMR are primarily Eu-

[8] International convention concerning the carriage of goods by rail. Signed at Berne, February 25, 1961.

[9] Convention on the contract for the international carriage of goods by road. Done at Geneva, May 19, 1956.

[1] Convention for the unification of certain rules relating to international carriage by air. Signed at Warsaw, October 12, 1929.

[2] See, e.g., Nánássy–Wick, *Das internationale Eisenbahnfrachtrecht*, Vienna 1965, pp. V–XI, and Helm, *Haftung für Schäden an Frachtgütern*, Karlsruhe 1966, pp. 2–3.

[3] Art. 27, sec. 2. The exceptions from the strict liability are "faute de l'ayant droit", "vice propre de la marchandise" and "circonstances que le chemin de fer ne pouvait pas éviter et (aux) conséquences desquelles il ne pouvait pas obvier". See further *infra*, p. 224, for an analysis of this provision.

[4] CMR, art. 17.

[5] See *Verkehr* (Vienna), No. 8, 21.2.1970, p. 308, and *Bulletin des Transports* (Paris), 11.10.1972.

ropean conventions and, unlike the Hague Rules and the Warsaw Convention for air transportation, do not have global application.

Carriage of goods by air is regulated by the 1929 Warsaw Convention[6] as amended by the 1955 Hague Protocol[7] and supplemented by the 1961 Guadalajara Convention.[8] An influence from the Hague Rules is noticed in the original 1929 Warsaw Convention, art. 20.2, where the carrier enjoyed the exemption from liability if he could prove that the damage had been caused by error in the navigation of the aircraft ("faute de pilotage, de conduite de l'aéronef ou de navigation"), but this was eliminated in the 1955 Hague Protocol. The description of the basis of liability is akin to CIM, art. 27.2, and CMR, art. 17.2. Thus, in art. 20, the carrier escapes liability if he can prove that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures ("s'il prouve que lui et ses préposés ont pris toutes les mesures nécessaires pour éviter le dommage ou qu'il leur était impossible de les prendre"). However, this is generally understood to mean a liability for negligence with the burden of proving non-negligence placed upon the carrier.[9] It is strange that the similar expressions in CIM and CMR are often interpreted to mean a more absolute liability, a strict liability except for *force majeure*.[1]

The limitation amount of the Warsaw Convention is 250 francs *Poincaré* (N.B. *not* Germinal francs) per kilogramme, one such franc corresponding to approx. US $ 0.07 (art. 22.2). The possibility of breaking the limit is particularly present in air law, since, according to art. 9, the carrier loses his right of exceptions and limitations, not only in case of "wilful misconduct" (art. 25), but also if he fails to issue an air waybill with the particulars

[6] The Warsaw Convention also governs the carriage of *passengers*.

[7] See, for a commentary to this Protocol, Mankiewics, "Hague Protocol to Amend the Warsaw Convention", *Am.J.Comp.L.*, vol. 78 (1956), pp. 74–97.

[8] Convention complémentaire à la Convention de Varsovie, pour l'unification de certaines règles relatives au transport aérien international effectué par une personne autre que le transporteur contractuel.

[9] See, e.g., McNair, *The Law of the Air*, 3rd ed. London 1964, pp. 184–6; Helm, *op. cit.*, p. 85 ("Haftung für vermutetes Verschulden"); Grönfors, *Allmän transporträtt*, Stockholm 1969, p. 74, and Lødrup, *Luftrett 2* (mimeographed), Oslo 1971, sec. 15 Scheer, *Die Haftung des Beförderers im gemischten Überseeverkehr*, Hamburg 1969, p. 62, describes the liability according to the Warsaw convention as "eine der Verschuldenshaftung ähnliche milde Gewährhaftung".

[1] See further *infra*, p. 226.

mentioned in art. 8 a–i and q. The 1955 Hague Protocol reduces the number of particulars required in the air waybill, but the drastic sanction—the loss of the right to limit according to art. 22.2—is partly retained.[2] By the 1971 Guatemala Protocol the position of *passengers* is considerably strengthened with regard to both the *basis* for the carrier's liability and the *limit*. The basis of liability is now strict *without* any other exceptions than where the death, injury or damage resulted solely from the passenger's state of health and defects of luggage. The limit is raised from 250,000 francs Poincaré (corresponding to US $ 16,000) to US $ 100,000, also fixed in francs Poincaré. In return, efforts are made to make the limit really "unbreakable" by deleting the "notice requirement" on the ticket and the baggage check (arts. 3–4) and by eliminating the rule stipulating unlimited liability in case of wilful misconduct (art. 25 of the 1929 Warsaw Convention and art. 25 a of the 1955 Hague Protocol).[3]

4. AN OUTLINE OF THE PRESENT DISHARMONY IN TRANSPORT LAW

4.1. *Different types of carrier's liability*

From the discussion above it will be seen that there are not fewer than *five* different basic types of carrier's liability:

- A liability for negligence with the onus of proving negligence on the claimant (e.g. the liability of the private carrier in English law).[4]
- A liability for negligence with the onus of proving non-negligence on the carrier, who has a duty of *exculpation* (e.g. clearly set out in secs. 429 and 606 of HGB and sec. 118 of the Uniform Scandinavian Maritime Codes).[5]

[2] See Mankiewics, *op cit., supra,* p. 222 note 7, p. 87.

[3] See, for a commentary, Mankiewics, "Warsaw Convention: The 1971 Protocol of Guatemala city", *Am.J.Comp.L.,* vol. 20 (1972), pp. 335–42.

[4] See, e.g., *Whalley* v. *Wray* (1799) 3 Esp. 74 (170 E.R. 543) per Lord Eldon: "To entitle the plaintiff to recover, it must appear that the loss happened by the neglect of doing that which was the regular and common duty of the defendant. The law raises no presumption of what is his duty: that is matter of evidence." See further Ridley, *op. cit.,* p. 20.

[5] It is conceivable to describe the carrier's liability for his servants and agents used for the performance of his obligation as a separate type of liability. However, since this is a main principle in contractual relations, it is understood to apply as a rule underlying all contractual liability principles based on negligence.

- A liability for negligence with the onus of proving non-negligence on the carrier *combined* with exceptions (e.g. the complicated liability system of the Hague Rules which, in practice, mainly corresponds to a duty of *exculpation* and in addition special exceptions for fire and errors in the navigation or the management of the vessel, provided the loss or damage has not been caused by the carrier's own fault or privity as distinguished from that of his servants).[6]
- A strict liability, regardless of negligence, with exceptions for the cargo owner's fault;
  the inherent vice of the goods;
  force majeure or similar concepts.
- A strict liability, regardless of negligence, without exceptions, (partly valid in CMR, namely for loss or damage caused by the deficient condition of the vehicle of transportation, art. 17.3).

The debate has primarily been concerned with the choice between the principle of *exculpation* and the principle of strict liability and with the difference in practice between them. The exceptions for fire and error in the navigation and the management of the ship belong to the peculiarities of maritime law and have recently been challenged.[7]

It appears from the discussion regarding the proper interpretation of the above-mentioned liability principles of CIM, art. 27.2, CMR, art 17.2, and art. 20 of the Warsaw Convention that there is a certain preference for the principle of *exculpation*. Perhaps, however, a synthesis of the present international opinion would demonstrate yet another alternative placed *between* the principle of *exculpation* and the strict liability principle. Thus, CIM, art. 27.2, after the 1952 amendment when the words "höhere Gewalt" were replaced by "Umstände, welche die Eisenbahn nicht vermeiden und deren Folgen sie nicht abwenden konnte", has been described as "eine Mittelstufe zwischen dem gewöhnlichen Zufall und der höheren Gewalt".[8] Similarly, art. 20 of

[6] See *supra*, pp. 218 ff.

[7] See, e.g., the report of the UNCITRAL Working Group on the work of its fourth (special) session in Geneva September/October 1972, United Nations document A/CN. 9/74 12 October 1972, p. 7. See also A/CN. 9//63/ Add. 1, 17 March 1972, pp. 69–70, and, for a commentary on the work by the UNCITRAL Working Group, P. Simon and Marie-Rose Hennebicq, "Les Nations—Unies et la Réglementation des Transports maritimes", *E.T.L.* 1972, pp. 741–2 and 772.

[8] Nánássy–Wick, *op. cit.*, p. 188.

the Warsaw Convention has been described as "... eine der Verschuldenshaftung ähnliche milde Gewährhaftung".[9]

CMR, art. 17.2, closely corresponds to CIM, art. 27.2, but there seems to be an additional argument for the standpoint that CMR, art. 17.2, does not mean a general principle of strict liability, since art. 17.3 *specifically* stipulates a strict liability for loss or damage caused by deficiencies of the vehicle. This would have been quite unnecessary if a general principle of strict liability was intended by art. 17.2.

See Helm, *op. cit.*, p. 35. But cf. *S.O.U.* 1972: 24, pp. 94–5, where reference is made to the 1956 edition of Nánássy's *Eisenbahnfrachtrecht.* However, in the 1965 edition of Nánássy–Wick, the previous opinion that CIM, art. 27.2, after the 1952 amendment still means a strict liability except for *force majeure* has been abandoned. See also Loewe, *Beförderungsrecht im internationalen Strassenverkehr,* Vienna 1965, p. 13, Buzzi–Quattrini, *Übereinkommen über den Beförderungsvertrag im internationalen Strassengüterverkehr,* Vienna 1961, p. 60, van Ryn, "Une nouvelle étape dans l'élaboration du droit de transports", *E.T.L.* 1966, pp. 657, 661, Sevón, "Sydfruktlast stulen. Force majeure i järnvägstransporträtten", *F.J.F.T.* 1967, pp. 377–88. See from the case law E.T.L. 1966. 305, Gerechtshof Amsterdam 21.10.1965, where an "extraneous factor" —a reduction in the air pressure of a tyre caused by a foreign object—was held a valid excuse. In E.T.L. 1966. 738 Arrondissementsrechtbank Amsterdam 11.3.1964, the CMR carrier could not invoke a violent rainstorm as an excuse. But the result in this case conforms with the principle of exculpation although, admittedly, with a rather stringent duty placed upon the carrier to take steps in order to avoid the damage. In E.T.L. 1969.888, BGH 21.12.1966, the CMR carrier was held liable for theft of goods from an unguarded lorry: "... es handelt sich bei der Haftung des Frachtführers nach art. 17 CMR um eine Gefährdungshaftung, wobei für den vorliegenden Fall dahingestellt werden kann, ob nicht nur ein Fall 'höherer Gewalt', sondern jedes unabwendbare Ereignis zum Haftungsausschluss führen kann" (at p. 892). In E.T.L. 1969.998, Arrondissementsrechtbank Rotterdam 21.1.1969, the carrier was again excused for damage caused by a deflated tyre overheated by friction and subsequently catching fire. The carrier succeeded in proving that he had exercised all reasonable care to avoid driving the vehicle on insufficiently inflated tyres both before and during the voyage. See also E.T.L. 1972.1058, Voedegerecht 1e Kanton Antwerp, where the CMR carrier was held liable for

[9] See *supra* p. 222, note 9.

> damage caused by sudden, violent braking, but a possibility is envisaged for him to escape liability by presenting "proper proof that violent braking was really necessary in the actual circumstances".

It is admittedly difficult accurately to determine the meaning of *force majeure* and corresponding expressions (*Höhere Gewalt, vis major,* Act of God). Thus, as we have seen, when reference is made to *force majeure* in French law, or in legal systems influenced by French law, it is possible, or even probable, that *force majeure* is equivalent to "cas fortuit"—as referring to every cause where negligence can be disproved.[1] Furthermore, even if *force majeure* is considered to be more restricted than "cas fortuit", it is difficult—if not impossible—to draw a sufficiently sharp dividing line.

In German law, the concept of "Höhere Gewalt" in CIM, art. 27.2, in its version before the 1952 amendments, required, in order to become operative as a defence, that the circumstance causing the loss should be

- *unforeseeable,*
- *exceptional,*
- from *external sources,*
- and of such a character as to make the loss or damage *unavoidable.*[2]

However, there is in transport law a tendency to dispense with the requirements that the contingency must be "exceptional" and "from external sources".[3] And this is well reflected by the literal wording of CIM, art. 27.2, CMR, art. 17.2, and art. 20 of the Warsaw Convention. It seems that the influence of the restricted concept of *force majeure*—although still lurking in the background—is slowly fading away. Consequently, we seem to be heading towards the principle of *exculpation* as the common denominator.

[1] See *supra,* p. 215 at note 7.

[2] See, e.g., Nánássy, *Das internationale Eisenbahnfrachtrecht,* Vienna 1956, pp. 519 and 531 ff., and cf. the observations *supra,* p. 217.

[3] Cf., from Swedish law, Rodhe, *Obligationsrätt,* Stockholm 1956, p. 355; the *force majeure* contingency must arrive from *external sources* ("vara utifrån kommande"), have a *widespread effect* ("av omfattande verkan"), and be *unusual* ("sällan inträffande"), and cause an *insurmountable hindrance* to the performance of the contract ("oöverstigligt hinder för gäldenären att prestera"). In addition, the contingency should have been unforeseeable at the time of the conclusion of the contract, see Rodhe *op. cit.,* p. 542.

4.2. *Different limits of liability*

The limitation of liability to a fixed amount is a common feature in statutes regulating carrier's liability, the underlying theory being that the carrier, having no exact knowledge of the value of the goods he receives, should not be held liable in excess of a *normal* value. If the cargo owner wants a higher limit he must make a *declaration of value* and, in most cases, pay an extra amount in addition to the freight.[4] However, the *limitation amounts* and the technique used in fixing the limits exhibit an abundance of variants.

There are, in practice, *three basic variants* and, in addition, these are sometimes *combined* with one another. Even if the same technique is used in fixing the limit, *different amounts* apply to different means of conveyance. And, when efforts are made to guard against the depreciation of the value of the monetary unit, different methods are chosen. The following table will give a survey of the somewhat confusing situation.

Limits according to the weight	
Warsaw Convention, art. 22.2	250 francs Poincaré per kg
CIM, art. 31.1	100 francs Germinal per kg
CMR, art. 23.3	25 francs Germinal per kg
Hague Rules as amended by the 1968 Hague/Visby Protocol, art. 4, rule 5 a	30 francs Poincaré per kg (supplementing the unit limitation)[5]
Unit limitation	
Hague Rules, art. 4, rule 5	£100 sterling per package or unit

See, concerning the difficulties of interpreting the words "package or unit" in general, Selvig, *Unit limitation of carrier's liability. The Hague Rules, art. IV (5)*, Oslo 1960, (also in *A.f.S.*, vol. 5, pp. 1–264). The special question of the application of the unit limitation to containers has resulted in the so-called "container formula" of the 1968 Hague/Visby Protocol, art. 4, rule 5 c:

[4] See the Hague Rules, art. 4, rule 5, para. 3; CIM, art. 36; CMR, arts. 24 and 26; Warsaw Convention, art. 22.2.

[5] 1 franc *Poincaré* corresponds to approx. US $0.07 and 1 franc *Germinal* to approx. US $0.35. The franc *Poincaré* is described as "a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900", whereas the figures for the franc *Germinal* are instead "10/31 gramme of gold of millesimal fineness 900".

"Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid, such article of transport shall be considered the package or unit". See, for a comment on the situation before the Hague/Visby amendments, Grönfors, "Container transport and the Hague Rules", *JBL* 1967, pp. 302–6, and for a comment on the "container formula", Sisula, *Containerklausulen i Haag-Visbyreglerna,* Handelshögskolans i Göteborg skrifter 1970 no. 1.

Limitation per "incident"

General Conditions of the Nordic Forwarders' Association (1959), § 20	20,000 crowns per incident

The same amount in crowns applies in Denmark, Norway and Sweden in spite of the different values of the respective currency units. In Finland, the limit is 20,000 Fmk, which roughly doubles the limit as compared with Denmark and Norway. In the German General Conditions (ADSp) a *combination* is used of a weight limit and a per incident limit. Thus, with respect to damage to or loss of goods, § 54 a 2 provides: "DM 1.50 je kg brutto, keinesfalls mehr als DM 1,500, je Schadensfall". See for comments Krien-Hay, *Die Allgemeinen Deutschen Spediteurbedingungen (ADSp).* Berlin 1959, pp. 22 f., 383 ff.

4.3. *Different periods of liability*

It might be thought that the *period of liability* would not create any problems, since the period should naturally encompass the time when the goods are in charge of the carrier. However, this is not generally accepted. In order not to extend the particular régimes of maritime and air law, the period of liability has been more or less fixed to the vehicle of transportation itself. In maritime law, the Hague Rules adhere to the "tackle-to-tackle" principle and, in air law, the rules of the Warsaw Convention are based on the theory that the carrier, in his capacity as such, is only in charge of the goods when they are on board the aircraft, or at an airport, or any other place where the aircraft might land. Consequently, the periods of liability in the respective international conventions are as follows.

From receipt until delivery	
CIM, art. 27.1	
CMR, art. 17.1	
The Uniform Scandinavian Maritime Codes, sec. 118	However, exceptions are allowed with respect to the periods before loading and after discharge[6]
HGB § 606	
The French Statute of June 18, 1966, arts. 27, 29[7]	
While in charge of the operating carrier	
a. during the transport in a narrow sense ("tackle-to-tackle", from loading to discharge)	The Hague Rules, arts 1 e and 7
b. during the transport and including certain "ground handling operations"	Warsaw Convention, art. 18.2

Where the air or sea carrier accepts the goods before loading them on the vehicle of transportation and keeps them after discharge, serious problems may arise.[8] This not only is detrimental to the cargo owner, who may lose protection in the initial and terminal stages of the transport, but also creates adverse effects for the carrier since he may lose the statutory protection of limited liability during these periods.[9] And it is not always the case that exemption and limitation clauses can be made to operate.[1]

Scandinavian courts have shown a tendency to extend the coverage of the Hague Rules after discharge. Thus, in a case decided

[6] See the Uniform Scandinavian Maritime Codes, sec. 122, and *HGB*, sec. 663, subsec. 2.

[7] See Rodière, *Traité général de droit maritime 2*, Paris 1968, pp. 143 ff.

[8] See, in general, Grönfors, *Om ansvaret för lossat men icke mottaget gods vid sjötransporter*, Stockholm 1960, *passim*.

[9] See, for a typical example of this problem, *Pyrene Co.* v. *Scindia Nav. Co* [1954] 2 Q.B. 402, where, however, the damage was considered to have taken place *in the loading operation* and the carrier was held protected by the unit limitation of the Hague Rules.

[1] See, for a case where an air carrier was considered unprotected by the limit of the Warsaw Convention with respect to damage to a computer when handled by a fork-lift truck at Arlanda airport but *before* the booking of the cargo, A.f.L. 1970, 230 (City Court of Stockholm).

by the Swedish Supreme Court in 1951,[2] where linoleum rolls were damaged in a shed after loading when piled on top of one another instead of being placed upright according to instructions, the mandatory Hague Rules were applied. True, the damage did not occur in the discharge operation itself—if taken in a restricted sense—but happened in direct connection with the landing of the cargo.[3] In a subsequent case,[4] the Swedish Supreme Court ruled on similar facts that the Hague Rules did *not* apply, the reason being that the cargo had been delivered to authorized cargo terminals —so-called public godowns—in Hong Kong. Since these terminals were independent contractors, not instructed by the cargo owners to receive the cargo on their behalf, the cargo could not very well be considered to have been *delivered.* However, the independent position of the public godowns was also sufficient to sever the link with the carrier, who escaped liability for the damage.

When air and sea carriers engage in the handling of cargo before loading or after discharge, or even in pre- and on-carriage, competition will often require a more attractive offer to the customer than a liability reduced by broad exception clauses in the initial and terminal stages of the transport. Consequently, air carriers voluntarily extend the Warsaw liability in their "pick-up and delivery" service[5] and sea carriers similarly accept the Hague Rules liability even before loading and after discharge.[6]

4.4. *Different character of transport documents*

While the transport document used in the carriage of goods by sea—the bill of lading—is a *negotiable* (or "quasi-negotiable")[7] instrument, this is not the case with regard to way-

[2] N.J.A. 1951.130.

[3] See also N.D. 1960. 1 (City Court of Oslo).

[4] N.J.A. 1956.274.

[5] See, e.g., SAS conditions of carriage for air cargo (1966 version), arts. 8.3 and 11.

[6] See, e.g., the bills of lading of the England–Sweden Line (1966), clause 5 (but only with respect to "through-transit of containerized or otherwise unitized goods") and the Atlantic Container Line Ltd. (1968), clause 3.

[7] The term "quasi-negotiable" is sometimes suggested in view of the fact that the transferee does not acquire a better *title* than the transferor. See, e.g., Schmitthoff, *The Development of the Combined Transport Document,* edited by Università degli studi di Genova, facoltà di economia e commercio, 1972, p. 14, referring to the dictum of Lord Devlin in *Kum*

bills used in the carriage by rail, road and air. The bill of lading —as it is often said—"represents the goods" and it enables the holder of the document to *transfer the title* to the goods by transferring the original(s) of the document. The holder of the original(s) is the only one entitled to receive the goods from the carrier. When more than one original has been issued, the presentation of one original *at destination* is sufficient. If more than one holder of an original requests the delivery of the goods at destination, the carrier cannot deliver the goods to any one of them but is obliged to place them in safe custody for the account of whom it may concern. However, if the goods are tendered at another place than the destination, *all* originals must be presented. In banking transactions it is often stipulated as a condition for payment under the rules relating to commercial letters of credit that a "full set" of originals must be presented together with the invoice and the insurance policy. The Hague Rules do not contain anything about the legal character of the bill of lading. This is a matter which has been left to the respective national laws.[8]

In the carriage of goods by rail, road and air, the transport document—the waybill—has a different legal character from the bill of lading. At destination the goods have to be tendered to the person appointed by the sender as *receiver*. It is sufficient that he should identify himself as such; there is no need for him to present the transport document as a condition for delivery. Instead, in the carriage of goods by air and by road, the system of issuing *three* different types of document is used; the first is

v. *Wah Tat Bank Ltd.* [1971] 1 Lloyd's Rep. 439 at p. 446. It must be borne in mind that the "three-party relationship" (shipper–carrier–receiver) in the contract of carriage is different from the relationship between the issuer, the transferor and the transferee of a negotiable instrument. True, the *bona fide* transferee of a bill of lading does get a *better position* in relation to the carrier than the transferor, since the carrier's liability for failure to control the information in the bill of lading is intended to protect him. But his position is not the same as that of the *bona fide* transferee of a negotiable promissory note, who has a right in principle based upon the negotiable instrument as such and basically independent of the relationship between the issuer and the transferor (with the exception of certain enumerated situations, see the Uniform Scandinavian Promissory Notes Acts, sec. 17). See further *infra* pp. 233 f.

[8] See, for applicable rules in Scandinavian law, the Uniform Scandinavian Maritime Codes, secs. 151–68. The customary bill-of-lading text provides: "In WITNESS whereof the original Bills of Lading all of this tenor and date have been signed in the number stated above, one of which being accomplished the other(s) to be void."

stamped "for the carrier", the second "for the receiver", while the third is signed by the carrier and is kept by him and returned to the shipper when the goods have been received.[9] The shipper, in his capacity as the carrier's contracting party, has the right to give instructions (stop the goods in transit, change destination or appoint another receiver).[1] Ordinarily, this right ceases when the goods reach the destination and the person appointed as a receiver exercises his right to demand delivery of the goods from the carrier.[2] However, the shipper may waive his right to give instructions to the carrier by stipulating, already when the transport document is issued, that the right to give instructions is transferred from him to the receiver[3] or by transferring his original (the document stamped "for the shipper") to the receiver. As the carrier is only entitled to follow instructions given by a person presenting the document stamped "for the shipper",[4] the holder of the document, if identical with the buyer/receiver, gets security that the goods will reach him at destination. However, there are no means of *transferring the title* to the goods while in transit, since the waybill, as distinguished from the bill of lading, does not "represent the goods".

The same basic technique is used also in railway law, where the so-called *duplicate waybill* ("Frachtbriefdoppel") fulfils the same function as the waybill stamped "for the shipper".[5]

The fact that a seller/shipper waives his right to instruct the carrier and that a buyer/receiver can expect delivery at the destination in due course also enables banks and other financing intermediaries to give credit to the buyer at the time he receives the shipper's waybill.[6] The Uniform Scandinavian Sales Acts, secs. 16 and 71, which in commercial sales obligate the buyer to pay against tender of transport documents, treat an ordinary waybill in the same way as a bill of lading, provided the seller, after the transfer of the waybill to the buyer, can no longer give instructions with regard to the goods (the Swedish wording is:

[9] Warsaw Convention, art. 6. Cf. CMR, art. 5.
[1] CMR, art. 12, Warsaw Convention, art. 12.
[2] CMR, art. 13, Warsaw Convention, art. 12.4. Cf. CIM, art. 16, sec. 4.
[3] CMR, art. 12.3.
[4] Warsaw Convention, art. 12.3, CMR, art. 12.5.
[5] CIM, art. 21, sec. 2.
[6] In such cases, the bank ordinarily requires the buyer to surrender the waybill to the bank.

"... att säljaren efter dess utgivande till köparen ej äger över godset förfoga ...").[7]

The need for an instrument facilitating the *transfer of the title* to the goods while in transit is considerably reduced with the shrinking of the time required for the performance of the transport. Thus, even in transocean maritime trade, alternatives to the traditional ocean bill of lading are now used by the Atlantic Container Line (so-called "data freight receipts"). Furthermore, the need for transferring the title to the goods in transit mainly concerns commodities in bulk (ore, grain, timber products, oil) and not general cargo.[8]

There are differences between the different transport documents in other respects also, namely with regard to the *validity of the document as evidence* of the carrier's receipt of the goods as described in the document and his *responsibility for errors in the description.* All transport documents have a certain value as evidence, but it must be borne in mind that the information is normally given *by the shipper* and that, consequently, *he is responsible to the carrier* for the correctness of the information.[9]

However, the carrier is considered to have a *duty to check* the correctness of at least some of the information given and his failure to fulfil this duty may either have the effect that *he is estopped from disproving* the statements in the transport document[1] or, alternatively, that he becomes *liable in damages* for his failure to check them. These principles are, in a way, additional to the carrier's obligations to his contracting party, but nevertheless they *emanate* from the contract of carriage and purport to protect *third parties,* ordinarily the buyer/receiver, who *relies* upon the statements of the transport document. However, in this respect, the rules relating to the various transport documents are different. CIM does not contain any rule corresponding to

[7] See, in general, concerning the function of transport documents in sales law, Selvig, *Fra transportrettens og kjøprettens grenseland,* Oslo 1970, *passim* (also in *T.f.R.* 1969, pp. 9–93) and Hellner, "Sale, carriage, insurance integration of the contracts and harmonization of the law", in *Estudios juridicos en homenaje a Joaquin Garrigues,* Madrid 1971, p. 431, *passim.*

[8] See Schmitthoff, *op. cit.,* p. 13.

[9] Warsaw Convention, art. 10, CIM, art. 7, sec. 1, CMR, art. 7. See, for a case where the sender's liability for insufficient package and information was discussed, N.J.A. 1967, p. 597, but where the sender's liability according to CIM was held inapplicable on the ground that the damage occurred after the delivery of the goods (damage arose in a cargo terminal on account of fire). See, for critical remarks on this decision, Grönfors, *Sv.J.T.* 1972, pp. 279–80.

[1] See, e.g., Selvig, *op. cit.,* pp. 78 ff.

CMR, art. 9.2, to the effect that "it shall be presumed, unless the contrary is proved, that the goods and their packaging appeared to be in good condition when the carrier took them over and that the number of packages, their marks and numbers corresponded with the statements in the consignment note". However, CIM, art. 8 § 4, where it is stipulated that the railway, when the loading according to tariffs or special agreement is performed by the shipper, is not responsible for the information with regard to weight and numbers unless this has been expressly confirmed and mentioned in the waybill, is permitted to be read *e contrario*. This means that the railway is normally responsible for the information where it has performed the loading.[2]

The Warsaw Convention provides (art. 11.2) that "the statements in the air consignment note relating to the weight, dimensions and packing of the goods, as well as those relating to the number of packages, are prima facie evidence of the facts stated; those relating to the quantity, volume and condition of the goods do not constitute evidence against the carrier except in so far as they both have been, and are stated in the consignment note to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods".

As already mentioned, the Hague Rules leave this matter to be settled according to the different national laws. In Scandinavian law, the carrier is, in principle, strictly responsible for the information entered into the bill of lading unless he has made reservations. And, even if he has made such reservations by the customary *standard* expressions in the printed form ("said to be", "according to the declarations of the merchant", "number and weight unknown"), he cannot escape his duty to exercise reasonable control and, if something is found not in order, to enter *specific* reservations.[3] The seller/shipper, who desires to get a bill of lading without reservations—a so-called "clean" bill of lading—in order to be able to collect the purchase sum from the buyer/receiver or his bank, will frequently induce the carrier to refrain from entering reservations. In spite of the fact that the shipper is responsible in relation to the carrier for the information given,[4] the carrier will then often re-

[2] See Nánássy–Wick, *op. cit.*, pp. 60 ff., and Helm, *op. cit.*, p. 41.

[3] See N.J.A. 1949. 449 I, and Selvig, *op. cit.*, pp. 79 ff. See also E.T.L. 1972.787, *The Djakarta* (Supreme Court of Poland).

[4] See, for the position in Scandinavian law, sec. 153 of the Uniform Scandinavian Maritime Codes.

quest a letter of indemnity—a so-called "back letter"—thereby seeking to safeguard full recourse against the shipper for all damages he might have to pay to a *bona fide* bill of lading transferee.[5] This system has caused considerable difficulties and the efforts to rectify the situation cannot be said to have been effective.[6]

The rules relating to the transport documents used in the carriage by air, rail and road do *not*—apart from the rule making the information in the waybill *prima facie* evidence—impose a general duty on the carrier to control the information and enter reservations in the waybill, failing which he is responsible to a *bona fide transferee* either by being *estopped* from disproving the statements in the waybill or by a *liability in damages*. And it is improbable—or in any event doubtful[7]—that the rules relating to bills of lading in this regard can be applied to air, rail and road waybills as expressing general principles of law.

Even if the *bona fide* buyer/receiver gets a certain protection through the above-mentioned obligations imposed upon the carrier, difficulties may arise in the final stage of the transport. Let us assume that the carrier, according to the information in the transport document, has received 100 packages but upon delivery 10 packages are missing. Potential explanations include:

- wrong information in the transport document;
- theft, or loss due to other causes during the transit;
- wrongful despatch (e.g. discharge in an intermediary port);
- theft, or loss due to other causes, after discharge.

Now the fact that, in maritime law, the *period of responsibility* often ceases *before delivery* causes particular problems. Frequently, the receiver has no practical means of checking the goods immediately at the time of the discharge and, consequently, he runs the risk of facing the carrier's allegation that the goods have disappeared subsequent to the discharge, during the period when the goods have been stored on the quay or in a shed belonging to another enterprise ashore. True, the carrier must normally

[5] If the "back letter" has not been guaranteed by a bank, or by another solvent party, it mainly serves as counter-evidence to the statements in the bill of lading.

[6] See Schmidt *et al.*, *op. cit.*, pp. 128–9, and Riska, *Sjötransporträtt* 2, Helsinki 1969, pp. 61–3.

[7] See Selvig, *op. cit.*, p. 8.

prove that he has, in fact, discharged the number of packages mentioned in the bill of lading. But this he usually does by referring to a so-called tally, which, however, does not always constitute a reliable proof.[8] Perhaps it is fair to say that the protection for the buyer/receiver—the usual bill of lading transferee—created by the severe obligations imposed upon the carrier with respect to the information in the bill of lading is counter-balanced by the insecurity in the final stage of the transport, where the carrier's liability ordinarily ceases *before* delivery.

4.5. *Different rules relating to responsibility for delay*

Responsibility for delay is difficult to regulate exhaustively by international conventions. This question is more or less connected with the problem of non-performance and, thus, firmly rooted in basic contract law.[9] It is true that most international conventions contain provisions relating to delay, but, here again, the rules are widely different, following as they do different principles, namely:

- *Liability for delay interrelated to the freight*
  This is the system of CIM, arts. 11 and 34, and CMR, arts. 19 and 23.5.[1]
- *Liability for delay interrelated to loss of or damage to the goods*
  This is the principle of the Warsaw Convention, arts. 19 and 22.

What then, is the position of the Hague Rules in this respect? *The authentic text* (French) does not seem to permit an inclusion of a regulation of liability for delay ("responsabilité pour perte ou dommage concernant des marchandises"; Swedish:

[8] See N.J.A. 1962, p. 770, where the tally was not considered sufficient proof owing to the fact that parcels intended for different consignees had been mixed with one another in the shed after loading and not tallied and placed separately for each individual consignee. See, for comments, Hilding, *Om bevisning vid lossning av sjötransporterat gods,* Handelshögskolans i Göteborg skrifter 1964: 4.

[9] See Sundberg, *op. cit.,* pp. 399 ff. This problem will be elucidated in a forthcoming study by Grönfors, *Tidsfaktorn vid transportavtal.*

[1] CIM, art. 11, operating with fixed time limits, and art. 34, providing for fixed compensations without evidence that loss has been suffered as a result of the delay and with a possibility of awarding further compensation in the event that loss can be proved but, in such a case, limited to the *double* freight amount. CMR, art. 19, containing a definition of delay, and art. 23.5, setting the limit to the simple freight amount.

"ansvarighet för förlust, minskning eller skada") but the English version of the Hague Rules, using the expression "liability for loss or damage to *or in connection with* the goods" [my italics] seems to have been permitted to include damages for delay and indirect damages in *Anglo-Saxon Petroleum Co.* v. *Adamastos Shipping Co. (The Saxonstar).*[2] In the 1972 proposal for amendments of the Uniform Scandinavian Maritime Codes, the words of the suggested sec. 138 presuppose that the liability for delay follows the liability applicable to damage to and loss of the goods, since this is thought to be the correct interpretation of the Hague Rules in their present wording.[3]

The method of applying the same rules to delay as for damage to and loss of the goods has the advantage of simplicity. Commercially, however, the time used for the transport is interrelated to the freight. The higher freight paid for air transportation is primarily justified by the shorter transit time. Consequently, the method used in CIM of paying indemnity in proportion to the freight and of fixing the ultimate limit as corresponding to the double freight amount seems to be more appropriate.[4] This method, however, may require specific rules for cases of protracted delay. Sometimes, one simply does not know whether the goods have been lost, or whether the carrier may sooner or later be in a position to bring them on to the destination. Consequently, CIM and CMR contain "conversion" rules to the effect that the goods are deemed to have been lost when 30 days have elapsed after the expiry of the agreed delivery time.[5] In cases where no time has been agreed for the transport, the period required for the "conversion" is, in CMR, "sixty days from the time when the carrier took over the goods".[6]

4.6. *Other differences*

The account above of the basic differences in the different branches of transport law is not exhaustive. There are other differences, some of which will now be briefly indicated.

[2] [1958] 1 Lloyd's Rep. 73.

[3] See *S.O.U.* 1972: 10, p. 63. The desire to counteract clauses wholly exempting the carrier from responsibility for delay may have influenced this interpretation. But cf., for contrary views, e.g., Schmidt *et al., op. cit.*, p. 78, and Grönfors, *Allmän transporträtt*, Stockholm 1969, p. 81.

[4] Or, as in CMR, art. 23.5, the *simple* freight amount.

[5] CIM, art. 30, sec. 1, and CMR, art. 20.

[6] CMR, art. 20.

Liability for parties other than the contracting carrier

This is a complicated problem involving the liability of *non-contracting* but *performing* carriers' liability to the cargo owner on a *contractual basis* and *in tort*.[7] This situation frequently arises in cases of so-called *successive carriage*, i.e. when several carriers participate in carrying the goods to the destination but the contract is made with only one of them who becomes the *contracting carrier* while the others become *performing carriers*. Similarly, the entity promising the transport may not itself have the means to carry out any part of the transport at all. Instead, use is made of *sub-contractors* who, in such cases, do not stand in direct contractual relationship to the cargo owner. Furthermore, the problem of the liability of the carrier's *servants*—customarily resorted to in order to circumvent exemptions and limitations of liability valid to the benefit of the carrier—has necessitated the insertion of protective provisions in the various international conventions. In CIM and CMR these provisions are effective to the benefit of the carrier's servants generally, while the addition to the Hague Rules in the 1968 Hague/Visby Protocol excludes "independent contractors".[8]

Notice of claims[9]

Apparent loss or damage must be notified to the carrier at once and at latest upon the receipt of the goods (CIM, art. 46 § 2 c, CMR, art. 30, Warsaw Convention, art. 26, and Hague Rules, art. 3, rule 6).

[7] See, in general, Grönfors, *Successiva transporter*, Stockholm 1968, *passim*. CIM, arts. 39, 40, 43, 49–51, 53; CMR, arts. 28.2, 34–40; the 1961 Guadalajara convention and the proposal for an amendment of sec. 123 of the Uniform Scandinavian Maritime Codes, *S.O.U.* 1972: 10, pp. 54 ff. See also Report from the fifth session of the UNCITRAL Working Group on International Legislation on Shipping, February 1973, United Nations documentation A/CN. 9/WG. III (V)/CRP. 8/Add. 2, 14 February 1973.

[8] See Grönfors, "Why not independent contractors?", *J.B.L.* 1964, pp. 25–7. An extended protection for such parties is intended by the current so-called "Himalaya" clauses. See Sandström, "The limitation of the stevedore's liability", *J.B.L.* 1962, pp. 340–50, and Moore, *Liability of stevedores for cargo damage under United States and British law*, Handelshögskolans i Göteborg skrifter 1961: 2.

[9] The following exposition of the rules relating to notice of claims and the time bar only concerns loss of or damage to the goods and delay and, in addition, leaves aside special situations, such as the effect of the carrier's wilful misconduct or gross negligence.

In case of *non-apparent* loss or damage, notice should be given

– within 3 days after delivery	Hague Rules, art. 3, rule 6
– within 7 days after delivery, Sundays and public holidays excepted	CMR, art. 30.1
– within 7 days after receipt of the goods	CIM, art. 46 § 2 d
– within 14 days after delivery	Warsaw Convention, art. 26.2 (as amended by the 1955 Hague Protocol)

In case of *delay*, notice should be given

– within 21 days after delivery	CMR, art. 30.3 Warsaw Convention, art. 26.2 (as amended by the 1955 Hague Protocol)
– within 60 days after delivery	CIM, art. 46 § 2 b

(*Note:* if delay is covered by the Hague Rules,[1] the same rules apply as for loss of or damage to the goods)

The sanction for *non-compliance* with the duty to notify

– results in the loss of right of action	Warsaw Convention, art. 26.4 CMR, art. 30.3 (with respect to compensation for delay) CIM, art. 46
– results in a *prima facie* assumption that no loss or damage has occurred	Hague Rules, art. 3, rule 6[2] CMR, art. 30.1 (with respect to loss of or damage to the goods)

Time bar

– one year from delivery, or in case of non-delivery, from the day when the goods should have been delivered	Hague Rules, art. 3, rule 6[3]

[1] See *supra* p. 237 at note 3.

[2] The effect of such a provision, if any, is rather modest, since the claimant has the burden of proving the condition of the goods upon receipt anyway.

[3] The words "day when the goods should have been delivered" may

– one year from delivery, or in case of non-delivery, from the 30th day after the expiry of the transit period	CIM, art. 47 § 1 and § 2 a–b
– two years from the arrival or scheduled arrival of the aircraft	Warsaw Convention, art. 29.1
– one year from delivery, or in case of non-delivery, from the 30th day after the expiry of the agreed time limit or, where no such limit exists, from the 60th day after the date on which the goods were taken over by the carrier	CMR, art. 32.1 a–b

CIM and CMR contain special provisions for the *suspension* of the one-year period. Thus, a written claim suspends the period of limitation until such date as the carrier rejects the claim by notification in writing and returns the documents attached thereto (CIM, art. 47 § 3, and CMR, art. 32.2).[4] The Hague Rules and the Warsaw Convention require that *suit be instituted* within the time limit. Consequently, it is *not* sufficient to file a written claim.

Jurisdiction and arbitration

While CIM, CMR and the Warsaw Convention contain rules on *jurisdiction,*[5] no such rules appear in the Hague Rules. However, a suggestion that provisions on jurisdiction and arbitration

give rise to problems. This is pointed out in the Report of the Secretary General to the UNCITRAL Working Group on International Legislation on Shipping A/CN. 9/WG.III/WP.10 (vol. III), pp. 12 ff. The Working Group decided to suggest the basic adoption of the CMR principle but to extend the period of sixty days to ninety days. See the Report from its fifth session, United Nations documentation A/CN.9/WG. III (V) CRP. 8/Add. 4, 15 February 1973.

[4] In view of the fact that, in practice, it may be difficult to determine exactly whether the requirements for suspension are present, a proposal to introduce this principle in the proposed Hague Rules amendments was rejected by the UNCITRAL Working Group in its fifth session. See United Nations documentation A/CN.9/WG. III (V) CRP. 8/Add. 4, 15 February 1973.

[5] See CIM, arts. 41–44, CMR, art. 31, Warsaw Convention, art. 28.

should be inserted in the Hague Rules has recently been made by the UNCITRAL Working Group considering amendments of the Rules.[6]

5. INCONVENIENCES FROM THE DISHARMONY IN TRANSPORT LAW

5.1. Whereas, formerly, interest was focused on the respective means of conveyance—the ship, the aircraft, the train, the lorry— nowadays *the object to be carried* is the dominant factor.[7] For the cargo owner it is not so important as in earlier days whether the goods are carried by air, rail, road or sea. He may consider all possible alternatives. What matters are time and safety factors. Furthermore, the cargo owner prefers to deal with *one* contracting party who can promise him to transport or arrange the transportation of the goods from one point to another and there deliver the goods in time and in good order and condition. His interests are not fully taken care of when there are several independent enterprises operating the various means of conveyance, each having the position of a contracting carrier linked together by forwarding agents as intermediaries. Competition has caused the enterprises owning, or controlling, the respective means of conveyance to offer integrated ("door-to-door") service and has led forwarding agents to abandon their function as intermediaries and adopt the role of transport enterprises with the liability of a carrier.[8] It is particularly interesting to note the characteristics of the modern type of transport enterprise. It does not promise to carry the goods by a specific means of conveyance; it promises to take the goods to the destination in a manner which it deems fit.[9]

[6] See United Nations documentation A/CN.9/63/Add. 1, March 17, 1972, pp. 37–67.

[7] See, in particular, Grönfors, *Successiva transporter*, Stockholm 1968, p. 13.

[8] See Ramberg, "The combined transport operator and the F.I.A.T.A. Uniform bill of lading", *Shipping and Forwarding*, London, June 1969, pp. 3–12.

[9] See, in particular, the F.I.A.T.A. Combined Transport Bill of Lading ("FBL"). The means of conveyance is not mentioned at all, and in clause 12: "The Freight Forwarder reserves to himself a reasonable liberty as to the *means, route* and procedure to be followed in the handling, storage and *transportation* of the goods" [my italics].

Thus, the following factors should be particularly noted:

- the number of cases increases where *one* party assumes responsibility for transport by *different modes of transport* (combined transports);
- at the time of the conclusion of the contract, it is not always known whether the goods will be carried by air, rail, road or sea;
- it is not always the case that the enterprise giving the promise of transportation is identical with the enterprise owning or controlling the means of conveyance, and this necessitates a distinction between the *contracting* and the *performing* carrier, the latter becoming sub-contractor to the contracting carrier.[1]

Needless to say, with this new development the traditional law of carriage of goods has become grossly inadequate to serve the needs of the modern transport industry.[2] The advent of containerization—meaning not only that goods belonging to *one* shipper could be put in a container but also that goods belonging to *different* shippers, or intended for *different* consignees, could be *consolidated* in one unit, the container—accelerated the process of change. Already at the 1965 New York Conference of the Comité Maritime International (CMI) it was felt that containerization raised new legal problems and, as a result, in 1969 the so-called Tokyo Rules were agreed upon.

The main principles of these Rules, later adopted in the joint proposal by CMI and UNIDROIT (the so-called Tokyo-Rome Rules or "TCM" draft),[3] are based on the idea that the issuance of a document ("CT document") brings the Rules into operation. It is not until then that the Rules become mandatorily effective. Since the Rules do not apply *ex proprio vigore,* they

[1] See, in particular, the concept of the so-called "non-vessel-owning common carrier" (NVOCC) in American law. "Transmodalists" and "CTOs" (for Combined Transport Operators) are other terms to describe the new phenomenon. See Ramberg, *op. cit. supra*, and Gorton, *op. cit. supra* page 213 note 2, pp. 231 ff., and *idem*, "Freight forwarders and intermodal carriage in American administrative legislation", *E.T.L.* 1972, pp. 208–66.

[2] See Ramberg, "Systemtransporter och den osystematiska transporträtten", *F.J.F.T.* 1971, p. 505.

[3] See, for reports on the "TCM draft", Loewe, "Le Projet OMCI/CEE d'une Convention sur le Transport International de marchandises" (Convention TCM), *E.T.L.* 1972, pp. 622–713; Peyrefitte, "Le régime juridique des Transports Combinés", *E.T.L.* 1972, pp. 899–913, and Birgitta Blom, "Utkast till konvention om internationella kombinerade transporter (TCM-konventionen)", 11 *A.f.S.* (1972), pp. 722–744.

offer in fact a non-mandatory (optional) normative solution. But once the CT document, containing the required characteristics, has been issued, whereby the issuer voluntarily subjects himself to the Rules, they become effective *en bloc*.

Furthermore, the Rules are devised as a "superstructure" on the rules already existing in various conventions governing the different branches of transport law. The person issuing the transport document—the "CTO" (Combined Transport Operator) —is subjected to a liability during the entire transit but with the traditional exceptions for the shipper's fault, inherent vice of the goods and reasonably unavoidable and insurmountable causes and effects.[4] However, when it can be proved where the loss or damage occurred, the liability of the CTO is, in principle, to follow the mandatory rules customarily applied to this particular part of the journey. This, the so-called "network system", which has been expressed in a rather lengthy and complicated manner, fulfils two purposes, viz.

- it reduces the risk of *conflict with existing international conventions*,
- it reduces the "gap" between the CTO's liability and the liability of his sub-contractors and enables him to *reclaim by recourse actions* what he may have had to pay the cargo owner.

The complexities of the "network system" have resulted in a proposed alternative system, referred to as the "uniform system". However, this system has been carefully designed not to disturb the present structure of, in particular, the Hague Rules. Hence, the defences of fire and errors in the navigation and the management of the ship have been retained. The limitation amount has not yet been suggested.[5]

The TCM draft is based upon the theory that there is a *combination* of at least two different modes of transport.[6] Although the draft does not stipulate that it must appear from the CT

[4] This is expressed in a rather complicated manner by the use of a kind of "condensed" long list of exceptions ending with the general formula of CMR: "any cause or event which (the CTO) could not avoid and the consequences whereof he could not prevent by the exercise of reasonable diligence" (art. 9.2 i). See Birgitta Blom, *op. cit.*, pp. 734–5.

[5] But the franc *Germinal* has been suggested as the monetary unit (art. 4 d).

[6] See art. 1.2 providing that the "CT document" shall "evidence a contract for the carriage of goods by at least two different modes of transport".

document that the transport is to be performed by using at least two different modes of transport, this proviso has been suggested on various occasions. The idea that a CT document must evidence several modes of transport is a reflection of the traditional thinking concentrating on the means used to perform the transport rather than on the very essence of the integrated transport, which is to carry the goods—without involving a number of contracting carriers whether linked together by forwarding agents or not—from the shipper's to the receiver's premises. This fallacious approach is well evidenced by so-called "single mode" clauses appearing in the current standard "CT documents".[7] Hence, from a legal viewpoint the attention should be focused rather on the fact that, at the time of the conclusion of the contract, the carrier *does not ordinarily have to promise to carry the goods by a specific means of conveyance* than on the combination of different modes of transport. It is *not* the combination of various modes of transport as such that disconnects the contract from the existing international conventions governing the respective branches of transport law but rather the fact that the promise of transportation does not contain any reference to a particular mode of transport. A carrier's promise to effectuate the transport by using different modes of transport is nothing new. Provisions regulating his liability in such cases are to be found in both CIM and CMR.[8]

The *sui generis* character of the type of contract, where no agreement exists as to the mode of transport to be used, is even more accentuated when the contracting carrier does not own or control any means of conveyance, i.e. when he is a "forwarder-type" carrier.[9] In this connection reference may be made to the specific regulation of the "commissionaire de transport" in French law[1] and to the UNIDROIT draft convention on Contract of Agency for Forwarding Agents Relating to International Car-

[7] See clause 1 of the standard documents "FBL" and "Combiconbill": "Notwithstanding the heading 'Combined Transport Bill of Lading', the provisions set out and referred to in this document shall also apply if the transport as described on the face of the Bill of Lading is performed by one mode of transport only".

[8] CMR, art. 2, and CIM, art. 63.

[9] See Ramberg, *Systemtransporter*, p. 507 at note 28.

[1] See Durand, *Droit et pratique des transports terrestres*, Paris 1971, sec. B, and Rodière, *Manuel des transports terrestres at aériens*, Paris 1969, pp. 51 ff.

riage of Goods, which proposes a carrier's liability for the forwarder in cases where

- the parties have so agreed (art. 22)
- a flat rate has been agreed upon (art. 23)[2]
- an "international forwarding note" has been issued (art. 25).

In addition, it is *presumed* that the forwarder has accepted liability as carrier in cases of so-called consolidated shipments, i.e. when the goods are grouped with other goods under a single document of transport.[3]

5.2. *The "TCM draft" in a blind alley?*

As already mentioned, difficult problems arise owing to the fact that the TCM draft is based on the very *combination* of different modes of transport. It is doubtful whether the combination as such can make the contract *sui generis* and thus eliminate any risk of conflicts of conventions. Now, the "network liability system" does in fact imply a concession to existing international conventions, but does this suffice? First, it is a fallacy to assume that the conflict does not appear until the damage can be attributed to a certain stage of the transport, under the theory that it is not until then that one can determine which rules are offended by the rules of the TCM draft. The application of the respective mandatory rules has to be considered at the very moment when the contract is entered into, and not later. This being so, in order to avoid any conflict of conventions, one is forced to accept a complex promise containing a *potential* application of all mandatory law—the liability shifting like the colour of a chameleon as the transport progresses by various means of conveyance. Still, the difficulty of avoiding a conflict of conventions remains, since the rules of some conventions have an *expanding character*. It is *not* merely a question of accepting different rules for situations where loss or damage occurs in another type of transport vehicle. In this regard, it is necessary to take a close look at the complicated art. 2.1 of CMR, reading:

[2] See Ramberg, "The combined transport operator", *J.B.L.* 1968, p. 137, and Draft Convention on Contract of Agency for Forwarding Agents Relating to International Carriage of Goods and Explanatory Report, ed. by UNIDROIT, Rome 1967.

[3] See Ramberg, *op. cit.*, note 2, p. 137.

Article 2

> 1. Where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air, and, except where the provisions of article 14 are applicable, the goods are not unloaded from the vehicle, this Convention shall nevertheless apply to the whole of the carriage. Provided that to the extent that it is proved that any loss, damage or delay in delivery of the goods which occurs during the carriage by the other means of transport was not caused by an act or omission of the carrier by road, but by some event which could only have occurred in the course of and by reason of the carriage by that other means of transport, 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 means of transport would have been determined if a contract for the carriage of the goods alone had been made by the sender with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport. If, however, there are no such prescribed conditions, the liability of the carrier by road shall be determined by this Convention.

Thus, it is not sufficient that the loss, damage or delay should have occurred during the carriage by another means of transport. *This must be proved* and, in addition, it must be proved that the loss, damage or delay was not caused by an act or omission by the carrier by road but by some event which could only have occurred in the course of and by reason of the carriage by that other means of transport. This being so, one might ask if there is any room at all for a special "CTO liability" in cases where one mode is carriage by road. If the loss, damage or delay cannot be attributed to any specific part of the transport, then CMR applies. In other cases, it seems difficult to escape the other mandatory conventions, unless one accepts that the contract of combined transport is *sui generis*.

Nor is it possible to overcome the difficulties by introducing an *"overriding" liability system,* more severe for the carrier and more beneficial for the cargo owner than any existing international convention or mandatory law. One would have thought that the carrier could always accept a more severe liability than under mandatory law, which—at least from the private-law aspect—is intended to give the carrier's contracting party a "minimum protection". True, this is the main principle in the law

of carriage of goods,[4] but CMR, art. 41, is mandatory generally in "all directions". Even changes to the benefit of the cargo owner are unacceptable.[5] These brief indications may suffice to arouse a suspicion—the suspicion that the bold efforts to create an international convention relating to the contract of combined transport have foundered on the differences in the various branches of the law of carriage of goods and that the "TCM draft" has run into a blind alley.[6]

6. ATTEMPTS AT HARMONIZATION

6.1. *The main difficulty*

The above exposition shows an abundant variety of rules. In my view, however, the main difficulty lies in the *different basis of liability*. Once this has been solved, the harmonization of the rules should not meet any insurmountable difficulties.

In choosing between the alternatives, questions of varying importance call for consideration.

- Which principle leads to the most efficient *prevention* of loss or damage?
- Which principle is most *reasonable* taking into account the position of both contracting parties?
- Which principle is most efficient from a *juridical–technical* viewpoint?
- What effect do the different principles have on *insurance practices?*

The first question would seem to be of prime importance, since efficient prevention would reduce the *total cost* to the benefit of all parties concerned. However, the effect of different liabil-

[4] See the Hague Rules, art. 5, and Warsaw Convention, art. 33.

[5] CMR, art. 41: "... toute stipulation qui, directement ou indirectement, dérogerait aux dispositions de la présente convention". See *S.O.U.* 1972: 24, pp. 50–1.

[6] The further studies of the "TCM draft" and connected problems, recommended by a majority of countries, will not merely prolong the project but will mean that the draft convention will slowly fade away, while business enterprises freely develop their own practices, at best following recommendations by various non-governmental international organizations or, at worst, creating a heterogeneous mass of clauses and liability systems.

ity principles in this regard has never been satisfactorily explored. In fact, it may be seriously doubted whether the sanction of damages has any preventive effect at all in this particular field. Presumably, the desire of carriers to uphold efficient and safe traffic, stimulated by the accentuated competition in the carriage of general cargo, would be a more realistic motive for exercising due diligence in the care of the goods than would a fear of being held liable in damages to some cargo owners. Since the liability is normally insured, the preventive effect is even more diluted, the only risk being a possible increase of premiums on account of a "bad record".

The idea behind the second question seems attractive but can be disposed of rather quickly. In *contractual relations*—as distinguished from *liability in tort*—the most essential thing is not really where the risk for a certain *insurable* contingency is placed but rather a *clear distribution of the risk* so that one can determine as accurately as possible where the risk lies and, if necessary or desirable, effectuate a proper insurance coverage. This, then, leads on to the two remaining questions. Which principle would most efficiently clarify the placing of the risk and, therefore, constitute the best basis for determining the insurance coverage?

Presumably, the best solution lies in choosing one of the extremes, i.e. *either* to hold the carrier liable only in the event of his own wilful misconduct or gross negligence, which the carrier normally cannot cover by insurance anyway, *or* to hold him strictly liable with a minimum of exceptions. The latter alternative would, in fact, be nothing new. It would merely mean a return to the old principle of the common carrier's liability, the liability of an insurer. Insurers nowadays seem to prefer the first-mentioned alternative,[7] since the flexibility of the cargo insurance would be lost if the risk were to be covered by the carrier's liability and liability insurance.[8] In particular, the periods of the carrier's liability do not always cover the whole period of the transit of the goods from seller to buyer. Furthermore, some cargo owners—mainly the larger enterprises

[7] See *Summary of arguments in support of the current system of risk allocation between carrier and cargo-owner*, ed. by the Carriers' Liability Committee of International Union of Marine Insurance, October 1972.

[8] See, in particular, Kihlbom, "Cargo insurance and liability insurances —competitors or complements?" (in *Cargo Insurance and Modern Transport*, ed. K. Grönfors, Gothenburg School of Economics and Business Administration, Publ. 1970: 3).

—prefer to arrange for insurance themselves, in the belief that they can thereby save expense. In addition, the prudent cargo owner does not want to carry a part of the cost caused by the careless shipper; the "good risks" should not be compelled to intermingle with the "bad risks".[9] Nevertheless, considering the delicate question of the scope and structure of mandatory legislation, the position of the *uninsured* cannot be entirely disregarded. There must be at least some *minimum protection* which would normally require a carrier's liability insurance. Thus the abolition, or drastic reduction, of the carrier's liability seems to be a rather Utopian idea. If we want to avoid the traditional twins—the carrier's liability insurance and the cargo owner's insurance on the goods—we should therefore have to choose the other extreme. The liability system of the Hague Rules would have to yield to the basic principle governing the other branches of transport law, which would mean a general acceptance of a strict liability with exceptions. And the more restricted the list of exceptions and the interpretation of the *force majeure* defence becomes, the greater is the simplicity and clarification of the risk distribution achieved.

The suggested alternative by no means leads to an exclusion of cargo insurance. There should be no difficulty in preserving the advantages of cargo insurance, since the carrier—instead of insuring his *liability*—may himself effectuate an insurance on the goods. This would mean that he offers his customers a so-called "insured bill of lading". However, some cargo owners might prefer to arrange for the insurance of the goods themselves. But even such opponents to an "insured bill of lading" can be satisfied by being offered the possibility of retaining their general cargo-insurance policies. In such cases, the increased costs following from the increase of the carrier's liability may be neutralized by various devices, such as the co-insurance of the carrier in the cargo insurance or, alternatively, non-recourse agreements.

6.2. *The synthesis*

The possibility of accepting the principle of strict liability having thus been indicated, the following synthesis may, perhaps, serve as

[9] Such circumstances contributed to the cargo owners' rejection of the so-called "insured bill of lading" proposed by the British container consortia ACT and OCL in 1970.

a point of departure in the harmonization of the law of carriage of goods.

- A *basis of liability* based on the principle of *strict liability*, which means the abolition of the Hague Rules' defences for fire and for error in the navigation and the management of the ship;
- the same *limitation amount*, preferably a *limitation per kilogramme*[1] of goods lost or damaged, with the same monetary unit;
- the *abolition of the bill of lading* in favour of a waybill of the kind used in the carriage by air, rail and road;
- a liability for *delay* based upon the same principle of *strict liability* as suggested above with *fixed compensation* in the form of quotients of the freight (a kind of retroactive freight rebate) and an overall limitation *interrelated to the freight amount;*
- the same rules with respect to the *liability of the carrier's servants*, preferably with the scope provided for in CIM and CMR and without the distinction between "servants" and "independent contractors" suggested in the 1968 Hague/Visby Protocol;
- uniform rules with respect to
  notice of claims
  time bar and
  jurisdiction and *arbitration.*

6.3. *Two different approaches*

Traditionally, the development of the law of carriage of goods has followed different paths. It was not until the recent advent of "integrated transports" that any real difficulties emerged. The awareness of these difficulties has accelerated the endeavours to

[1] The words "lost or damaged" are important in case of *partial* loss or damage. The kilo limitation is then calculated on the part affected and not on the whole consignment. See, for a discussion on this matter in air law, Wessels, "Haftungsgrenze und Wertdeklaration in Artikel 22 Abs. 2 des Warschauer Abkommens bei Teilschäden an Fracht und Reisegepäck", *ZLW* 1960, pp. 35 ff. A change was made in the 1955 Hague Protocol introducing a special rule for the limitation of liability with respect to partial loss, damage or delay (art. 22.2b).

remove the differences. A change of the law relating to one branch of transport law should no longer be discussed without considering the possibility of achieving a harmonization of the law relating to the different branches.

Changes in the respective branches of transport law[2]

At first sight, the method of making occasional changes in the respective laws relating to the different branches seems to be the easiest way of reaching a harmonization. However, this may be seriously doubted. It must be borne in mind that the above-mentioned international conventions do not have the same broad application. CIM and CMR do *not* have global application at all. Therefore, any efforts to reach a global harmonization of the law of carriage require quite a different approach. In addition, apart from the inconvenience following from "step-by-step" changes in the present conventions and the ensuing necessity of changing the national laws, there is always, in the process, a danger of upsetting the international unification that does exist.[3]

A new convention relating to the law of carriage of goods

Instead of the modest and, presumably, extremely cumbersome method of making occasional changes in the various branches of transport law, another method presents itself as the natural alternative. This is the elaboration of an international convention covering the carriage of goods generally. And, should any circumstances require special regulation in any one of the branches concerned, such regulation could easily be embodied in a convention embracing all the different means of conveyance. In any event, the need for special regulations may be considerably reduced—or perhaps eliminated altogether—if the scope of such an all-embracing convention is properly limited. It is not necessary that

[2] See, e.g., Helm, *op. cit.*, p. 185: "Für die Vereinheitlichung der verschiedenen frachtrechtlichen Übereinkommen bleibt danach die einzige Möglichkeit, bei künftigen Änderungen der einzelnen Abkommen die entsprechenden Normen der anderen mehr als bisher vergleichend heranzuziehen und damit die internationale Rechtslage langsam einer Vereinheitlichung näher zu führen."

[3] The situation in air law provides a good example. Some, but not all, of the countries which have ratified the 1929 Warsaw Convention have ratified the 1955 Hague Protocol and the 1961 Guadalajara Convention. And what will happen with the 1971 Guatemala Protocol remains to be seen.

the convention should encompass all the different types of contracts of affreightment. The purpose of the convention should be to present a uniform solution for the carriage of such goods which, from time to time, are carried alternatively by air, rail, road or sea. This will facilitate the method practised by modern transport enterprises of disconnecting the promise of transportation from the means of conveyance, the essence of the promise being to carry the goods from one point to another. The distinction used in the French statute of June 18, 1966, between "transport" and "affrètement", the former type concentrating on the promise to carry the goods from one point to another while the latter concerns the use of the ship,[4] may serve as a guide in defining the scope of a new convention.

Furthermore, it may very well suffice to regulate the basic problems. Special problems—such as the freight risk, right of cancellation and of changing the transport, deviation, general average, liens—could be left aside and taken care of by the respective national laws. The efforts should concentrate on the regulation of *international* transports. The changes needed with regard to *domestic* transports are much easier to resolve and will, in any event, be greatly influenced by the development of an international common denominator.[5]

[4] See Rodière, *Traité général de droit maritime,* vol. 1, Paris 1967, p. 31, and vol. 2, Paris 1968, pp. 7 ff.

[5] Helm, *op. cit.,* p. 184, in his survey of the law of carriage of goods, stresses the difficulties and concludes that "Die Vereinheitlichung der internationalen Haftungsregelungen en bloc ist unter den *augenblicklichen* [my italics] Umständen unmöglich". But most of the difficulties envisaged (see, in particular, his summary at p. 183) can be met by a proper limitation of the scope of a new convention. In a memorandum submitted by the Norwegian delegation to the UNCITRAL Working Group on International Legislation on Shipping of December 10, 1972 (A/CN.9/W.G.III(V)/W.P.9), it is suggested that one "should keep in mind the possibility of preparing a new convention as appropriate, instead of merely revising and amplifying the rules in the 1924 Brussels Convention on Bills of Lading and in the 1968 Protocol". It is also suggested "that the new rules should be patterned after other international conventions concerned with the transport of goods". This suggestion may seem progressive but it really follows the traditional approach, since the new convention envisaged should only cover carriage of goods *by sea.*

See, for a more radical approach, the question posed in *Bulletin des Transports Internationaux par Chemins de Fer,* October 1972: "Faut-il établir un véritable droit de transport unique de bout en bout ...?" (quoted from *Revue trimestrielle* No. 4, December 1972, p. 37, ed. by Institut du Droit international des transports, Rouen). And, in a meeting of UNIDROIT in April 1973, the harmonization of the law of carriage of goods, being considered a subject of great importance, was included in the working-programme.