



# Relations Between the Rotterdam Rules and the CMR

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## **RELATIONS BETWEEN THE ROTTERDAM RULES AND THE CMR**

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## **RELATIONS BETWEEN THE ROTTERDAM RULES AND THE CMR<sup>1</sup>**

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On the 11th of December 2008 the UN General Assembly adopted the "Convention ofnContracts for the International Carrying of Goods Wholly or Partly by Sea", known as the "Rotterdam Rules". This new Convention strives to extend and modernize the existing international rules relating to contract of maritime carriage of goods. This Convention is supposed to replace The Hague Rules, The Hague-Visby Rules and the Hamburg Rules, thus achieving uniformity of law in the field of maritime carriage.

The Rotterdam Rules have been prepared in intergovernmental negotiations that lasted for over 10 years by the United Nations Commission for International Trade Law (UNCITRAL). The preparatory work on the convention was conducted by the Comité Maritime International (CMI). The final text was signed in Rotterdam in September 2009. In the meantime 23 countries have signed the Convention<sup>2</sup>, all together representing 25% of the world's trade. Spain was the first nation to ratify the Rotterdam Rules. This new instrument has been greeted by shipowner organizations who firmly believe that this will achieve greater global uniformity for cargo liability, facilitating e-commerce through use of electronic documentation. Moreover, 'door to door' contracts involving other modes of transportation in addition to the sea-leg are included by the instrument. The Convention will come into force one year after ratification by the 20th UN Member state. Although there is reported to the widespread support for the Convention, the expectation is that it may be some time before the Rotterdam Rules enter into force. A ratification process is indeed, a long range process as the text needs to be understood and clarified<sup>3</sup>.

In Europe, some voices raised to oppose to such a ratification by European member states. Different arguments have been outlined<sup>4</sup>. One of them specially drew our attention. It concerns the possible interference between this new convention and other unimodal existing conventions, notably the Geneva convention of 1956 on carriage of goods by road<sup>5</sup>.

This paper contemplates to analyze these arguments in the light of the multimodal provisions included int The Rotterdam Rules.

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<sup>1</sup> The CMR, Convention on carriage of goods by road, signed in Geneva, May 15th 1956.

<sup>2</sup> Armenia, Cameroon, Congo, Democratic Republic of the Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, Luxembourg, Madagascar, Mali, the Netherlands, Niger, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo, and the United States of America.

<sup>3</sup> For an early comment : Y. Baatz, Ch. Debattista, F. Lorenzon, A. Sery, H. Staniland, M. Tsimplis, *Rotterdam Rules : a practical annotation*, Informa, 2009, by the IML of Southampton - England.

<sup>4</sup> See : *Questions and Answers on The Rotterdam Rules*, by The CMI International Working Group on the Rotterdam Rules (Ver. 2009.10.10).

<sup>5</sup> Another international instrument seem to have been forgotten, the A.U.C.T.R.M. (Uniform Act on Contract of Carriage of Goods by Road) adopted within the O.H.A.D.A. (African Organization for the Harmonization of Trade Law). This Act indeed provides for uniform rules for international relations between the concerned African states, but also governs domestic road transport. African states who signed the RR may be ignoring their own legislation. See, J. Putzeys, *RR versus CMR ?*, *Liber amicorum* M. Huybrecht, Larcier, Bruxelles, 2011, p.479.

## I. The issue

The Rotterdam Rules<sup>6</sup> is a maritime convention but contains some multimodal aspects. It was clearly drafted to provide for a unique regime for door-to-door transport including a maritime leg (« maritime + »), which stands out from article 5 of the convention defining its scope of application.

### **Art. 5 - General scope of application**

1 . Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:

- (a) The place of receipt;
- (b) The port of loading;
- (c) The place of delivery; or
- (d) The port of discharge.

2 . This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties .

At first sight, this provision seems to refer only to sea carriage. But, the article must be interpreted in consideration with the definition of « contract of carriage » provided for in article 1, which requires at least a sea leg, and possibly a non maritime leg. A contract concluded by a maritime carrier offering a complete transport from a seller's plant (shipper) to a buyer's warehouse (consignee) including a sea voyage (generally called a « door-to-door » contract) may then be governed by an unique regime, the RR.

**Article 1 - Definitions** 1 . "Contract of carriage" means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage

In particular, the non maritime leg, before the loading of the goods on the ship, or after unloading may be governed by the Rules. The following interrogation thus raises : What will be the applicable regime for the inland leg : Rotterdam Rules, derogations authorized by article 80 for volume contracts, domestic law, or other international instruments<sup>7</sup> ? Obviously, an overlap between the RR and former unimodal conventions is likely to happen. In Europe, rose a serious concern about the application or not of the CMR convention on carriage of goods by road for the inland road leg. Why ? A rapid view on this convention may be useful to understand the issue.

**The CMR convention.** This convention was adopted in 1956 and at the present time, is ratified by no less than 55 states. It is principally an European convention, but not only. Its geographical scope ranges from Atlantic ocean to Pacific ocean (from Ireland to Vladivostock in eastern Russia). So it is a real international convention, even if from the american point of view this convention may look rather regional.

This instrument is rather old but has proved its efficiency and is applied daily by courts in Europe and northern Asia<sup>8</sup>. It is defended by shippers as well as road carriers as it is generally

<sup>6</sup> Set forth below as "the RR".

<sup>7</sup> For instance the CMR, or other conventions on air, rail or waterway transport.

<sup>8</sup> See the UNIDROIT website, aiming at collecting the whole case law on the CMR issued by states party to the convention : [www.unilaw.org](http://www.unilaw.org). The website would however need to be completed and improved.

considered as a balanced text. The potential precedence of the RR over the CMR began to upset some actors of the transport world in Europe. Indeed, Rotterdam Rules have been considered as less protective for shippers and road carriers<sup>9</sup>. Such a situation was denounced by European organizations of shippers<sup>10</sup>, as well as the IRU<sup>11</sup>. Some of the arguments developed appear to be relevant but mostly, it seems that the fear came from a certain difficulty to analyze the relevant provisions of this new instrument, which are obviously somewhat complex.

**The arguments against the Rotterdam Rules.** Different kind of interrogations were presented. These arguments have been synthesized in a paper wrote by former official representative of the states in the working group who drafted the convention<sup>12</sup>. The aim of this paper was to clarify certain concerns raised by several declarations issued by international organizations<sup>13</sup>. As for multimodal aspects, and in particular relations with the CMR, the general feeling was that there was a risk that Rotterdam Rules encroaches on the CMR, implementing provisions considered as less protective for both shippers and road carriers. It was also denounced that, in certain situations, none of them would be aware of the applicable regime which could led to serious problems, notably as regards insurance. As for provisions on multimodal transport, it was held that the Rotterdam Rules provided for a lower compensation<sup>14</sup>. Besides, such limit would apply for domestic legs included in a door-to-door contract.

Some of these critics seem, at first sight, relevant, even if comparison between the liability limits of both instruments may be diversified. To make one's opinion on this debate, the provisions of the Rotterdam Rules relating to multimodal transport need now to be analyzed.

## II. Analysis of the Rotterdam Rules multimodal aspects

Potential conflicts between Rotterdam rules and CMR may arise in two situations, treated differently by the RR :

- a road transport preceding or following a maritime leg ;

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<sup>9</sup> A rapid comparison on definition of loss, damage or delay, time for suit, jurisdiction can be found in W. Czapski, *Les Règles de Rotterdam et la convention CMR. Quelles en sont les implications pour les transporteurs routiers ?*, p. 6, IRU symposium on the RR, Geneva, nov. 2010.

<sup>10</sup> AUTF (Association of Users of Freight Forwarding) ; ECE ( U.N. Economic and Social Council).

<sup>11</sup> Position of the IRU (International Road Union) on the Rotterdam rules, Geneva August, 16th, 2009 (CTM/G9635/CRA) : [www.iru.org](http://www.iru.org); J. Putzeys, *RR versus CMR ?*, *Liber amicorum* M. Huybrecht, Larcier, Bruxelles, 2011.

<sup>12</sup> All documents synthesized in : *The Rotterdam rules: an attempt to clarify certain concerns which have emerged*, by F. Berlingeri, Ph. Delebecque, T. Fujita, R. Illescas, M. Sturley, G. van der Ziel, A. von Ziegler, S. Zunarelli, [http://www.mcgill.ca/files/maritimelaw/Rotterdam\\_Rules\\_An\\_Attempt\\_To\\_Clarify\\_Concerns.pdf](http://www.mcgill.ca/files/maritimelaw/Rotterdam_Rules_An_Attempt_To_Clarify_Concerns.pdf).

<sup>13</sup> The relevant papers were the following :

1. Report of the fifty-first session of the Working Party on Intermodal Transport and Logistics of the U.N. Economic and Social Council of 6 May 2009. Hereafter "UNECE Report" : (ECE/TRANS/WP.24/123).

2. A document of the European Shipper's Council with an analysis of the Rotterdam Rules : (A/CN.9/WG.III/WP.81)

[http://www.mcgill.ca/files/maritimelaw/European\\_Shippers\\_Council\\_Position\\_Paper.pdf](http://www.mcgill.ca/files/maritimelaw/European_Shippers_Council_Position_Paper.pdf);

3. A paper of the Working Group on Sea Transport of FIATA being Annex two to FIATA's document MTJ/507 of 26 March 2009;

4. The Position Paper of the European Association for Forwarding Transport Logistic and Customs Services-CLECAT.

<sup>14</sup> Road (CMR): 8,33 SDRs per kilogram; sea (RR): 3 SDRs.

- a road mode of transportation using a maritime mode of transportation : i.e. : roll on/roll off

The two situations are dealt with respectively by article 26 and article 82 of the RR:

- article 26 provides for a general solution to conflict of conventions when the sea voyage is preceded or followed by an inland leg ;
- article 82 deals with, as far as road transport is concerned, a specific situation : combined transport.

Such provisions are based upon the well known « network system ». Let us analyse these two provisions separately.

But previously we would like to consider one question raised by the revolutionary article 80 of the Rotterdam Rules which authorizes contractual freedom for volume contracts<sup>15</sup>. As for the relations between this future instrument and the road convention, some authors wondered if a road leg could be governed by contractual derogating provisions under article 80. The answer seems to be no<sup>16</sup>. As we will see through the analysis of article 26 of the RR, some provisions of the instruments governing other modes of transportation than sea transport, prevail upon the rules provided for in this convention : provisions related to liability, limitation of liability or delay for bringing an action<sup>17</sup>. As far as these subjects are concerned, no derogation can be admitted on the grounds of article 41 of the CMR stating the mandatory regime of this convention<sup>18</sup>. As for other provisions of the RR, derogations should be valid provided that the non maritime instrument applicable authorizes such derogations. But this is not the case of the CMR convention which forbids any derogation<sup>19</sup>.

As a consequence, it must be concluded that no contractual freedom will be admitted for road legs, at least if the competent court is one of a state party to this convention.

Let us now examine the two relevant articles of the RR which have been drafted complementarily, article 26 and article 82.

### **A. Article 26 of the Rotterdam Rules<sup>20</sup>**

This provision relates to non maritime stage of transport and obviously includes road legs preceding or following a maritime transport, as indicated in the title of the article. It solves potential conflicts of conventions when a door-to-door contract has been concluded. But if separate contracts were decided for non maritime legs, the RR will not govern them. Thus, article 26 only concerns door-to-door contracts including a maritime leg.

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<sup>15</sup> Article 1§2. “Volume contract” means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.

<sup>16</sup> F. Berligeri, *Aspects multimodaux des Règles de Rotterdam*, DMF 2009, n°708.

<sup>17</sup> See under p. 6.

<sup>18</sup> *Cass. com.*, 30 juin 2009, n° 08-15.026, B.T.L. n°3280 du 13 juillet 2009 p.447, obs. M. Tilche p.439, Dalloz n°29/2009, p.1963, note X. Delpech.

<sup>19</sup> *Cass. com.*, 17 May 1983, . Bull. civ. IV n°147.

<sup>20</sup> *Rotterdam Rules : a practical annotation*, Informa, 2009, p 77.

*Article 26*

*Carriage preceding or subsequent to sea carriage*

When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, **the provisions of this Convention do not prevail over those provisions of another international instrument** that, at the time of such **loss, damage or event or circumstance causing delay:**

(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities **if the shipper had made a separate and direct contract with the carrier** in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(b) **Specifically provide for the carrier's liability, limitation of liability, or time for suit;** and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument .

## 1. Legal nature

The legal nature of article 26 has been discussed. Is it or not a provision on conflicts of conventions ? Indeed, it provides that “ the provisions of this Convention do not prevail over those provisions of another international instrument ...”. Such wording seems to indicate that the article can be considered as a provision on conflicts of convention. The doubt raises from the fact that it refers to an hypothetical contract (“separate and direct contract with the carrier in respect of the particular stage of carriage”)<sup>21</sup>. However, in practice, such a discussion, in spite of its theoretical interest, seems useless as the effect of article 26 is the same of a real provision on conflicts of conventions : precedence of the unimodal convention over the RR. But we will see afterwards that such precedence is sometimes only partial.

## 2. Scope of application

According to this text, Rotterdam rules provisions will be ousted as far as they relate to « loss, damage or delay ». It must be deduced from such a precision that RR provisions relating to other subjects will remain applicable. The network system provided for by the convention is then rather limited<sup>22</sup>. But we will see later that even provisions concerning other subjects than loss, damage or delay may be ousted out by the CMR due to its mandatory character.

## 3. Conditions of application

Three conditions are required for the ousting of RR:

The first condition concerns the moment of the incident : the incident must have taken place before loading on the ship or after unloading, meaning that the maritime leg will always be governed by the Rules. If the event occurred during these stages but lasts and is aggravated

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<sup>21</sup> D. Glass, *Meddling in the Multimodal Muddle ? A network conflict in the UNCITRAL Draft Convention on the carriage of Goods*, L.M.C.L.Q. 307, 309 (2006) ; M. Hoeks Lim, *Multimodal carriage with a pitch of sea salt : door-to-door under the UNICTRAL Draft instrument*, European Transport Law (E.T.L.) 2008, p. 270 ; J. Putzeys, *op. cit.* ; F. Berlingeri, D.M.F. *op. cit.*

<sup>22</sup> M. Hoeks Lim, *op. cit.*, p. 257 ; L. Rasmussen, *Multimodal Aspects of the Rotterdam Rules*, IRU Seminar on the Rotterdam Rules, Geneva, 3 Nov. 2010, p. 3.

during the maritime voyage, it will not fall under the scope of article 26, being considered as a maritime incident<sup>23</sup>.

The second condition is based upon a theoretical contract, i.e. a contract that could have been concluded for non maritime stage of transport. The international instrument governing the concerned mode of transportation (for instance, CMR for road transport) will thus be applicable provided that the situation falls within its scope of application. Clearly the incident should have taken place during a period covered by the other international convention. As far as road transport is concerned, it means that Rotterdam rules will be ousted by the CMR only if the road leg is international. However, application of article 26 should not depend on the interpretation of the scope provisions of other unimodal conventions. The purpose of the fiction provided for by article 26 § (b) was precisely to ensure that this article take place independently of other conventions.

Thus, all domestic previous or former road transport (for instance, from Genoa to Milan<sup>24</sup> for a sea transport coming from Houston) will remain under the scope of application of the Rotterdam Rules. More than anything, some countries have adopted the CMR for domestic law. The precedence of the RR would then ruin achievement of the unity of road transport regime<sup>25</sup>. Such a situation has been denounced<sup>26</sup> as the national law normally applicable to such a situation may have been more favourable to the parties of the contract of carriage by road.

The third condition subordinates the primacy of the other instrument to its mandatory character. As far as the CMR convention is concerned, such a requirement is obviously fulfilled as article 41 of the same convention precisely underlines its wholly mandatory character<sup>27</sup>.

On the basis of such conditions, we can conclude that the provisions of the CMR convention on damage, loss and delay will prevail on the RR's for the road leg as far as this leg is international. Some authors denounced the risk for a road carrier, subcontractor of a door-to-door contract, to accept nevertheless to be submitted to the Rotterdam rules<sup>28</sup>. But even if such a situation is surely likely to happen, I do not think this choice of law (sort of paramount clause) would be valid, at least in front of courts of states party to the CMR convention<sup>29</sup>. Of course, the risk is evident because, on the one hand all incident are not solved in courts, and, on the other hand, if the court is one of a state party to the Rotterdam rules and not to the CMR, such court will be likely to make the Rotterdam rules provisions prevail.

To benefit from the CMR provisions, and contrary to article 17§1 of the Rotterdam rules which only requires the shipper to establish the loss, damage or delay, the party wishing to

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<sup>23</sup> For instance a damage caused to a good transported under controlled temperature.

<sup>24</sup> Both cities being located in Italy.

<sup>25</sup> For instance see the Belgian domestic law (July 10th 1999) integrating partially CMR provisions ; Article 1 of the Austrian law of 28 June 1990 (BGB 1, 1990, 459).... J. Putzeys, *op. cit.*, p. 477.

<sup>26</sup> See above, I.R.U. position ; J. Putzeys, *op. cit.*

<sup>27</sup> **Article 41 CMR**

1. Subject to the provisions of article 40, any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void. The nullity of such a stipulation shall not involve the nullity of the other provisions of the contract.

2. In particular, a benefit of insurance in favour of the carrier or any other similar clause, or any clause shifting the burden of proof shall be null and void.

<sup>28</sup> W. Czapski, *op. cit.*

<sup>29</sup> W. Czapski, *op. cit.* ; J. Putzeys, *op. cit.*



rely on the CMR provisions will have to establish that the event took place during the road leg. We all know, especially for container transport, that it is very hard to establish the moment when the incident occurred. If it cannot be proved that the incident occurred during the road leg, it seems that article 26 will not be applicable. All unlocalized loss will then always be governed by the RR.

Thus in certain situations, the CMR will be partially applicable and completed by certain provisions of the RR. On the basis of such principles a list of Rotterdam rules provisions, applicable or not to a road leg, can be made.

#### **4. Classification of provisions under article 26**

On the basis of the interpretation of this article, a classification of the Rotterdam rules provisions can be made, distinguishing those of the provisions overruled by the CMR provisions, and those which should remain to be applicable<sup>30</sup>.

##### **Prevailing CMR provisions**

The applicable CMR provisions concern first loss, damage or delay, but other provisions could however be applicable due to the mandatory character of this convention.

- ***Provisions on loss, delay or damage***

- a. Dangerous goods : articles 15 (Goods that may become a danger) and 32 (Special rules on dangerous goods) will be replaced by article 22 CMR;
- b. Grounds for liability : article 17 (Basis of liability) will be replaced by articles 17 and 18 CMR;
- c. Delay : article 21 (Delay) will be overruled by articles 19 and 20 CMR;
- d. Calculation of compensation : article 22 (calculation of compensation) will be replaced by article 23 CMR;
- e. Notice in case of loss, damage or delay : art. 23 (Notice in case of loss, damage or delay) replaced by art. 30 CMR;
- f. Limit of liability : articles 59 to 61 (Chapter 12 - Limits of liability) replaced by articles 23 to 27 CMR.

- ***Other provisions***

Other provisions of the Rotterdam Rules, which do not concern loss, damage or delay, should thus be applicable to road leg. However, it will not always be the case, as again, the CMR convention is wholly mandatory. For example it seems that provisions on shippers obligations<sup>31</sup>, on transport documents<sup>32</sup>, on delivery<sup>33</sup> or related to the right of control<sup>34</sup> will not be applicable the subcontractors, i.e. road carriers.

As for provisions on jurisdiction and arbitration, the situation is more complex.

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<sup>30</sup> F. Berlingeri, *op. cit.*

<sup>31</sup> Chapter 7 - Obligations of the shipper to the carrier : art. 27 to 34.

<sup>32</sup> Chapter 8 - Transport documents and electronic transport records : art. 35 to 42.

<sup>33</sup> Chapter 9 - Delivery of the goods : art. 43 to 56.

<sup>34</sup> Chapter 10 - Rights of the controlling party : art. 50 to 56.

Chapter 14 on jurisdiction will only be applicable in relations between the maritime carrier and the shipper or consignee. In case the shipper or consignee sues directly the subcontractor, the action will be non contractual as no contractual link exist between them<sup>35</sup>. In such case, provisions of chapter 14 should be applicable, leading to a risk for the road carrier of pleading very far from its country<sup>36</sup>. But if the action is brought against the road carrier on the basis of an assignment of rights from the maritime carrier to the shipper (or consignee), the action will be contractual, based upon the subcontract and then the CMR rules on jurisdiction could apply<sup>37</sup>.

On the contrary, Chapter 15 on arbitration may not seem to be applicable as the road contract is not a contract governed by the Rotterdam Rules<sup>38</sup>.

### **Remaining Rotterdam Rules applicable provisions**

Several other articles of the Rotterdam Rules will not be affected by article 26 for two different reasons.

Some provisions have no equivalent in the CMR : Articles of Chapter 4 (Obligations of the carrier) : article 11 (Carriage and delivery of the goods), 12 (Period of responsibility of the carrier), 13 (Specific obligations) ; as well as articles 18 (Basis of liability), 19 (Liability of the carrier for other persons).

Others will remain efficient as they only relate to maritime stage : 14 (Specific obligations « of the maritime carrier »), 16 (Sacrifice of the goods during the voyage by sea), 24 (Deviation) and 25 (Deck cargo on ships).

### **6. Conclusion about article 26.**

A rapid sight on this provision shows the complexity of this limited network system. Legal uncertainty is obvious because even if, in principle, the CMR should prevail in some situations, it seems very hard to identify such situations. Besides, though contracts of carriage of goods by road should not fall within the scope of the RR, they may be applicable to certain road legs.

Let's illustrate this complexity by a few examples :

1. A door-to-door transport from Jakarta (Indonesia) to Paris (France) including a road leg from Le Havre to Paris will be totally governed by the RR ;
2. A similar transport from Jakarta to Cologne (Germany) via le Havre, will be partially governed by the CMR for the road leg (loss, damage, delay) and partially by the RR ;
3. A transport by sea from Shangai (China) to Hamburg (Germany), final destination Lund (Sweden), the truck being loaded on a ferry Hamburg-Malmö (Sweden), and

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<sup>35</sup> J. Putzeys, *op. cit.*, spec. p. 483.

<sup>36</sup> For instance, if the shipment is from Koln (Germany) to Jakarta (Indonesia) via the port of Le Havre (France), article 66 § 1 (ii), gives jurisdiction to « The place of receipt agreed in the contract of carriage », i.e. Jakarta. The consignee may then intend to sue the carriers in front of this Court.

<sup>37</sup> Article 31.

<sup>38</sup> Article 75§1.

continuing is way to Lund by road, the Hamburg-Lund leg will be governed by the CMR.

4. But if the truck does not take the ferry but the bridge between Copenhagen (Denmark) and Malmö, the road leg will be partially submitted to the CMR and partially to the RR ;
5. A transport from Jakarta to Le Havre by sea, final destination Newcastle (England) where the truck is loaded on the Channel rail shuttle between Calais and Dover, the whole carriage from Le Havre to Newcastle will also be partially submitted to the CMR and the RR ;

These examples show that the application of a single regime is a lure. Moreover, comparable situations are nevertheless ruled by different instruments. Complexity and legal uncertainty authorize to doubt about the efficiency of the RR in multimodal situations.

Let us now move to the second provision of the Rules concerning multimodal aspects, article 82.

### **B. Article 82 of the Rotterdam Rules<sup>39</sup>**

During the preparatory works of the convention, it appeared that the article 26 was unable to prevent all conflicts of conventions. A second provision was then lately drafted to complete article 26<sup>40</sup>.

#### **4. Origin of the provision<sup>41</sup>**

In particular, article 26 was considered unlikely to avoid the risk of a possible conflict with the Montreal and Warsaw conventions on air transport<sup>42</sup>, as these instruments also contain provisions on multimodal transport. First, the draft only addressed the relations between the Rotterdam Rules and the Montreal convention<sup>43</sup>. But later, other possible conflicts with unimodal conventions were identified, which lead to a final text tackling with all other modes of transportation. However, except for air transport where paragraph (a) provides for a general conflict rule, the final article is not general as the other instruments will not prevail as a whole on the Rotterdam Rules. The other paragraphs deal only with a specific circumstance : multimodal seamless transport (i.e. : without unloading and reloading goods).

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<sup>39</sup> *Rotterdam Rules : a practical annotation*, Informa, 2009, p.257.

<sup>40</sup> See above p.6 : legal nature of article 26.

<sup>41</sup> On this subject, see : F. Berlingeri, D.M.F. *op. cit.* ; M. Hoeks Lim, *op. cit.*, L. Rasmussen, *op. cit.*

<sup>42</sup> Respectively : Convention for the Unification of Certain Rules Relating to International Carriage by Air, Montreal, 28 May 1999 and Convention for the Unification of Certain Rules for International Carriage by Air, signed at Warsaw on 12 October 1929 and amended several times afterwards.

<sup>43</sup> UNCITRAL A/CN.9/WG.III/WP.56, articles 89 and 90 (that became article 82).

The analysis of the paragraph concerning road transport shows its limited scope of application.

## 5. Analysis of the provision

### **Chapter 17 - Matters not governed by this Convention**

*Article 82 - International conventions governing the carriage of goods by other modes of transport*

Nothing in this Convention affects the application of any of the **following international conventions in force at the time this Convention enters into force, including any future amendment** to such conventions, that regulate the liability of the carrier for loss of or damage to the goods :

(a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;

(b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;

(c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or

(d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without transshipment both by inland waterways and sea .

Article 82 is included in a chapter entitled « Matters not governed by this convention ». Thus, it clearly announces that some situations will not be governed by the Rotterdam Rules.

The very title of the article is « *International conventions governing the carriage of goods by other modes of transport* », which shows that this provision is clearly a conflict of convention provision, setting aside the Rotterdam Rules when another international instrument is applicable.

However, it must be noted that the precedence of other international conventions on the Rotterdam Rules are submitted to several conditions.

First, the sole conventions in force at the moment of the entry into force of the Rotterdam Rules<sup>44</sup> will be taken into account<sup>45</sup>. Possible new conventions on contract of transport of goods will then have to be compatible with the Rotterdam Rules. Such a wording is however classical for conflict of conventions provisions<sup>46</sup>. What is more annoying is that the article only focuses on international conventions, thus excluding other international or regional instruments. This concern is particularly pregnant as regards the European Union where transport policy is the subject of many harmonization instruments (regulations or directives), which cannot be qualified as international conventions. The adoption of the Rotterdam Rules by all European member states, or, by the European Union itself, would undoubtedly have an impact on the future European Rules on transport. Indeed, the EU White paper of 2011 entitled « Roadmap to a Single European Transport Area - Towards a competitive and resource efficient transport system » clearly quotes several times multimodal transport<sup>47</sup>.

<sup>44</sup> Is it doubtful that a new instrument would be adopted till this date, but who knows ?

<sup>45</sup> A special reference to future amendments to such conventions however enables to extend the scope of application of the article.

<sup>46</sup> V. C. Brière : « *Les conflits de conventions internationales en droit privé* », Préf. P. Courbe, Bibl. de Dr. Priv., Tome 347, LGDJ, 2001. Adde, P. Reuter : « *Introduction au droit des traités* », Publications de l'Institut Universitaire des Hautes Etudes Internationales, Genève - PUF, 3e éd. 1995.

<sup>47</sup> [http://ec.europa.eu/transport/strategies/2011\\_white\\_paper\\_en.htm](http://ec.europa.eu/transport/strategies/2011_white_paper_en.htm).

Thus, there could be a risk that European measures could not be taken, even for exclusively intra-european relations, because of the precedence of the RR.

Second, the only conventions who will prevail on Rotterdam Rules are those « that regulate the liability of the carrier for loss of or damage to the goods ». This expression seems to exclude conventions on another subject, which is quite logical. An authorized author<sup>48</sup> however declared that the only purpose of the formula was to identify the pertinent conventions, but not to restrict the scope of application of article 82<sup>49</sup>.

I will now analyze the specific paragraph dedicated to road conventions, paragraph (b).

(b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of **goods that remain loaded on a road cargo vehicle carried on board a ship**;

This provision is not a general provision on conflicts of conventions which would provide for a general primacy of road conventions over Rotterdam Rules. Indeed, it focuses on specific situations, those of « **goods that remain loaded on a road cargo vehicle carried on board a ship** », which clearly refers to roll on/roll off transport. Article 82 then states that the road convention will be applicable, if the incident relates to liability (regime ; limitation) or time for bringing an action. As far as the CMR is concerned, it implies an international road leg. If not, the Rotterdam rules will remain applicable<sup>50</sup>.

This formulation is inspired by article 2, paragraph 1, of the CMR convention, which is the only provision on multimodal transport in this convention and is also limited to such situations<sup>51</sup>. When the conditions are fulfilled (*i.e.* a truck loaded on a ship), the applicable regime will then be determined by article 2 of the CMR.

#### Article 2 CMR

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 it is proved that any loss, damage or delay in delivery of the goods which occurs during the carriage by the other mode of transportation **was not caused by act or omission of the carrier by road, but by some event which could only occurred in the course of and by reason of the carriage by that other mode of transportation**, the liability of the carrier by road shall be determined not by this convention but in the manner in which the liability of the carrier by the other mode of transportation would have been determined if a contract for the carriage the goods alone had been made by the sender with the carrier by the other mode of transportation in accordance with the **conditions prescribed by law** for the carriage of goods by that mode of transportation. If, however, there are no such prescribed conditions, the liability of the carrier by road shall be determined by this convention.

The conditions of application of article 2 of the CMR are the following.

First, there must be no « rupture de charge » (seemless transport), meaning unloading and re-loading of the goods. Clearly, it does not apply to all mutlimodal transports, but only to

<sup>48</sup> F. Berlingeri, DMF, *op. cit.*

<sup>49</sup> A list of the concerned conventions would have been preferable.

<sup>50</sup> Which has by the way been criticized (see above p.7).

<sup>51</sup> W. Czapski *La responsabilité du transporteur routier lors du transroulage et du ferroulage*, E.T.L. 1990, n°2, p.172; IDIT, *Aspects juridiques de l'intermodalité*, study for the Haute-Normandie Regional Council, 2005 and 2006, spec. p. 7 and following (report n°1, 2005).

Ro/Ro transport. The CMR convention will then be applicable to international contracts concluded between a shipper and a road haulier, including a maritime (or rail : truck-on-train) transport of the vehicle (Ro/Ro traffic though the Channel sea or Mediterranean sea). Some authors consider that this provision only apply for road-sea transport (pre-carriage) and not for sea-road transport (post-carriage)<sup>52</sup>. I do not agree with this position because if the road haulier has concluded a door-to-door contract, I believe this provision also governs the road leg after the maritime voyage. But this assertion could be right if we imagine that no pre-carriage by road was performed, goods being loaded on a truck directly in the loading port. However this situation seems to me very unlikely to happen.

Second, the article is also based upon the « network system », which consists in applying to the road carrier theoretical contract provisions governing the other mode of transportation, a maritime convention in our example.

At this stage, it must be noticed that, unlike article 26 of Rotterdam rules<sup>53</sup>, the text mentions « the law » applicable to the other mode of transportation and not « the international instrument ». In my opinion, it means that if an international convention is not rightfully applicable to the maritime leg, the situation will be governed by the domestic maritime law designated by a conflict of laws rule<sup>54</sup>.

Besides, such application of maritime law supposes on the one hand, that the origin of the incident can be identified, and, on the other hand, that the damage resulted from the maritime transport : « *Provided that to the extent it is proved that any loss, damage or delay in delivery of the goods which occurs during the carriage by the other mode of transportation was not caused by act or omission of the carrier by road, but by some event which could only occurred in the course of and by reason of the carriage by that other mode of transportation* ».

We must at this stage notice again that these provision modifies the burden of proof. Under article 2 of the CMR, this convention will be automatically applicable except if established that the incident was exclusively linked with the maritime transport. The burden of proof will then be born by the person invoking the application of the Rotterdam Rules.

Let's take an example. If a fire occurs due to a failure of the electrical system of the truck during the maritime voyage, there is no special link between this incident an the maritime leg. But if the fire has been caused by an external event to the truck (failure of the electrical system of the holds), then the origin of the incident is linked to the maritime leg and the Rotterdam Rules will apply. Actually Rotterdam Rules should be applicable if the event occurs on board and has not been caused by the road carrier.

Moreover, there is another condition to the application of maritime conventions. Not all the provisions of these conventions will be applicable, at least if we refer to the French version of the CMR.

#### **Article 2 CMR**

1. - Si **le véhicule contenant les marchandises** est transporté par mer, chemin de fer, voie navigable intérieure ou air sur une partie du parcours, **sans rupture de charge** sauf, éventuellement, pour l'application des dispositions de l'article 14, la **présente Convention s'applique néanmoins, pour l'ensemble du transport**. Cependant, dans la mesure où il est prouvé qu'une perte, une avarie ou un retard à la livraison de la marchandise qui est survenu au

<sup>52</sup> See above, p. .

<sup>53</sup> See above, p.6.

<sup>54</sup> W. Czapski, *La responsabilité du transporteur routier lors du transroulage et du ferroutage*, E.T.L. 1990, n°2, p.172.

cours du transport par l'un des modes de transport autre que la route n'a pas été causé par un acte ou une omission du transporteur routier et qu'il provient d'un fait qui n'a pu se produire qu'au cours et en raison du transport non routier, la responsabilité du transporteur routier est déterminée non par la présente Convention, mais de la façon dont la responsabilité du transporteur non routier eût été déterminée si un contrat de transport avait été conclu entre l'expéditeur et le transporteur non routier pour le seul transport de la marchandise, **conformément aux dispositions impératives de la loi concernant le transport de marchandises par le mode de transport autre que la route.** Toutefois, en l'absence de telles dispositions, la responsabilité du transporteur par route sera déterminée par la présente Convention.

The article provides that the theoretical maritime contract will be governed by « *dispositions impératives de la loi concernant le transport de marchandises par le mode de transport autre que la route* ». The text clearly refers to « dispositions impératives » of the law (in our case, maritime), « impératif/tive » meaning in French, mandatory. It infers that not all provisions of the law or maritime convention will be applicable, but only mandatory provisions<sup>55</sup>. The end of the article clearly states that « If, however, there are no such prescribed conditions, the liability of the carrier by road shall be determined by this convention », i.e. CMR.

Such an interpretation of the French text raises several questions. First, as maritime conventions are not in general wholly mandatory, it may be difficult to identify the provisions who can be qualified as so. Are the Hague-Visby Rules compulsory for relations issued apart from a bill of lading?<sup>56</sup> As for Rotterdam Rules, there is at the present time no official list of mandatory provisions.

But there is an hesitation relating such interpretation as the english version of article two, which is also an official version, does not seem to limit the application of maritime law to its mandatory provisions. Indeed, the english version only quotes « conditions prescribed by law » with no mention of mandatory character. This contradiction in the wording of the text is quite annoying. French case-law is rather rare on this article but the few decisions issued always focused on mandatory provisions. Failing an official interpretation of the text<sup>57</sup>, it is thus generally admitted that maritime law can prevail on the CMR only if mandatory<sup>58</sup>. Even, english authors and courts adopt the interpretation of the french text<sup>59</sup>. In such conditions, it seems however that maritime conventions will not generally be considered as compulsory, especially if applicable through a paramount clause<sup>60</sup>. The only situation identified of a mandatory application of a maritime convention to a door-to-door road transport including a maritime leg would be the situation when a bill of lading, with no reference to a charter-party, would have been issued but not transferred, a maritime convention governing rightfully the maritime stage<sup>61</sup>.

<sup>55</sup> For instance, a french Court of appeal decided that prescription will continue to be ruled by the CMR (art. 32) and not by the HVR (Art. 3§ 6) : *CA Aix en Provence, 30 mai 1991* : Rev. Scapel 1991, p. 105 ; DMF 1992, p. 194 ; BTL 1992, p. 281.

<sup>56</sup> J. Putzeys, *RR versus CMR ?*, *Liber amicorum* M. Huybrecht, Larquier, Bruxelles, 2011, p.474.

<sup>57</sup> Under article 47 of the CMR, International Court of Justice has jurisdiction to interpret the convention, but no action have never been referred to it.

<sup>58</sup> J. Putzeys, *Quand la mer devient route*, *Liber amicorum* L. Tricot, Kluwer, 1988, p.411.

<sup>59</sup> D.J. Hill and A.D. Messent, *CMR*, Lloyd's of London press, 1984 ; M. Clarke, *International carriage of goods by road*, Stevens, 1982, p. 5; new edition: LLP 2003 ; A.E. Donald, *The CMR*, Derek Beattie, 1981, p. 11.

<sup>60</sup> *Cass. com.*, 5 juil. 1988, Bull. 1988 IV N° 234 p. 161; JCP 1988 p. IV. 330 ; E.T.L., p. 221 ; BTL 1989, p. 449 ; Unif. Law Rev. 1998. II. p. 741.

<sup>61</sup> Paris, 13 oct. 1986, BT 1986, n°2220 ; contra : Cour de cassation. (belg.) 2 fév. 1979, RW 1978-79, col. 2109 s. For a more detailed explanation, see J. Putzeys, op. cit., spec. p. 413 s.

## 6. Conclusion on article 82

To conclude about article 82 of the Rotterdam Rules, combined road-sea transports will continue to be governed by article 2 of the CMR, if the situation copes with the conditions of application of this provision, specially localization of the damage. But even under such article, maritime conventions are most unlikely to apply in practice. Such a conclusion may reassure European defenders of the CMR convention but I am not sure that it removes all ambiguity as even in Europe, this provision is considered as rather complex and source of legal uncertainty for the road carrier as well as the shipper, who will not be easily aware of the applicable regime<sup>62</sup>.

It is now time to conclude.

### Conclusion

The question was, what will be the applicable regime to a road leg preceding of following a maritime transport ? Will the RR reach their multimodal ambition?

Unfortunately, the answer to these questions is clearly “No”. Except for domestic pre-loading or post-loading stages of maritime door-to-door contracts, it seems to me that the aim of Rotterdam Rules, to provide for a unique regime for door-to-door contracts, has partly failed. The complexity of the relevant provisions jeopardizes legal certainty.

It so remains necessary to continue to think about a real mutlimodal instrument<sup>63</sup>. This is why, in a certain way, I understand the concerns expressed by European actors because within the European union, the adoption of such an instrument could be easier. Nevertheless, we must not forget that maritime world is much larger than Europe. If such an instrument were to be adopted, It should take into account the Rotterdam Rules if ever they enter into force.

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<sup>62</sup> M. Bombeeck, Ph. Hamer, B. Verhaegen, *La responsabilité du transporteur routier dans le transport par car-ferries : L'article 2 de la Convention relative au contrat de transport international de marchandises par route*, E.T.L., 1990, 107-193.

<sup>63</sup> W. Tetley, *Summary of Some General Criticisms of the UNCITRAL Convention (The Rotterdam Rules)* (Preliminary observations), speech made in front of the American Maritime Law Association, Nov. 5, 2008, [http://www.mcgill.ca/files/maritimelaw/Summary\\_of\\_Criticism\\_of\\_UNCITRAL\\_\\_No\\_1.pdf](http://www.mcgill.ca/files/maritimelaw/Summary_of_Criticism_of_UNCITRAL__No_1.pdf).