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Conflicts of Conventions in the Rotterdam Rules

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In the Rotterdam Rules,[1] States Parties commit themselves to denounce previous carriage by sea Conventions.[2] Other Conventions are, however, believed not to conflict with the Rotterdam Rules,[3] partly due to some elaborate conflict clauses in the Rules. In this article I will first discuss the collision clauses from a policy point of view, and thereafter I will discuss whether conflicts exist with other transport Conventions despite the conflict rules.

1 Introduction[4]

In the discussions, one often hears references to the mandate of negotiations, the difficulties encountered during negotiations and the drafting history. I have chosen a perspective similar to that which might be taken by the courts when the Rules are in force. In this situation, it is first and foremost the norms carried by the text of the Convention that matter. I will try to clarify these norms, so that politicians can take a view as to whether this is what they want. Negotiation history may explain why a text has become the way it has, but it cannot justify the fact that it becomes law.

2 Policy analysis

My first topic is how the conflict of Conventions as envisaged by the draftsmen looks from a policy point of view.

The idea in the Convention is that it shall apply door-to-door, regardless of mode of transportation, as long as an international sea leg is involved.[5] Exceptions are only made for conflicting liability rules for other modes of transport. Such conflicts include rules where there is no per unit limitation of liability, the per kilo limitation is higher than in the Rotterdam Rules and the basis of liability is stricter.

[1] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (A/RES/63/122). The Convention opened for signature on 23 September 2009. I would like to take the opportunity to commend the persons contributing to a successful completion of the Rotterdam Rules negotiations within reasonable time.
[2] Rotterdam Rules art 89.
[3] For some materials relating to the Conventions discussed here see http://www.folk.uio.no/erikro.
[4] This paper was presented in preliminary format at the Inter-Tran conference 'The European Transport Policy – Legal and Logistical Impacts on the Finnish Transport Industry (30 January 2009) and then at the 3rd Arab Conference for Commercial and Maritime Law in Alexandria (19 April 2009). The ideas have been further developed after the presentations.
[5] Rotterdam Rules arts 1(1) and 6.

The main provision to deal with this is Article 26, which provides that conflicting Conventions, on certain conditions, shall take precedence over the Rotterdam Rules before or after the sea voyage. During the sea voyage it is envisaged that there is no conflict, presumably because, inter alia, the CMR[6] refers back to the Rotterdam Rules and similar Conventions in respect of the sea leg.[7] However, if there is a problem Article 82 Rotterdam Rules provides that the special Conventions in case of conflict shall take precedence, and also to a greater extent than what would appear to flow from Article 26.

The details of the drafting of Article 26 and the associated drafting of Article 82 have already been much debated,[8] and I do not wish to go into details in this respect here. What is of a greater concern is the result the draftsmen intended. To illustrate how the Rotterdam Rules will work, one can perhaps imagine a carriage by road from Northern Sweden, across the Øresund to Denmark with delivery at the port in Denmark.[9] In that case, the new regime will have the following effects.

The inland stretch in Sweden remains uncovered by any international Convention[10] unless the carrier undertakes to extend the maritime contract to that part of the transport.[11] If the carrier does not do that, but still undertakes the whole transport in two different contracts, there will in fact be a multimodal operation, but in law a national, unimodal road transport plus an international transport across the channel.

If the carrier undertakes the entire transport under one contract, the liability regime applying to the road transport will vary. If the goods are carried across the channel by sea, the Rotterdam Rules regime will apply for the road stretch as well.[12] But if the goods are carried by road, the CMR will apply to the whole carriage.[13]

These different possibilities illustrate clearly the weaknesses of the door-to-door approach in the Rotterdam Rules. First, such a situation is quite complicated. The effects of the different ways of organizing the transport are not easily understood. In the above examples, the carrier's liability pursuant to international rules for the road stretch in Sweden may be 0,[14] 8.33 SDRs per kg[15] or 3 SDRs per kg/857 SDRs per unit (whichever is the higher),[16] and there is no obvious reason for the variation.

Secondly, it does not add to uniformity. On the contrary, in the above example the Rotterdam Rules add yet another regime for the inland transport without removing any, even if all involved States Parties implement the Rules as intended. The uniformity achieved by the denunciation of older carriage Conventions required by the Rotterdam Rules could be maintained even if the Rules had created more uniformity among the Conventions that are supposed to remain in force.

[6] Convention on the Contract for the International Carriage of Goods by Road (CMR) 1956, as amended by Protocol to the CMR 1978.

[7] CMR Convention art 2.

[8] See in particular C Hancock 'Multimodal transport and the new UN Convention on the carriage of goods' [2009] 14 JIML 484–95 and A Diamond 'The next sea carriage Convention?' [2008] LMCLQ 135–87.

[9] I assume, of course, that all involved States are States Parties to the Rotterdam Rules and the CMR Convention.

[10] There is no international Convention which applies to domestic road transport in Sweden. The CMR Convention only applies to international carriage: see its art 1(1).

[11] Rotterdam Rules art 1(1) ('The contract ... *may* provide for carriage by other modes of transport ...'; emphasis added). Similarly on the application of the CMR, see M A Clarke 'International carriage of goods by road: CMR' (4th edn Informa London 2003) 46.

[12] This follows from the general scope of the Rotterdam Rules (see above). The conflict rule in Rotterdam Rules art 34 does not apply, as this only relates to conflicts with applicable international Conventions, and there is, as already mentioned, no international Convention which applies to domestic road transport in Sweden.

[13] CMR Convention arts 1(1) and 17.

[14] Again, there is no international Convention which applies to domestic road transport in Sweden.

[15] CMR Convention art 23(3).

[16] Rotterdam Rules art 59(1).

Thirdly, it does not create a level playing field. The liability rules seem to favor some modes of transport and some ways of organizing the transport over others, while it is generally recognized that the alternatives ideally should compete on equal terms in this respect.[17] I do not know whether it makes it worse or better that it is perhaps not always obvious which interests are favored (see below).

Finally, the Rotterdam Rules go a long way to maintain maritime peculiarities. I doubt that the nature of maritime transport really warrants liability rules that are fundamentally different from those of other modes of transport. I will discuss this shortly. But if the nature of maritime transport warrants such special rules, it does in all events not seem logical to extend them to the non-maritime part of the transport, as do the Rotterdam Rules. If there are special reasons why the per kilo limit should be 3 SDRs at sea, while it is 8.33 SDRs in road transport, why then apply the special maritime limit also for the road stretch, as in the example above? This creates a privilege for the sea carrier by including the road carriage in his offer to the customer and thereby triggering the use of the sea carriage limitation regime, if that is beneficial to him, and I can see no reason why the sea carrier should have such a privilege.[18]

But are there really valid reasons for the maritime peculiarities, even in the sea leg? A good way of approaching this problem is to compare the different regimes for the carrier's liability for cargo damage, and look for a pattern that reflects the nature of the carriage.

Convention	*Mode*	*Basis for liability*	*Limitation*	*Breaking the limit*	*Global limitation*
Rotterdam Rules	Sea	Negligence with exceptions, art 17	3 SDRs/kg or 857 SDRs per unit (whichever is the higher), art 59	Almost unbreakable, art 61	LLMC[19] etc
CMR Convention	Road	Quite strict, art 17	8.33 SDRs/kg, art 23	Wilful misconduct, art 29	Never
Budapest Convention	Inland waterways	Quite strict, art 16	2 SDRs/kg or 666.67 SDRs per unit (whichever is the higher), art 20	Almost unbreakable, art 21	Strasbourg Convention[20]
Montreal Convention[21]	Air	Very strict, art 18	17 SDRs/kg, art 22	Quite unbreakable, art 22	Never
CIM Rules	Rail	Quite strict, art 36	17 SDRs/kg, art 40	Almost unbreakable, art 44	Never

[17] The Convention concerning International Carriage by Rail (COTIF) 1980 Appendix B; Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM Rules) art 48 §2 specifically provides that: 'Where one and the same sea route is served by several undertakings ..., the regime of liability applicable to that route shall be the same for all those undertakings'.

[18] The sea carrier has this privilege even if the sea leg of the transport is very minor in relation to the road leg; see on this point UNCITRAL Document A/CN.9/621 para 187. In other Conventions, there is an example of a choice of Convention rule that depends on the relative length of the legs; see Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (CMNI) (2000) art 30(2).

[19] Convention on Limitation of Liability for Maritime Claims (1976).

[20] Strasbourg Convention on the Limitation of Liability of Owners of Inland Navigation Vessels (CLNI) 1998.

[21] Convention for the Unification of Certain Rules for International Carriage by Air (1999) (Montreal Convention).

The obvious peculiarity with maritime transport – that there are so many eggs in one basket as ships are much bigger than any other means of transportation – is often taken care of by global limitation. The low per kilo limit cannot in any event be justified by this peculiarity, as the unit limitation sometimes leads to much higher liabilities than in the other modes of transport.[22]

It may also be that maritime transport is more risky than transport by other modes, and that the liability rules therefore ought to be more lenient to the carrier. I have, however, seen no evidence that the risk actually is greater at sea. And if it were, I suppose that would be an argument for stricter rules rather than more lenient rules to induce the greater care necessary under such circumstances.[23]

The insurance arrangements in maritime transport are at least as sophisticated as in any other modes of transport. The fact that there is an efficient insurance system should not, of course, justify stricter liability. But the insurance system is no reason to maintain the maritime peculiarities.

I do not think that there is any chance that the liability rules of other modes of transport should be aligned with the maritime standard. If it is desirable to obtain uniformity and a level playing field, there is therefore only one way to go – to align maritime liability with the liabilities of other modes of transport. The peculiarities of maritime transport are no reason for not doing so, at least not as long as global limitation is maintained.

The Rotterdam Rules do not, perhaps, reflect the best policies in respect of simplification, uniformity, level playing fields and maritime peculiarities. However, one should not make this a bigger problem than it actually is. Insurance costs are marginal, and other factors are likely to be much more decisive in the pursuit of profitability, both on the carrier's side and on the cargo side. Although the playing field may not be level, it is not so very unlevel. It would be perfectly possible to live with the differences in liability rules outlined above, however unwarranted they may be. This last point, however, can also be turned the other way around – if cargo liability insurance is not a major problem, how can one defend keeping up and extending the maritime peculiarities in this field, as the Rotterdam Rules do?

3 Technical analysis

3.1 The problem

I will now turn from the policy analysis of what the draftsmen have tried to achieve in respect of door-to-door regimes to the issues the draftsmen did not address. I will restrict myself to technical matters, ie where there may be an unresolved conflict between the Rotterdam Rules and one or more unimodal transport Conventions.

The carrier's liability for localized damage or delay will not be discussed. Article 26 will thus fall outside the scope of this discussion, as it is clear from the wording that it only applies to the carrier's liability for localized damage or delay:

> 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 ...

[22] The unit limitation will be applicable for goods weighing less than 857/3 kg/unit = 285.67 kg/unit. If the goods weigh less than 857/17 kg/unit = 50.41 kg/unit, the maximum liability of the Rotterdam Rules would be higher than even that of the Montreal Convention or the CIM Rules. This may very well be the case, eg for computers and teddy bears, which again may or may not be worth far more than the limit.

[23] J Ramberg *The law of transport operators in international trade* (Stockholm University Law Publishers 2005) at 37ff also points out that the maritime limitation rules can be seen as risk sharing in a common adventure.

What I will attempt to do is first to identify conflicts between the Rotterdam Rules and other transport Conventions. By conflicts I mean not only that the regulations differ in effect, but also that they differ in wording. Even if a close reading of the two instruments should conclude that there is a construction that would remove all conflicts, the State Party to the unimodal Convention may have violated it by replacing the Rotterdam Rules wording for the wording agreed in the unimodal Convention.

Furthermore, there may be a conflict between two Conventions even if the private parties can comply with both of them by waiving rights. It is the obligations of the States Parties to harmonize legislation, and not the possibilities of the private parties to comply with it that is the concern here.

Some of the Conventions include a provision that expressly states that the provisions in that Convention shall apply regardless of the basis of the claim.[24] Presumably this applies also if the basis of the claim is another Convention. But even if such provisions are not included, the purpose of a Convention on harmonization of laws must be that the States Parties are not also free to promote alternative rules for the same subject area.

As discussed below, the focus is on the shipper and the contractual carrier. Similar problems could arise in respect of the unimodal carrier as a performing carrier. The Rotterdam Rules include provisions of the liability of such performing parties if they are maritime performing parties,[25] and these rules could be in conflict with other Conventions. However, such possible conflicts are to some extent avoided by excluding an 'inland carrier' from the definition of a 'maritime performing party'.[26]

The exclusion of inland carriers from the definition of maritime performing parties is by its wording limited to inland carriers whose services are not 'exclusively within a port area'. An inland road carrier that picks up the goods at the ship's side and takes them to a hinterland destination is thus not a 'maritime performing carrier', and no conflicts with the CMR Convention arise in respect of the Rotterdam Rules' liability for maritime performing carriers. However, conflicts may still arise in respect of the CMR Convention and the Rotterdam Rules' liability for the contractual carrier that includes the hinterland leg of the transport, and this is what will be discussed below.

After the discussion of possible conflict areas (below at 3.3–3.6) I will discuss whether conflict rules such as Article 82 of the Rotterdam Rules can resolve any conflicts, or whether the conflicts in fact make the particular Convention irreconcilable with the Rotterdam Rules (below at 3.6–3.7).

For the sake of simplicity, I will use the CMR Convention as the main focus for the discussions below.

3.2 Documents

It has already been stated that the Rotterdam Rules apply to the example given above of carriage by truck through Sweden and then across the Øresund by ferry from Sweden to a location in Denmark.[27] Therefore, a document issued by the carrier would be subject to the Rotterdam Rules Chapter 3 on Electronic transport records and Chapter 8 on Transport documents and electronic transport records. However, at the same time, the transport will be subject to the document rules of the CMR Convention Chapter 2. The fact that a part of the

[24] Budapest Convention art 22, Rotterdam Rules art 4 and Montreal Convention art 29. The corresponding rule in the CMR Convention art 28 is limited to extra-contractual claims. The CIM Rules do not include any rule of this kind.
[25] Rotterdam Rules art 19.
[26] ibid art 1(7).
[27] Above Section 2.

transport will be carried out by sea does not relieve the carrier of the obligation to issue a CMR Convention Consignment Note to the final place of destination,[28] regardless of whether the liability rules of the CMR apply to the sea leg.[29] This means that two very different rules on documentation may apply to the same transport.

It may not be in conflict with the Rotterdam Rules that a CMR Convention Consignment Note is issued for the transport in addition to the documentation envisaged in the Rotterdam Rules. After all, the carrier is under no absolute obligation to issue any kind of documentation under the Rotterdam Rules,[30] and there is no ban on documentation that departs from the patterns set out in the Rules. Still, for the States Parties to the Rotterdam Rules it may not be appropriate to maintain a competing set of rules on cargo documentation. An international Convention in which the States Parties agree on how the rules on cargo documentation should be applied would otherwise be quite meaningless.[31]

In any event, the CMR Convention provides an absolute right for the sender to have a CMR Convention Consignment Note rather than the Rotterdam Rules documentation,[32] and normally disallows States Parties the right to authorize the use of other documentation, eg a Rotterdam Rules document of title, even by specific additional Conventions.[33] Therefore, there is a conflict between the two sets of rules in this respect.

Obviously, when there are two sets of document rules there are some similarities but also some differences in the details, eg of the particulars to be contained in the documents. I will not carry out a full comparative study in this respect as the incompatibility has already been established.

There are also document requirements that are different from the requirements in the Rotterdam Rules in air law,[34] rail law[35] and inland waterways law.[36] In the air law regime, it is expressly provided that its document rules will prevail even if Rotterdam Rules documents are issued.[37] Thus, the same problems arise in respect of these Conventions as in respect of the CMR Convention. However, in inland waterways law it is presupposed that other documents can be used; indeed the use of a maritime bill of lading may render the inland waterways regime inapplicable.[38]

3.3 Disposal and delivery rules

The rules of disposal and delivery of the cargo are traditionally closely linked to the cargo documentation. It is therefore no surprise that the rules differ in the CMR Convention and the Rotterdam Rules; indeed, the Rotterdam Rules contain a number of variants in Chapters 9, 10 and 11. The most conspicuous differences are:

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[28] CMR Convention art 4.
[29] Other liability rules may, however, apply by virtue of CMR Convention art 2.
[30] Rotterdam Rules art 35.
[31] No reservations are allowed in the Rotterdam Rules; see art 90.
[32] CMR Convention art 4.
[33] CMR Convention art 1(5): 'The Contracting Parties agree not to vary any of the provisions of this Convention by special agreements between two or more of them, except ... to authorize the use in transport operations entirely confined to their territory of consignment notes representing a title to the goods'. The Article was pointed out in the course of the negotiations of the Rotterdam Rules; see UNCITRAL document A/CN.9/616 para 216 et seq.
[34] Montreal Convention art 4 et seq.
[35] CIM Rules art 11 et seq and Convention concerning International Carriage by Rail (COTIF) 1980 Appendix B, Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM Rules), Annex III Regulations concerning the International Carriage of Containers by Rail (RICo) art 10. As in the CMR Convention, the use of other documents than those provided for in the Convention is expressly prohibited (CIM Rules art 13 §4).
[36] Budapest Convention ch III.
[37] Montreal Convention art 9.
[38] ibid art 2.

- the controlling party is defined differently in CMR Convention Article 12 and Rotterdam Rules Article 51
- the rules on presentation of documents are different in CMR Convention Article 12 and Rotterdam Rules Chapter 9
- the rules for non-collected goods differ in CMR Convention Article 14 and Rotterdam Rules Article 45(c).

These are straightforward examples of contradictory regulation; a State Party to both Conventions would be in conflict with its obligations under one as well as the other.

One could imagine that this conflict would be resolved by the choice of document; a CMR Convention Consignment Note would trigger the CMR Convention rules on disposal and delivery, while a Rotterdam Rules document would trigger the Rotterdam Rules. But it will not necessarily be clear which set of rules the issuer had in mind, and at least the CMR Convention rules will apply regardless of form due to a special provision in that Convention.[39] Possible clarification between the private parties can, as already mentioned, in any event not relieve a State Party of its duty to implement the rules of the CMR Convention and the Rotterdam Rules, respectively.

There are also rules on disposal and delivery of the cargo that are different from the requirements in the Rotterdam Rules in air law,[40] rail law[41] and inland waterways law.[42] Thus, the same problems arise in respect of these Conventions as in respect of the CMR Convention.

3.4 Carrier's liability for unlocalized damage

In respect of localized damage, the Rotterdam Rules to some extent refer to other Conventions.[43] However, in respect of unlocalized damage the idea is apparently that this should be dealt with solely by the Rotterdam Rules. This creates a problem, because the other Conventions to some extent also include provisions for unlocalized damage.

Indeed, the system of the CMR Convention is virtually identical to that of the Rotterdam Rules in this respect. There is a general liability rule, and then exceptions for localized damage.[44] If the damage is not localized, the general liability rule applies, which makes it a rule for unlocalized damage.[45]

The CMR Convention is not a multimodal Convention. However, it follows explicitly from Article 2 that it does apply even if the transport includes ro-ro carriage by sea. And even if the transport includes a carriage by sea that is not ro-ro, the carrier will be liable for unlocalized damage under the general liability rule. The Convention does not include an exception for such legs, and such exemptions would in any event not apply if the carrier could not prove that the damage occurred at such a leg, and thus would not be unlocalized.

[39] CMR Convention art 4: 'The absence, irregularity or loss of the consignment note shall not affect the existence or the validity of the contract of carriage which shall remain subject the provisions of this Convention'.
[40] Montreal Convention art 12 et seq.
[41] CIM Rules arts 28 and 30–34.
[42] Budapest Convention art 10 and ch 14.
[43] Rotterdam Rules art 34.
[44] CMR Convention arts 17 and 2.
[45] M A Clarke (n 11) 33. In a report of the UNCITRAL Secretariat to the delegates negotiating the Rotterdam Rules, it was pointed out that a road carrier does not necessarily have responsibility for the sea leg. But the point was hardly that he would *never* have such responsibility; see UN Document A/CN.9/WG.III/WP.29 (31 January 2003): Transport Law: Preparation of a draft instrument on the carriage of goods [by sea]: General remarks on the sphere of application of the draft instrument. Note by the Secretariat paras 62–63 and 115–16. In UN Document A/CN.9/WG.III/WP.78 (21 September 2006): Transport Law: Preparation of a draft Convention on the carriage of goods [wholly or partly] [by sea]: Relation with other Conventions. Note by the Secretariat para 35, it is noted that the conflicts do not arise in respect of subcontractors, but no explanation is offered why, for example, the CMR Convention is not applicable to the main contract of carriage if it involves both road and sea transportation.

Again, there is a striking conflict between the Rotterdam Rules and the CMR Convention. Both Conventions include liability rules for unlocalized damage. They are different,[46] and a State Party cannot implement both sets.

Similar to the CMR Convention, there are liability provisions that include unlocalized damage – even if other modes of transport are involved – in rail law.[47] The inland waterways regime provides that the contractual carrier remains liable if the goods are trans-shipped, even in breach of the contract.[48] This provision presumably also applies to trans-shipment to another mode of transport. Thus, the same problems arise in respect of these Conventions as in respect of the CMR Convention. In air law, however, the unimodal regime only applies to the air part of the carriage, and no issue of unlocalized damage arises that can create a problem in relation to the Rotterdam Rules.[49]

3.5 Shipper's liability

Both the CMR and the Rotterdam Rules include rules on shipper's liability.[50] Again, they are not identical, neither in form nor in tenor. It would not be possible for a State Party to both Conventions to implement both sets of rules, as the intended clarity and uniformity would then be lost in transports within the scope of both Conventions, and the shipper would get either more or less liability than envisaged in either of the Conventions.

There are also rules on shipper's liability that are different from the requirements in the Rotterdam Rules in air law,[51] rail law[52] and inland waterways law.[53] Thus, the same problems arise in respect of these Conventions as in respect of the CMR Convention.

3.6 Conflict rules – the principal view

In the text above, I have identified four clear-cut examples of conflict between the Rotterdam Rules and the CMR Convention (and other unimodal Conventions). There are also others, such as rules of the evidentiary effect of the transport documents, time bars, conditions for breaking the limits etc.[54]

Could Article 82 remove the conflicts? The parts of Article 82 that relate to the CMR Convention read as follows:

> 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*: ...
>
> (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*; ... (emphases added)

If one reads this without the words in emphasis, the rule is quite straightforward: When applicable, a Convention governing the carriage of goods by road, such as the CMR Convention, takes precedence whenever it is applicable. In that way there is technically no conflict. I shall refer to this below as 'the conflict rule'.

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[46] See above Section 2.
[47] This follows implicitly from CIM Rules arts 27 §4(b) and (for certain listed services) 48 and expressly from RICo Rules art 3.
[48] Budapest Convention art 4.
[49] Montreal Convention art 38 (but see art 18(4)).
[50] CMR Convention arts 7 and 10; Rotterdam Rules ch 7.
[51] Montreal Convention art 10.
[52] CIM Rules art 19 §4.
[53] Budapest Convention art 8.
[54] See UN Document A/CN.9/WG.III/WP.29 paras 72–105 and UN Document A/CN.9/WG.III/WP.78 para 41.

However, there are two major qualifications of this conflict rule (the emphasized words). They both point to the carrier's liability, and the second one specifically to one particular situation of localized damage. The conflict rule is simply not a general conflict rule, and it does not include conflicts of the kind outlined above; indeed, there are no indications in the *travaux préparatoires* that the draftsmen even considered such conflicts (or indeed any indication what they actually intended). Therefore, one must conclude that the conflict rule in Article 82 does not resolve the conflicts with the CMR Convention outlined above.

If States Parties to the Rotterdam Rules are to act correctly, they must therefore denounce the CMR Convention. That is unfortunate, as the Rotterdam Rules in other respects are shaped to avoid conflicts with that Convention.

What is said about the CMR Convention is also true for the other unimodal Conventions. The first qualification in italics in the quotation above is common for all of them. And the second qualification – in Article 82 paragraphs (a), (c) and (d) respectively – are similar to the CMR qualification in that they all refer to localized damage.

3.7 Conflict rules – a rescue attempt

My conclusion above in 3.6 is rather serious. I will therefore make an attempt to harmonize the Rotterdam Rules with the other unimodal Convention by stretching the words of Article 82 to the extent necessary to rescue the Convention, so one can see what that would look like.

(i) First, can Article 82 resolve conflicts of Conventions as outlined above? That would depend on whether the qualifications in fact exclude such conflicts as those outlined above at sections 3.1–3.4 from its scope.

The first qualification to be discussed here is contained in the words:

> ... 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 ...

The words obviously reflect CMR Convention Article 2 on ro-ro transports; a provision which makes the maritime liability regime applicable for localized damage if a truck with CMR Convention cargo has been loaded on board a ship, even if the CMR Convention is applicable for the entire transport carried out by the truck. Apparently, the words do not include containers removed from the truck and carried by sea in the course of a CMR Convention carriage, and they do not include the CMR Convention provisions on documents etc.

However, even if the words as such are quite narrow, it does not necessarily narrow down the conflict rule correspondingly. Obviously, the words may qualify the conflict rule, so that the conflicts between the CMR Convention and the Rotterdam Rules only are resolved to the extent the CMR Convention applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship.[55] But equally well, the words can be understood to qualify the Convention referred to, so that sub-paragraph (b) of the Article is only a complicated code description of the CMR Convention. In that way, the conflict rule applies when there is a conflict with a Convention for road carriage that includes a rule such as CMR Convention Article 2, regardless of whether that rule applies in the specific conflict.

There is some support in the *travaux préparatoires* that it is the latter reading that is the correct one, as the idea was to avoid conflicts with existing Conventions.[56] If this is correct, one hurdle that could prevent the conflict rule to resolve the conflicts between the Rotterdam Rules and the unimodal Conventions would have been overcome.

[55] This seems to be the reading of A Diamond (n 8) 142–43 and C Hancock (n 8) 493.
[56] UNCITRAL Document A/63/17 para 249.

The qualifications in respect of other unimodal Conventions in Article 82, paragraphs (a), (c) and (d) could be read in a similar manner,[57] so that the conflict rule in Article 82 could apply to all conflicts between these Conventions and the Rotterdam Rules.

(ii) However, there is still another hurdle, namely the other qualification: '... that regulates the liability of the carrier for loss of or damage to the goods ...'. These words may either specify that the conflict rule only applies to Conventions that include liability rules or that it only applies to the rules concerning the carrier's liability of the Conventions. In the latter case, the conflict rule of Article 82 would not resolve the conflicts concerning documentation, delivery and shipper's liability pointed out above.

The wording, however, clearly indicates that the former contraction is the correct one. What creates some doubt is the fact that it is somewhat strange to put in an elaborate clause such as this in a stringent legal text, as it does not seem to add much of significance, since all of the Conventions that otherwise qualify under the criteria of Article 82 include liability rules anyway. Still, the better reading may arguably be the reading that renders the words legally meaningless.

Thus, the second hurdle could also be overcome with a somewhat strained construction. Again, this would be the same for the other unimodal Conventions, as the words discussed here apply to all of them.

(iii) Altogether, therefore, it appears that the substantive conflicts between the Rotterdam Rules and the CMR Convention are resolved by Article 82.[58] However, the solution would not be a good one.

Technically, this would mean that, for each transport, it would be necessary to determine whether the CMR Convention would apply, and then apply a mixture of the CMR Convention and the Rotterdam Rules, which it is not for any road carrier to ascertain. This would be very complicated – and the conflict of Conventions issue will be brought from the courtroom to the everyday life of the trucker. How can a road carrier possibly determine whether he should issue documentation pursuant to the CMR Convention or the Rotterdam Rules?

Politically, this would mean that large parts of the fully fledged Rotterdam Rules would not apply to many door-to-door transports in Europe, even if a sea leg is included. The rules on documents, uniform liability etc of the CMR Convention would take precedence, as there is usually a road leg before and after the sea leg, and the CMR Convention applies in most European Member States. From a European point of view, it may be that this is a meager political outcome of a door-to-door reform.

In respect of uniformity, the result would be that yet another regime would be created: the Rotterdam Rules – CMR Convention mixture. This would be a step backwards.

Thus, even with the strained construction outlined above the Rotterdam Rules can be preserved together with the other unimodal Conventions only if one is willing to swallow a camel or two.

(iv) A pertinent observation in respect of this sad result is perhaps that the problems could have been avoided had the Conventions been more flexible.[59] It has been well known for decades that conflicts of Conventions such as those discussed here arise whenever a new

[57] In the same way as para (b) implicitly refers to CMR Convention art 2, para (a) implicitly refers to Montreal Convention arts 38 and 18, para (c) implicitly refers to CIM Rules art 48 and para (d) implicitly refers to Budapest Convention art 2(2).

[58] Sceptic A Diamond (n 8) at 145 and Hancock (n 8) at 492 et seq.

[59] See E Røsæg: 'The applicability of Conventions for the carriage of goods and for multimodal transport' [2002] LMCLQ 315–49 at 332.

Convention is negotiated. Still, effort is always employed in these Conventions to ensure that other Conventions do not touch any part of it.[60] In the Rotterdam Rules, this rigid tradition has been followed[61] and, in addition, omitted the standard supersession clause[62] that would have allowed backwards compatibility. The honorable exception is the railways Convention, which expressly allows for adjustments by new Conventions[63] – seemingly without harm of any kind.

4 Summary

It has been a major point in the drafting of the Rotterdam Rules that they shall extend to door-to-door transport. It has, however, proved difficult to extend a maritime Convention to land. First, the resulting regimes are complicated and undesirable from a policy point of view (Section 2 above). Secondly, there remain unresolved conflicts with unimodal transport Conventions that cannot easily be ignored (Section 3 above). The attempts to resolve conflicts in the Conventions leave a motley image and are, to some extent, unsuccessful.

[60] CMR Convention art 1(5) provides that the parties cannot make special agreement among themselves, as otherwise would have been allowed under the Vienna Convention on the Law of Treaties 1969 arts 30 and 41. Budapest Convention art 32 provides for certain special arrangements between two or more States Parties, and such special arrangements that would be relevant here are then presumably not allowed. Montreal Convention art 57 disallows reservations.

[61] Rotterdam Rules art 90 disallows reservations. In addition, the conflict rule in art 82 does not apply to future Conventions.

[62] See eg International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996 art 42 and United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules) 1978 art 25.

[63] CIM Rules arts 66, 8.