Multimodal waybill: Is a predictable EU liability system an achievable alternative to international conventions?

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The vision: A single European Transport Area

Tools: Removal of regulatory, administrative and technical barriers

Legal barriers
- Multiple transport documents
- Different liability regimes
- No multimodal liability regime
The problem of liability level

- Indexed liability level: 1 SDR = 1.10 EURO
- Sea: 2 SDR/kg or 666.67 SDR/unit
- Road: 8.33 SDR/kg
- Rail: 17 SDR/kg
- Air: 19 SDR/kg
- Problem: what liability level applies in a multimodal context?
The questions to be addressed

The European and international discussion on regulatory attempts:

- EU 2005 A draft set of (opt out) uniform liability rules
  No consensus
- EU 2007 The freight logistics action plan
  Could a network based liability system work?
- UN 2009 The Rotterdam Rules
  The modified network solution

Is a predictable EU liability system an achievable alternative?
The present international situation – unpredictable and unclear

**English Court of Appeal – pragmatic**

- Quantum Corporation Inc v. Plane Trucking
- Singapore – Paris – Dublin (air and road)
- Cargo stolen during the road leg.

*Is CMR applicable?*

Yes – a contract of road carriage exist when the cargo is taken over by a road carrier

**German Supreme Court (Bundesgerichtshof) – formal**

- BGH 17 July 2008
- Tokyo – Rotterdam – Münchengladbach (sea and road)
- Cargo damaged during road leg.

*Is CMR applicable?*

No – CMR does not apply to multimodal contracts - a matter of principal
The EU attempt on a uniform liability system

- **The vision:** “A set or uniform multimodal liability rules which concentrate the risk on one party and provide for strict liability for all types of losses irrespective of the modal stage where a loss occurs and of the cause of such loss”

- **The 2005 proposal**
  - Uniform liability rules
  - Strict liability
  - Limited to 17 SDR/kg – highest at the time
  - Opt out
  - Step back intention
The 2007 European Freight Action Plan

Two alternatives should be addressed:

1) A European standard liability clause for all transport operations (uniform liability)

2) A European liability rule to fill in gaps between existing liability regimes (network liability)

The 2011 White paper: ”Any comprehensive multimodal proposal of the Commission will have to take the global convention [the Rotterdam Rules] into account.”

SEC(2011) 391 at 189
The Rotterdam Rules

- Governing international multimodal transport with a sea leg
- Broad scope – almost all contractual issues
- Carrier liability, chapter 5
- Mandatory provisions
- Neglect with reversed burden of proof
- Liability limited to 3 SDR/kg or 875/unit
- Modified network system in art 26
The modified network liability system

- Art. 26 makes provisions of other instruments applicable in certain cases:
  - Liability
  - Limitation of liability
  - Time for suit

- Only where loss etc. occurs solely on a non-maritime leg.

- Only where another mandatory international instrument would be applicable for the leg where the loss etc. occurred.
Is a predictable EU liability system an achievable alternative to international conventions?

- EU 2005 ambition and proposal – predictable
- EU 2007/2011 ambition + UN Rotterdam Rules - unpredictable, but achievable:
  - A small step forward
  - Solving the problem of undisclosed damages
  - If the Rotterdam Rules becomes an international success, they are hard to navigate around
  - A double international system not recommended
- If not – go for the 2005 proposal