60 Years CMR: Future proof or time for a reform?

Multimodal Transport, CMR and the Effects on the Liability Regime of the Persons Involved in the Whole Carriage Operation

MTC: A BRIEF INTRODUCTION
Development of carriage and related services according to trade needs

- Carriage with containers or pallets
  
  From port-to-port to door-to-door carriage.

- Roll on/roll off (ro-ro).

Information and Communication Technologies (ICT)

Multimodal Transport

- A unique contractual carrier and a unique contract of carriage between the consignor and the carrier.
- Several actual carriers.
- MTC:
  - “International multimodal transport” means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country” (art. 1.1).
  - “Multimodal transport contract” means “a contract whereby a multimodal transport operator undertakes, against payment of freight, to perform or to procure the performance of international multimodal transport” (art. 1.3).
- ECMT (European Conference of Ministers of Transport):
  - Multimodal transport: the “carriage of goods by two or more modes of transport”;
  - Intermodal transport: “the movement of goods in one and the same loading unit or road vehicle, which uses successively two or more modes of transport without handling the goods themselves in changing modes”;
  - Combined transport: the “intermodal transport where the major part of the European journey is by rail, inland waterways or sea and any initial and/or final legs carried out by road are as short as possible”.

[Image: multitransport.png]
The Multimodal Transport Contract

• The unique contract of carriage concluded between the MTO and the shipper concerns the carriage of the goods with at least two different transport modes.

• The MTO, as contractual carrier, undertakes the obligation to provide the transport of the goods concerned by the contract, by performing the carriage personally or with other (actual) carriers.

Contracting Carrier/Actual Carrier

• MTO therefore is the contracting carrier for the transport legs that does not performs with its own means.


**Article 39 - Contracting Carrier - Actual Carrier, Montreal Convention 1999**

“The provisions of this Chapter apply when a person (hereinafter referred to as «the contracting carrier») as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as «the actual carrier») performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary”.

---

**Art. 1 – Definitions, RR 2009**

(...) 5. **“Carrier”** means a person that enters into a contract of carriage with a shipper.

6. (a) **“Performing party”** means a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.

(b) **“Performing party”** does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.

7. **“Maritime performing party”** means a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.
THE MULTIMODAL TRANSPORT INTERNATIONAL REGIME

1980 Geneva Convention

• Art. 1.1 of the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24 May 1980, not in force yet): “International multimodal transport” “means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country”.

"International multimodal transport" “means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country”.
1999 Montreal Convention

Art. 18.4: «The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air».

1999 Montreal Convention

Art. 38: «In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of Article 18, apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.

2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air». 
Hamburg Rules

Art. 1.6: «"Contract of carriage by sea" means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea».

Rotterdam Rules

- «Maritime plus» instrument.
- Art. 1.1.: «"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».
- Art. 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». 
Who is Liable? What is the Regime of Liability in a Multimodal Transport?

• No unique regime for the whole transport, with the exception of some domestic legal systems, which enacted a special statute for this type of transport, but they govern the case if the Court’s Int’l Private Law rules refer to one of them.
• What happens if the stage where the loss/damage occurred is known?
• What happens if it is unknown?
• It depends on the domestic law governing the contract under Int’l Private Law rules.
• Different doctrines:
  – The **uniform law system**: the MTC’s regime is the same, irrespective of the different transport stages.
  – The **absorption theory**: where the whole multimodal transport is ruled by the law governing the prevalent transport leg.
  – The **network system**, where each transport mode is governed by its special law.

THE SO-CALLED MODE-ON-MODE TRANSPORT AS MULTIMODAL TRANSPORT?
So-called mode-on-mode/piggy back carriage

- Art. 2, CMR 1956: “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”.

- It is a type of accompanied transport.

Accompanied/Unaccompanied Transport

- Unaccompanied transport (container, swap bodies, semi-trailers)

- Accompanied transport (e.g.: Rolling Highway–RoLa; Ro-Ro)
Regime

Under art. 2 CMR, this Convention shall nevertheless apply to the whole of the carriage.

For damages localized in a transport leg other than road, resulting from some event which could only occurred in the course of and by reason of the carriage by that other means of transport: regime of liability of that transport mode.

In the other cases, CMR applies.

Is mode-on-mode transport a case of multimodal transport?

The mode-on-mode transport cannot be considered as a multimodal transport, because:
1. The actual mode-on-mode contract is that between the CMR carrier and the sub-carrier. Its very object is the truck carrying the goods by a unimodal transport mode.
2. The cargo is in the CMR carrier’s charge.

1. The actual mode-on-mode contract is that between the MTO and the consignor.
2. During a leg other than road, the goods are subject to its typical risks.

1. For qualifyin the contract what does import is the contract between the MTO and the consignor.
2. The mode-on-mode transport is a type of multimodal transport.
THE MAIN ISSUES

Period of Liability

- H-VR: “from the time when the goods are loaded on to the time they are discharged from the ship” (tackle-to-tackle).
- Hamburg Rules: “the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge. (…) The carrier is deemed to be in charge of the goods: (a) from the time he has taken over the goods from:
  (i) the shipper, or a person acting on his behalf; or
  (ii) an authority or other third party to whom, pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment” (port-to-port).
Period of Liability

• Montreal Conv.: “The carrier is liable for damage (...) which (...) took place during the carriage by air”. “The carriage by air (...) comprises the period during which the cargo is in the charge of the carrier. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air”.

Liability Ex Recepto

• CMR: “between the time when he takes over the goods and the time of delivery”.
• RR: “The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered”.
• 1980 MT Conv.: “from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country”.
Servants and Agents under the H-VR

- Art. 4 bis: “If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules. (…) The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in these Rules”.
- Himalaya Clause.
- Liability in tort.
Servants and Agents under the Hamburg Rules

• Art. 7: “1. The defences and limits of liability provided for in this Convention apply in any action against the carrier in respect of loss of or damage to the goods covered by the contract of carriage by sea, as well as of delay in delivery whether the action is founded in contract, in tort or otherwise.
2. If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.
3. Except as provided in article 8, the aggregate of the amounts recoverable from the carrier and from any persons referred to in paragraph 2 of this article shall not exceed the limits of liability provided for in this Convention”.

• Art. 10: “2. All the provisions of this Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him. The provisions of paragraphs 2 and 3 of article 7 and of paragraph 2 of article 8 apply if an action is brought against a servant or agent of the actual carrier”.

Servants and Agents under the 1999 Montreal Convention

• Art. 30: “If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention”.

• Art. 43: “In relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier shall, if they prove that they acted within the scope of their employment, be entitled to avail themselves of the conditions and limits of liability which are applicable under this Convention to the carrier whose servant or agent they are, unless it is proved that they acted in a manner that prevents the limits of liability from being invoked in accordance with this Convention”.
Handlers as Servants or Agents or Independent Contractors?

- Handlers as servants of the carrier.
- Handlers as independent contractors.
- Handlers as bailees of the consignor.

Performing Parties under the RR

Art. 19: "1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:

(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and

(b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage. (…)

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of this article."
Persons for Whom the Carrier is Responsible

- Art. 3 CMR: “the carrier shall be responsible for the acts of omissions of his agents and servants and of any other persons of whose services he makes use for the performance of the carriage, when such agents, servants or other persons are acting within the scope of their employment, as if such acts or omissions were his own”.
- Art. 28 CMR: “In cases where the extra-contractual liability for loss, damage or delay of one of the persons for whom the carrier is responsible under the terms of article 3 is in issue, such person may also avail himself of the provisions of this Convention which exclude the liability of the carrier or which fix or limit the compensation due”.
- Are independent contractors included in these provisions? It could depend – again – on the qualification of their relationship with the parties of the contract of carriage.

CMR as Regime of MTC?

- According to some Authors, road carriage is not only considered for the contract’s purposes within CMR, but it is also its subject-matter, therefore CMR cannot govern multimodal transport when the MTC does not expressly provide for transfrontier road transport. Quantum.
- According to another current, it could be possible to distinguish the “contract of carriage by road” from the “contract for the carriage by road in vehicles”.
- Could CMR govern the MTC according to the uniform system or the simplified network system outside the scope of art. 2 (like in the Italian domestic law with regard to the provisions of the Civil Code)? German Supreme Court, Godafoss.
UNCTAD/ICC Rules for Multimodal Transport Documents

• Art. 1: they govern a contract where the parties expressly incorporated them in the contract by reference to the "UNCTAD/ICC Rules for multimodal transport documents".

• The MMTD is often preferred to the CMR Consignment Note, because the former is a negotiable instrument.
MTO’s Liability for the Acts of Auxiliaries, Servants, Etc.

• MTO’s period of liability di responsabilità del MTO: «from the time he has taken the goods in his charge to the time of their delivery» (rule 4.1).

• The MTO is liable «for the acts and omissions of his servants or agents, when any such servant or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the performance of the contract, as if such acts and omissions were his own» (rule 4.2).

But ...

• The MTO is not liable for the loss of or damage to the goods carried by sea or inland waterway or the delay in their delivery where such events occurred during that leg and resulted from:
  – «act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship»,
  – «fire, unless caused by the actual fault or privity of the carrier».
The Liability Regime of the MTO’s servants, agents, etc.

• The Rules govern also the claims towards the MTO’s servants or agents or any other person of whose services he makes use for the performance of the contract.

• These persons enjoy the same limitation of liability (rule 12).

CONCLUDING REMARKS
• One of the CMR’s advantage with regard to the subject-matter at issue is indeed its reference to an ample range of subjects of whose services the CMR (contracting) carrier avails himself.
• However this regime cannot govern multimodal transport contracts as a general rule.
• Moreover, could it really be considered as covering all the possible cases of service providers in a complex transport operation door-to-door with a unique contract?
• According to my personal opinion, not only a uniform regime on MTO should be enacted, but also the uniform conventions concerning (unimodal) international transport should be implemented by providing a clear and comprehensive regime of the persons involved in an international carriage as providers of ancillary services.

Thank you for your kind attention

Prof. Dr. Elena Orrù
Assistant Professor of Maritime and Transport Law
Department of Legal Studies
Alma Mater Studiorum – University of Bologna
Adjunct Professor of The Regime of Transport Infrastructures
School of Engineering and Architecture
Alma Mater Studiorum – University of Bologna, Ravenna Campus

http://www.unibo.it/docenti/elena.orru2