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1. Convention on international multimodal transport in the Arab Mashreq

The secretariat of the United Nations Economic and Social Commission for Western Asia (UN-ESCWA) prepared a convention on 'International Multimodal Transport of Goods in the Arab Mashreq'. UN-ESCWA consists of 14 member countries: Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Oman, Palestine, Qatar, Saudi Arabia, the Syrian Arab Republic, the Sudan (new member), United Arab Emirates and Yemen.

On the website 'Forwarderlaw.com' (www.forwarderlaw.com), Dr Jean-Michel Morinière (advocate in France, a Legal Consultant at the Abu Dhabi office of law firm Clyde & Co and a delegate of IMMTA to the UNCITRAL Working Group III) summarises this convention in his article 'A new legal framework for multimodal transport in the Middle East?' Under this convention, the party liable for the carriage 'door to door' is called 'International Multimodal Transport Forwarding Agent'. He is liable for loss, damage or delay unless he can prove that one of the listed exemptions (e.g. fault of the shipper, force majeure, inherent vice or reduction in volume) applies. If the location of the loss is not known, liability limits depend on the agreed modes of transport and are largely in line with the unimodal international carriage conventions. This convention would not have mandatory force of law, but would merely apply to the extent that the parties do not agree otherwise. A party who wants to undertake multimodal transport as a profession must obtain a license.

According to the UN-ESCWA report on its 25th session held in Sana'a 26-29 May 2008, the adoption and signature of this draft convention was discussed in a closed meeting of ministers and heads of delegation, who expressed their deep appreciation and thanks to the ESCWA secretariat for its efforts in preparing the draft convention. As a similar text had been proposed at the League of Arab States, participants agreed that the necessary coordination and consultation would be undertaken with the aim of submitting to the member countries a single convention text, which will be considered for adoption and signature at the next meeting of Arab Transport Ministers, scheduled for October 2008.

Please use the following web links for:

- The UN-ESCWA report on its 25th session held in Sana'a 26-29 May 2008, document E/ESCWA/25/10 (paragraph 71, item E):

<http://www.escwa.un.org/information/publications/edit/upload/escwa-25-10-e.pdf>

- Dr Jean-Michel Morinière's article of 14 July 2008:

http://www.forwarderlaw.com/library/view.php?article_id=506 **TTT**

2. Container sealing for US bound maritime cargo

As of 15 October 2008, US Customs & Border Protection requires that all laden containers entering the US by sea must have seals which meet the ISO/PAS 17712 standard. This ruling is in effect for all cargo bound for the US, whether as a destination or passing through the country. In addition, the details of seal numbers must be included in the Vessel Automated Manifest System (AMS) sent to the CBP at least 24 hours before the ship's departure for the US.

The ISO standard states that seals must not only be strong, but also uniquely and irreversibly marked; seals which are compliant with the standard are subject to tensile, shear, impact, and bending tests. It is important that the manufacturer is approved, so buyers must watch out for counterfeit seals on sale. The standard also requires that it is impossible to tamper with a seal without leaving readily apparent traces. Evidence of tampering includes a frayed appearance of cable or wire seals, or scratches on bolt, rod or padlock-type seals.

The seals should, if possible, be placed on the seal brackets which are on the door sill and the bottom of the locking bar (if they are fitted) rather than on the higher seal brackets which are on the locking bar and the door. Some older containers do not have this facility. This prevents thieves removing the locking bar handle hub rivet, opening the doors without disturbing the seal and after stealing, putting the rivet back in its place, gluing it in.

The shipper or consolidator should ensure that only authorised staff control the use of seals and ensure that the seal is fixed to the container once stuffing is complete. The Club has had experiences where the truck driver has been left to fit the seal at the shipper's premises and deliberately not snapped it shut. In transit the container was opened, cargo stolen and then the seal applied properly. Ideally, the details of seals should also be recorded at nodal points in the supply chain and physically checked for integrity.

It is understood that empty containers are not subject to the new CBP requirement, and can be left unsealed, as can tank containers, open-tops and those which cannot accommodate a seal. For C-TPAT participants these regulations are not new; however, they are now required of all containers entering the US by sea. CBP may assess civil penalties against a party responsible for violation of the sealing requirements, including detaining the ship. **TTT**

3. Does CMR apply to the international road portion of a multimodal transport contract?

CMR, the Convention on the Contract for the International Carriage of Goods by Road, is in force in 53 countries governing international road carriage in Europe and extending into parts of Asia and Africa. CMR can become relevant for anyone involved in shipping goods to or from Europe. A Transport Operator based in South East Asia or America who assumes liability door-to-door could well find that he is liable under CMR for loss or damage during a cross-border road leg in Europe.

Pursuant to Article 1(1), CMR applies (provided road carriage is international and at least the agreed place of departure or destination is in a CMR country) 'to every contract for the carriage of goods by road'. A critical issue is whether CMR might apply to the international road portion of a multimodal transport contract.

a) *Quantum v Plane Trucking* (England and Wales Court of Appeal) 2002

In *Quantum v Plane Trucking*, multimodal transport of a consignment of computer hard disks was first by air from Singapore to Paris CDG and then by road (and ferry) from France to Ireland. The disks worth some USD1.5 million were stolen during the road leg. Air France had issued to cargo interests an air waybill in which the AF flight numbers reflected air/ road carriage in the way carriage was in fact performed. As the Air France conditions of carriage allowed Air France to substitute other means of carriage without notice, cargo interests argued that the contract for the carriage from Paris to Dublin was not specifically for carriage by road but by any mode Air France liked, with the result that CMR would not apply.

However, Mance LJ (now Lord Mance), with whom the other two judges agreed, dissected the passage 'contract for the carriage of goods by road' in Article 1(1) CMR and held that CMR applied not only where the parties agreed carriage by road (excluding any other modes), but also to cases where the carrier had an option to elect road from a choice of carriage modes. Mance LJ first discussed a number of Continental decisions and then held that the application of CMR depended on whether the carriage was actually performed by road (provided that the contract specified or permitted such road carriage).

For the (second) question whether CMR applied to the international road leg of a multimodal transport contract, Mance LJ used the same approach and concluded that the concept of a 'contract for the carriage of goods by road' in Article 1(1) CMR included a contract providing for or permitting the carriage of goods by road on one portion of the multimodal transport. Thus, the court held that CMR applied to the case before it.

In *Datec v UPS* (2007), multimodal transport was first by air from England to Germany, then onwards by road to Holland. The UK House of Lords, without further discussion, applied CMR to the international road portion, thus confirming *Quantum v Plane Trucking* (to which Lord Mance expressly referred).

b) German Federal Supreme Court (Bundesgerichtshof) 17 July 2008

The judgement of the German Federal Supreme Court (Bundesgerichtshof) of 17 July 2008 concerned a contract for the carriage of 24 containers from Tokyo to Germany (Mönchengladbach). The goods were carried by sea from Tokyo to Rotterdam, from where road carriage was intended to the final destination in Germany. The sub-contracted road haulier collected the goods from the port in Rotterdam. While still on the port premises, the road trailer toppled which caused severe damage to a container holding 50 photocopying machines. Cargo interests claimed EUR 218,485 plus interest. The Transport Operator issued to cargo interests a 'waybill' which provided for Japanese law and jurisdiction.

The Higher Regional Court Düsseldorf (the court below) held in 2005 that it had jurisdiction to deal with this claim, because Article 31(1)(b) CMR conferred jurisdiction to the court at the place designated for delivery and because the rules on jurisdiction in CMR take precedence over the jurisdiction clause in the 'waybill'. A necessary precondition to jurisdiction based on Article 31(1)(b) CMR was that CMR actually applied to the road portion of this multimodal transport contract. The Higher Regional Court held that it did. The court argued that CMR aimed to achieve a harmonized legal regime and that it should be irrelevant for the application of CMR that the carrier - in addition to the international carriage by road - agreed to carry by another mode of transport.

However, in its judgment of 17 July 2008 the German Federal Supreme Court reversed the decision by the Higher Regional Court. The Federal Supreme Court found that CMR did not apply 'directly' ('autonomously') to an international road portion of a multimodal transport contract. It explained that only the 'special case' of Article 2 CMR (where the goods remain on the vehicle whilst carried for part of the carriage by a different mode) applied to multimodal transport contracts.

The court cited a strong majority of German commentators in support of this conclusion. It also said that it relied on materials (though without providing details) namely the drafting history of CMR, an account of the discussions at the 1956 CMR Conference and the German government's explanations on both CMR and the 1998 transport law. The court explained that CMR, apart from Article 2, aimed to harmonize only international road carriage which was unimodal. It admitted that the text of Article 1 CMR (in English and French, the two authoritative languages) did not 'undoubtedly' exclude the application of CMR to multimodal contracts, but felt that even the text of Article 1 'rather' pointed against application of CMR to multimodal contracts.

After the Federal Supreme Court rejected the direct ('autonomous') application of CMR, it held that CMR did not come into play 'indirectly', i.e. via the applicable domestic law, either. Since the applicable domestic law specified in the 'waybill' was Japanese law and Japan is not a Member State of CMR, the court held that there was no such 'indirect' application of CMR.

In two judgments from the 1980, the Federal Supreme Court had held that CMR actually did apply to a road portion of a multimodal transport contract (*Quantum v Plane Trucking*, see 'a') above, actually cites these two judgments in support of its own position). The Federal Supreme Court in its judgement of 17 July 2008 explained that these two old judgments were not in conflict with the ruling that CMR did not apply 'directly' to the road portion of a multimodal carriage contract, because the Federal Supreme Court applied road carriage law in these two old cases merely 'indirectly' via the applicable domestic law.

As the Federal Supreme Court held that CMR applied neither 'directly' nor 'indirectly', cargo claimants were left without jurisdictional basis for suing in Germany and had their claim dismissed.

The judgment of 17 July 2008 is significant because it is the first time the German Federal Supreme Court discussed whether CMR applied to multimodal transport since entry into force in 1998 of the current German transport law, which introduced a chapter dedicated to multimodal transport (sections 452-452d Commercial Code).

c) Conclusion

On the issue whether CMR applies to the international road portion of a multimodal transport contract, *Quantum v Plane Trucking* (as confirmed in *Datec UPS*) and the judgment by the German Federal Supreme Court of 17 July 2008 reached conflicting conclusions. The German Federal Supreme Court said that *Quantum v Plane Trucking* did not conclusively indicate whether it concerned (like the judgment by the German court) 'autonomous' ('direct') application of CMR, but the Court of Appeal in *Quantum v Plane Trucking* did analyse the wording of CMR itself, i.e. considered, as the German court would say, whether CMR applied 'directly'.


At present, multimodal transport can be governed by a special provision in a unimodal transport convention (such as Article 2 CMR) or by the applicable law (German law being an example). Subject to such rules, established multimodal/ combined transport bills of lading like the TT Club Series 100 or the FIATA 'FBL' address the various issues of multimodal transport and expressly provide for facts such as the ones in the judgment of the German Federal Supreme Court.

The full texts of the two judgements can be found under the following web links:

- Quantum Corporation v Plane Trucking Ltd (England and Wales Court of Appeal) of 27 March 2002:

<http://www.bailii.org/ew/cases/EWCA/Civ/2002/350.html>

- German Federal Supreme Court (Bundesgerichtshof) of 17 July 2008 (in German language):

<http://www.bundesgerichtshof.de/> (please first go to 'Entscheidungen', then enter in 'Aktenzeichen' the text 'I ZR 181/05') 

4. Conclusion

Please note that our London office has moved to 90 Fenchurch Street, London, EC3M 4ST. Telephone and e-mail details have remained unchanged.

We hope that you will have found the above items interesting. If you would like to have further information about any of them, or have any comments you would like to make, please email the editor at tt.talk@ttclub.com. We look forward to hearing from you.

Peter Stockli
Editor for the TT Club

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