I have been asked to comment upon the multimodal aspects of the Rotterdam Rules. Indeed, the Rotterdam Rules have multimodal aspects, but it is not a real multimodal convention like the Convention on International Multimodal Transport of Goods from 1980. The Rotterdam Rules regulate contracts of carriage wholly or partly by sea. They do also to some extend regulate connected land/air transports on the contracting carrier level. However, they leave the CMR and other unimodal land/air transport conventions intact. Finally, the Rotterdam Rules do not at all regulate multimodal transports without a maritime leg – say a combined road/rail transport.

The Rotterdam Rules – let me simply call it “the Convention” - is applicable where the parties have entered into a contract which provides for international carriage by sea. Thus it is the agreement of the parties which is decisive for the application of the Convention. The agreement between the parties must provide that at least part of the transport includes a maritime leg in order for the Convention to apply. This feature is fundamental and well known in the other unimodal conventions, and I shall come back to this when dealing with the conflict of conventions issue.

Maritime carriers have always considered international mandatory regulation of multimodal transports with some skepticism. On the one hand maritime carriers prefer contractual freedom, and we want to have our own multimodal transport documents which we can adjust according to the individual circumstances with full respect of course for mandatory requirements. On the other hand we are eager to achieve legal certainty as to which rules are applicable to a maritime transport
or to a multimodal maritime transport, and we believe it is of paramount importance to achieve real international harmonization.

The MT Convention 1980 has not really got any acceptance, and the UNCTAD/ICC Rules for Multimodal Transport Documents have not had the significant uniforming effect we hoped for. Certainly, one should not ignore the importance of the UNCTAD/ICC Rules and the impact they have had on the FIATA and BIMCO documents, but the impact the UNCTAD/ICC Rules have had on the individual carrier multimodal documents is more limited.

Maritime carriers agreed that yet another attempt should be made in order to achieve a uniform international regulation of multimodal transports. What was achieved was the more modest but also the more realistic Rotterdam Rules which provide for a more limited regulation of multimodal transports as already mentioned, but importantly also provide up to date modern rules for the pure maritime transports. The smart thing about the Convention is that it covers both the traditional port-to-port maritime transports and also multimodal transports with a maritime leg. The Convention therefore covers door-to-door transports where such transports are agreed. This was important to many UNCITRAL delegations, who thought that it would not be worthwhile to establish yet another unimodal maritime convention.

It is a real possibility, that the Rotterdam Rules will achieve broad international acceptance. It is likely that the US, many European and African States and hopefully some States in the Far East will ratify the Convention within a few years. Thereby international uniformity will be safeguarded. If the Rotterdam Rules fail to enter into force, there is no other alternative but regionalism. That would be a disaster for international transports and international trade. Regionalism leads to numerous legal disputes, race to court, considerably increased administrative costs etc.

II) THE SCOPE OF APPLICATION AS TO CONTRACTING CARRIERS AND PERFORMING PARTIES

The first question I shall deal with is the application of the Convention to the various parties involved in the performance of the transportation agreement - for the purposes of this seminar road and sea transports.

The period of responsibility of the carrier depends upon the agreement of the parties. The parties may tailor the geographical extent of their agreement according to their needs. The parties may enter into an agreement for a port-to-port transport and the application of the Convention will then be limited to that port-to-
port leg. Any prior or subsequent transport, say a road haulage agreed separately between the shipper and a road haulier, falls outside the Convention. The parties may instead opt for say a door-to-door transport, and the Convention will then cover door-to-door.

The carrier – that is the contracting carrier – remains liable under the rules of the Convention vis-à-vis the shipper for the whole agreed transport, and the carrier is vicariously liable for all his servants, agents and also for subcontractors used in the performance of the carrier’s contractual obligation to transport the goods to their final destination. An entirely different question is to what extend can the shipper – if at all – sue subcontractors. In the Convention subcontractors are called performing parties.

The Convention makes it possible for the shipper to sue directly – in addition to the carrier – certain performing parties. This is so for persons who perform any of the carrier's obligations during the period between arrival of the goods at the port of loading and the departure of the goods from the port of discharge. The persons performing such services are called maritime performing parties in the Convention. It must be stressed that such services must be performed exclusively at sea or within a port area. If a service – say a rail or road carriage – commences beyond the limits of the port, the shipper cannot on the basis of the rules of the Convention sue the rail or road carrier. This means that rail and road carriers as subcontractors are by and large left outside the Convention. They remain as today subject to whatever rules apply to their transportation leg, e.g. the CMR.

I should also stress that in order for a maritime performing party to incur liability under the Convention, the maritime performing party must have 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.

Also the 1980 Multimodal Convention did not provide a right for the shipper to sue directly performing land subcarriers. It was thought that establishing such a right would have encroached on the various unimodal land transport conventions.

In summary: the Convention makes the contracting carrier liable vis-à-vis the shipper for the whole transport and also vicariously liable for servants, agents and for subcontractors made use of at any stage in the transport. In addition the shipper may sue a maritime performing party, but the shipper cannot on the basis of the Convention sue a non-maritime performing party – say a rail or road carrier performing services which extend outside the port area.
III) THE LIABILITY RULES APPLICABLE IN THE VARIOUS SITUATIONS

The second question I shall deal with is which liability rules are applicable in the various situations.

The Convention is based upon the network system, but it is a rather limited network system. The Convention is only networking as far as liability, limitation of liability and time for suit are concerned, and some strict conditions furthermore has to be fulfilled in order for the Convention to network. The relevant provision of the Convention is art 26. It provides that where loss etc. occurs solely before or after carriage by sea, the rules of the Convention shall not prevail over the rules in an international instrument dealing with liability, limitation of liability and time for suit which would have applied at the time of the loss etc. if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss etc. occurs. This is indeed heavy stuff – but something we know from the CMR art. 2.

Let me illustrate by way of an example. A transport agreement is entered into for a transport from Glasgow to Milan. Containership carriage is applied between Newcastle and Le Havre and then road haulage to Milan. If the damage cannot be localized, the ordinary liability rules of the Convention apply to the contracting carrier when sued by the shipper. If the damage can be localized to the ship leg, the same applies and the shipper may in this case in addition to the carrier sue a possible maritime performing party, performing the maritime leg where the damage occurs. If the damage can be localized to the continental road leg, the same does not apply. In this case - in the relation between the shipper and the contracting carrier - art. 26 comes into play and so to say replaces the ordinary liability rules of the Convention by the liability rules of the CMR. The Convention does not regulate the relationship between the shipper and the road haulier not being a maritime performing party. As far as the contractual relationship between the contracting carrier and the performing road carrier is concerned this is not a contract for carriage wholly or partly by sea and therefore this relationship is not regulated by the Convention, but by any applicable national or international convention – here the CMR.

Art 26 requires that one must look at “the particular stage of carriage” where the loss etc. occurs, and the question then is: does a mandatory international instrument apply to that stage. If the stage is a national road leg, the CMR does not seem to be applicable and art. 26 would then lead to application of the ordinary liability rules of the Convention. This would change if the CMR were amended to cover national road traffic in addition to international traffic.
IV) THE CONFLICT OF CONVENTIONS ISSUE

The third and last question addresses the provision in art. 82 of the Convention dealing with some conflicts of conventions. I shall limit my comments here to art. 82 (b) which deals with the relation between the Convention and the CMR. It is in this respect provided in art. 82 that nothing in the Convention affects the application of any convention or future amendments thereto 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. I refer in this respect to art. 2 of CMR.

Before commenting on art. 82 I must stress what I said at the beginning of my speech, that the Convention applies to contracts of carriage which provide for carriage by sea. Conversely, the Convention does not apply to contracts which provide for say carriage of goods by road, although such road contracts may include a maritime element. Such contracts may be subject to the CMR. The parties have contractual freedom to enter into the type of contract which best suits their needs. In some cases it may be unclear what type of contract the parties entered into or what type of contract they intended. The parties, and by the end of the day the courts, will have to decide via qualification of the contract whether it is a contract for carriage by sea or by road. In qualifying the contract the parties and the courts may take into account the intention of the parties, the parties' earlier practice, the documents issued, the goods involved, the transport to be performed etc. If in our example Glasgow to Milan only a CMR consignment note is issued by the contracting carrier to the shipper, it seems pretty clear that the parties had road carriage under the CMR in mind.

If this understanding of the Convention and the other unimodal conventions is correct, art. 82 may be unnecessary, because there is then no conflict. However, some delegations in the UNCITRAL discussions thought there was a possible conflict between the Convention and the other unimodal transportation conventions and that is why art. 82 has been included.

The wording of art. 82 (b) is not entirely clear and it may be interpreted in a couple of ways. The wording seems, however, to point at a limited application of the CMR instead of the Convention, namely to cases where loss etc. to goods takes place during ro-ro sea carriage while the goods remain loaded on the road vehicle. Even if such a limited application of the CMR is intended by art. 82 (b), it must be recalled that art. 26 of the Convention in relation between the shipper and the contracting carrier ensures application of the liability provisions of the CMR (and a few other provisions) in a number of cases where loss etc. occurs during a land
leg of the transport. Furthermore as stressed a number of times, the CMR subcarrier falls outside the Rotterdam Rules.

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