Jurisdiction & Multimodal Transport : A Green Perspective.

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Jurisdiction & Multimodal Transport : A Green Perspective ?[1]

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Abstract:
The promotion of multimodal transport by European Authorities is based on several considerations, amongst which its positive influence on sustainable developement. From the point of view of private law, it is questionable whether EU law could be an incentive for promote modal shift. This issue will be adressed from the angle of litigation as the way litigations are settled can be considered as one of the criteria of sustainability.
Considering the current jurisdiction and arbitration rules applicable to multimodal transport, it must be noted that no enforceable international convention specifically governs this type of transport. Identifying the applicable regime to litigations raised by multimodal transport is quite a challenging assignment as it is determined by a great variety of sources.
The analysis of the rules governing this type of litigations prove that they are not an incentive for the development of multimodalism. Imagining a better way to settle multimodal litigations in Europe thus appears relevant.

Key words: Multimodal transport – jurisdiction – arbitration.

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Introduction

The promotion of multimodal transport by European Authorities is based on several considerations, amongst which its positive influence on sustainable developement[2]. Several methods have been investigated to encourage the development of multimodal transport. One of these could consist in analysing the above mentioned development towards sustainable freight within the European Union from the point of view of private law[3]. This issue will be adressed from a particular angle, the angle of litigation. Indeed, the way litigations are settled can be considered as one of the criteria of sustainability.
Litigations arising from multimodal transport are governed by rules derived from different legal sources. The first step that must be taken if a dispute related to multimodal transport has not been resolved amicably, is to identify the judge (or arbitral tribunal) who has the jurisdiction, according to the relevant source. It is therefore worth investigating whether jurisdictional rules on multimodal transport may contribute (or not) to promoting co-modality, or modal shift. Before dealing with this issue, it is necessary to define the terms in question. The word 'jurisdiction', means, according to the Oxford dictionnary, "*The official power to make legal decisions and judgements ; A system of law courts; a judicature ; The territory or sphere of activity over which the legal authority of a court or other institution extends*". As regards litigations related to multimodal transport, the term jurisdiction refers to a combination of the above definitions. More precisely, it consists in identifying the Courts with the ability to rule such litigations. The analysis will be extended to arbitration, as several international instruments contain provisions on this alternative method of dispute resolution. Discussion on the different definitions of multimodalism is frequent[4]. The InterTran project defined co-modality, as "*an optimal combination of various modes of transport within the same transport chain, so called intermodal or multimodal transport*". This expression will be considered here in a broad sense, including all journeys performed by at least two different means of transport.
Considering the current jurisdiction and arbitration rules applicable to multimodal transport, it must be noted that no enforceable international convention specifically governs this type of transport. Identifying the applicable regime to litigations raised by multimodal transport is thus quite a challenging assignment. As far as 'door to door' transport is concerned, the Rotterdam Rules intended to solve part of the issue. But, it is unclear if this goal was achieved, as different regimes remain in relation with the mode of transport and the legal instrument governing non maritime legs of transport[5].
At present and in the absence of an international legal instrument, the legal regime is determined by three types of sources : contracts concluded between the parties, unimodal conventions, or even State laws when these conventions are not applicable. Looking at jurisdictional rules governing this type of litigations, it is questionable whether there may be an incentive for the development of multimodalism (1). A step further is perhaps necessary, venturing into a foresight exercise designed to identify the best way to settle multimodal litigations in Europe (2).

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Chapter 1 Jurisdiction rules and multimodality

Wondering whether jurisdictional rules may be an incentive for the development of multimodalism it is necessary first to analyse the currently applicable rules, and then to consider their possible influence on multimodality.

1.1. Presentation of the current state of international law

To identify which jurisdictional rules are applicable to a multimodal dispute requires the adoption of the same method as identifying the regime applicable to a transport dispute in general. It consists in the identification of the appropriate applicable International Convention or Domestic Law. This is a major issue related to multimodality. Indeed, the lack of special international rules for multimodal transport produces two significant problems. Firstly, the inadequacy of the liability regime, which may change according to when the damage occurred. Secondly, legal uncertainty, precisely arising from the difficulty to identify the appropriate regime, especially when the origin of the damage is unknown[6]. If we set aside this issue and assume that the applicable regime has been identified, one must look if the applicable instrument contains jurisdiction and/or arbitration provisions or not. Such rules can be found in different types of instruments. First in legal instruments (International conventions, European Regulations, State Laws). Second, in non binding instruments (soft law, drafts, non enforceable Conventions). And finally, in contracts.

1.1.1. Jurisdiction and arbitration rules in legal instruments

1.1.1.1. Jurisdiction and arbitration rules in unimodal conventions

International conventions likely to apply to a dispute related to multimodal transport are unimodal conventions. Indeed, given the lack of a special international instrument, courts confronted with a litigation resulting from a multimodal transport, generally try to identify the stage of transport during which the damage occurred, and subsequently apply the corresponding unimodal regime, thus using the so-called ' network system'. This method is generally provided for in unimodal conventions[7]. For instance, if the carriage has been performed successively by a road carrier, and then by sea, according to article 2 of the CMR, this convention will govern the contract, provided that a unique contract has been concluded, that the goods have not been unloaded from the vehicle and that the damage occurred during the road leg[8]. But if the vehicle containing the goods is carried over a part of the journey by sea, and the damage occured during the sea leg and was caused by the maritime carrier, the liability of the carrier by road shall be determined according to the applicable mandatory sea regime. As a consequence, an international

multimodal transport is most often governed by a unimodal Convention. Some of these unimodal Conventions do not contain any specific litigations rules, like Hague-Visby Rules. As for the others, the main characteristics of jurisdiction and arbitration provisions will be described below.
Another international legal source could be a European Regulation. So far however, no European Regulation governing the carriage of goods exists. As for the transport of passengers, the existing Regulations[9] do not contain any provision relating to multimodal transport.
When none of the international unimodal Conventions apply, multimodal contracts are governed by domestic laws, generally identified through a rule of conflict of law. Very few State laws provide for special rules on multimodal transport[10].

At present, five international conventions governing contracts of carriage contain jurisdiction and arbitration provisions. As for maritime transport, the only relevant convention is the Hamburg Rules of 1978 (HR) [11]. The recent Rotterdam Rules adopted in 2008 (RR)[12] also contain this type of provisions, though these are not yet in force. Moreover, such provisions may not be applied universally as Chapters 14 and 15 of the Convention are optional. Furthermore, it is unlikely that the EU will opt for these provisions as they strongly derogate from the Brussels I Regulation[13]. As for the carriage of goods by road, the Geneva Convention (CMR) of 1956[14] includes the most far-reaching rules. The Convention governing international railway transport is the COTIF dated 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999 (COTIF)[15]. And finally, the two air transport conventions, the Warsaw Convention regulating liability for the international carriage of persons, luggage, or goods performed by aircraft for reward of 1929 (WC)[16] and the Montreal Convention of 1999 (MC)[17]. Jurisdiction and arbitration provisions contained in these conventions apply if the convention is applicable itself, notwithstanding a possible interference with the Brussels I Regulation if the dispute falls within the scope of application of this instrument. At present, such interference is really problematic with the CMR, as this convention contains developped enforcement provisions[18]. As for the conventions adopted by the EU itself[19], compatibility of the jurisdiction and arbitration provision has been preserved. This issue has been taken into consideration in the negociations of the Rotterdam Rules with the adption of a 'opt-in' system for the two chapter dedicated to jurisdiction and arbitration. Indeed, such provisions proved to be inconsistent with the Brussels I Regulation and jeopardized the adoption of the convention by EU states.
Despite some differences, the main characteristics of these jurisdiction and arbitration provisions can be identified[20]. These special rules are generally designed on the same model. First, it must be noted that transport law being part of international trade law, the principle of contractual freedom is in this field prominent. Contracting parties may thus agree on a jurisdiction or arbitration clause. If no choice has been made by the parties, these conventions provide for subsidiary forums. Relating to jurisdiction provisions, article 31 of the CMR constitutes a topical example of these types of provisions. As for arbitration, article 22 of the Hamburg Rules is one of the most far-reaching provision in this area.

Article 31 CMR

1. In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory:
(a) The defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made,
or (b) The place where the goods were taken over by the carrier or the place designated for delivery is situated.
2. Where in respect of a claim referred to in paragraph 1 of this article an action is pending before a court or tribunal competent under that paragraph, or where in respect of such a claim a judgement has been entered by such a court or tribunal no new action shall be started between the same parties on the same grounds unless the judgement of the court or tribunal before which the first action was brought is not enforceable in the country in which the fresh proceedings are brought.
3. When a judgement entered by a court or tribunal of a contracting country in any such action as is referred to in paragraph 1 of this article has become enforceable in that country, it shall also become enforceable in each of the other contracting States, as soon as the formalities required in the country concerned have been complied with. These formalities shall not permit the merits of the case to be re-opened.
4. The provisions of paragraph 3 of this article shall apply to judgements after trial, judgements by default and settlements confirmed by an order of the court, but shall not apply to interim judgements or to awards of damages, in addition to costs against a plaintiff who wholly or partly fails in his action.
5. Security for costs shall not be required in proceedings arising out of carriage under this Convention from nationals of contracting countries resident or having their place of business in one of those countries.

Article 22 HR – Arbitration
1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.
2. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.
3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:
(*a*) a place in a State within whose territory is situated:
(i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or
(ii) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or
(iii) the port of loading or the port of discharge; or
(*b*) any place designated for that purpose in the arbitration clause or agreement.
4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.
5. The provisions of paragraphs 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.
6. Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen.

Freedom of choice. By exercising free choice, contracting parties may express their willingness in two ways : by selecting a competent court or by opting for arbitration. As for jurisdiction clauses[21], the parties are generally allowed to designate in the contract a court of their choice, or even designate the jurisdiction of a country. However, it is a rather 'supervised' choice as operators are not allowed to choose their jurisdiction freely. The choice is generally limited to forums authorised by the Convention when no choice is made[22]. Besides, only Courts of contracting parties to the convention can be designated. Such a requirement is logical as it aims to guarantee the application of the convention itself. Indeed, if a case is brought in front of a national Court of a non contracting State, this Court is quite unlikely to apply the convention, though domestic laws do not always prohibit them from doing so[23]. But the main problem of these provisions is that they do not authorise exclusive jurisdiction clauses. Whenever a forum has been specially chosen by the contracting parties, the plaintiff may opt to bring an action before the chosen court, or before one of the other forums listed in the provision. However, this system tends to ruin the objective of foreseeability of jurisdictions clauses.
Regarding now arbitration clauses when allowed by international unimodal conventions[24], the traditional principle of party autonomy in this domain is undermined by a strict framework. It is often the case that the seat of arbitration can only be selected from a limited list of locations, generally corresponding with forums authorised by the convention when no choice is made. There are also formal requirements, particularly the obligation for the clause to be in writing[25]. And finally, freedom of choice regarding applicable rules by the parties or arbitrators is also limited. Indeed, the clause will only be valid if the arbitrators apply the corresponding convention. This last requirement aims to guarantee the application by the arbitrators of the convention itself. However, such a requirement tends to mix conditions of validity of the arbitration clause itself and conditions of enforceability of the award. The arbitration clause should not be invalid if the parties designated a different law or convention to govern their contract[26]. Arbitrators should be aware that these unimodal conventions are mandatory and should be applied to ensure the validity of the award itself, despite the choice of a different law. Failing to do so, the award could indeed be declared unenforceable in the countries which are parties to such conventions under Article V, paragraph 2 (b) of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, the recognition or enforcement of the award being considered contrary to the public policy.

Absence of choice. If no choice is made by the parties, conventions provide for subsidiary forums. These forums are very close to those generally encountered in international private law instruments, as Brussels I Regulation for instance or even State laws. In this sense, Article 31(1) CMR can be taken as an example, and compared to Article 5-1° of Brussels I Regulation.
Four forums can be generally found in these conventions[27].
The first one is the *domicile of the defendant :* Courts where the defendant is ordinarily resident, or has his principal place of business, have jurisdiction.
The second one is the *forum of conclusion of the contract :* location of the branch or agency through which the carriage contract of was made.
The third one is the *forum « of departure »* : place where the goods were taken by the carrier.

And finally, the fourth forum is the *forum of « arrival »*: place designated for delivery.
Compared to Bussels I Regulation or domestic laws (for instance French law), the only significant difference is the *forum of departure* which has no parallel in those instruments.
Another important point related to the precise designation of the forum must be noted. Some instruments designate a precise Court, for example the Court of the domicile of the defendant[28]. While others, like the CMR for instance[29], only designate the country in which the actions may be brought, and not the precise court where these actions may take place. This point is important because it is not so easy for parties to be aware of that issue just by reading the provisions. And moreover, it leads to legal uncertainty because once the country where a suit can be brought has been identified, there still remains the need to find the proper Court designated by domestic jurisdiction rules according to the *lex fori*. And to some extent, jurisdictional rules looking similar, can ultimately prove to lead to different Courts. In the *Lutz* case[30], the 'Cour de Cassation' had to solve the problem caused by the absence of an equivalent of the forum of delivery (31 (1) (b) CMR) in French legislation. According to this provision, France had jurisdiction. But no French Court could be identified by application of the French legislation. Indeed, the French equivalent provision gives in fact jurisdiction to the place of the 'actual' delivery (art. 46 CPC). And in the case at hand, the goods had been totally destroyed during the carriage. Although France had jurisdiction according to this article, it was consequently impossible to identify a competent Court in France, as there was no delivery at all. The High Court decided however that, as France had close links with the case (it was the place of contractual delivery), Courts of this place could be seized according to the principle of sound administration of justice. This decision has been criticized as this solution seems to deviate from the current interpretation of the convention[31]. Such a discrepancy however is issued by the application of the *lex fori* and could be solved by seizing the International Cour of Justice, as provided for in article 47. But this recourse has never been used. Rather, the solution adopted in the *Lutz* case is quite consistent with the underlying principles governing the CMR jurisdictional rules.
***Lis pendens* and recognition provisions.** Finally, some of these conventions contain *lis pendens* and related actions rules[32]. Recognition and enforcement rules can also be found in certain conventions[33]. When the litigation is linked to the EU, difficulties regarding the combination of these conventions with EU Laws and in particular with Brussels I Regulation arise frequently.
These types of rules are challenging as regards such a combination with Brussels I Regulation which includes both rules on jurisdiction and on recognition and enforcement of judgments. In fact, a combination of jurisdiction provisions does not meet any major obstacles as article 71 of the Regulation (Chapter VII - 'Relations with other instruments'), stipulates that the regulation does not affect any conventions adopted on special matters (principle of *lex* specialis) to which the Member States are parties and containing jurisdiction or recognition or enforcement of judgments provisions (1). Thus, this provision authorises Courts of a Member State, which is a party to a Convention on a particular matter, to assume jurisdiction in accordance with that convention[34].
By contrast, combinations of rules on recognition or enforcement of judgments, as well as those on *lis pendens* raise many problems.
The European Court of Justice had occasions to decide on such issues in the famous *TNT*

Express Nederland case in 2010[35]. This case concerned the compatibility of CMR *lis pendens* (Art. 31(2)) and recognition and enforcement (Art. 31(3)) provisions with Brussels I Regulation. In 2002, Siemens Nederland NV and TNT (the carrier) had entered into a contract for the carriage of goods by road from Netherlands to Germany. But the goods were not delivered to their destination. TNT instituted proceedings before the Rotterdam Court in Netherlands against Siemens' insurer, asking for a declaration of limitation of liability. TNT asked to benefit from Article 23 of the CMR, which lays down the rules applicable to the amount of compensation that can be claimed. The Rotterdam Court dismissed the action and TNT appealed against that judgment to the Regional Court of Appeal in The Hague. Two years after, the forwarder's insurer brought an action against TNT before the Regional Court of Munich in Germany for compensation in respect of the loss suffered by Siemens on account of the loss of the goods. Given that proceedings between the same parties and concerning the same carriage were already pending in the Netherlands (Rechtbank te Utrecht), TNT contended that, under the *lis pendens* rule laid down in Article 31(2) of the CMR, the Munich Court could not hear the insurer's action. The Court however rejected TNT's line of argument founded on Article 31(2) of the CMR and ordered it to pay compensation. The insurer then requested the enforcement of this judgment in the Netherlands pursuant to Regulation No 44/2001. TNT then demanded the order to be set aside and the enforcement of the judgment to be refused or, at least, the decision to be deferred until the Hague Court of Appeal had ruled on the appeal lodged against the judgment of the Rotterdam Court. His argument was that by virtue of the *lis pendens* rule laid down in Article 31(2) of the CMR, the Munich Court lacked jurisdiction to hear the insurer's action. But the insurer argued on the grounds of 44/2001 Regulation. TNT was dismissed. TNT appealed on a point of law against the order of the Rechtbank te Utrecht. In its submission, TNT argued that the Court failed to have regard to the fact that, by virtue of the second subparagraph of Article 71(2)(b) of Regulation No 44/2001, Article 31 of the CMR derogates from the prohibition, laid down in Article 35(3) of the regulation, on reviewing the jurisdiction of the court of the Member State of origin. In those circumstances, the Supreme Court of the Netherlands decided to suspend proceedings and to refer the following questions to the Court of Justice for a preliminary ruling.
Six questions were asked to the ECJ, which can be summarized into two main problems. The first one concerned the relations between Brussels I Regulation recognition and enforcement rules and those of the CMR, as regards Article 71(2)(b) of Regulation No 44/2001. In other terms, which rules should prevail. The second issue raised the same problem as regards *lis pendens* rules, existing in both sources. The answer of the ECJ to the first question was the following : "Article 71 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that, in a case such as the main proceedings, the rules governing jurisdiction, recognition and enforcement that are laid down by a convention on a particular matter, such as the *lis pendens* rule set out in Article 31(2) of the Convention on the Contract for the International Carriage of Goods by Road, signed at Geneva on 19 May 1956, as amended by the Protocol signed at Geneva on 5 July 1978, and the rule relating to enforceability set out in Article 31(3) of that convention, apply provided that they are highly predictable, facilitate the sound administration of justice and enable the risk of concurrent proceedings to be minimised

and that they ensure, under conditions at least as favourable as those provided for by the regulation, the free movement of judgments in civil and commercial matters and mutual trust in the administration of justice in the European Union (*favor executionis*)". In other terms, despite Article 71 of Council Regulation (EC) No 44/2001, recognition and enforcement or *lis pendens* provisions of a convention on a particular matter, do not prevail over Regulation (EC) No 44/2001 rules if they provide for conditions less favourable as those provided for by the Regulation. In this case, the key issue was the verification of the jurisdiction of the first Court seized. Indeed, Regulation 44/2001 prohibits such a verification. But article 31(3) of the CMR does not offend this rule. It only provides that a judgment enforceable in a contracting State according to the convention's rules shall also become enforceable in each of the other contracting States, as soon as the formalities required in the countries concerned have been complied with. Indeed, according to Article 35, paragraph 2 of Regulation 44/2001 the judge in charge of enforcement is not supposed to verify the competence of the judge who made such a decision. But it is less clear to know if this provision can be applied when the *lis pendens* rules of the convention have not been respected. However, the fact that ECJ stated that EC Regulation *lis pendens* rules also prevailed on those of the CMR, leads to the conclusion that the enforcement of the German decision cannot be rejected.
This interpretation has been confirmed recently by another ECJ decision in case C 452/12 of 2013[36]. In this case only *lis pendens* rules were discussed and the first seized Court's jurisdiction was not challenged. ECJ confirmed the prevalence of EU regulations over the CMR's provision on *lis pendens*. The conclusion to be drawn from the above cases is that despite Article 71 of Regulation 44/2001 which theoretically gives priority to special conventions, theses conventions can be set aside when recognition, enforcement or *lis pendens* rules are at stake. Indeed, the CMR provisions are far less precise than the EU Regulations. Moreover, ECJ prioritizes the principle of *favor executionis*, ensuring the free movement of judgments and mutual trust in the administration of justice in the European Union. Doubtless such conflicts are likely to disappear in the future as EU will adopt itself the new conventions and check before their compatibility with EU instruments.
This discussion is important as it affects the way jurisdiction rules for multimodal transport should be designed.

1.1.1.2. Jurisdiction and arbitration rules in domestic laws

The second legal source of jurisdiction and arbitration rules that may be applied to multimodal litigations is domestic law. For example, French Law does not provide for any special jurisdiction or arbitration rules for transport litigations. Therefore no rules for multimodal transport litigations exist. These litigations are governed by general rules of civil procedure. As for jurisdiction, rules related to contracts (or torts) are applied. Those are quite similar to Brussels I[37]. Arbitration is also governed by the Civil Procedure Code[38]. Brussels I Regulations apply to recognition and enforcement of judgments, provided that the litigation is within its scope of application. Otherwise, French international private law rules apply. As for enforcement of arbitral awards in France,

French law is competent[39] as New York convention of 1958[40] authorises State parties to apply their own legislation if more favourable to enforcement than the convention, which is the case for French law.

1.1.1.2. Jurisdiction and arbitration rules in nonbinding instruments

Regarding non-binding instruments such as soft law, or non enforceable conventions, two instruments prove to be relevant. First, the UNCTAD/ICC rules for Multimodal Transport Documents[41], which provides a set of rules that can be voluntarily applied to a multimodal contract. However, these Rules do not contain any specific provision on jurisdiction or arbitration. They only mention such issues as possible additional clauses. Second, the UNCTAD Convention on multimodal transport, adopted in 1980, which, however, never came into force[42].
Yet, this latter convention is interesting as it had provided for special provisions on jurisdiction and arbitration. Article 26 'Jurisdiction' contains rules which are not really different from those provided for in unimodal conventions. We can find here the four forums previously described, as well as a provision enabling free choice of jurisdiction but which is still not exclusive.

ARTICLE 26 – JURISDICTION

1. In judicial proceedings relating to international multimodal transport under this Convention, the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:
(a) defendant place of business : The principal place of business or, in the absence thereof, the habitual residence of the defendant; or
(b) place of conclusion of the contract : The place where the multimodal transport contract was made, provided thatthe defendant has there a place of business, branch or agency through which the contract was made; or
(c) place of « departure » ou « arrival » : The place of taking the goods in charge for international multimodal transport or the place of delivery; or
(d) place freely chosen : Any other place designated for that purpose in the multimodal transport contract and evidenced in the multimodal transport document.

The same conclusion as those related to the actual unimodal conventions can be reached for the arbitration provision (art. 27).

ARTICLE 27- ARBITRATION

1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to international multimodal transport under this Convention shall be referred to arbitration.
2. The arbitration proceedings shall, at the option of the claimant, be
instituted at one of the following places:
(a) A place in a State within whose territory is situated:
The principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or
(ii) The place where the multimodal transport contract was made, provided that the defendant has

there a place of business, branch or agency through which the contract was made; or (iii) The place of taking the goods in charge for international multimodal transport or the place of delivery; or
(b) Any other place designated for that purpose in the arbitration clause or agreement.
3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.
4. The provisions of paragraphs 2 and 3 of this article shall be deemed to be part of every arbitration clause or agreement and any term of such clause or agreement which is inconsistent therewith shall be null and void.
5. Nothing in this article shall affect the validity of an agreement on arbitration made by the parties after the claim relating to the international multimodal transport has arisen.

The analysis of the previous rules on arbitration and jurisdiction, though contained in an instrument specially dedicated to multimodal transport is rather disappointing. They reveal that in this area, the drafter of these instruments did not consider that particular rules for multimodal transport were necessary, those currently governing transport in general proving to be at last relevant, subject to minor adaptations. Indeed, multimodal transport litigations have the same basic features as unimodal litigations, involving a claimant (generally the owner of the goods) and a defendant (generally the carrier), along with their respective insurers. Both are generally multiparty. As far as forums are concerned, the need for a different forum specially appropriate for multimodal litigations does not appear clearly. However it does not mean that these mechanisms of dispute resolutions are actually efficient.

1.1.1.3. Jurisdiction and arbitration rules in contracts governing multimodal transport

Finally contracts must be examined. Indeed, as few legal provisions are specifically drafted for multimodal transport, contracting parties are likely to design their own provisions, provided that they respect mandatory rules. A large range of contracts, and general terms and conditions for multimodal transport have been analysed[43]. It must be noted however, that most jurisdiction clauses examined designate the Courts of the country in which the multimodal transport operator is established and which correspond to a common practice in maritime and road transport. When transport is mainly performed by sea, arbitration clauses are sometimes included, though arbitration clauses are more commonly found in charter-parties. But these clauses are still not different to those found in unimodal contracts. Here again, the necessity to draft clauses specially designed for multimodal purposes does not appear clearly.

Now that the existing provisions have been reviewed, their influence on multimodality development needs to be analysed.

1.2. Influence on multimodality

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1.2.1. Absence of special jurisdiction and arbitration dedicated to multimodal transport

Having briefly looked at the main features of jurisdiction and arbitration provisions contained in the current instruments governing contracts of transport, it seems necessary to analyse whether or not these provisions are likely to encourage multimodal transport. A negative answer can be inferred from the previous analysis. Several justifications can prove it. Obviously, jurisdiction and arbitration provisions contained in unimodal conventions have not been specifically designed for multimodal transport. Thus, they may not be particularly adapted to it. However, it must be admitted that these provisions were drafted for transport purposes and thus provide rather appropriate forums, linked with the material reality of transport : forum of the taking of the goods, forum of delivery etc. In this sense, these forums could be appropriate for multimodal transport as well.

1.2.2. Encouragement of *forum shopping*

Problematically, though not aspecific problem to multimodal transport, a certain trend to foster *forum shopping*[44] can be observed. When the parties have not agreed on an exclusive jurisdiction clause or an arbitration clause, the different options offered to the claimant are obviously not only used to provide an easy access to justice. The multiple optional forums offered to the parties, encourage plaintiffs to bring actions in front of the court more likely to grant the application of the claimant. In the field of transport litigation, taking adavantage of procedural differences existing between domestic laws along with interpretation discrepancies is rather frequent. A topical example is the use of negative declarations of liability. This manœuvre is frequently used by road carriers who bring actions in countries where such judgments can be ruled[45]. Jurisdiction is also selected according to their interpretation of article 29 of the CMR[46] concerning the breaking of liability limits[47]. As Belgium for instance adopts a very restrictive interpretation of the expression 'wilful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seized of the case, is considered as equivalent', the limits are never overruled in this country. As a consequence, if it is possible for the carrier to seize a Belgian Court of a negative action of liability, the decision hinders any further decisions that may have been issued at the initiative of the actual ‘victim’ of the loss or damages causes to the carried goods. This situation corresponds precisely with the facts in the *TNT* and *Nipponkoa* cases. This type of procedural behaviour is quite normal. But talking about uniform international instruments somehow ruins the objective of uniformity of laws. Especially so when the location of the suit is chosen on the grounds of interpretation discrepancies of international instruments by State parties. Such procedural manoeuvring is certainly not very sustainable.

1.2.3. Encouragement to settle out of Courts

Finally, it is well known that the identification of the applicable regime is particularly complex in multimodal transport. Thus, identifying the Court which has jurisdiction is also very difficult. Such obstacles, added to a certain tendency for procedural manoeuvring, fosters settlements out of Courts. Avoiding trial can be considered positively. The famous French author *Honoré de Balzac* said "Un mauvais arrangement vaut mieux qu'un bon procès"[48]. However, it must be said, I do not agree with this. Rather, settlements do not always benefit the 'victim'. Accepting a settlement only to avoid pleading far away from home, or because of legal uncertainty on the applicable regime is so high that the claimant, or the claimant's lawyer, is unable to know what the outcome of the trial could be, thus weakening the claimant, and often inciting him to accept an unfair settlement.
The law at present does not entirely ensure satisfactory solutions for multimodal litigations. It is too complex, it fosters forum shopping, apart from situations where a balanced agreement has been made. The previous developments are not all specific to multimodal transport and can be found in transport litigations in general. A more proactive approach should be tried to find potential solutions to improve the effectiveness of settlement of multimodal disputes.

Chapter 2 Improving effectiveness of settlement of multimodal disputes

The point being made is that current jurisdictional rules are not likely to encourage multimodal transport, or even to enable efficient resolution of disputes. To encourage the development of multimodal transport, one of the solutions is to improve legal certainty by adopting a specific liability regime. Several works have been carried out in the past years and even decades, unfortunately unsuccessfully[49]. It would certainly be easier to achieve uniform rules under EU legislation. But I must confess that I am rather reluctant to resort to EU legislation as far as carriage of goods is concerned. In my opinion, the good level for ruling is the international level and not a regional one. Yet, there are numerous obstacles before an international convention is in force. In this sense, a European regulation could be a first step. But how could settlements of multimodal disputes be improved ? To answer this question, it is necessary first to agree on criteria of efficient dispute resolution methods, and, perhaps, to invent 'a green method' of dispute resolution for multimodal litigation. Limiting forum shopping is certainly the first obvious way to achieve this goal.

2.1. Limiting *forum shopping*

From a legal point of view, the main criteria of sustainability are legal certainty. The point has been made that jurisdiction and arbitration rules are generally so complex that the entitled Court or arbitration tribunal is not easily identifiable. Moreover, the options

offered to claimants frequently lead to *forum shopping*. A solution to these issues could be to abandon the multiple forums offered to the claimants and to propose a single forum. Indeed, offering multiple options, at the place of taking of the goods, the place where the contract has been concluded.. etc. certainly promotes access to justice, but also increases legal uncertainty and 'bad' forum shopping.
If a single forum was to be provided for, it is however hard to admit that we could get rid of the principle of *actor sequitur forum rei*, granting jurisdiction to the domicile of the defendant. But if legally possible, the only relevant forum would certainly be the place of performance of the contract, which, in transports, is the place of delivery of the goods to the consignee. Several reasons confirm this analysis. This place meets the criteria of legal certainty as it is generally mentioned on the transport document. Thus, this forum is easily predictable. Moreover, such a forum is in many cases close to the dispute as it is often the place where the damage is discovered and where evidence can generally be found. And, incidentally, it corresponds with Brussels I Regulation for contractual litigations.

Indeed, in Europe at least, it seems irrelevant to derogate from Brussels I Regulation as it creates more problems than it solves. Brussels I Regulation for contractual litigations provides for two jurisdictions: the domicile of defendant (article 2) and "in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided" (article 5(1)(b)) which is for transport the place of delivery[50]. So we can finally reach the conclusion that no special jurisdiction provisions are requested as far as jurisdiction is concerned, at least when Brussels I Regulation is applicable[51]. When this Regulation does not apply, that is when the defendant is not established in the EU, such provisions may however prove of interest. Recent international conventions like Rotterdam Rules set up a system of opting in[52]. This system preserves European rules as it is likely the EU will not opt for these provisions. But it also discards uniform conventional rules when EU legislation is not applicable which is not satisfactory for international traders as jurisdictions domestic rules are very different from a country to another. A solution could be to restrict the application of conventional provisions on jurisdiction to situations where EU Regulation n°44/2001[53] is not applicable.
This system has proven very complex. Could arbitration be a solution to these difficulties ?

2.2. Inventing a sustainable multimodal dispute resolution

A sustainable dispute resolution method would need to meet criteria such as speed, low cost, quality and expertise. Yet, we have to recognize that such values are frequently underlined when describing arbitration. This leads to the following question : is arbitration a better way to resolve a multimodal dispute ? Indeed, it seems an appropriate method of dispute resolution as for expertise and legal multiculturalism. Another advantage of this system would be the uniform application of international law. As we often say in France "international arbitrators do not have a forum", meaning that they

have no allegiance to a State or a State law. In this context, there are more unlikely to interpret international texts (Convention or Regulation) according to domestic laws or principles. However, it should not be denied that arbitration has definite advantages, but also serious disadvantages, such as costs. Nevertheless, creating a real European Arbitration and Mediation Centre specialized for all means of transport, particularly in the field of multimodal transport, could be an appropriate remedy for these difficulties. It must not be forgotten however that, as arbitration is based upon the will of the parties, it cannot be imposed. And in this sense, the simpler the rules, the better. Such complex rules as in the CMR, or even more so in the Rotterdam Rules, are totally inappropriate for arbitration. And above all, they are unable to achieve one of their goals which is to protect the consent of the parties. But this is another issue that cannot be developed here.

Conclusion. Improving multimodal dispute resolution raises many questions that cannot be easily answered. Several points must be kept in mind however.
A need for specific jurisdictions and enforcement rules is not obvious for multimodal transport in European instruments.
It is indeed necessary to simplify the existing ones, for multimodal litigations and transport litigations in general, especially in international instruments and arbitration. This could be done in two ways. By using EU regulation 44/2001 instead of special provisions on jurisdiction. And by encouraging the promotion of arbitration in this field.

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[1] This paper is the written version of a speech given during the colloquium : « European Multimodal Sustrainable Transport : Quo Vadis ? » held in september 2014, Institute of International Economic Law, University of Helsinki.
[2] See. InterTran project : http://www.helsinki.fi/katti/english/InterTran-project.htm.
[3] See : Eftestøl-Wilhelmsson, Ellen. *European Sustainable Freight – The Role of Contract Law* http://www.helsinki.fi/katti/english/EE- W_Publications/European_Sustainable_Freight.pdf
[4] See UNECE Glossary published in January 2001 : *Terminology on Combined Transport*, p. 17 ff. : http://www.unece.org/fileadmin/DAM/trans/wp24/documents/term.pdf.
[5] Legros, C. (2012) *Relations between the Rotterdam Rules and the CMR*, TMLJ, vol. 36, 725-740 ; see also : Eftestol-Wilhemsson, E. *The Rotterdam rules in a multimodal context*, (2010) 16 IMJL, 274.
[6] Hoeks, Marian. *The law applicable to the multimodal contract for the carriage of goods*, (2009), Erasmus University Rotterdam, p. 9 ff.
[7] Art. 38 of the Montreal Convention, art. 1 of the COTIF-CIM ; art. 2(2) CMNI ; art. 16 of the Hamburg Rules.
[8] *CA Aix-en-Provence, 28 november 2005,* IDIT CMR-UNIDROIT Data base N°22345 *; Cass com 2 october 1990*, Bull. civ. IV, n°226 ; JCP 1990. IV. 378 ; RJDA (1991) 16, n° 73.
[9] **Air :** Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 - Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents ; Regulation (EC) no 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air
Rail. Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations.

Maritime : Regulation 1177/2010 concerning rights of passengers when travelling by sea and inland waterway. The Regulation was published on 17 December 2010 in the Official Journal of the EU and its provisions will apply as from 18 December 2012.
Regulation 392/2009 , adopted on 23 April 2009, on liability of carriers of passengers by sea in the event of accidents deals specifically with the rights of passengers in case of loss or damage resulting from an accident. The Regulation will apply as from 31 December 2012.

[10] In Europe both Germany and The Netherlands have ruled on multimodal transport. But these statutes do not include jurisdiction rules.

[11] United Nations International Convention on the Carriage of Goods by Sea adopted in Hamburg on 31 March 1978.

[12] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea adopted 11 December 2008.

[13] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[14] The Convention on the Contract for the International Carriage of Goods by Road, signed at Geneva 19 May 1956.

[15] The Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 as amended by the Protocol of Modification of 3 June 1999 (Vilnius) – Appendix B (CIM).

[16] Originally signed in 1929 in Warsaw (hence the name), it was amended in 1955 at The Hague, Netherlands, and in 1971 in Guatemala City, Guatemala.

[17] The Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on 28 May 1999. Art. 2(1).

[18] See below page 7.

[19] The Montreal convention for instance was approved by an EU Council Decision of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (EUOJ L 194 , 18/07/2001 P. 0038 – 0038). The Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999, was signed in Bern, Switzerland on 23 June 2011, and entered into force on 1 July 2011, in accordance with Article 9 of the Agreement (EUOJ L 183/1, 13/07/2011).

[20] For more details, see : Legros, C. *Compétence juridictionnelle : les conflits de normes en matière de contrats de transport internationaux* (Jurisdiction : Conflict of Norms in the Field of International Transport Contracts), (2007) Journal du droit international - JDI, 799-836, 1081-1125.

[21] CMR, Art. 31 ; Art. 21 HR ; Art. 46(1), COTIF-CIM ; Art. 32, WC ; Art. 67 to 72 RR.

[22] See below p. 6.

[23] *Cass com 28 march 2000, Navire Teesta*, N° 98-11600, RJDA (2000) 7-8, 766 ; DMF (2000), 920 : In this case the Hague Visby Rules were not applicable *ipso jure*. However, the French Cour de cassation refused to apply the Hamburg Rules although conditions for the application wet met, on the grounds that France had not ratified this convention.

[24] CMR, Art. 33 ; HR, Art. 22 ; MC, Art. 34 ; RR, Art. 67 to 72.

[25] Which is not a legal requirement for international contracts under French Law : Art. 1507 Civil Procedure code.

[26] This is however the tendency in French case-law : see Legros, C. *Compétence : arbitrage et CMR (*Arbitration and CMR*)*: comment of *CA Aix 2 September 2004,* (2005) JCP, éd. E & A, p. 1930.

[27] Of course the precise content of these provisions may vary from an instrument to another.

[28] MC, Art. 33; WC, Art. 28-1.

[29] COTIF, RU-CIM, Art. 26 ; HR, Art. 21; RR, Art. 66.

[30] *Cass civ. (1) 20 december 2000*, N°98-15.546, Bull. 2000 I N° 342 p. 221.

[31] Loewe R., *Commentary on the Convention of 19 May 1956 on the Contrat for the International Carriage of Goods by Road (CMR)*, (1976) European Transport Law, 311.
[32] Art. 31(2) CMR ; Art. 21(4) HR ; Art. 26(4) CIMT (UNCTAD Convention on multimodal transport of 1980) ; Art. COTIF-CIM 46(2).
[33] Art. 31(3) CMR ; Art. 73 RR.
[34] Case C-148/03, ECJ October 2004, *Nürnberger Allgemeine*, [2004] ECR I-10327 - EUCJ 19 December 2013 - Case C 452/12, *Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV* [2013] ECR I 4107, Legros C., (2014) JCP E N° 39, 1480, n°12 - Case C-157/13, ECJ 2 september 2014, *Nickel & Goeldner Spedition v Kintra*, Legros C., (2015), Rev. Crit. DIP, to be published.
[35] Case C 533/08, ECJ 4 May 2010, *TNT Express Nederland* [2010] ECR I 4107.
[36] Legros, Cécile. *Incidence d'un jugement déclaratoire négatif de responsabilité rendu sur le fondement de la CMR sur la compétence du second juge saisi d'une action récursoire* (Influence of a negative liability decision issued on the grounds of the CMR on jurisdiction), [2014] JCP ed. E&A, 1480, comm. n°12.
[37] Art. 42 to 48 Civil Procedure Code (CPC).
[38] Art. 1442 to 1527 Civil Procedure Code (CPC).
[39] Art. 42-48 CPC and case law.
[40] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention").
[41] http://unctad.org/en/PublicationsLibrary/tradewp4inf.117_corr.1_en.pdf
[42] http://unctad.org/en/PublicationsLibrary/tdmtconf17_en.pdf
[43] notably : FIATA combined transport bill of lading and the BIMCO/INSA COMBIDOC…
[44] *Bat v Exel* (2013) EWCA civ 1319, analised by S. Lamont-Black, in *Enhancement of harmonization, predictability and foreseeability through the EU guidance in transport law?* , this review, p. XX.
[45] Notably, The Netherlands, Belgium, Italy. In France, procedural rules do not allow claimants to bring actions unless they have an actual interest to do so. Preventive actions are then prohibited, except in certain limited areas.
[46] Article 29(1) CMR : « The carrier shall not be entitled to avail himself of the provisions of this chapter which exclude or limit his liability or which shift the burden of proof if the damage was caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seised of the case, is considered as equivalent to wilful misconduct. »
[47] See *inter alia* : Smeele, F. *Dutch case law on Art. 29 CMR* European Transport Law 35 (2000), 329-341 ; 36 (2001), 37-40 *; (2003)* ; Theunis, J. and Peters J. F., *Wilful misconduct under the CMR*, Etudes offertes à B. Mercadal, (2002) Francis Lefebvre, 523 ; Grignon-Dumoulin, S. *Forum shopping - Article 31 de la CMR*, (2006), Uniform Law review, 609 ; Calme, S. *Le choix offert à la victime quant à la réglementation applicable au sein même de la convention CMR : un arrêt de principe de la Cour de justice fédérale allemande* (2011) Revue de Droit des Transports, 8 ; Glockner, H., *Limits to Liability and Liability Insurance of Carriers under Articles 3 and 23 to 29 of the CMR*, in: IRU (ed), International Carriage of Goods by Road (CMR); Haak, K. F., *The Liability of the Carrier under the CMR*, The Hague, Stichting Vervoeradres, 1986.; O.J. Tuma, *The Degree of Default under Article 29 CMR*, Uniform Law review 3 (2006), 585.
[48] *Illusions Perdues*, T5.730 : « a bad settlement is better than a fair trial ».
[49] Legros, Cécile, Bailly-Hascoët, Valérie, *Aspects juridiques de l'intermodalité* (Legal Aspects of Intermodality), in *Les corridors de transport*, (2012) EMS, p. 153-182.
[50] Cass com 16 november 2010, N° 09-66955, Bulletin 2010, IV, n° 181.
[51] That is when the defendent is domiciled in EU (art. 2).
[52] See above p.3.

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[53] Now Regulation n°1215/2012.