Contribution to European Intermodal Sustainable Transport

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The Law Applicable to Multimodal Transport . The Rotterdam Rules.

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Without pretending to exhaust such a wide topic in a short paper, I will describe the most important issues concerning the law applicable to multimodal transport.

The **need to regulate** in a uniform way multimodal transport rises with the same exponential development of this type of carriage. As a matter of fact, in the past a leading position was assumed by sea transport due to the vastness of commercial traffics on Mediterranean and Atlantic, so that multimodal carriage was for a long time considered as a branch of sea transport, without making a difference between sea freight transhipment and other modes of transport. But after the second world war, it was evident that sea carriage was not sufficient to consignee for the commercial traffic from the cities on the Atlantic coasts to inland.

Moreover, the growing use of *containers*, welcomed by carriers and shippers, has had a decisive influence in the development of transport from *door to door* (i.e from the place of production of the goods at the place of destination) achieved through the combination of more modes of carriages.

So the performance of two or more modes of conveyance became itself a part of **definition of multimodal transport** as given from the UN Convention on International Multimodal Transport of Goods at its article 1, that sounds like this "*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 to a multimodal transport operator to a place designated for delivery situated in a different country*". It goes on to define the multimodal operator as "*any person who on his own behalf or through another person acting on his behalf concludes a multimodal transport contract and who acts as a principal, not as an agent or on behalf of the consignor or of the carriers participating in the multimodal transport operations, and who assumes responsibility for the performance of the contract*"

Despite the above clear definition, it's not so easy and explicit the reference about the law applicable to this kind of transport for the opposite theories conceived, in particular concerning carrier's liability.

The first real attempt to discipline in a uniform way multimodal transport was realized in 1980 in Geneva through the **UN Convention on International Multimodal Transport of Goods**, as

mentioned above. Geneva's Convention identifies the law applicable to multimodality and, therefore, the carrier's liability, depending on whether the damage occurred is localized or not. In the first case, it is applicable, whether existing, an international convention or national law that discipline the unimodal transport, as by rail, road, air, inland water and maritime which contain limits of liability higher than those covered by Geneva's Convention. In the case of not localized damages, it identifies carrier's liability for loss, damage or delay concerning the consignee of goods from their takeover to the delivery, unless the carrier manages to demonstrate to have adopted all reasonable measures required to avoid the damaging event and its consequences. When carrier's liability is established, he can limit its debt to a 920 SDR per package or other unit or to 2,75 SDR per kilogramm gross of loss or damaged goods in the case in which transport concerns a sea leg; per 8,33 SDR of gross weight when sea leg is excluded.

The efforts made by the supporters of Geneva's Convention have failed. As a matter of fact it hasn't never entered into effect as both carriers and shippers have considered its liability regime so complicated and containing so high limits of debt for carriers. Another limitation of Geneva's Convention consisted of the high number of signatures (30) required for its ratification.

Despite the failure, Geneva's Convention has represented a model for several States in issuing internal regulations of multimodal transport.

Aspects of multimodal transport are, in fact, part of national laws and international conventions about unimodal transport.

First of all some States (such as Austria, Brazil, China, Germany, India, Mexico and Holland) have adopted regulations that can be applied to national but also international multimodal transports, when latter include a place of consignee and/or delivery situated on their territory.

Secondly, there are **international Conventions** that contemplate cases of multimodality, as:

i) **CMR** about road transport concerns the cases in which a means of land transportation is loaded on a means sea, river or air, without reloading and it is based on the located damage, applying law of the leg in which damage occurred, as long as it is not a road leg;

ii) **Montreal Convention** for air transport applies the discipline relative to each leg, as long as the leg concerns an air transport;

iii) **COTIF – CIM** for rail transport that extends its regulation when there are complementary transports to the rail one;

iv) **The Hamburg's Convention** on maritime transport establishes that its rules are applied only to maritime leg of a transfer of goods that includes more modes of transport. Therefore, Hamburg's Convention disciplines only maritime leg;

v) **CMNI** that disciplines international transport for inland ways. Aspects of a multimodal transport concern the cases in which transport by river precedes or follows a maritime leg. Furthermore, it is necessary that carriage is not reloading, that there's not a maritime bill of lading and that the river leg is longer than the maritime one.

Also international unimodal Conventions, as called above, have disappointed the expectations of stakeholders. All of them, in fact, are not suitable to regulate multimodal conventions either because some of them forget to discipline carrier liability for the entire transport and regulate merely legs of reference, both because others limit their application when a different way of transport is necessarily linked to their attributable legs.

In this context, confused and incomplete, a great work has been made by **International Chamber of Commerce and UNCTAD** that, combined, have developed the so- called **UNCTAD/ICC Rules** adopted in 1991. The Rules extend their binding force only for the parties that incorporated them into a contract of carriage. Their provisions of carrier liability are based on the general principle that carrier is responsible for the damages to the carriage only when he doesn't manage to prove the absence of his fault or negligence. The limits of debt are the same provided by Geneva's Convention when damage is not localized while it will be applied limits provided by international unimodal Conventions when damages are localized. Carrier, instead, will be liable to compensate entirely damage occurred to the carriage when committed recklessly or awareness.

UNCTAD/ICC Rules have been incorporated in several bill of ladings as **FIATA** (Combined Transport Bill of Lading) and **BIMCO** (Multidoc 95) as documents used in commercial practise.

Although this customary practise can replace the absence of mandatory legislation in a positive way thanks to its uniform regulation, it seems less effective than an international Convention that really would be able to reach a uniform legislation.

In this condition of uncertainty and in absence of a legal regulation either as international legislation both as pactional rule, **european Courts** have tried to find the regime applicable to multimodal transport. The work of judges is consisted in extending maritime transport rules to the most part or phases of multimodal transport, developing different theories:

i) the "***uniform liability system***" in which carrier is subject to a unique responsibility system, regardless of every single leg that composes multimodal transport or depending on the "prevailing route" or principal carrier, in which when maritime leg is the largest, it is applicable to the entire multimodal transport;

ii) The "***network liability system***" in which the multimodal operator is subject to liability according to the transport leg where damage or loss occurred.

Both regimes have a positive and a negative approach. Regarding the "*uniform liability system"*, it has the positive distinction to give a certain liability system for all phases of transport but on the other hand it results incompatible with some of unimodal transport conventions. Concerning the "*network liability system"* the situation is reversed. While in fact, the latter is compatible with most of the different unimodal conventions, it creates, however, uncertainty about the rules that can be applied when the damage or loss are not localized.

Without intending to be exhaustive and mention the rulings of the entire European cases law, my purpose is to address the positions of the **Italian courts.**

Italian judges adhere to the predominant theory that considers applicable to multimodal transport article 1680 of the Italian Civil Code; a lesser extent adheres to the "prevailing route" already seen, and another part to the "network liability". The reason of the adoption of the applicability of article 1680 Civil Code resides in the uniform regime of carrier liability that, although much stricter, can be freely derogated by the parties. But criticism to this position is expressed in a dual aspect: i) the applicability of article 1680 violates rules of private international law as it is not possible to regulate with "*lex fori*" a case that shows international character and ii) it also involves a stricter regime of responsibility for the carrier which is subject to very narrow limits to raise exceptions. So, for a period of time, it seemed that Italian Supreme Court had adopted the "network liability system", under which every leg has its regulation. An important sentence, as a matter of fact, n. 13253 dated June 6, 2006, considers applicable the combined discipline so that each phase of transport remains subject to the relatives rules. Despite this clear argument, the subsequent judgments have returned to previous positions, *tout court* applying Civil Code for its extension to all kinds of transport, except those disciplined by special laws. The sentence n. 18657 dated august 6, 2013, in fact, argues as to multimodal transport should be applied article 1678 and following Civil Code, independently to the prevailing leg. In this way, Italian judges also ignore agreements between the parties, demonstrating an opposite position compared to that of european judges, who emphasize, instead, intention and negotiation.

The latest effort oriented towards a choice of international convention about multimodal transport is the United Nation Convention on Contracts for the International Carriage of Goods, Wholly or Partly by sea, known also as **Rotterdam Rules,** submitted for signature in Rotterdam, on September 23, 2009.

The title attributed to this Convention explains also its content and purpose. Intent of the redactors is, in fact, to discipline carriage by sea that can be kept through other modes of transport (wholly or partly by sea), as long as the sea leg is always present.

Rotterdam Rules, however, were not conceived to regulate multimodal transport. In fact they not include a discipline of multimodality and the Convention acts as integrating rule of international maritime transport of goods, expanding its applicability.

It introduces the so called "*door to door*" system, that is to say the transport from the place of loading to the place of delivery. This means, for Rotterdam Rules, that carrier is responsible from the moment he takes over the goods till the moment he delivers them. For this reason and for its ability to regulate an integrated transport, its entry into force is expected positively. This Convention looks as a real way that can satisfy modern demands of transporters, in particular the use of transport *via* containers, the necessity to realize a unique transport contract through a unique responsible subject. The carrier will be responsible on the basis of the "network system", thereby excluding the application of a uniform discipline, whenever damage or loss occurred in a non - sea leg or delay depends on a non - sea leg. In this way, unimodal conventions will find their application for the correspondent leg and every conflict between them and Rotterdam Rules will be avoided. The uniform liability is provided by Rotterdam Rules only when damage cannot be localized so that it is impossible every reference to an unimodal convention and the applicability of a uniform system is necessary.

In agreement with the content and principles established by Rotterdam Rules is my point of view. I think that a uniform way of regulation for multimodal transport is absolutely significant but the applicability of one or the other liability system (network or uniform) should be based on the possibility to localize or not the damage or loss. Whether damage is localized, it should be proper applying the unimodal convention which regulates the correspondent leg so that it can be avoided any conflict that could arise. Whether damage, loss or delay is not localized, it could reasonably be applied a uniform liability system that establishes rules and limitations previously known by the carrier.