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Recourse Claims between Carriers – another obstacle to intermodality?

Dr. Simone Lamont-Black*

Abstract:

The applicable legal regime for recourse and contribution claims between carriers is far from straightforward. It entails a mix of contract terms, domestic law and mandatory carriage convention provisions, accordingly resulting in a complex mixture of provisions and, in particular, of limitation rules. An example of their interaction is given by the English Court of Appeal in *South West SHA v Bay Island Voyages* where the court had to decide on limitation of a contribution claim for an incident falling under the Athens Convention for the carriage of passengers and their luggage by sea. The case illustrates the critical interaction between convention rules and domestic law, which may differ in each case, depending on the applicable convention regime. The result is a complicated web of provisions and hierarchies offering a multitude of pitfalls for freight forwarders and carriers alike. This effect is showcased more broadly under English law where the domestic contribution act and the convention regimes as implemented into UK law provide for an uneasy relationship.

1. Introduction

Many carriage or freight forwarding contracts are not (fully) performed by the contracting party and other persons and carriers may transport the goods or be involved at some stage. Where loss occurs there are likely to be several parties potentially liable to the cargo claimant, whether in contract or tort or otherwise. If one of the liable parties compensates the claimant he will want to be able to take recourse from the others involved or from the person who had caused the damage. Most international carriage conventions provide some rules on recourse rights between carriers or on interaction of their liability where several carriers are involved in the transportation. Contractual provisions between carriers and performing parties may contain indemnity or contribution clauses and English domestic law, particularly in the form of the Civil Liability (Contribution) Act 1978 determines contribution and apportionment of liability between several persons liable in respect of the same damage. How these regimes interact differs according to the convention applicable in its reach of provisions on multiple carriers, whether it leaves scope for domestic law on contribution and reimbursement to be applied and how the convention is implemented into the national legal framework. As will be seen, even where the convention purports not to regulate recourse claims, convention rules on limitation of time for suit may still impinge on contribution claims under English law. The article examines a number of uncertainties within the interaction of the regimes and concludes that this is another area where the multiplicity of convention regimes, their lack of harmonisation and uncoordinated implementation may cause difficulties to carriers and freight forwarders who have to apply this multitude, heeding the crucial differences or lose their right of recourse.

To set the scene this article firstly gives a short introduction to the English law of contribution and reimbursement and illustrates the interaction of the relevant Act with carriage conventions on the basis of a recent case in the context of the Athens Convention on the carriage of passengers¹.

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¹ The Convention relating to the Carriage of Passengers and their Luggage by Sea (Athens) 1974 (Athens Convention)

Thereafter a brief overview over the various cargo transport convention's provisions on recourse claims and multiple carrier rules is provided before engaging in a deeper examination of these rules with an analysis of their, at times, fraught interaction with the relevant domestic law in form of the English Civil Liability (Contribution) Act 1978.

2. The Civil Liability (Contribution) Act 1978

English law of contribution and reimbursement is currently in a fragmented state and regulated at common law, in equity and in parts nowadays also by statute.² The key statute on contribution and recourse is the Civil Liability (Contribution) Act 1978. Despite the seemingly narrow name, the Act allows for recovery of any amount between contribution of only a part up to a full indemnity, i.e. a 100% contribution.³ As the Act may impact on recourse claims between carriers it warrants a short introduction and discussion before putting it into context with the pertinent implementations of international carriage instruments.

The 1978 Act was to make new provision for contribution between persons who are jointly or severally, or both jointly and severally, liable for the same damage, and in certain other similar cases where two or more persons have paid or may be required to pay compensation for the same damage.⁴ It was to ensure that the contribution defendant would not be unjustly enriched where the defendant's liability to a third party had been discharged by a claimant who had been liable to the same third party.⁵

Thus, by section 1 of the Contribution Act "any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)." The right to contribution applies even where the other person's liability arises from a different cause of action.⁶ This was an extension of the Act beyond the former and superseded Law Reform (Married Women and Tortfeasors) Act 1935, which only gave a right to contribution between persons who were liable for the same damage in tort. Liability has to be for the same damage; that it may substantially be for materially similar damage is not enough.⁷ Contribution can only be claimed from a person whose liability in respect of the damage has been or could be established in an action against him in England and Wales by or on behalf of the person who suffered the damage, although the law applicable to such claim would not have to be English law.⁸

By section 1(3) of the Act, liability in contribution remains despite expiry of a time bar of the underlying action by the person who suffered damage against the contribution defendant, so long as the right on which the claim is based is still in existence. This was a change from previous case law

² See Mitchell para 1.18ff., Bugden, Lamont-Black, *Goods in Transit* (3rd edn, Sweet & Maxwell, 2013) (hereafter Bugden) ch.11 on Restitution. For a discussion of the legal basis of claims for contribution, also with an international viewpoint, see Takahashi pp 7 ff. For a general introduction of the Act see also Dugdale, "Civil Liability (Contribution) Act 1978", (1979) 42 MLR 182, Mitchell para 4.20 ff. and Bugden paras 11-013 ff.

³ See Mitchell, *The Law of Contribution and Reimbursement* (Oxford, 2003) (hereafter Mitchell), para 4.37 n.128 quoting Lord Scarman in *Hansard*, HL (series 5) vol 395, col 247 (18 July 1978).

⁴ *Royal Brompton NHS Trust v Hammond* [2002] UKHL 14; [2002] 1 W.L.R. 1397 at [37] Lord Hope.

⁵ See *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 A.C. 366 at [76], Lord Hobhouse and Bugden and Lamont-Black, *Goods in Transit* (3rd edn, Sweet & Maxwell, 2013) (hereafter Bugden), para 11-011 ff.

⁶ S. 6(1) Contribution Act: "...whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise"; *Royal Brompton NHS Trust v Hammond* [2002] UKHL 14; [2002] 1 W.L.R. 1397 at [41] Lord Hope and Mitchell para 4.22 ff.

⁷ *Royal Brompton NHS Trust v Hammond* [2002] UKHL 14; [2002] 1 W.L.R. 1397.

⁸ Contribution Act 1978 s 1(6) and also see *Iveco SpA v Magna Electronics Srl (formerly Italamec Srl)* [2015] EWHC 2887 (TCC) and *XL Insurance Co SE (formerly XL Insurance Co Ltd) v AXA Corporate Solutions Assurance* [2015] EWHC 3431 (Comm).

under the former 1935 Act.⁹ However where time limitation has the effect of extinguishing the right altogether, there is also no longer a right to contribution. A claim in contribution under the 1978 Act itself is barred 2 years after it accrued.¹⁰

Where the issue of liability of the person claiming the contribution has been decided by a judgment it is conclusive¹¹ but where the contribution claimant made payment based on a bona fide settlement alone he must show that he would have been liable assuming that the factual basis of the claim against him could be established.¹²

In principle, the amount of the contribution recoverable by any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question. The courts have power in any such proceedings to exempt any person from liability to make a contribution; or to direct that the contribution to be recovered from any person amounts to a complete indemnity. However, where the defendant's liability is limited, this will also provide a ceiling for recovery of the contribution claimant.¹³

The right to recover contribution under the Act supersedes any right, other than an express contractual right, to recover contribution otherwise than under the 1978 Act in corresponding circumstances, but the Act was not intended to interfere with existing rights to indemnity, whether contractual or quasi-contractual¹⁴ or with contractual arrangements for contribution.¹⁵

As will be seen below, there can be difficulties in delineation between the 1978 Act and international carriage conventions. In the carriage context only very few implementing instruments specifically tackle the issues and exclude the application of the 1978 Act. These are the Carriage of Goods by Road Act 1965 in relation to actions between successive carriers¹⁶ and the Rail Passengers' Rights and Obligations Regulations 2010 in relation to parties responsible for the same damage.¹⁷

A recent case decided by the Court of Appeal illustrates some of the problems raised by such interaction.

3. *South West SHA v Bay Island Voyages*

In *South West SHA v Bay Island Voyages*¹⁸ two main issues had to be decided: firstly, whether a contribution claim was regulated by the Athens Convention¹⁹ and, secondly, whether the time limit

⁹ See *George Wimpey & Co Ltd v British Overseas Airways Corp (BOAC)* [1955] A.C. 169; [1954] 3 W.L.R. 932; HL and the discussion below at 4.4 c).

¹⁰ See Limitation Act 1980 s 10.

¹¹ Contribution Act 1978, s 1(5).

¹² Contribution Act s 1(5) and 1(4) and see Mitchell paras 11.16 ff. on settlements and 11.11 ff. on court orders.

¹³ Contribution Act s.2.

¹⁴ Mitchell, para 4.37. As per Law Com No 76, 1977 (Report on Contribution) para 26, the Law Commission had defined a 'right of indemnity' in their Report to include rights 'founded in quasi-contract' as well as rights 'created by contract' (as quoted in Mitchell, para 4.37).

¹⁵ See Contribution Act s 7(3). In its second part it reads: "...but nothing in this Act shall affect - (a) any express or implied contractual or other right to indemnity; or (b) any express contractual provision regulating or excluding contribution; which would be enforceable apart from this Act ...".

¹⁶ See CoGRA 1965 s.5 Contribution between Carriers.

¹⁷ SI 2010/1504; see s 5 Contribution between parties responsible for damage.

¹⁸ 14 July 2015, [2015] EWCA Civ 708.

¹⁹ In this case, the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea of 1974 in its statutory application to domestic carriage by the Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987 (SI 1987/670).

provided in the Athens convention was only a time bar or had the effect for extinguishing the right of action altogether.

The case concerned the contribution claim pursuant to section 1 of the Civil Liability (Contribution) Act 1978²⁰ of a health authority against a sea carrier. The employee of the health authority had taken part in a corporate team building exercise and had been passenger on board the carrier's RIB (Rigid Inflatable Boat) on the Bristol Channel when incurring a spinal injury. At the time of bringing the contribution claim an action for damages against the carrier for personal injury of the passenger would have been time barred under the Athens Convention²¹ and the relevant domestic law incorporating the Convention for such domestic carriage.²²

It was argued on behalf of the carrier that the Convention's stipulation²³ that "no action for damages for death of or personal injury to a passenger, or for the loss of or damage to luggage, shall be brought against a carrier or performing carrier otherwise than in accordance with this Convention" meant that no contribution action could be taken outside the Convention's rules. Under the convention however the action was time barred, since article 16 provided that "an action for damages arising out of the death of or personal injury to a passenger or for the loss of or damages to luggage shall be time-barred after a period of two years".²⁴

The Court of Appeal²⁵ disagreed on both accounts. The Convention²⁶ provided exclusive rules on liability of an actual or performing carrier to a passenger for damages,²⁷ but explicitly without prejudice to rights of recourse between a carrier and performing carrier.²⁸ The carriers' interaction inter se was covered no further by the Convention, nor were recourse rights between carriers and other parties dealt with by the Convention.²⁹ There was therefore a gap which could be filled by other legal or contractual provisions.

²⁰ Hereafter Contribution Act.

²¹ Athens Convention relating to the Carriage of Passengers and their Luggage by Sea of 1974, and now also in its version as amended by its Protocol of 2002:

The Athens Convention 1974 (with its 1976 Protocol on Special Drawing Rights) applied in UK law by virtue of the Merchant Shipping Act 1995 ss.183–184 and Sch.6 for convention carriage (that is, international carriage) and for domestic carriage originally by the Carriage of Passengers and their Luggage (Interim Provisions) Order 1980 (SI 1980/1092) and now by Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987 (SI 1987/670) r.3. By virtue of EC Regulation on sea passengers (the Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents, OJ L131, 28.05.2009, p.25) the Athens Convention in its version of the 2002 Protocol (also referred to as Athens Convention 2002) applied since 31st December 2012 as a matter of EU law (see also Merchant Shipping (Carriage of Passengers by Sea) Regulations 2012 (SI 2012/3152) and s.183(2A) of the Merchant Shipping Act 1995 providing a UK framework for the application of the EC Regulation). Since 28th May 2014, Sched 6 of the Merchant Shipping Act 1995 has been amended to give effect to the Athens Convention in its version of the 2002 Protocol (also referred to as Athens Convention 2002), but the previous version of the Athens Convention remains in force for domestic carriage (see r.3 of the Merchant Shipping (Convention Relating to the Carriage of Passengers and their Luggage by Sea) Order 2014) falling outside the application of the EC Regulation on sea passengers (see r. 4 of the Merchant Shipping (Carriage of Passengers by Sea) Regulations 2012 (SI 2012/3152)); but see the raised limits for UK carriers by the Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1998 (SI 1998/2917).

²² See Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987 (SI 1987/670) r.3, as preserved by r.3 of The Merchant Shipping (Convention Relating to the Carriage of Passengers and their Luggage by Sea) Order 2014 after the coming into force of the 2002 Protocol and its implementation into UK law by the 2014 Order.

²³ Art 14 of the Athens Convention 1974.

²⁴ Art 16.1 of the Athens Convention 1974.

²⁵ The leading judgment was given by Lord Justice Tomlinson; Lord Justice Kitchen and Lord Justice Laws agreed.

²⁶ See Athens Convention 1974 art 4. Other Conventions also provide similarly: see Guadalajara Convention, esp. art X; MC arts 39 ff. and esp. art 48; HambR art 10, esp. 10.6.

²⁷ See Athens Convention 1974 art 14.

²⁸ Athens Convention 1974 art 4.5.

²⁹ See *South West SHA v Bay Island Voyages* [15-21].

Indeed, it was clarified by Lord Hope of Craighead in *Sidhu v British Airways Plc*³⁰ for air carriage that while the Warsaw Convention aimed at holistic harmonisation of those issues that were covered, in that the remedies available to passengers could only be those of the Convention and no others, the convention only provided partial harmonisation insofar as it covered the issues. While there had been controversy whether the Warsaw Convention³¹ and in particular their limitation provisions applied to contribution claims, that it did not was clarified further by the Montreal Convention.³² A similar approach was to be taken with the Athens Convention which covered claims by passengers, but not claims for contribution between carriers.³³

Instead, contribution was covered by English domestic law under the Civil Liability (Contribution) Act 1978. However, the convention's regime and the inherent question of the carrier's liability to the passenger under the convention was nevertheless a critical element for the contribution claim,³⁴ as a carrier was only liable for contribution if he would have been liable to the passenger.

However, since there would be no claim for contribution against a contribution debtor if the underlying claim against him was no longer in existence,³⁵ the next question for the court was the nature of the time bar in article 16 of the Athens Convention. Only if the original claim had been extinguished, in contrast to simply having been barred by lapse of time, would this be a valid defence against the contribution claim. Lord Justice Tomlinson compared different conventions and their wording and the effect that had been connected to them as well as looking at their interpretation in cases that had been decided so far.

He set the wording of the Warsaw Convention "the rights... shall be extinguished"³⁶, the Limitation Act 1980 in its special provisions dealing with conversion³⁷ and with claims to recover land³⁸ and defective products³⁹ stipulating the right of action to be extinguished, and the formulation of the Hague Visby Rules "in any event the carrier and the ship shall be discharged"⁴⁰, in contrast to the language of the Maritime Conventions Act 1911 "no action shall be maintainable to enforce a claim"⁴¹, The Brussels Convention on Collisions 1910 "actions for recovery of damage are barred after an interval of two years"⁴² and the Limitation Act 1980 for time limits for actions for tort or simple contract "an action founded on tort/simple contract shall not be brought after the expiration

³⁰ [1997] AC 430 at 444 and 447.

³¹ *South West SHA v Bay Island Voyages* [18]: "In a line of cases the District Court and in one case a State Appellate Court in the United States held that Article 29 of the Warsaw Convention applied to recourse actions against carriers – see *Magnus Electronics Inc v Royal Bank of Canada* 611 F Supp 436 (ND Ill, 1985), 19 Avi 17,944; *Oriental Fire and General Insurance Co Ltd v Citizens National Bank of Decatur* 581 NE 2d 49 (Ill App, 1991); *Royal Insurance Co v Emery Freight Corp* 834 F Supp 633 (SD NY, 1993). However in *Connaught Laboratories Ltd v Air Canada* (1978) 23 OR (2d) 176 (Ont HC) the Ontario High Court concluded that Article 29 had no effect on the claims of carriers between themselves."

³² *South West SHA v Bay Island Voyages* [20] referring to MC art 37, *Chubb Insurance Company of Europe SA v Menlo Worldwide Forwarding Inc*, 32 Avi 15, 978 (CD Cal, 2008) and Shawcross and Beaumont, *Air Law*, Issue 142, September 2014, at paragraph 446.1. In particular: "In *Chubb Insurance Company of Europe SA v Menlo Worldwide Forwarding Inc*, 32 Avi 15, 978 (CD Cal, 2008), followed in *Allianz Global Corporate & Speciality v EMO Trans California Inc* 34 Avi 15,274 (ND Cal, 2010) the US Court of Appeals for the Ninth Circuit held that the reference in Article 37 to the existence of a right of recourse excluded the applicability of the limitation provisions of Article 35."

³³ *South West SHA v Bay Island Voyages* [17].

³⁴ *South West SHA v Bay Island Voyages* [21].

³⁵ Civil Liability (Contribution) Act 1978 s 1(3).

³⁶ WC art 29.1.

³⁷ Limitation Act 1980 s 3(2).

³⁸ Limitation Act 1980 s 17 and s 18(2) and (3).

³⁹ Limitation Act 1980 s 11A(3).

⁴⁰ HVR art III r.6 and see *Aries Tanker Corporation v Total Transport Limited* [1977] 1 WLR 185 at 188 Lord Wilberforce.

⁴¹ Maritime Conventions Act s 8, repealed, and see now s 190 of the Merchant Shipping Act 1995: "no proceedings to which this section applies shall be brought after the period of two years".

⁴² Brussels Convention on Collisions 1910 art 7.

of six years⁴³ and in section 14B “(1) An action for damages... shall not be brought after the expiration... (2) This section bars the right of action...”⁴⁴.

In so doing he elaborated on the cases of *Aries Tanker Corporation v Total Transport Limited*⁴⁵ on the Hague Visby Rules and maritime conventions and *Financial Services Compensation Scheme Limited v Larnell (Insurances) Limited (in liquidation)*⁴⁶ on the effect of section 14B of the Limitation Act 1980 in contrast to other provisions of the same Act. He concluded that there was a clear distinction between time limits barring the rights of action or extinguishing them and these distinctions had to be observed and their effect noted. This was also the case when interpreting international conventions. While their wording was not as decisive as in English statutes, indeed their interpretation unconstrained by technical rules of English law or English legal precedent, they were construed on broad principles of general acceptance, allowing for other language versions to be taken into account.⁴⁷

On interpretation, the focus was on giving effect to the uniform character of the convention and that was to be exclusive of any resort to domestic law, whether one’s own or that of other Convention states. While it was important to have regard to any international consensus upon the understanding of the provisions of international conventions and thus to what courts in other jurisdictions suggested, regard had to be given to the actual words used and their meaning.⁴⁸

While there might not be international consensus on the understanding of the relevant provision there seemed to be broad consensus as to a distinction between time limits extinguishing the substantive right and those of merely barring the action and there was a related distinguishing terminology used by each system of law. The wording of the limitation provisions in the Warsaw and Montreal Conventions, according to a general, albeit not uncontested understanding, were interpreted as right extinguishing. In contrast, the wording used in the Athens Convention pointed to a mere time bar; this was the appropriate effect and in keeping with the plain natural content of the words used. A different effect could only be obtained by demonstrating a different autonomous and internationally understood meaning, which did not exist in this case.⁴⁹

Appeal was therefore allowed against the decisions of the lower courts which had dismissed the contribution action as extinguished by lapse of time.

The case highlights a number of interesting questions on the application or exclusivity of convention systems to recourse or contribution claims and the effect of convention time bars. So, what are the convention provisions in this context?

⁴³ Limitation Act 1980 ss 2 and 5.

⁴⁴ *South West SHA v Bay Island Voyages* [26] referring on the interpretation of s 14B to *Financial Services Compensation Scheme Limited v Larnell (Insurances) Limited (in liquidation)* [2005] EWCA Civ 1408, [2006] QB 808.

⁴⁵ [1977] 1 WLR 185.

⁴⁶ [2005] EWCA Civ 1408, [2006] QB 808.

⁴⁷ See *South West SHA v Bay Island Voyages* [29 -30] referring to *Stag Line Ltd v Foscolo, Mango and Co. Ltd* [1932] AC 328 at 350 Lord Macmillan and *James Buchanan & Co Ltd v Babco Forwarding & Shipping (U.K) Ltd*, [1978] A.C. 141 at 152 E Lord Wilberforce.

⁴⁸ *South West SHA v Bay Island Voyages* [31] referring to *Morris v KLM Royal Dutch Airlines* [2002] 2 AC 628 at 677, Lord Hobhouse: “...Whilst it is important to have regard to the international consensus upon the understanding of the provisions of international conventions and hence to what the courts in other jurisdictions have had to say about the provision in question, the relevant point for decision always remains: what do the actual words used mean? (*Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, the Hague Rules; *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141, CMR, *Fothergill v Monarch Airlines Ltd* [1981] AC 251, Amended Warsaw; *Sidhu v BA, sup, Warsaw.*)”.

⁴⁹ *South West SHA v Bay Island Voyages* [32 - 45], also referring to Berlingieri, *Time-Bared Actions*, (2nd edn, LLP, 1993).

4. Cargo transport convention systems on multiple carrier rules and rights of recourse

4.1 Overview

To examine whether a convention provides rules on recourse or contribution between carriers the conventions' rules on multiple carriers are now compiled and contrasted.

Convention or system	Successive carrier rules	Contractual and actual carrier
CMR ⁵⁰ arts 34 - 40	Strict successive carrier (SC) rules– all carriers carrying under same contract and by taking over the consignment note liable for complete transit (34)	N/A
CIM ⁵¹ arts 26, 45, 50-52 arts 27, 45.6	Strict SC rules - all carriers carrying under same contract and by taking over the consignment note liable for complete transit (26); No joinder!	<i>Rules also for substitute carriage (joint and several liability) (27)</i>
WS 1929 ⁵² art 30 (& <i>Guadalajara Conv. 1961</i>) ⁵³	SC Rules – Art 30 - all carriers part of contract to extent of their part of carriage; liable generally only for own part of carriage	<i>Actual carrier rules via Guadalajara Convention</i>
MC ⁵⁴ arts 36, 48 arts 39 - 48	SC rules – art 36 – all carriers part of contract to extent of their part of carriage; liable generally only for own part of carriage	<i>AND actual carrier rules 39 – 48</i>
HVR ⁵⁵ art.III r.6 bis	N/A	N/A
Hamburg Rules ⁵⁶ arts 10, 20.4	N/A	<i>Joint and several liability of contr. and actual carrier (10.4)</i>
RR ⁵⁷ arts 20, 64	N/A	<i>Joint and several liability of contr. carrier and maritime perf. party (20)</i>
CMNI ⁵⁸ arts 4, 24.4	N/A	<i>Joint and several liability of contr. and actual carrier (4.5)</i>

Table: Overview over convention coverage of regimes on multiple carriers.

As can be seen, many of the transport conventions give some guidance on recourse actions or contain rules on successive carriers and the apportionment/division of liability amongst them, often

⁵⁰ The United Nations Convention on International Carriage of Goods by Road 1956.

⁵¹ CIM 1999; CIM standing for Uniform Rules Concerning the Contract of International Carriage of Goods by Rail. It is the Appendix B to the Convention concerning International Carriage by Rail 1999 (COTIF). To show CIM's basis in the COTIF Convention, reference is therefore made at times as COTIF-CIM.

⁵² The Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw) 1929.

⁵³ The Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules to International Carriage by Air Performed by a Person other than the Contracting Carrier (Guadalajara) 1961.

⁵⁴ The Convention for the Unification of Certain Rules for International Carriage by Air (Montreal) 1999.

⁵⁵ The International Convention for the Unification of certain Rules relating to Bills of Lading of 1924 (Hague Rules) as amended by the 1968 Brussels Protocol (Visby Protocol) (Hague-Visby Rules).

⁵⁶ The United Nations Convention on the Carriage of Goods by Sea (Hamburg) 1978 (Hamburg Rules).

⁵⁷ The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam) 2008 (Rotterdam Rules).

⁵⁸ The Convention on the Contract for the Carriage of Goods by Inland Waterway (Budapest) 2001 (CMNI).

also including rules on which carrier can be sued by cargo.⁵⁹ If applicable, these international rules ought to take priority over any other domestic provisions.⁶⁰

While many of the conventions give a right of action to the cargo claimant against the actual carrier alongside the contractual carrier,⁶¹ often explicitly stipulating their joint and several liability,⁶² they mostly leave rights of recourse between the carriers unregulated.⁶³ Some conventions are limited to highlighting that recourse actions are not affected by the convention,⁶⁴ whereas others give a minimum timeframe for limitation of recourse actions.⁶⁵

Since the conventions are mandatory to differing degree, awareness of the extent of the conventions' provisions on recourse claims and possible gaps that could be filled contractually is essential. Some of the conventions only prohibit that the carrier reduces his liability,⁶⁶ but others require that all their rules are adhered to.⁶⁷

Indeed the most extensive coverage of carriers inter se, where they are falling within the framework of successive carriers is provided by the CMR⁶⁸ and to a lesser degree by CIM with some much more limited provisions in the air conventions.

4.2 CMR

a) *Successive carrier provisions*

The CMR regulates successive carriers in Arts 34 – 40. If the carriers are carrying as true successive carriers, that is, under one contract as enshrined in the consignment note and by taking over the goods and the consignment note, they all become liable for the performance of the contract as a whole.⁶⁹ However as a counterpart to this wide-ranging liability suit against them is limited. The cargo claimant only has the right to sue the first carrier, the last carrier or the carrier responsible for

⁵⁹ See the land and air conventions, CMR arts 34 – 40, CIM arts 26, 45, 50-52, WS art 30, and MC art 36-37.

⁶⁰ See e.g. CoGSA 1965 s 5(1), Rail Passengers' Rights and Obligations Regulations 2010/1504, Pt 2(2) reg. 5(1) and see Civil Liability (Contribution) Act 1978 (hereafter Contribution Act) s 7(3) (a). And see **discussion below at 4.3 d**.

⁶¹ See the air conventions the Warsaw regime via the Guadalajara Convention, MC arts 39 – 45, the sea and inland waterway conventions, HambR art 10, RR arts 19 and 20, CMNI art 4 and the rail convention in its provision for a substitute carrier, CIM art 27.

⁶² See the sea and inland waterway conventions, HambR art 10.4, RR art 20, CMNI art 4 and the rail convention in its provision for a substitute carrier, CIM art 27.

⁶³ See as an exemption from this rules the CMNI with its article 4.1, providing that the convention liability rules also apply between contracting and actual carrier.

⁶⁴ See Guadalajara Convention art X, MC arts 37 and 48,

⁶⁵ See the sea and inland waterway conventions, HVR art III r6 bis, HambR art 20.4, RR art 64, CMNI art 24.4

⁶⁶ See CIM art 5 which outs the decreasing of the carriers liability but allows for agreement of greater and more burdensome obligations of the carrier than provided in the Rules; under the HR and HVR – art III r.8 a carrier cannot be relieved from liability and similar as per RR art 79 and HambR art 23.1 & 23.2 provisions to the extent that they limit or decrease obligations and liability of carrier are void.

⁶⁷ See e.g. CMR art 41 which is strict and does not allow change whether increasing or decreasing a carrier's liability other than amendments to the liability regime of successive carriers (CIM art 40);

See also the CMNI art 25.1 according to which contractual stipulations that exclude, limit or increase liability of the carrier are null and void; and WC arts 23 & 32 and MC art 26 & 49 where a clause infringing the provisions of the convention is null and void, but MC allows for some freedom for the carrier to waive defences in art 27.

⁶⁸ On their definition, their liability outwardly and inter se, time limits and rights of suit and jurisdiction.

⁶⁹ CMR art 34 and see Clarke, *International Carriage of Goods by Road: CMR* (6th edn, Informa Law, 2014) (hereafter Clarke), para 50 ff.; Messent, Glass, Hill & Messent, *CMR: Contracts for the International Carriage of Goods by Road* (3rd edn, LLP, 2000) (hereafter Hill & Messent) para 11.1 ff.; and Schmidt, Herber, *Münchener Kommentar zum Handelsgesetzbuch, Band 7, §§ 407 - 619 Transportrecht* (3rd edn, Verlag C H Beck, 2014) (hereafter MüKo HGB) CMR, art 34, para 8 ff. (Jesser-Huß).

the goods at the time the event resulting in the liability occurred, although he can sue more than one of these carriers at any one time.⁷⁰

b) The system of recourse

The liability between carriers is ultimately determined according to causality: the carrier or carriers who have caused the loss or damage are to be solely liable. A carrier who has paid compensation can recover the compensation paid according to these principles from the carriers responsible. If the cause of the loss cannot be determined, all carriers share in the compensation in proportion to the share of payment of the carriage charges due to them. Where a carrier is insolvent his share will be absorbed by the others in the same way, in proportion to the share of carriage charges due to them.⁷¹ Recourse claims are possible in one and the same forum against all carriers in the court of the place of business of one of the successive carriers involved in the carriage.⁷² While the successive carrier whose place of business has been chosen to found jurisdiction does not have to be a defendant, the claiming carrier does not count as such a successive carrier and thus cannot, without more, sue at his place.⁷³ Suit must generally be brought within one year,⁷⁴ from judgment against the carrier or, if settled out of court, from actual payment of the claim.

c) Mandatory application

The CMR provides for mandatory application of its rules and variation of its provisions is thus generally not possible.⁷⁵ However, CMR carriers can vary the final distribution of carrier liability amongst each other.⁷⁶ Yet, this freedom to contract does not extend to amending the time limits provided by the Convention,⁷⁷ whether amongst successive carriers or otherwise.⁷⁸

d) Boundaries

Where a carrier is not a successive carrier but a sub-contracted carrier, he will carry under the CMR⁷⁹ under his own contract, possibly made with the principal carrier as sender, and the ordinary rules of suit including the basic limitation periods apply, that is, from the time of the damaging event, irrespective of any contract terms to the contrary.⁸⁰ It has therefore been observed that where limitation is an issue, some jurisdictions have broadened the definition of a successive carrier. Whether this is appropriate is open to discussion and disputed.⁸¹ Discussion goes even so far as to query the appropriateness of the successive carrier system altogether.⁸²

⁷⁰ CMR art 36.

⁷¹ CMR arts 37-38.

⁷² CMR art 39.2; and these rules are different from the forum rules in cargo claims, which are regulated in CMR art 31; and see *British American Tobacco Switzerland SA v Exel Europe Ltd* [2015] UKSC 65, [2015] 3 W.L.R. 1173, in particular see [33 – 42].

⁷³ See CMR art 39.2, *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd* [1981] 1 W.L.R. 1363; [1981] 2 Lloyd's Rep. 402 (CA), Clarke, para 53 ff., Hill & Messent para 11.119 ff. and also MüKo HGB, CMR, art 39, para.7

⁷⁴ Unless there is wilful misconduct, in which case there is a three year limitation period, see art 39.4.

⁷⁵ Whether by standard conditions of carriage or otherwise, see CMR art 41.

⁷⁶ CMR art 40, allowing changes to the allocation in arts 37 and 38 only. In particular, CMR art 39 cannot be contracted out of.

⁷⁷ CMR art.39.4 applies the art.32 one year limitation period, yet the period only begins from the date of the last judicial decision fixing the amount of compensation payable or, in the absence of a judicial decision, the date of payment.

⁷⁸ See CMR art 40 and 41.

⁷⁹ Providing there is international transport involving a convention state as per CMR art 1.

⁸⁰ CMR art 41. So also the Swedish position: see

⁸¹ See Hill & Messent para 11.11 ff., Clarke, para 44b(i) with further references to French, German and Austria decisions; in favour also Staub HGB, CMR, art 34, paras 23 ff and Art 39, paras 2 and 12 (Helm) with further references and also to Austrian case-law. Cf. Tibergh & Schelin, *On Maritime and Transport Law* (4th edn, Axel Ax:son Johnson Institute for Maritime and other Transport Law, 2014) p 166 with reference to Swedish Supreme Court, NJA 1996.211; MüKo HGB, CMR, art 32 paras 2, 22 - 24, art 37 para 2 - 3 and art 39 para 9 (Jesser-Huß); Thume, art 39, para 2 (Schmid) and Koller, CMR, art. 39, para 5.

⁸² MüKo HGB, CMR, art 34 para 7 (Jesser-Huß).

4.3 COTIF-CIM

a) *General*

COTIF-CIM was the original source for the successive carrier concept, as at the time of state railways, through transport by one single provider was impossible and the service had to be performed by different carriers carrying the goods in succession to their final destination. While the CIM successive carrier concept is similar to that now enshrined in the CMR, CIM's provisions contain some differing approaches.

b) *Successive Carrier requirements and similarities with CMR*

The similarities are that it is a requirement to be a successive carrier in order to be liable for the whole journey.⁸³ Equally, a successive carrier is one who carries the goods together with other carriers under a single contract by taking over the goods and the consignment note. CIM also contains similar provisions as to the division of final liability amongst the carriers based on causality, failing this based on the division of shares in the freight due, which can be varied by agreement.⁸⁴

While all carriers are liable under the CIM contract, only the first, the last, or the carrier in whose care the goods were lost or damaged can be sued by the cargo claimant,⁸⁵ or the carrier who was entered with his consent as the carrier to deliver the goods at destination.⁸⁶ The last carrier in art 45.1 is therefore interpreted, not as the carrier entered to deliver the goods if he in fact never received them, but the carrier who had been the last to take part in the actual contract by taking over the goods and the consignment note.⁸⁷ Indeed the carrier who gave consent to be entered into the consignment note as last carrier due to deliver the goods could already be sued in his own right according to article 45.2. This interpretation of the last carrier also goes in line with the interpretation of the equivalent provision in the CMR, the wording of which was adopted in the revision of article 45.1 of CIM. However the interpretation of the last carrier notion under the CMR is not entirely undisputed either.⁸⁸

c) *Recourse procedure*

Thereafter, however we find subtle but important differences and CIM, for example, is rather strict in protecting the carriers from suit and the costs related to it. Whether for actions of the cargo claimant or the carrier seeking recourse a choice of defendant must be made and is final on bringing action.⁸⁹ CIM has not adopted the solution of article 36 *in fine* of the CMR, which allows the cargo claimant to sue several carriers at once; instead it gives the option to sue only one of the carriers; which carrier is at the choice of the claimant. Once an action is brought against one carrier the right to choose is extinguished.⁹⁰ The reason given was that carriers by rail did not have the same

⁸³ See CIM arts 49 ff and 3(a) for the definition of "carrier", as opposed to „substitute carrier“, and MüKo HGB, CIM, Vor Art 49, para. 1.

⁸⁴ See CIM arts 49-50 with 52.

⁸⁵ CIM art 45.1.

⁸⁶ CIM art 45.2 - this part provision is different to the CMR, where this is not included.

⁸⁷ This is explained as a result of redrafting the provision for CIM 1999. See the previous version of the article, CIM 1980 art 55.3: "Other actions arising from the contract of carriage may be brought against the forwarding railway, the railway of destination or the railway on which the event giving rise to the proceedings occurred. Such actions may be brought against the railway of destination even if it has received neither the goods nor the consignment note." and the Explanatory Report to CIM 1999 art 26 para 3, art 45 para 2. Cf. MüKo HGB, CIM, art 45, para 10 (Freise) and Koller, CIM, art 45, para 2, fn 6 who also require this last carrier to deliver the goods.

⁸⁸ See e.g. Hill & Messent, para 11.63 ff., MüKo HGB, CMR, Art 36 para 5 (Jesser-Huß), MüKo HGB, CIM, art 45 para 10 (Freise) and Koller, CIM, art 45, para 2, fn 6 and Explanatory Report to CIM 1999 art 45 para 2.

⁸⁹ CIM arts 45.7 and 51.2.

⁹⁰ See CIM art 45.7 and Explanatory Report to CIM 1999, art 45, para 1 and MüKo HGB, CIM, art. 45, para.2.

problems of solvency as road carriers had, so that plurality of suit was not necessary.⁹¹ This protection of rail carriers from exposure to law suits on compensation is further backed up by a prohibition of joining recourse actions with proceedings for compensation.⁹²

Limiting the rail carrier's exposure to suit as well as minimising the costs and expenses incurred in litigation as a theme can be further observed in the procedure for recourse actions. Similar to the CMR, proceedings may be brought against all successive carriers in the court where one of the defendant carriers has his principal place of business, at the choice of the claimant carrier.⁹³ However, under CIM, recourse actions between successive carriers must be made against all carriers in the same court and proceedings, otherwise the right of recourse against any carriers not so sued is lost.⁹⁴ In the same vein, the court must decide over all of the carriers in one and the same judgment.⁹⁵

d) *Time bar for recourse actions*

A further difference is the provision, or lack thereof, on a time bar for recourse actions. In contrast to the CMR, CIM does not provide for such a time limit which appears to have been left to domestic law. For COTIF implementations⁹⁶ and the embedding of the EU Rail Passenger Rights Regulation,⁹⁷ in neither, the Railways (Convention on International Carriage by Rail) Regulations 2005 nor the Rail Passengers' Rights and Obligations Regulations 2010,⁹⁸ has any provision been made regarding limitation of recourse claims between carriers based on carriage within the Regulations and thus COTIF-CIM, COTIF-CIV or the EU Passenger Rights Regulation.⁹⁹

In England and Wales, if taken as a contract, quasi-contract or tort claim or a claim for sums recoverable by statute (which had been taken to encompass contribution-type claims), limitation would be 6 years,¹⁰⁰ yet as, and only as, a statutory contribution claim under the Civil Liability (Contribution) Act 1978 the special limit would be 2 years from the date of judgment or award or, if no judgment was rendered, from the date of payment.¹⁰¹ How would the recourse claim thus be classified - which of the above would it be? Would it be the 6-year limit or would a recourse claim under CIM be classified as a claim falling within the Contribution Act resulting in a 2-year time bar?

⁹¹ Explanatory Report to CIM 1999, art 45, para 1.

⁹² CIM art 51.6.

⁹³ CIM art 51.3 and 51.4.

⁹⁴ CIM art 51.2.

⁹⁵ CIM art 51.3.

⁹⁶ Apart from CIM, in Annexe B, COTIF contains several other Annexes, including rules on passenger transportation in the Uniform Rules concerning the Contract for International Carriage of Passengers and Luggage by (CIV). Since the focus of the article is on freight forwarding and carriage of goods, reference is only made to CIV where necessary and relevant for a comparison.

⁹⁷ The Regulation (EU) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passenger's rights and obligations (thereafter EU Rail Passenger Regulation), implementing with some slight changes the provisions of COTIF-CIV for rail passengers (hereafter also EU Rail Passenger Rights Regulation).

⁹⁸ SI 2010/1504, giving effect to the EU Rail Passenger Right Regulation.

⁹⁹ Whether direct or via the EU Regulation of rail passenger's rights and obligations incorporating the successive carrier rules of CIV (see EU Rail Passenger Regulation art 11, incorporating inter alia Title VII of COTIF-CIV).

¹⁰⁰ Limitation Act 1980, ss 2, 5 and 9. See also Law Commission Report on Limitation of Actions of 2001 (LAW COM No. 270) paras 2.71 ff., inter alia referring to *Re Farmizer (Products) Ltd* [1997] 1 BCLC 589 144, applying s 9(1) of the 1980 Act to a claim under s 214 of the Insolvency Act 1986 against a director for a contribution towards a company's assets and *Rowan Companies Inc v Lambert Eggink Offshore Transport Consultants VOF (No 2)* [1999] 2 Lloyd's Rep 443, David Steel J followed *Re Farmizer* holding that the application of s 9(1) of the 1980 Act was not restricted to liquidated sums, but that it applied to any monetary relief whether in the form of a debt, damages, compensation or otherwise.

¹⁰¹ According to the Limitation Act 1980, s 10.

Unlike the Carriage of Goods by Road Act 1965, implementing the CMR, which gives explicit priority to the provisions of successive carriage under the CMR¹⁰² and insofar dis-applies the Civil Liability (Contribution) Act 1978,¹⁰³ the Railways (Convention on International Carriage by Rail) Regulations 2005¹⁰⁴ implementing the COTIF Convention, omit any such provision. Could this omission lead to conflict between the COTIF Convention and the English Contribution Act and thus also impact the question of classification of the recourse action? COTIF -CIM¹⁰⁵ contains stipulations on recourse actions between successive carriers¹⁰⁶ and provides for the mandatory application of its uniform rules,¹⁰⁷ while the right provided by the English Contribution Act, in principle, is to supersede any other right to contribution.¹⁰⁸

Several solutions are possible to manage this conflict: one could either interpret the Rail Regulation to contain such priority of the convention stipulations by analogy or, at least, one could interpret the provisions of the Contribution Act sympathetic to CIM. That a disapplication provision is included in the later passed Rail Passengers' Rights and Obligations Regulations 2010,¹⁰⁹ may point to a legislative oversight in the 2005 Regulations, rather than to the alternative: an intentional change of direction so as not to give effect to the convention obligations in favour of national law.

By s. 7(3) the Civil Liability (Contribution) Act 1978 the right to recover contribution under the Act supersedes any right, other than an express contractual right, to recover contribution otherwise than under the 1978 Act in corresponding circumstances, which could be an issue with giving priority to the CIM provisions. However the section provides further that nothing in the Act shall affect an "express or implied contractual or other right to indemnity". A right to indemnity may also arise by statute.¹¹⁰ One may wish to argue therefore that an action for recourse based on art.50 CIM is the enforcement of such an indemnity right distinct from a contribution action under the 1978 Act with the result of achieving the intended priority of CIM. This type of scenario as per CIM contribution regime, seems however not to have been considered by the Law Commission at the time of formulating the Law Reform Proposals and the words of contribution and indemnity had been carefully chosen.¹¹¹

¹⁰² While the CMR also includes time bar provisions for successive carrier recourse actions.

¹⁰³ Section 5 of the CoGRA 1965 on Contribution between carriers states: "(1) Where a carrier under a contract to which the Convention applies is liable in respect of any loss or damage for which compensation is payable under the Convention, nothing in section 1 of the Civil Liability (Contribution) Act 1978, or section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 shall confer on him any right to recover contribution in respect of that loss or damage from any other carrier who, in accordance with article 34 in the Schedule to this Act, is a party to the contract of carriage. (2) The preceding subsection shall be without prejudice to the operation of article 37 in the Schedule to this Act."

¹⁰⁴ SI 2005/2092.

¹⁰⁵ As indeed COTIF-CIV, in Chapter VII.

¹⁰⁶ See CIM arts 49- 52.

¹⁰⁷ CIM art 5.

¹⁰⁸ Contribution Act s 7(3) and set out in more detail below.

¹⁰⁹ The 2010 Rail Passenger Regulations s 5 entitled Contribution between parties responsible for damage reads: "(1) Sections 1 and 2 of the Civil Liability (Contribution) Act 1978 (entitlement to and assessment of contribution) do not apply where liability for contribution between persons liable in respect of the same damage is governed by the European Regulation. (2) In paragraph (1), 'contribution between persons liable in respect of the same damage' has the same meaning as in section 1(1) of the Civil Liability (Contribution) Act 1978 (entitlement to contribution)." Paras (3) – (4) have equivalent provisions dis-applying the operation of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.

¹¹⁰ See Halsbury's Law of England/Damages Vol 12(1) Reissue para 837 note 11.

¹¹¹ Law of Contract Report on Contribution (LAW COM. No.79), para 26 ff (see in particular para 27 on definition of contribution and indemnity as used in the Report). See also Working Paper No 59 "Contribution" at para 14, consistently with the Law Commission Report at para 27, only using the word indemnity where a total indemnity is referred to; it is thus unlikely that a regime similar to the CIM successive carrier contribution regime, which, depending on causality, gives contribution or full indemnity claims to successive carriers, was thought of at the time when stipulating section 7(3).

Even if one concluded that art.50 CIM confers rights to contribution rather than indemnity and thus does not fall within the exemption of the 1978 Act,¹¹² the CIM provisions should be applied. After all, courts are required to interpret ambiguities in the law in a manner that is consistent with the treaty and thus the international obligations of the United Kingdom.¹¹³ Courts should therefore give priority to the convention provisions over the 1978 Act or, at the very least, give full credit to the convention's stipulations when applying their discretion in apportioning contribution under the 1978 Act.¹¹⁴ In analogy with the Road and Passenger Rail implementation provisions¹¹⁵ it seems that the convention provisions would have been intended to have priority, had the issue been fully considered at the time of the devolved law making/implementation.

Where does this therefore leave the limitation period? How the priority of the CIM provisions is achieved has impact on the limitation period as this will decide the classification of a recourse action as an action under the Contribution Act or as an action independently under CIM. It seems that the limitation period of 2 years under section 10 of the Limitation Act 1980 is not applicable if the contribution claims falls outside the Contribution Act¹¹⁶ and that, where the contribution is provided for by statute, this falls within s 9(1)¹¹⁷ of the 1980 Act the consequence is that a 6 year limitation applies.

e) Type of carriers qualifying as successive carriers

In contrast to the CMR where only road carriers can be successive carriers, under CIM, successive carriers can not only be rail carriers, but also road or inland waterway carriers – as opposed to substitute carriers, who can only be rail carriers.¹¹⁸

However this may create problems of delineation with other regimes that may be applicable. CIM and thus the possible extension of the successive carrier regime to other transport modes generally only applies to supplementary transport to rail carriage if domestic.¹¹⁹ Therefore the delineation would be between national law and CIM, yet for international on-carriage the Budapest Convention for Inland Waterways (CMNI) or the CMR could apply.¹²⁰ Consequently, the applicable regime and thus whether the supplementary carrier falls within the successive carriage rules of CIM will depend on whether the supplementary transport stops before crossing a border or not. Where on-carriage was international road carriage the CMR would be applicable instead, where carriage involved was at least from or to a contracting state, even if no road consignment note was issued and the carrier simply took over the rail consignment note.¹²¹ The same would apply for the CMNI for international inland waterway carriage where no specific transport document is needed.¹²²

For example, where we had an international rail transport to Maastricht under CIM followed by a short road on-transport of only a few kilometres across the border to Lanaken in Belgium, the road leg would fall outside the CIM provisions (and into those of the CMR), whereas the longer on-transport to Sittard in the Netherlands would fall into the CIM provisions and the road carrier would

¹¹² Depending on the interpretation of the notion of indemnity used in the Act.

¹¹³ See Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013), p.172.

¹¹⁴ Leading in fact to a reduction of discretion to zero.

¹¹⁵ s.5 of the Carriage of Goods by Road Act 1965 and in s 5 of the Rail Passengers' Rights and Obligations Regulations 2010.

¹¹⁶ See also H G Beale et al, *Chitty on Contracts* (31st edn, Sweet & Maxwell, 2012) para 28-015 note 70 and *Hampton v Minns* [2002] 1 W.L.R. 1.

¹¹⁷ Section 9 is headed: "Time limits for actions for sums recoverable by statute".

¹¹⁸ See CIM art 26 and 27 and CIM Explanatory Report to art 3 para 3 and MüKo HGB, CIM, art 26, para 6 and art 27 para 2 (Freise).

¹¹⁹ See CIM art 1.3, or unless it was trans-frontier carriage on (the few) registered lines in sea or waterway transport, CIM art 1.4.

¹²⁰ CMR art 1.1 and CMNI art 2.1.

¹²¹ See CMR art 4.

¹²² CMNI, art 2.1.

be part of the successive carrier regime of CIM. Thus, the same carrier could be liable under the CIM successive carrier regime if the on-transport remained in the same country and would fall outside these rules for international on-transport, presumably even where the carrier had agreed to be entered with his consent as delivering carrier into the consignment note,¹²³ as CIM would then not apply. He would therefore for the performance of an international road carriage only be liable if his personal liability could be established, yet in case he performed only a national road leg he could be faced with potential liability for the full contractual international rail transportation.¹²⁴

f) Substitute Carriers

CIM clarifies, that where the carrier is not a successive carrier, but a substitute rail carrier,¹²⁵ he will not be liable for the full carriage of the goods,¹²⁶ but only be liable under contract for the particular carriage undertaken with the difficulties of proof that the goods were indeed damaged or lost during his care. A substitute carrier is a rail carrier to whom the carrier has entrusted in whole or in part the performance of the carriage.¹²⁷ The CIM liability rules are applicable to him and he is directly liable to the cargo claimant, even though no direct contract was concluded between them, facilitating compensation of the cargo claimant by inter alia limiting costs and risk of insolvency of the principal carrier.¹²⁸

In respect of the leg of carriage performed by him, the substitute rail carrier is liable jointly and severally with the carrier; although the latter remains liable for the whole contract in any event.¹²⁹ Recourse rights between the substitute carrier and the carrier are explicitly not prejudiced by the provision¹³⁰ and fall outside the provisions of recourse between successive carriers under arts 49 ff.¹³¹ They are thus left to domestic law, such as the English Contribution Act, and any contract made between the carriers, including any potential application of CIM to such contracts.¹³² While the CMR does not have any such equivalent provision, such system is comparable to the actual and contractual carrier regimes in sea and air conventions.¹³³

4.4 Air carriage conventions

a) Successive Carrier Rules

Both the Warsaw Convention system and the Montreal Convention provide for rules on successive carriage, setting out that each of the carriers who accepts passengers, luggage or goods is subjected to convention rules and is deemed to be a party to the contract, although, in contrast to the CMR

¹²³ CIM arts 45.2 and 26 with 1.3.

¹²⁴ If the requirements CIM art 26 were fulfilled, although then also enabling him to possibly claim recourse according to CIM arts 50 ff.

¹²⁵ CIM art 27; a carrier who is not a rail carrier, but a road carrier for example is not a substitute carrier who can be sued directly, but an auxiliary according to art 40 (see Explanatory Report to CIM 1999, art 3 para 3.

¹²⁶ Under CIM art 49 ff.

¹²⁷ CIM art 27.

¹²⁸ See CIM arts 27.2, 27.4 and 45.6 and Explanatory Report to CIM 1999 art 45 para 4, art 27 para 1 and art 3 para 3 adopting the institution on the “actual carrier” as known in air and sea transport. The provision essentially follows that of art 10 of the Hamburg Rules, making the substitute carrier directly liable under the CIM Rules. See also MüKo HGB, CIM, art 27, paras 1 – 3 (Freise).

¹²⁹ CIM art 27.1 and 27.4

¹³⁰ CIM art 27.6.

¹³¹ ¹³¹ See CIM arts 49 ff and 3(a) for the definition of “carrier”, as opposed to „substitute carrier“, and MüKo HGB, CIM, Vor Art 49, para. 1 (Freise).

¹³² In case the requirements were fulfilled, see CIM art 1.1 and 1.2 and requiring international carriage between CIM Member States.

¹³³ See for air carriage the Guadalajara Convention of 1962 applied under the Warsaw regime, and MC arts 39 – 48; for sea carriage the Hamburg Rules art 10 and the RR art 20 and inland waterways the CMNI art 4.

and CIM, only to the extent that the contract is performed under his supervision.¹³⁴ Thus liability is not incurred by a successive carrier for part of the carriage unrelated to him.

Compared to the CMR and CIM, rights of suit against successive carriers, are also further restricted, in case of passenger claims to suit generally only against the carrier which performed the carriage during which the accident or the delay occurred.¹³⁵ Claims for baggage or cargo, however, can be made against the last carrier, and further, against the carrier which performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.¹³⁶

Application of the convention systems is achieved by looking at the overall carriage; if the parties regarded the carriage as a single operation, even if the carriage is performed by several successive carriers, whether part of a single contract or a series of contracts and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.¹³⁷

The Montreal Convention and, where applicable in the form of the Montreal Additional Protocol No 4, also the Warsaw Convention system¹³⁸ clarify explicitly that recourse claims are not covered by the convention; these are thus left to domestic law.¹³⁹

b) Actual and contractual carriers

Provision for actual carriers is found in the Montreal Convention and for the Warsaw Convention system is made by means of the supplementary Guadalajara Convention of 1961. Application of the conventions systems to and liability of actual carriers is clarified insofar as they perform the carriage and that of contractual carriers for the whole of the carriage.¹⁴⁰ Insofar as liability overlaps the claimant can choose between suing the actual or contractual carrier or both, jointly or separately and carriers can make use of the rules of the *lex fori* to join the other carriers.¹⁴¹ Recourse actions between these carriers are explicitly not prejudiced by the conventions.¹⁴²

Thus whether for successive carriers, third parties or the actual contractual carrier relationship, recourse claims are outside the convention and thus governed by domestic law, including time limits for suit.¹⁴³ And time limitation under the air carriage conventions is a very serious matter leading to a loss of the underlying right altogether.¹⁴⁴

c) Air convention time bars in context of the English Contribution Act

¹³⁴ WS art 30.1 and MC art 36.1.

¹³⁵ WS art 30.2 and MC art 36.2, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

¹³⁶ WS art 30.3 and MC art 36.3. Although contrast CIM art 45.7, where the claimant may initially have a choice between several carriers, but can only sue one of them and by making the choice loses the right of action against all others.

¹³⁷ WS art 31.3 and MC art 1.3.

¹³⁸ The Warsaw Convention of 1929 as amended by the Hague Protocol of 1955 and further amended by the Montreal Additional Protocol No 4 of 1975, The Warsaw-Hague-MP.4 Convention (WS-H-MP4).

¹³⁹ See Shawcross and Beaumont, *Air Law*, Issue 142, September 2014, at paragraph 446.1, *Chubb Insurance Company of Europe SA v Menlo Worldwide Forwarding Inc*, 32 *Avi* 15, 978 (CD Cal, 2008) and *South West SHA v Bay Island Voyages* [20]. And see discussion above [n.30-31](#).

¹⁴⁰ Guadalajara arts I - III and MC arts 39-41.

¹⁴¹ Guadalajara art VII and MC art 45.

¹⁴² Guadalajara art X and MC art 48.

¹⁴³ See also *Chubb Insurance Company of Europe SA v Menlo Worldwide Forwarding Inc*, 32 *Avi* 15, 978 (CD Cal, 2008), *United Airlines v Sercel* [2012] NSWCA 24, Shawcross and Beaumont, *Air Law*, Issue 142, September 2014, at paragraph 446.1 and *South West SHA v Bay Island Voyages* [17-21].

¹⁴⁴ See WS art 29 and MC art 35 and see *South West SHA v Bay Island Voyages* [41] with reference to Elmar Giemulla, Ronald Schmid (ed.) *Montreal Convention Commentary*, The Hague, Kluwer Law International, 2006 Art 35 para 28 ff.

Whereas the Carriage of Goods by Road Act needed not to include any time bar provision for recourse actions as this is already dealt with in the CMR Convention, a provision on extended time limitation for recourse claims under the air conventions had been made by the Carriage by Air Act 1961 in its section 5.

However section 5 had undergone several changes over time: Formerly its second half had set a time bar for contribution claims to two years from the date of judgment against the carrier by air.¹⁴⁵ In *South West SHA v Bay Island Voyages* Tomlinson LJ had explained that section 5(2) of the Carriage by Air Act simply clarified that the convention's time limitation should not be read as applying to contribution claims. The initial version of this sub-section had therefore provided for the 2 year time bar from judgment out of caution, since this matter was not covered by the air conventions.¹⁴⁶ However this part was repealed by the Limitation Act 1963, most likely in the light of section 4(4) of the 1963 Limitation Act stipulating likewise¹⁴⁷ and in order to provide for time limitation for contribution in one general provision only. Yet still in the 1963 Act, section 4(4) clarified that the limitation rules for contribution rights arising from claims subject to the air convention would also be falling in the main contribution limitation rule of sub-sections (1-3), a clarification that would later fall away.¹⁴⁸

Section 4(1) of the 1963 Limitation Act initially referred to section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 which was later replaced by section 1 of the Civil Liability (Contribution) Act 1978.¹⁴⁹ However this section now also included in its sub-section (3) that claims for contribution could generally be enforced even if time barred, although no longer where expiry of the limitation period meant an extinction of the right instead of a mere time bar. This was an amendment of the existing law on contribution which had developed inconsistently.

Indeed, in the judgment of the House of Lords in *George Wimpey & Co Ltd v British Overseas Airways Corp (BOAC)*¹⁵⁰, it had been held that a claimant could not recover contribution where the defendant had previously been sued by the creditor and had, by judgment, been found not to be liable, even if the reason was 'merely' that the creditor's action was statute-barred. This was held to be the consequence of section 6(1)(c) of the 1935 Act allowing contribution only from a "tortfeasor who ... if sued would have been liable". Yet, in the same case Lord Reid considered obiter¹⁵¹ that where no suit had taken place "if sued" might refer to the time at which the other tortfeasor (the contribution

¹⁴⁵ The original version of s 5(2) read: "Article 29 in the First Schedule of this Act shall not be read as applying to any proceedings for contribution between tortfeasors, but no action shall be brought by a tortfeasor to obtain a contribution from a carrier in respect of a tort to which the said Article 29 applies after the expiration of two years from the time when judgment is obtained against the person seeking to obtain the contribution."

¹⁴⁶ *SWSHA v BIV* at [17].

¹⁴⁷ Limitation Act 1963 s.4(1) and (4) under the heading "Time-limit for claiming contribution between tortfeasors", read: "(1) Where under section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 a tortfeasor (in this section referred to as "the first tortfeasor") becomes entitled after the passing of this Act to a right to recover contribution in respect of any damage from another tortfeasor, no action to recover contribution by virtue of that right shall (subject to subsection (3) of this section) be brought after the end of the period of two years from the date on which that right accrued to the first tortfeasor."

"(4) In relation to torts falling within Article 29 in Schedule 1 to the Carriage by Air Act 1961, the preceding subsections shall have effect in substitution for the limitation imposed by subsection (2) of section 5 of that Act; and accordingly in that subsection the words from "but no action" onwards are hereby repealed:

Provided that this subsection shall not affect any action for a contribution where before the passing of this Act judgment has been obtained against the person seeking to obtain the contribution."

¹⁴⁸ See Limitation Act 1980 s 10.

¹⁴⁹ See the consequential amendment in para 6 of Schedule 1 of the Civil Liability (Contribution) Act 1978.

¹⁵⁰ [1955] A.C. 169; [1954] 3 W.L.R. 932; HL.

¹⁵¹ [1955] A.C. 169 at p. 190.

claimant) was sued.¹⁵² This more generous view was also preferred in a Scottish case on an equivalent issue under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.¹⁵³ An even broader view taken was that all that mattered was that the contribution defendant could have been sued in time in the past.¹⁵⁴

This uneasy relationship was abolished with the Civil Liability (Contribution) Act 1978 and limitation of the underlying claim is therefore no longer a defence against a contribution claim,¹⁵⁵ unless this meant the extinction of the underlying right. Whether the effect of the extinction of rights on contribution rights resulting out of cargo movements within the conventions of the Carriage of Air Act was appreciated when making these amendments is questionable – at least no discussion thereof can be found in the preparatory documents of the Law Commission. Noteworthy in this context is, however, that the Limitation Acts, exceptionally, provide for the extinction of rights in certain circumstances.¹⁵⁶ Neither seems a later report on Limitation of Actions in 2001¹⁵⁷ to shed light on this discussion. While it considered the effect of limitation, whether as a bar or as extinction of the right of action, and taking also into account the effect of extinction on contribution, it did not analyse the matters where extinction of action already curtailed contribution claims.

The effect of the many changes to the contribution and limitation provisions is, it seems, that even claims for contribution arising from claims for liability for damage under the air conventions as implemented into UK law by the Carriage by Air Act 1961 are subject to the time limitation rules under the convention.¹⁵⁸

¹⁵² He also considered favourably the view that it could mean, "if sued at some time" or "if sued at the time most favourable to the plaintiff", although he did not confirm these two suggestions and left it to a later decision.

¹⁵³ *Dormer v Meville Dundas & Whitson Ltd* 1990 SLT 186, 189 on s 3(2) of the 1940 Act, where it was also held that the creditor could not by his own action of suing the other tortfeasor late so as to destroy the contribution action of the claimant. The wording and content of the Scottish 1940 Act and the English 1935 Act were however sufficiently different so that the difficulties of a judgment in favour of the other tortfeasor only by means of pleading limitation in the *George Wimpey* case did not emerge.

¹⁵⁴ *Morgan v Ashmore Benson, Pease & Co* [1953] 1 W.L.R. 418 at 420; *Fortes Service Areas v Department of Transport* of 18th July 1984, 1984 WL 988591, CA per Browne-Wilkinson LJ (and agreed by Dunn LJ): "To my mind the words in their plain meaning mean 'if sued at any time'; that is to say, if it is possible to point to any time at which an action by the plaintiff against the third party would have succeeded, that is enough to satisfy the requirements of the section."

¹⁵⁵ S 1(3) of the Contribution Act and see Law Commission Report, Law Com No 79 paras 25, 60 and 81(g), Working Paper no 59, paras 31-35 and Mitchell para 12.32. See also *RA Lister & Co Ltd v EG Thomson (Shipping) Ltd (No.2)* [1987] 1 W.L.R. 1614, at 1621 and 1623, QBD; *Nottingham HA v Nottingham City Council* [1988] 1 W.L.R. 903 at 906 and 912; *CA and Societe Commerciale De Reassurance v Eras (International) Limited (formerly Eras (U.K.)) and Others (The Eras Eil Actions)* [1992] 1 Lloyd's Rep 570 at 601, CA.

¹⁵⁶ See e.g. Limitation Act 1980, s 3(2) for the owner's title to a chattel which is extinguished after 6 years after its conversion and s 11A (3), where the tort victim's right to sue for damage caused by a defective product is extinguished after 10 years from the relevant time. In both cases there is an interest for finality.

¹⁵⁷ Law Com No 270 (2001) (HC 23) para 5.21: "In the Consultation Paper we provisionally proposed that no change should be made to the general rule that the expiry of the limitation period should merely bar the remedy. We explained that we could see no advantages in changing the present position, and that making 'extinction' the general rule could create difficulties, most notably in contribution cases. [FN: Limitation of Actions, Consultation Paper No 151 (1998), para 14.21.] Nor did we think that it would be practicable to change the position in relation to the exceptional cases where the limitation period extinguishes the right, so that a uniform rule of barring the remedy could be applied. In land-related claims and conversion, such a reform would undermine the claimant's title acquired on the expiry of the relevant limitation period. The position relating to the expiry of the 'long-stop' period under the Consumer Protection Act 1987 is governed by European law and is consequently outside the remit of this Paper." And see Limitation of Actions, Consultation Paper No 151 (1998), para 14.21: "...Moreover, we feel that making "extinction" the general rule could create difficulties (notably in the case of actions for a contribution, where the limitation period for an action by the plaintiff in the original action against the defendant to the contribution action may have expired before the right to bring a contribution action has accrued). Our provisional view is that ... no change should be made to the present law on the effect of the expiry of a limitation period..."

¹⁵⁸ By reason of the Contribution Act s 1(3). Yet, a solution to exactly marry the limitation of the contribution claim with that of the main claim was seen as unsatisfactory by the Law Commission in their Working Paper No 59 "Contribution" at para 35, but a closing of the time gap as much as possible to force a timely contribution claim was suggested as a potential solution and comments were invited on it. This suggestion reminds, for example, of the solutions found in the sea carriage

This result may also seem to be in line with the case-law under the CMR where the CMR and its time bar is strictly applied between senders and carriers under the CMR, even if all parties are carrier's themselves. Yet, exceptionally, also under the CMR, recourse actions between carriers classed as successive carriers, benefit from a longer period.¹⁵⁹ Indeed, this additional period seems to have been a motivating factor in some jurisdictions for a wide interpretation of the notion of successive carriers the successive carrier regime in order to cover a wider range of carriers and bring their interactions into the extended time bar of section 39.4 CMR for recourse actions.¹⁶⁰

Yet, one may see in the provision in section 1(3) of the Contribution Act 1978 without reintroduction of a further stipulation in the Carriage by Air Act an intentional clarification that any extinction of rights under the air conventions is final, whether such a right of action was exercised by cargo or by other carriers for contribution or recourse. After all, the air conventions are strict and cannot be contracted out of,¹⁶¹ thus, one may argue, clearly showing the mandatory nature of the convention rules. This interpretation might, however, be going beyond what was intended to be covered by the air conventions:

The Montreal Convention in articles 29 and 30 set out the convention's priority for claims only for damage sustained in case of death or bodily injury of a passenger, destruction or loss of, or of damage to checked baggage or of cargo.¹⁶² Yet contribution claims are specifically left untouched by the convention and a contribution claim is not a claim for damages due to such loss based on a carrier's liability for damage, but based on a right of recourse¹⁶³ to share in the cost of the loss. This is what the Montreal Convention in contrast to the earlier Warsaw Convention¹⁶⁴ clarified in its article 37¹⁶⁵ (and also in article 48 for the relationship between actual and contractual carriers),¹⁶⁶ that the convention only regulates the relationships between passenger, consignor and consignee towards the air carrier and vice versa. Third parties however are not included.¹⁶⁷ Indeed the stipulation in section 5 (2) of the Carriage by Air Act 1961¹⁶⁸ seems to be based on the assumption that contribution claims are not covered by the conventions,¹⁶⁹ otherwise the Act would be in breach of the convention rules and therefore the obligations of the UK under international law¹⁷⁰ to give effect to them.

conventions where indemnity claims against third parties are allowed at least for a further 3 months (HVR art III r6bis) or 90 days (HambR, art 20.4, RR art 64, CMNI art 24.4), failing any more flexible provision of the relevant lex fori.

¹⁵⁹ CMR art 39.4 with 32.

¹⁶⁰ Although this approach has been criticised as going beyond the legal framework of the CMR; see [above n.80](#).

¹⁶¹ According to WC art 32 and MC art 49, a clause infringing the provisions of the convention is null and void.

¹⁶² Elmar Giemulla, Ronald Schmid (ed.) *Montreal Convention Commentary*, The Hague, Kluwer Law International, 2006 at Introduction, para 43.

¹⁶³ See *South West SHA v Bay Island Voyages* at [20] referring to the US Court of Appeals for the Ninth Circuit in *Chubb Insurance Company of Europe SA v Menlo Worldwide Forwarding Inc*, 32 Avi 15, 978 (CD Cal, 2008), followed in *Allianz Global Corporate & Speciality v EMO Trans California Inc* 34 Avi 15,274 (ND Cal, 2010) the relevant entry in Shawcross and Beaumont, *Air Law*, Issue 142, September 2014, at paragraph 446.1, further referring to a Canadian decision in *Connaught Laboratories Ltd v Air Canada*, as well as the New South Wales Court of Appeal in *United Airlines v Sercel* [2012] NSWCA 24 all affirming the decision in Chubb. See also Shawcross and Beaumont, *Air Law*, Issue 145, June 2015, at paras 413, 446.1 and 463, 464 – 500, showing also that there are opinions to the contrary, and e.g. the French Court de Cassation in *Eureka Logistique v UPS* (court de cass, 20 Oct 2009) (2009) 63 RFDA 435 applied the 2 year limitation period also to recourse actions.

¹⁶⁴ But see the inclusion in art 30A in the Warsaw –Hague Convention in its version as amended by the Montreal Protocol No 4.

¹⁶⁵ See Shawcross and Beaumont, *Air Law*, Issue 145, June 2015, at paras 463, 464 – 500.

¹⁶⁶ The latter provision has its correlation in Art X of the Guadalajara Convention for the Warsaw regime.

¹⁶⁷ MüKo HGB-Ruhwedel, MÜ, art 37 para 2-3 and art 36 para 27 and *South West SHA v Bay Island Voyages* [20].

¹⁶⁸ Clarifying the convention's limitation provisions do not apply to contribution claims.

¹⁶⁹ Shawcross and Beaumont, *Air Law*, Issue 145, June 2015, at para 446.1.

¹⁷⁰ See Vienna Convention on the Law of Treaties (1969), arts 26 – 29.

Therefore, one may instead see the various changes in the Carriage by Air Act 1961 and Limitation Acts as an oversight of legislation due to the parallel reforms and consolidation of the Limitation Acts culminating in the Limitation Act 1980 alongside the development of the law of contribution from section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 to the Civil Liability (Contribution) Act 1978.¹⁷¹ The amendments to the 1963 Limitation Act and consolidation into the 1980 Limitation Act might have simply been premised on the assumption that contribution arising from claims under the Carriage by Air Act fell within the same regime as the then section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935. It might also have been assumed that with section 5 of the Carriage by Air Act being repealed, limitation was brought all in line with the general rule and it might have been forgotten that the air conventions contained the extinction of the right on limitation. However whether the dis-application of the convention rules on limitation in section 5(2) of the Carriage by Air Act 1961 with the suggested underlying intention as set out above is indeed sufficient to circumvent the explicit rule in section 1(3) of the Contribution Act will have to be tested in court.

4.5 Conventions on sea carriage and inland waterways

Sea and inland waterway carriage conventions have no specific system for successive carriers but most of these conventions systems, with the notable absence of the Hague and Hague Visby Rules, contain provisions on the liability of the actual carrier under the convention, the joint and several liability of the actual and contractual carriers, and cargo's rights of suit against either or both of them.¹⁷² They also, as is the case in the Hague Visby Rules,¹⁷³ provide for an extended time bar for recourse claims: generally reference is made to the *lex fori*, but a minimum time beyond that of the underlying claim for damage under the conventions of 3 months or 90 days is provided.¹⁷⁴ Otherwise they seem to leave recourse actions to domestic law and this is explicitly pointed out in the Hamburg Rules.¹⁷⁵

5. Effect of time bar provision

In the context of section 1(3) of the English Contribution Act it is noteworthy that the **sea** and waterway conventions, with the exception of the Hague and Hague-Visby Rules,¹⁷⁶ are all worded as time bars although the Rotterdam Rules explicitly allow reliance on the time barred rights to counterclaim and set-off, whereas the CMNI explicitly rejects such possibility.¹⁷⁷ It is submitted that the Hague-Visby Rules' provision of article III rule 6bis must be applied as having priority over section 1(3) of the Contribution Act. Thus while under English law a 2 year time bar for contribution claims would generally apply, it seems that the effect of section 1(3) of the Contribution Act would be that while recourse claims under the Hague-Visby Rules would remain possible after expiry of the

¹⁷¹ See Law Com No. 79 para 32.

¹⁷² See HambR art 10, RR arts 19 and 20, CMNI art 4.

¹⁷³ Albeit not the Hague Rules.

¹⁷⁴ See HVR art III r6 bis, HambR art 20.4, RR art 64 and CMNI art 24.4.

¹⁷⁵ See HambR art 10.6 but contrast the CMNI which provides explicitly for the application of the convention rules between the contractual and the actual carrier, thus limiting the freedom to contract on other terms (CMNI art 4.1 and 25).

¹⁷⁶ See *Aries Tanker Corporation v Total Transport Limited* [1977] 1 WLR 185 (see in particular Lord Wilberforce at 188) and also *Henriksens Rederi A/S v Centrala Handlu Zagranicznego (CHZ) Rolimpex (The Brede)* [1974] QB 233, where it was held that cargo damage could not be relied on as defence or set-off or against freight claims and was extinguished after the time lapse; cf. *Goulandris Brothers Ltd v B Goldman & Sons Ltd* [1957] 2 Lloyd's Rep 207 Pearson J for a contribution claim under the York-Antwerp Rules.

¹⁷⁷ See RR art 62.3 and contrast CMNI art 20.5; no such provision is found in HambR art 20, seemingly leaving the matter to domestic law.

underlying right, they would have to be brought no later than within 3 months from settlement or service of the claim form against the contribution claimant.

In both the CMR and CIM limitation of time for suit is regulated with some detail, although both leave some matters regarding extension of the period of limitation or of some suspension and interruption issues to national law.¹⁷⁸ Although the conventions clarify that the right of action cannot be exercised by way of counterclaim or set off once limitation has occurred,¹⁷⁹ the provisions on limitation of time for suit are understood as a mere bar to the remedy, rather than as extinction of the right.¹⁸⁰ Indeed, CIM in its preceding article to the limitation of action prescribes the extinction of the right of action on acceptance of the goods without ascertainment of any loss or damage,¹⁸¹ and thus shows that limitation is not a matter of extinction of the right itself. This would be of importance if any recourse claims would be made under the Contribution Act, insofar as the Act would not be dis-applied in favour of the specific CIM convention recourse rules.

6. Conclusion

It is seen from the discussion on recourse rights that the interaction of domestic law with the conventions provisions can be challenging and that the piece-meal incorporation of conventions or amendments to implementing legislation without full regard of all the implications can prove to be hazardous to parties seeking recourse. Even if one system is understood, the next convention system seems to operate and interact with the English domestic contribution provisions in a different manner again. Time limitation for recourse actions thus stretch from no additional time to the underlying claim for damage in case of the air conventions, the CMR where recourse is outside its successive carrier rules and the Hague Rules, to 3 months in case of the Hague Visby Rules, 1 year in CMR successive carrier relationships,¹⁸² 2 years in other sea conventions¹⁸³ and to 2 or 6 years in case of CIM.¹⁸⁴

Overall, conventions must be implemented appropriately and in case of clashes with domestic law, convention rules must be given priority. This principle, while giving a guideline does not necessarily give clarity to the parties of a contribution claim. Thus any uncertainty in the law is complicating recourse for parties, even more so where there are likely several uncertainties due to the use of different transport methods. Therefore the disparate systems compounded by disparate implementation makes the use of true transport intermodality an even riskier business.

From an English law perspective it is recommended that, at least, the current uncertainty as to the interaction between COTIF-CIM¹⁸⁵ and the Contribution Act and the Warsaw and Montreal Conventions with the Contribution Act are removed.

It is thus recommended that the Railways (Convention on International Carriage by Rail) Regulations 2005 be amended to dis-apply the Contribution Act insofar as the COTIF-CIM Convention applies. Wording similar to that of the Rail Passengers' Rights and Obligations Regulations 2010 could be used for this purpose. However, in addition, the position on limitation of recourse actions should be

¹⁷⁸ See CMR art 32.3 and CIM, art 48.5.

¹⁷⁹ See CMR art 32.4 and CIM, art 48.4.

¹⁸⁰ See Clarke para 43, CIM art 48 in contrast to art 47 and MüKo HGB, CMR, art 32 para 48 (Jesser-Huß).

¹⁸¹ See CIM art 47.

¹⁸² Unless wilful misconduct introduces a 3 year period.

¹⁸³ Due to the application of the Contribution Act with its special time bar in s 10 of the Limitation Act 1980.

¹⁸⁴ Depending on whether the claim is seen as falling within the Contribution Act or instead under the CIM convention rules.

¹⁸⁵ And also COTIF –CIV.

clarified. After disapplication of the Contribution Act limitation would be 6 years. It is submitted that this is inappropriately long in the field of carriage where Convention limitation is only one year, with the exceptional grounds providing for 2 years.¹⁸⁶ The 2-year solution from judgment of payment of the underlying claim as in section 10 of the Limitation Act 1980 would seem more appropriate, but application of this provision would have to be clarified due to the provision's very limited scope or a similar provision added to the 2005 Rail Regulations, also called COTIF Regulation. Incidentally such provision is also missing in the 2010 EU Rail Passenger Regulations, implementing the EU Passenger Rights Regulation. It is submitted that limitation should be aligned with the position chosen to apply under the COTIF Regulation, so as to avoid different time frames for contribution claimed resulting from the carriage of passengers under CIV, depending on whether within or outside the EU.¹⁸⁷

Equally section 5(2) of the Carriage by Air Act 1961 should be amended to re-introduce its initial version, setting a time bar for contribution actions arising out of air conventions' damages claims at 2 years from judgment or payment of the underlying claim. Additionally, to ensure its effectiveness, a further provision should be added insofar to dis-apply section 1(3) of the Contribution Act. If, however this was not be seen as an acceptable solution and that for policy reasons priority should be given to the finality of extinction provisions of the underlying claims, then sections 5(2) and (4) should be deleted, in order so as not to cause confusion.

Whether an alignment to a 2-year contribution time frame for other non-mandatory contribution regimes, such as that of the HVR is appropriate should also be considered. If the amendments as above were included, it is submitted, that such an alignment would be a positive step in unifying a disparate and haphazard system.

¹⁸⁶ And 3 years for claims for death or personal injury to passengers.

¹⁸⁷ The EU Regulation having priority over COTIF, see Art 2 of the Agreement Between The Intergovernmental Organisation For International Carriage By Rail And The European Union 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 of 23rd June 2011.