

Conventions, regulations and national laws – harmony or turmoil?

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Convention based national legislation

Important conventions and their counterparts in Swedish legislation – carriage of goods

<i>Conventions</i>	<i>National legislation</i>
Hague Rules 1924 and Visby Rules 1968 (Hague-Visby Rules)	Chapter 13 Maritime Code (1994:1009).
Hamburg Rules 1978	As far as possible due to Hague-Visby.
COTIF 1999, Appendix B, CIM.	Railway Transport Act, as proposed amended 2014.
MC 1999	Air Transport Act (2010:500)
CMR 1956.	CMR Act (1969:12). Rules for national transports in Road Transport Act (1974:610).

Convention based national legislation

Important conventions and their counterparts in Swedish legislation – carriage of passengers

<i>Conventions</i>	<i>National legislation</i>
Athens Convention	Chapter 15 Maritime Code (1994:1009)
COTIF 1999, Appendix A, CIV.	Railway Transport Act, as proposed amended 2014
MC 1999	Air Transport Act (2010:500)

A shrug of resignation

- The shattering different liability regimes for carriage of goods by different modes has made the subject recalcitrant; the students cannot understand it, the legal scholars scarcely handle it and the practitioners can do nothing but change details.
 - Helm, *Haftung für Schäden an Frachtgütern* (1966)
Vorwort (free trans.)
- And then came the European Union and made the situation even worse.

EU-law and national legislation

- Direct effect
 - Applies on treaties, international agreements and secondary legislation.
 - A provision is binding to authorities and capable of conferring rights on individuals if it is sufficiently clear, precise and unconditional
- The special case of directives
 - Vertical but no horizontal direct effect
- Exceptions from no horizontal effect regarding directives
 - Indirect effect
 - Freezing effect
 - Incidental effect
 - General principles override
 - Regulation references to directives

EU transportation law

- Aim to ensure the smooth, efficient, safe, and free movement of people and goods.
 - Regulation (EC) 392/2009 of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents (Athens) and Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway.
 - The European Union (EU) acceded to Cotif, as a regional economic integration organisation, with effect from 1 July 2011.
 - Regulation (EC) 1371/2007 of 23 October 2007 on rail passengers' rights and obligations (CIV).
 - Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents (Montreal Convention).
 - Regulation (EC) 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.
 - Council Decision 2001/539/EC of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention)
 - Regulation (EU) No 181/2011 of 16 February 2011 concerning the rights of passengers in bus and coach transport.

Conventions and EU-law

- EU has external power and legal personality.
 - Art. 47 TEU
 - Able to enter into international agreement.
- Agreements concluded by the EU are binding on Member States.
 - Art. 216(2) TFEU
- External power can be exclusive
 - Art. 3 TFEU
- In many instances shared with Member States.
 - Ergo: Both EU and Member States can ratify the same convention.

Conventions or EU-law: the question on primacy

- Ratified by Sweden and Finland in 2002.
- The Montreal Convention was given the status of *acquis l'Union* for passengers by Council Regulation [EC] 889/2002 of 13 May 2002 (amending Regulation 2027/97), as from 2004.
- Regulation (EC) 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.
- C-344/04, *IATA and ELFAA*, EU:C:2006:10
 - The Montreal Convention entered into force, so far as concerns the Union, on 28 June 2004. Therefore from that last date the provisions of that Convention have, in accordance with settled case-law, been an integral part of the Union legal order. In accordance with the Court's case-law, those agreements prevail over provisions of secondary Union legislation.

Convention based EU-law

- Regulation 1371/2007 rail passengers' rights *Articles 11 and 15*
 - Subject to the provisions of this Chapter, and without prejudice to applicable national law granting passengers further compensation for damages, the liability of railway undertakings in respect of passengers and their luggage shall be governed by Chapters I, III and IV of Title IV, Title VI and Title VII of Annex I [*i.e. COTIF Annex A, CIV*].
 - Subject to the provisions of this Chapter, the liability of railway undertakings in respect of delays, missed connections and cancellations shall be governed by Chapter II of Title IV of Annex I [*i.e. COTIF Annex A, CIV*].

Example: The Swedish mess on carriage of passengers by rail

- Swedish Rail Traffic Act, according to the Law Commission's Report (SOU 2015:9).
 - Incorporates CIV by way of promulgation.
 - Both national and international carriage by rail.
- Regulation 1371/2007 rail passengers' rights.
 - Incorporates CIV by way of promulgation.
 - Add special rules for delay and cancellation.
 - Normally the Convention (CIV) has priority,
 - but here a special agreement gives Regulation priority.
- Act (2015:953) on passenger rights in public transport.
 - Exemption in 1371/2007 for travels up to 150 km.
 - Price reduction, damages and assistance.

Example: Air carriage of passengers

- Different time bar rules
 - 261/2004 Air passengers rights No rules
 - Montreal Convention 2 years
 - Domestic legislation on air carriage Same
 - Domestic legislation in general 10 years (Sweden)
- *What rule to apply?*
- *Moré, C-139/11, EU:C:2012:741*
- *Dawson v. Thomson Airways Ltd. [2014] EWCA Civ. 845*

Example: Delay in carriage

- Delay v. non-performance
 - Non-performance falls outside the scope of most conventions.
- The question is how the breach is to be handled under domestic law. There are different lines of argumentation that can be explored
 - In national law we apprehend non-performance as delay. Non-performance is thus read as delay in the convention and the convention is applied (*Aluminium wire* ND 1984 p. 264).
 - The delay provision in the convention is used by analogy.
 - General principles in transport law (*The potato ethanol* NJA 2016 p. 563).
- Ergo: There is an intended intricate interaction between Conventions and national law that is not always easy to understand.

Example: Choice of law in sea carriage

Hague-Visby Rules

Article X

The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if

- (a) the bill of lading is issued in a contracting State, or
- (b) the carriage is from a port in a contracting State, or
- (c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract;

whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

Rome I-regulation

Article 3 Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.

Article 25 Relationship with existing international conventions

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.
2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

The change of setting in Rotterdam

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Rotterdam Rules

Article 5 General scope of application

1. Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage any one of the following places is located in a Contracting State:

- (a) The place of receipt;
- (b) The port of loading;
- (c) The place of delivery; or
- (d) The port of discharge.

2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

Conclusions

- Transport is fundamental to our economy and society. It enables people to enjoy the freedom to travel, moves goods across the continent and creates growth and jobs. EU sets out 40 specific action points.
- Non of the points concern legislative approaches.
- Few signs of simplified national legislation, at least in the Nordic countries.
- The patterns of liability is shattering and recalcitrant which tend to give some turmoil alike effects.
- What shall we do about it?
- Learn to handle the turmoil by principles of transport law.

Thanks for the attention

